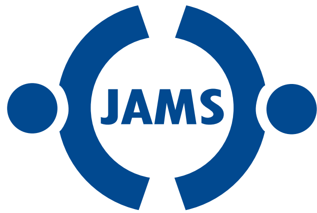


THE RESOLUTION EXPERTS®

JAMS GLOBAL CONSTRUCTION SOLUTIONS

Leading ADR Developments from The Resolution Experts

Volume 4, No. 2 • Spring 2011

ALSO IN THIS ISSUE . . .

How Neutrals Can Provide Early Case Management of Construction Disputes
BY JOHN LANDE, ESQ. 6

Evaluative Mediation
BY JESSE B. (BARRY) GROVE III, ESQ.. 10

JAMS launches iPhone App. . . . 11

Navigating Through a Construction Project: "California Construction Law"
REVIEWED BY LINDA DeBENE, ESQ. & BARBARA A. REEVES NEAL, ESQ. . 12

Notices & Events 14

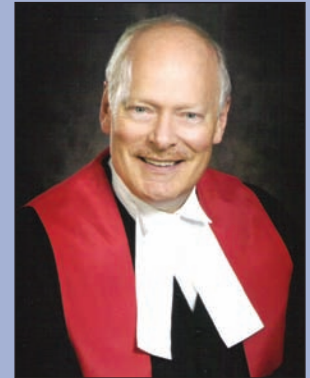
JAMS is the largest private alternative dispute resolution (ADR) provider in the world. With its prestigious panel of neutrals, JAMS specializes in resolving complex, multi-party, business/commercial cases – those in which the choice of neutral is crucial.

The JAMS Global Engineering and Construction Group provides expert mediation, arbitration, project neutral and other services to the global construction industry to resolve disputes in a timely and efficient manner.

SIGN UP FOR YOUR FREE ELECTRONIC COPY OF THIS NEWSLETTER!

To receive ***JAMS Global Construction Solutions*** electronically, please go to **http://www.jamsadr.info/info/index/pg_register** or email **constructionsolutions@jamsadr.com.**

Don't Count Courts Out — A View from the Bench



By **THE HONOURABLE MR. JUSTICE ROBERT A. GRAESSER**[1] ***Court of Queen's Bench of Alberta***

As a current member of the judiciary in Alberta, and as a former arbitrator and mediator in my previous law practice, I have my own perspective on the differences between what judges do in trials and in settlement conferences, and what arbitrators and mediators do in their ADR processes.

Court vs. Private Dispute Resolution

I recognize that, both as a trial judge and a settlement conferencing judge handling judicial dispute resolutions, or "JDR"s, I compete with the private sector, who ply their skills as arbitrators and mediators. I face complaints from media-

See "Don't Count Courts Out" on Page 2

Appellate Arbitration: The Wave of the Future

By **PHILIP L. BRUNER, ESQ.** ***Arbitrator, Mediator, Dispute Resolver and Director of the JAMS Global Engineering & Construction Group***

Ever since the US Supreme Court ruled in *Hall Street v. Mattel*, 552 US 576 (2008) that parties were not legally permitted to enlarge by agreement the scope of judicial review of an arbitration award beyond the limited statutory grounds for vacatur under the Federal Arbitration Act, lawyers and clients considering whether to arbitrate complex disputes subject to the FAA have explored alternative ways of acquiring a broad right of appellate review outside of the judicial process. Clients with major cases particularly have been concerned about getting a "de novo" review of questions of law where they later conclude that the arbitrator "got it wrong." Their solution has been to craft arbitration clauses calling for **appellate arbitration** pursuant to ***JAMS Optional Arbitration Appeal Procedure***.

See "Appellate Arbitration" on Page 9

To learn more about the JAMS Global Engineering and Construction Group, go to http://www.jamsadr.com/construction-practice/.

Don't Count Courts Out — A View from the Bench continued from Page 1

tors that we unfairly compete with them because our services as judicial settlement judges are provided free of charge. However, I do not seem to face complaints about the provision of our traditional services as a trial judge, largely because the shortcomings of those services are what arbitrators tout as being the main reason to arbitrate.

Undoubtedly, arbitrators would feel more competition from the bench if some of the procedural, cost and time issues could be better controlled by the courts, and, as well, if there were a specialized bench. How likely changes in court processes will be is a debate that has gone on since at least *Jarndyce v. Jarndyce* in Dickens' 19th century England. Despite that those familiar with litigation decry interminable examinations for discovery; lengthy document production processes, usually involving the search for marginally relevant documents and minutia from everyone remotely connected with the litigation; and the incredibly high cost and extended length of time occupied by the court proceedings, any attempt to curtail traditional processes, at least in my jurisdiction of Alberta, has generally been met with great resistance.

The search for "truth and justice" often demands leaving no stone unturned as the parties' rights are determined. Access to justice, on the other hand, demands processes that are reasonably affordable and timely. The twain may never meet. A resolution with full disclosure and discovery and a trial with admissible evidence before an impartial trial judge may achieve the highest form of justice—or truth finding—with many protections against error built into the process. But at what cost? And over what period of time? A process that costs more than the result, or takes so long that the result has become moot, creates pyrrhic victories. That is the law of diminishing returns.

On the other hand, an abbreviated process, with limited disclosure and minimal adherence to the accepted rules of evidence, may produce an inexpensive and quick result, but at what cost to the quality of the resolution? Here is where the quality of the arbitrator shines through.

My thesis is that both systems—the court system and the private system—can and should co-exist and provide a continuum of processes that will allow parties to achieve a level of justice that is acceptable to them. That, to some extent, requires a "client"-based approach to the provision of dispute resolution services.

The Parties as "Clients"

Certainly, the parties to the dispute are generally the arbitrator's or mediator's "clients". And this means that there are business aspects of the relationship that require tending. The arbitrator or mediator is a business person, providing a service. Reputation is important. So arbitrators and mediators tend to be polite and respectful, if not somewhat deferential, and are usually mindful of the fact that, just as they are appointed by agreement, they can also be discharged by agreement (or simply not selected the next time).

Significantly, arbitrators and mediators work in private. There is almost no scrutiny of their decisions or activities, short of judicial review or limited appeals in the case of arbitrators. The public will never learn of their work, nor will the press or academics.

Arbitrators or mediators who misconduct themselves, or who are incompetent, may lose their professional status as attorneys or be struck from the roles of institutional ADR service providers, but they may still carry on their practices nonetheless.

Different Processes

Contrast this with the position of a judge, who is generally selected by the court's scheduling coordinators. Judge-shopping in most jurisdictions is a thing of the distant past. The trial judge may not be known until he or she actually walks into the courtroom to preside over the trial. The parties have limited or no control over whom will be selected to resolve their dispute. There is no guarantee that counsels' worst nightmare—Judge Bullingham, the "Mad Bull" of Rumpole of the Bailey fame—will not walk through the judicial entrance to the courtroom.

The judge's duties are not owed only to the parties, but also to the system and the public. One only has to look at the principles of judicial ethics, namely independence, impartiality, diligence, fairness and equality, to recognize that judges owe duties and loyalties not just to the parties that appear before them, but to many other stakeholders. The work of judges is publicly scrutinized;

Undoubtedly, arbitrators would feel more competition from the bench if some of the procedural, cost and time issues could be better controlled by the courts, and, as well, if there were a specialized bench. How likely changes in court processes will be is a debate that has gone on since at least *Jarndyce v. Jarndyce* in Dickens' 19th century England.

courtrooms are open to the public and the press; and judges' decisions are criticized publicly, politically and academically. This accountability means that, in the most extreme degree, judges may be removed from office for misconduct or incompetence.

Issues About Commercial Arbitrations

Yet the landscape may be changing. Arbitrations in particular are more frequently being criticized for being too costly, taking too long and being too much like trials. They are no longer being seen as the practical alternative to litigation. Commercial entities who fled from litigation in favor of arbitrations are increasingly becoming disenchanted. According to some, arbitrations have been ruined by lawyers that act as arbitrators and cling to their training with procedural and evidentiary rules in conducting arbitrations. And the lawyers who represent clients in arbitration proceedings are loathe to abandon the comfort and familiarity of extensive record production, discovery and pre-trial procedures to speed up the process and reduce its costs.

Whatever the reasons, the bloom is, to some extent, off the arbitration rose. Some counsel and parties were previously nervous about arbitration because of the perception that arbitrators (particularly non-lawyer arbitrators) were more inclined to "split the baby" than were judges, and were more likely to find a middle ground and avoid making difficult or hard decisions. After all, arbitrators want to do equity, and look to their reputation for fairness as a selling point for future work. That is a point hotly contested by arbitrators, and there are undoubtedly many arbitrators who claim that they can be and are every bit as tough as the most hard-nosed judge in making adverse credibility findings and rendering decisions that may have devastating consequences on one of the parties. Of course there are judges who can be criticized for the same compromising or soft-hearted inclinations. But judges are frequently called on to make difficult credibility findings, give harsh remedies (such as injunctions or contempt findings) and find clear winners and losers.

From my own self-reflection, after some years as a private arbitrator and now some years as a judge, I tend toward the view that arbitrators are more client-friendly than are judges. I believe that I have been less inclined to find middle ground, or

See "Don't Count Courts Out" on Page 4

Don't Count Courts Out — A View from the Bench continued from Page 3

throw bones to the otherwise losing party as a judge, than I was as an arbitrator. Arbitrators work in a more comfortable arena where their decisions are less likely to be appealed or reviewed, and they do not face scrutiny from the public, academics or their colleagues. Arbitration awards are published for and to the parties, and unless there is a judicial review or appeal of the decision, the decision remains private, confidential and for all practical purposes, buried. That is not to say that I regret any of the decisions I made as an arbitrator, or feel guilty about any of them. But I was working in a different environment, where the rules of evidence were relaxed and the level of scrutiny on me was much different. I was more concerned about giving a fair result than a result that would survive judicial review or scrutiny or even public scrutiny because of the confidentiality of the process.

Power Advantage of Judges

The big advantage the judge has over the private mediator is the power of the office. Judges, whether good, bad or indifferent, are perceived by most people as having power. Clients have little appreciation of the differences between or among judges. There is something powerful, and cathartic, about "telling it to the judge", or having a judge involved in the resolution of a dispute. Parties feel like they have had their day in court, and have been heard. Evaluations by a judge, whether through non-verbal communication, discussions of risk, expressing preferences for the other party's position, or providing an opinion, generally have a strong effect on counsel and their clients.

Private mediators do not have that power. It is easier for counsel to dismiss a mediator's evaluative interventions than a judge's, and that is one reason why clients sometimes pick a former judge as a mediator.

The additional benefit of the judicial settlement process is cost—you don't have to pay the judge but you do have to pay private mediators. This can be significant in smaller cases, or for financially-challenged parties; but in my view, the main reason for the popularity of judicial settlement conferencing is the clout a judge brings to the process.

Concerns Over the Judge's Role

Opinions on the law, or the likely outcome of the case, may not be treated with as much weight coming from a private mediator. But the judge's (or former judge's) pronouncements will likely have a greater effect. How does the judge, in an informal setting, where the parties are making representations in conversation rather than under oath and without the rules of evidence being applied, give an opinion that may be relied on?

Another problem is where one party is under-represented and it is clear that there is an inequality of skills at the settlement conference. A private mediator may be able to shrug, and take comfort in the fact that party autonomy allows a party to choose a less-skilled lawyer and take unreasonable or hopeless positions. But before a judicial mediator, how does that impact on the judicial ethic of equality? I recognize that the courts sometimes find themselves in the position of presiding over a case where one of the lawyers is performing in a sub-standard manner. The judicial role is a difficult one in such circumstances. How far does the judge go in trying to level the playing field? Can we intervene to protect the unsuspecting client from unskilled lawyering? We may have a duty to do so where there is true incompetence, but incompetence is not defined by a bright-line scale.

And what about fairness to the party who is being well represented? The appearance of judicial intervention can be viewed very negatively. This is a common problem where one of the parties is self-represented. The represented client must indeed feel very uncomfortable when the judge is giving the appearance of helping the self-represented party. Judges worry about these matters; private mediators may not.

What about the imprudent settlement? How does a judge preside over a settlement conference where he or she has significant concerns that the settlement agreed to is imprudent for one of the parties? How does that impact on public confidence in the administration of justice? Or diligence? Most people will credit the judge with a significant role in the settlement process if he or she is presiding; people will be quick to shift the blame when the settlement is the subject of buyer's remorse the next day, or the question to one of the settlement parties is "You did what?" or "You only got that little?" Private mediators may not have such

concerns, as party autonomy prevails, and they may be seen as less influential in the process than a presiding judge.

Advantages of Private Mediations

There are also cases that are better suited to private mediation. While there are many skilled judicial mediators, and many of the newer judicial appointments may come from the ranks of former mediators and arbitrators, the skill level of private mediators is strong. Private mediators have greater flexibility with respect to their time. You are not limited to the skills available in a particular jurisdiction: mediators travel, and it is common for well-known mediators from across the United States and Canada to offer their services in many jurisdictions. Judges are limited to their home jurisdiction.

Advantages of Court Mediations

But there are also many cases that are well suited to a judicial mediation or settlement process. The parties may feel that they have had their day in court if they have participated in a process presided over by a judge. Evaluative interventions or processes are perhaps better conducted using judges or former judges because of the weight given to a judicial opinion as opposed to a mediator's opinion.

Spectrum of Alternatives

In my view, there is plenty of scope for all processes. Dispute resolution through the traditional litigation route is subject to all sorts of criticisms and concerns -- some legitimate, some exaggerated. Counsel and clients need to strategize as to the most appropriate means of dispute resolution for their particular dispute and their unique needs and interests. Unless a precedent is needed by one of the parties (which is rare), settlement is generally preferable to litigation. Risks are managed in the settlement process, rather than rolling the dice by going to trial.

Private mediations may be at one end of the spectrum of choices; trial at the other. With facilitative processes, mediations are available, as are facilitative judicial settlement conferences. The parties retain control—they determine whether the matter should be settled or not. For evaluative processes, a rights-based judicial settlement conference may be the best choice, if the parties want a voluntary, non-binding process. They get the benefit of a judicial opinion of sorts, without being bound to accept it. At the fully evaluative end, there are private arbitrations and trials. Each of those has its advantages and disadvantages. But in both cases, the parties essentially lose control of the process, and are bound by the decision or opinions of a third party.

A hybrid is a binding judicial dispute resolution process. This resembles the mediation-arbitration option sometimes used in the private sector. The mediator attempts to facilitate a settlement; but, if that is not forthcoming, the process is turned into an arbitration, and the mediator gives a binding decision on the issues that have not been agreed along the way.

In any event, there is generally a process for all disputes and all disputants. Some will require a binding process that takes the decision-making out of their hands (or responsibility). Others will keep control and settle when the time is right, and when a settlement meets their needs or interests. Private arbitrators and private mediators will continue to be in demand, and will provide valuable services.

Epilogue

The common law does not progress when individual cases are resolved with arbitrations and mediations. When parties shun the courts, the development of laws is largely left to the legislators. The disputes that are resolved behind closed doors do not add to the jurisprudence, leaving the common law behind the realities of the business world. One could argue that there is a public duty to litigate and participate in the development of the common law, but that is undoubtedly a hollow argument with private disputants. Perhaps governments and municipalities (and possibly the media) recognize an obligation to litigate in the public interest, but that is an argument unlikely to succeed with private disputants.

The courts are not the be-all and end-all of dispute resolution. But they remain a viable and practical choice in many commercial disputes, and they should not be rejected out of hand. ■

1. The opinions set out in this article are those of the author, and do not represent the views of the Alberta Court of Queen's Bench.

How Neutrals Can Provide Early Case Management of Construction Disputes

By **JOHN LANDE, ESQ.**

This article describes how neutrals can provide early case management and resolution services to help parties in construction disputes resolve them more efficiently.

In an all-too-common pattern in litigation-as-usual, settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original conflict, the parties' relationship deteriorates, the process takes a long time and a lot of money and none of the parties is particularly happy with the settlement. Almost any disagreement can lead to an escalation of the conflict that diverts energy away from the critical tasks needed to resolve disputes efficiently.

Although some lawyers enjoy this process and make a good living from it, many would prefer to use a more constructive and efficient process. They know that most cases will eventually settle—often only after a process that takes too long and costs too much—but they often feel powerless to steer clients toward a more productive path.

They are often trapped in a "prison of fear" which locks them into unnecessarily long and expensive litigation. They fear that the other side would interpret the mere suggestion of negotiation as a sign of weakness and an invitation to take advantage of their clients. Logically, this is absurd because even lawyers with strong cases should have an interest in an early settlement under favorable terms. But this fear grips much of the legal profession, nonetheless.

Lawyers sometimes do escape from their prison of fear. They help clients assess the benefits and risks of negotiation, let the other side know of their interest in negotiation (but willingness to litigate if necessary), and cooperate with the other side in a constructive early negotiation. Even when they aren't sure that they can trust the other side, they may decide that trying early negotiation is better than the alternatives, such as litigation-as-usual or capitulation.

Early negotiation can be particularly helpful in construction disputes, where there are often multiple parties, numerous claims and counterclaims and complex technical issues. Without a lot of cooperation, it is easy for everyone to get caught up in an escalating conflict that gets resolved only after lengthy, bitter and expensive litigation.

Although lawyers can sometimes initiate early negotiation without engaging a third party to manage the process, sometimes a neutral may be necessary or extremely helpful.

Laying the Foundation for Dispute Resolution

How can neutrals help parties[1] build an escape hatch from the prison of fear? Neutrals can help them plan and manage the dispute resolution process and can keep it "on track" by effectively dealing with adversarial exchanges that threaten to derail it. Providing confidence in the process can be particularly helpful at the outset, when the parties may be especially afraid and distrustful.

Neutrals can provide additional confidence by reassuring parties that they can leave the process at any time they believe it is no longer in their interest to continue. If parties do end the process and proceed in litigation, they probably will not have lost very much considering that most of the information they will provide is probably legally discoverable. Indeed, even if an early case management or mediation process does not result in agreement, it can help the parties focus on the key issues and avoid wasteful procedures when they do litigate.

Professor Lande is Director of the LL.M. Program in Dispute Resolution and Isidor Loeb Professor at the University of Missouri School of Law. E-mail him at landej@missouri.edu or view his website at http://www.law.missouri.edu/lande/.

Early in the case, neutrals can arrange meetings with counsel to identify the information that each side needs to reasonably evaluate the matter. Neutrals can emphasize that by voluntarily sharing information, parties signal that they have a high degree of confidence in their case and an interest in negotiating a fair agreement.

Neutrals can manage the process of exchanging information to minimize the risk of exploitation that parties may fear. For example, neutrals can arrange for each side to begin by exchanging basic information that is clearly necessary and discoverable. Following initial exchanges, they can decide what specific additional information would be necessary. Neutrals can serve as "discovery escrow agents" to protect each side with simultaneous exchanges of information if this would help build confidence.

Neutrals can also help arrange assurances about the accuracy and completeness of information. If desired, each side can provide information under penalty of perjury, providing similar assurances as in formal discovery. Moreover, neutrals can help lawyers agree to limited formal discovery to obtain information from people who are not parties in the dispute. If the parties settle a dispute, neutrals can ask if parties want language in settlement agreements making representations about material facts that could be the basis for remedies for fraud.

Sometimes, the critical information needed to promote settlement involves facts that are not legally discoverable such as the parties' key interests, settlement priorities, business plans and expectations about the future. If the parties mediate, each side can provide such information confidentially to the mediator, with assurances that it will be used carefully to promote settlement without disclosure except as authorized.

In construction disputes, experts' analyses are often critical elements in negotiation and litigation strategies. Neutrals can help parties avoid expensive and risky "battles of the experts" by helping parties hire joint neutral experts. This substantially reduces the cost and risk of using separate partisan experts for each side. Neutrals can manage the process of selecting and hiring the neutral experts. This includes helping parties decide what information will and will not be provided to the experts, what analyses the experts will provide, whether they could be called as witnesses in litigation, or whether their work-product could be introduced in evidence. Arrangements for engaging neutral experts might include provisions for obtaining additional expert input under certain circumstances, such as if the results are outside a specified range.

Neutrals can help parties plan and manage the dispute resolution process and can keep it "on track" by effectively dealing with adversarial exchanges that threaten to derail it.

Considering all the tasks that may be involved leading up to the dispute resolution phase of the process, neutrals can help schedule various steps in the process, considering various critical-path sequencing issues. Neutrals can also help design multi-step dispute resolution formats so that parties start with negotiated processes like mediation and arrange for adjudicative processes like arbitration if they do not reach agreement within a specified period.

If parties do adjudicate the dispute, neutrals can help parties agree to narrow the issues to be argued, identify expert witnesses to be called, share exhibits and generally inform each other of their plans. Neutrals can also elicit an agreement by the parties to focus arguments on the merits of the dispute and avoid tactics that unnecessarily aggravate the conflict.

In addition to managing specific procedural issues leading up to the dispute resolution phase, neutrals can provide a great service by promoting good working relationships between the lawyers. Arranging a face-to-face meeting at the outset, perhaps over a meal, can help lawyers get to know each other as individuals, not merely as "opposing counsel." At these initial meetings, the neutral and lawyers may spend much of their time getting to know each other, not just discussing the details of the case. When lawyers and

See "How Neutrals . . ." on Page 8

How Neutrals Can Provide Early Case Management continued from Page 7

neutrals have such personal connections, they are more likely to resolve problems in a case more easily than if they maintain a professional arms-length relationship.

A Robust Role for Neutrals in Resolving Construction Disputes

Of course, neutrals participate directly in the ultimate dispute resolution process itself by providing a range of services such as mediation, evaluation and arbitration. If neutrals have managed the process of preparing parties to get ready for the dispute resolution process, it is a logical extension to help the parties design that process. Neutrals can manage the logistics in arranging for suitable space, audio-visual technology, refreshments and related matters. In some cases, key individuals may not be able to attend in person and the neutrals can arrange for video- or teleconferences if appropriate.

More substantively, neutrals can orchestrate the exchange of information and documents specifically needed for the process, attendance (and, possibly, non-attendance) of particular individuals, participation of experts, preparation of the parties to have realistic expectations about the process, scheduling of the meetings or hearings, facilitating procedural agreements about the process and arranging for procedural agreements to be documented, as appropriate. In coordinating with counsel before the mediation or hearing convenes, neutrals can specifically discuss potential problems in the process, ideas for making it work successfully and an agenda or schedule for the process. In mediations, neutrals may help lawyers prepare by discussing with them the parties' substantive concerns.

Mediators can also arrange for the lawyers to coordinate the drafting of boilerplate language of a settlement agreement before convening the mediation session. This helps avoid last-minute blowups over issues that were supposedly not controversial. If these issues are not addressed in advance, they may arise very late in a mediation, when everyone is tired and wants to go home. Or, if lawyers take a memorandum of agreement from a mediation and plan to draft a full settlement, disputes over boilerplate can lead to extensive delays and even kill a deal. Negotiating the boilerplate in advance can help parties start the mediation session with a positive expectation of settlement. If lawyers negotiate the boilerplate language before the mediation session and identify disputes over the language, the mediator can help resolve the disputes in a timely way as part of the mediation.

> This article recommends that neutrals offer to "bundle" a broader range of case management services. Certainly, some neutrals already do more than "helicopter" in to mediate or arbitrate a case.

Conclusion

The development of a market for a broad range of neutral case management services can help parties begin and end their dispute resolution processes sooner and more efficiently.

In contrast to the movement to "unbundle" lawyers' services by offering clients the option to retain lawyers to perform selected services "à la carte," this article recommends that neutrals offer to "bundle" a broader range of case management services.[2] Certainly, some neutrals already do more than "helicopter" in to mediate or arbitrate a case. Many providers and provider organizations offer administrative and logistical services in managing cases.

Sometimes, however, parties would benefit from a broader range of case management services, particularly those involving the professional skills of experienced neutrals described above. Enterprising neutrals can provide great value by offering a wider range of services, à la carte

or as part of more-or-less standard packages of services. Just as people can choose from various combinations of many products and services, ranging from bare-bones to five-star, neutrals might develop tiered levels of service to satisfy different clients' needs. If a substantial number of neutrals offer such services, parties and lawyers are likely to see them as normal and desirable—and then buy them.

Obviously, the parties need to compensate the neutrals for these case management and resolution services, but neutrals may be able to provide the services more economically than the parties' lawyers. Moreover, having neutrals provide these services gives greater assurance that no one will try to gain some advantage from making the procedural arrangements. And it also permits a fair allocation between the parties of the case management costs.

In an ideal world, parties in construction disputes would resolve all their disputes without lawyers and, when they do retain lawyers, resolve them without hiring neutral dispute resolution professionals. This isn't an ideal world. Parties sometimes do need to hire lawyers and neutral dispute resolution professionals, especially in complex construction disputes. In these situations, neutrals can provide great benefit to parties, courts and society by offering extensive early case management to supplement their dispute resolution services. ■

1. References to parties include their lawyers unless otherwise indicated by the context.
2. Hon. Frank Evans uses the term "ADR management" referring to a similar concept. See Frank G. Evans, *The ADR Management Agreement: New Conflict Resolution Roles for Texas Lawyers and Mediators*, HOUS. LAW., Sept./Oct. 2007, at 10.

Appellate Arbitration

continued from Page 1

The *Procedure* empowers the parties to pick an Appeal Panel comprising one or three arbitrators to review, at the request of either party, an arbitration award issued by a panel below. Paragraph (D) of the *Procedure* articulates the standard of review as follows: "The Appeal Panel will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision." In essence, an Appeal Panel reviewing an arbitration award subject to the FAA exercises the same standard of review as that of a US Court of Appeal reviewing a decision of a US District Court. Thus, an Appeal Panel, *inter alia*, may review "de novo" all questions of law, and may issue an appellate award that affirms, modifies or reverses the award below prior to presentation of the Appeal Panel's award for judicial confirmation under the FAA.

In a recent JAMS appellate arbitration proceeding, two parties not satisfied with an award issued by a non-JAMS arbitrator on dispositive issues, filed an appeal with JAMS under its *Optional Arbitration Appeal Procedure*. The stipulated record on appeal included key documents and extensive briefing on seven critical legal issues. The parties selected three JAMS arbitrators with special expertise in construction law to sit as an Appeal Panel. The Panel reviewed "de novo" the parties' appealed legal issues on the stipulated record and briefs without a further hearing, and issued a final award that affirmed in part and reversed in part as a matter of law the award issued by the arbitrator below. The arbitration thereby was finally concluded. The cost of the appellate arbitration review itself was quite reasonable, and conferred the added benefits of (1) obviating further extensive expensive arbitration hearings below, (2) virtually assuring that the award, having already been subject to appellate review, would be confirmed perfunctorily by the court under the FAA, and (3) providing the critical "de novo" appellate review of legal issues by selected experts without regard to the statutory limitations of the FAA.

No longer must parties opt for litigation over arbitration in order to preserve the important right of appellate review. Parties now simply may provide in arbitration clauses and agreements that each party has a right to appeal an arbitration award to an Appeal Panel pursuant to *JAMS Optional Arbitration Appeal Procedure*. A copy of the *Procedure* may be found at http://www.jamsadr.com/rules-clauses/. ■

Mr. Bruner is a JAMS arbitrator, mediator and project neutral based in Chicago. Email him at pbruner@jamsadr.com or view his Engineering & Construction bio online.

Evaluative Mediation

By JESSE B. (BARRY) GROVE III, ESQ.

Mediation to resolve construction disputes, in my experience, began to gain acceptance in the late 1970's. By the time of my retirement from practice in 2006 it had become a feature of almost all cases. During the course of those 25 years, the style of mediation has evolved from facilitative to evaluative, so much so that some mediations now resemble non-binding arbitrations. One of my recent experiences as a mediator illustrates the point.

Back in the day, a mediator was chosen for a variety of reasons including primarily mediation skills, persuasiveness, ability to intuit weaknesses and stature. But the mediator was not expected to be skilled in construction law or claims techniques. In fact, there were not any who possessed heavy construction claims experience from prior practice, although there were some who were known for experience in mediating construction matters. That did not matter. Since the mediator was not a decision maker, what he thought of the merits of the case was of little consequence. His job was to move the parties toward an acceptable middle ground based on what *they* thought of the merits of the case. In doing so, he could be counted on to tell both parties that their positions were weak. I cannot remember a single case in which the mediator told one of my clients to stand fast based on the quality of the client's position. Nor can I remember a single case in which the mediator stated his own opinion on the correct settlement value.

In preparation for one of these mediations, lawyers would caution their clients that persuading the mediator was not the game to play. Persuading the other side with the help of the mediator was. And clients would be warned not take too seriously the mediator's dire predictions. He could not, after all, be expected to have a very informed view because there was usually almost no pre-negotiation education opportunity. Most mediators did not want briefing beyond a five-page or so statement of position that would be read the night before. The mediation itself was a one-day (and sometimes night) affair. It was essentially a quick, high pressure, last chance for the clients to come to their senses. Mostly it worked so long as the clients were commercially sophisticated and reasonably well advised by counsel.

But it must have been less than satisfying because a gradual trend developed towards selection of mediators with substantive skills to perform evaluative mediations, sometimes featuring a mediator's proposal. At JAMS, members of the Global Engineering and Construction Group see quite a bit of this now, which brings me to my illustration.

A while ago I was asked to mediate a particularly tough case involving renovation of an historic public building. Visualize the renovation of Grand Central Terminal in New York City for a project analog. The project went bad from the start. It finished over a year late. Asbestos was everywhere it should not have been in quantities that were unpredicted. Unforeseen hidden conditions were discovered daily and the Requests for Information ("RFI") were at one point running at a level of six per day. As working conditions became more chaotic, some subcontractors ceased cooperative coordination with the other trades and began seizing opportunities to install their work regardless of impact on orderly sequencing. With the job running increasingly late, the general contractor applied unremitting pressure on the subcontractors, leading to acrimony and charges of mismanagement. The RFI and change order procedures were too cumbersome for the owner and its design team to keep up with what was happening in the field. This resulted in cash flow strangulation of the contractors (some did not survive). By the time of substantial completion, tens of millions of dollars in claims were unresolved and ultimately denied.

Litigation ensued between the general contractor and the owner, and nine subcontractor suits were

consolidated. The owner asserted a substantial counterclaim for defective work and liquidated damages. Active litigation at huge expense consumed the next four years. The parties and their counsel became increasingly polarized. Two attempts to commence mediation were stillborn. Since the main parties were highly sophisticated and experienced, and were guided by first class construction counsel, everyone knew it was unthinkable to send the case to trial, but no one had any faith that a mediation could succeed.

Enter the Mediator. It quickly became apparent that the parties desired an "evaluative mediation" meaning that they required the Mediator to analyze and evaluate the claims to the point that credible predictions, with supporting rationale, of the outcome on the parties' positions—claim by claim and issue by issue—could be formulated for the guidance of the parties in the final negotiation. To that end, during the first several months the Mediator spent something over 60 hours of independent review and research of the parties' positions and pre-mediation submissions and court filings. Between July of one year and March of the next, the Mediator spent over 80 hours in private meetings with the parties to probe and analyze the strengths and weaknesses of their positions. There followed, during April and May, joint meetings between the Mediator and the parties wherein presentations of positions by each party were made for the benefit of the Mediator and the other parties (95 Mediator hours). Finally, the Mediator and the parties spent about 70 hours in negotiations between June and August. There has rarely, if ever, been a more painstaking and thorough mediation.

It should be noted that the parties were required in the course of this mediation to make full disclosures of information deemed by any party to be necessary for fair evaluation. Books of account were made available and breakdowns and audits were disclosed. "Total Cost" and "Total Time" methodologies were deemed unacceptable. If one party suspected that an event or a side deal was in play, then that was chased down. Full disclosure of expert opinions, including detailed reports and presentations, was achieved. By the end, the Mediator and the parties were satisfied that no one was "hiding the ball." This was extremely important because the parties initially entered the mediation substantially misinformed about certain facts despite four years of discovery.

In the end, it worked. The parties found common ground. For this particular case, this was the only style of mediation that had any chance. For most cases, it is a style that ought to be considered. ■

Mr. Grove is a JAMS mediator, arbitrator, and project neutral based in Washington, DC. Email him at bgrove@jamsadr.com or view his Engineering & Construction bio online.

Introducing the JAMS App—the first ADR App for the iPhone and iPad

In our continuous effort to provide the best service to our clients, we are proud to announce the first ADR App developed for the iPhone and iPad. The JAMS App is intuitive, easy to use and free to download from Apple's App Store.

The JAMS App allows busy attorneys to view and/or download a neutral's bio, case manager and complete contact information at the touch of a button. You can tap to call or email any JAMS office.

You can also search and map to any of the more than 20 JAMS Resolution Centers. JAMS newsletters, press releases and other articles are available through the JAMS App as well.

Download your free JAMS App today by clicking on the App Store and searching for "JAMSApp." ■

Navigating Through a Construction Project: "California Construction Law"

Reviewed by LINDA DeBENE, ESQ. and BARBARA A. REEVES NEAL, ESQ.

Notice to construction lawyers and construction industry professionals: this is a book you need on your desk. The 2011 ***California Construction Law*** (17th Ed.) is an indispensable guide to construction law in California. With over 1100 pages, the book is a thorough and up-to-date resource, containing 14 chapters and 10 appendices, covering every step of a construction project. The book updates the prior edition (and supplements) and includes substantially expanded sections about insurance, indemnity and construction defect issues.

California Construction Law is organized much as one would build a project, with chapters dealing with pre-construction issues, construction issues, disputes, remedies, insurance and several specialty subjects. The two authors—Kenneth Gibbs, a full-time JAMS neutral, and Gordon Hunt, a member of Hunt Ortmann Palffy Nieves Lubka Darling & Mah, Inc.—are both leading authorities on construction law and litigation in California. They take the reader by the hand and thoroughly explore, step-by-step, everything one ought to know about California construction law.

The best way to approach this book is the way you would read a good novel. Sit back, sip your favorite beverage and open the book. First, check out the table of contents to get an idea of where the story is going. Reading through just the table of contents (both the summary contents and the detailed contents at the beginning of each chapter) is enough to educate anyone on the issues lurking at whatever stage of construction with which you might be concerned. Are you concerned about licensing? Chapter 1 covers everything from the license requirement through disciplinary action, types of licenses, issues regarding unlicensed contractors and subcontractors and licensing of construction managers, to name a few. Chapters 2 and 3 continue to lay the groundwork with in-depth instruction on issues that arise in connection with bidding for public and private work, and, once you have gotten the bid, the important considerations surrounding preparation of construction contracts.

The excitement builds with Chapters 4 and 5: breach of contract by the owner or contractor. Yes, dear reader, it is an unfortunate truth that not all construction contracts, no matter how carefully drafted, result in happily completed constructed projects. The authors chronicle everything that can go wrong. Breaches by the owner for failure to make payment, delay, defective plans, abandonment, failure to grant jobsite access, acceleration, interference with the contractor's performance, failure to approve shop drawings, failure to approve and process change orders and change order requests, failure to inspect and approve work on the critical path, failure to deliver owner-furnished equipment and finally, as the tension builds to the breaking point, wrongful termination and ejection of the contractor from the job. Then of course there follows, in depth, the damages that may be recoverable for such breaches.

Turn-about being fair play, the authors examine the problems of breach of contract by the contractor: failure to perform the work according to the plans and specifications, and failure to complete the work (abandonment). Damages, offsetting backcharges and the rules covering remedies for latent and patent defects, as well as violations of building codes bring the chapter to a close.

Chapters dealing with construction claims (Chapter 6), scheduling and proof of delay claims (Chapter 7), and expanding liability in the construction industry (Chapter 8) provide the plot development so necessary to a good book. First there is the background, then the crisis, then the development that keeps the reader turning pages. These chapters

provide not only an in-depth analysis of claims for delay, disruption and acceleration, but also the practical "how-to" of proving and defending these claims, including the use of forensic schedules.

Chapters 9-11 provide important information about statutory remedies, including mechanics liens, stop notices and bonds on public and private works, as well as Miller Act remedies. Think of this as character development filling out the story. Not the most exciting stuff, but so very important to any construction project. These chapters are to the point and include valuable analyses of the very latest of developments in liens and releases.

The authors then introduce two interesting characters, bankruptcy (Chapter 12) and home improvement contracts (Chapter 13). Bankruptcy, the alligator in the bathtub that can ruin any project, is a problem any time, but especially in today's economic climate. The authors carefully walk through what business people and their attorneys need to know about how to deal with the bankruptcy of another party to a construction contract. Home improvement contracts arising, as they often do, out of the efforts of home solicitation salespersons, are subject to abuses of the law by certain contractors. Described are the resultant to very strict requirements, misdemeanor penalties and fines (thus introducing the crime aspect of the story). The authors provide detailed discussion of the statutory requirements and case law involving home improvement contracts, from how to prepare such contracts to issues of rescission, arbitration and breaches.

The book ends not with a climax but with resolution: alternative dispute resolution. Arbitration, mediation and other types of ADR are surveyed in Chapter 14. This is recommended reading to those who would prefer not to spend their days pursuing their legal rights in an oppressive and expensive court environment or a poorly managed arbitration.

A reference to the *JAMS Optional Expedited Arbitration Procedures* at ***www.jamsadr.com/rules-clauses/*** and the *College of Commercial Arbitrators Protocols for Expeditious, Cost-Effective Commercial Arbitration* at ***www.thecca.net/CCA_Protocols.pdf*** would have been useful here, to remind readers that arbitration can be as efficient and cost-effective as the parties (and their selected arbitrators) make it.

For those involved in California construction law (or for those practicing in other jurisdictions that sometimes look to California construction law for guidance) this book is a must. A constructive suggestion: you know your favorite book that you want always to carry with you? Could we get it on CD or better yet, a thumb drive? ■

Ms. DeBene is a full-time mediator, arbitrator, special master, and project neutral with JAMS in Northern California. Email her at ldebene@jamsadr.com or view her Engineering & Construction bio online.

Ms. Reeves is a full-time mediator, arbitrator, special master, and project neutral with JAMS in Southern California. Email her at breeves@jamsadr.com or view her Engineering & Construction bio online.

Three people were at work on a construction site. All were doing the same job, but when each was asked what the job was, the answers varied. Breaking rocks, the first replied. Earning my living, the second said. Helping to build a cathedral, said the third.

NOTICES & EVENTS

GEC NEUTRALS RESOLVE AN ARRAY OF CONSTRUCTION DISPUTES

- **ZELA "ZEE" G. CLAIBORNE, ESQ.** was sole arbitrator with respect to a claim by a developer against a contractor relating to a $12.5 million solar energy project in Arizona, involving 45,000 ground mounted photovoltaic panels.
- **KENNETH C. GIBBS, ESQ.** mediated a major claim between a performance bond surety of a defaulted general contractor and a municipality in Arizona regarding the construction of a waste water treatment plant.
- **JOHN W. HINCHEY, ESQ.** is serving as an arbitrator on a three-member panel in connection with an international dispute between a contractor and the owners and developers of a resort hotel in Mexico. John is also serving as chair of an arbitration tribunal hearing a contract termination dispute between an international contractor and a U.S. domestic railway company, involving a long-term contract for the maintenance and repairs of a fleet of railway locomotives.
- **HARVEY J. KIRSH, ESQ.** was sole arbitrator in connection with multiple claims arising out of the dismantling, demolition, and deconstruction of structures at a major gold mine located north of Lake Superior. Harvey is also sole arbitrator in connection with a dispute between a government agency and a general contractor relating to the interpretation of a system for evaluating competitive bids for the public procurement of construction services for an armed forces base in Eastern Canada. He also recently acted as mediator with respect to a multi-million dollar dispute between a New York Hospital and its landlord relating to roof repairs, asbestos removal, maintenance, and other long-term lease obligations.
- **JAMES F. NAGLE, ESQ.** arbitrated a dispute between a regional government authority and an architectural/engineering (A/E) firm arising out of services performed on a particular construction project which was federally funded and to which portions of the Federal Acquisition Regulation applied. The issue arose out of the government authority's refusal to acknowledge certain salary and bonus payments made by the A/E firm, on the premise that the government authority was not satisfied that it would in turn receive federal funding by way of reimbursement for those payments.
- In a novel process under an international joint venture among major energy companies, **THOMAS J. STIPANOWICH, ESQ.** served as one of three "Preliminary Arbitrators." After disputes arose, the panel collaborated to develop a list of recommended candidates from whom a single Final Arbitrator, with the appropriate skills and strengths, would be chosen to conduct a hearing and decide disputes. In another dispute, Tom served as chair of an arbitration panel in a complex, multi-party, multi-million dollar construction case involving a major project at one of the nation's busier international airports. The panel addressed numerous claims and counterclaims (delays, differing site conditions, changes, termination for cause).

BOOKS, ARTICLES AND SPEAKING ENGAGEMENTS

- In a video produced by the American Bar Association relating to its February 9-15, 2011 Mid-Year meeting in Atlanta, **JOHN W. HINCHEY, ESQ.** presented a preview of the meeting session in which he made a presentation dealing with the College of Commercial Arbitrators' "Protocols for Expeditious, Cost-Effective Commercial Arbitration." John also made a presentation on the Protocols to the Florida Construction Law Institute on March 31, 2011 in Orlando, Florida. On February 18, 2011, he was a panelist at the Annual Meeting of the American College of Construction Lawyers in Key Biscayne, Florida, speaking on the topic, "Innovative Methods for Resolving International Construction Disputes"; and on March 30, 2011, John delivered an Adjunct Lecture to the School of Business Management of Georgia State University on the topic, "International Commercial Dispute Resolution."
- **ZELA "ZEE" G. CLAIBORNE, ESQ.** co-chaired the Sixth Annual Arbitration Training Institute, sponsored by the American Bar Association's Section on Dispute Resolution, which was held in Los Angeles on February 24-26, 2011. The program also included JAMS GEC neutrals **PHILIP L. BRUNER, ESQ., JOHN W. HINCHEY, ESQ., RICHARD CHERNICK, ESQ., R. WAYNE THORPE, ESQ.** and **HON. CURTIS E. VON KANN (RET.)** as faculty members and presenters.
- **ZELA "ZEE" G. CLAIBORNE, ESQ.** and **RICHARD CHERNICK, ESQ.** co-authored an article entitled "Reimagining Arbitration," which was published in the *Litigation Journal*, a publication of the American Bar Association's Litigation

Section. Zee and Richard also made a presentation on this topic to the American Bar Association's Dispute Resolution Section in Denver in April.

- On May 5, 2011, **CRAIG MEREDITH, ESQ.** addressed the Insurance Practice Section of the Bar Association of San Francisco on "Insurance Issues in Mediation."
- On May 12, 2011, **HARVEY J. KIRSH, ESQ.** presented his paper on "Key Developments in Arbitration Practice" at the Joint Spring Symposium of the American College of Trial Lawyers and Canada's Advocates' Society in Toronto. The theme of the Symposium was "Practical Advocacy: Critical Updates, Latest Tools, and Creative Solutions."
- An article by **THOMAS J. STIPANOWICH, ESQ.** titled "Revelation and Reaction: The Struggle to Shape American Arbitration," is being published in the *Penn State Yearbook on Arbitration and Mediation*. Tom also recently spoke at a national conference titled "The Future of Arbitration" at George Washington University Law School. Additionally, Tom recently gave the keynote address, dealing with international arbitration, at a conference co-sponsored by the ABA Section on International Law and the L.A. County Section on International Law.
- June 13-17, 2011 was **JAMS NATIONAL ARBITRATION WEEK** and featured complimentary arbitration CLEs and events in JAMS Resolution Centers across the country. JAMS GEC neutrals **M. WAYNE BLAIR, ESQ., PHILIP L. BRUNER, ESQ.**, **RICHARD CHERNICK, ESQ., ZELA "ZEE" G. CLAIBORNE, ESQ., HON. CLIFFORD L. MEACHAM (RET.), JOSEPH T. McLAUGHLIN, ESQ., ALEXANDER S. POLSKY, ESQ., R. WAYNE THORPE, ESQ., MICHAEL D. YOUNG, ESQ.** were among the speakers.

RECENT HONORS AND APPOINTMENTS

- The following JAMS neutrals have been named to the *2011 Southern California Super Lawyer* list in the "Alternative Dispute Resolution" category: **GEORGE D. CALKINS II, ESQ., RICHARD CHERNICK, ESQ., KENNETH C. GIBBS, ESQ., JOEL M. GROSSMAN, ESQ., GERALD KURLAND, ESQ.,** and **ALEXANDER S. POLSKY, ESQ.** Ken Gibbs has also been named in the "Construction" chapter of the 2011 edition of the *Chambers USA Directory* for his "truly excellent construction expertise and the ability to skillfully resolve disputes." **ROBERT DAVIDSON, ESQ.** has also been recognized in the "International Arbitration" chapter as a leading arbitrator.
- JAMS neutral **GEORGE D. CALKINS II, ESQ.** received the prestigious 2011 West Coast Casualty Jerrold S. Oliver Award of Excellence. **HON. JONATHAN H. CANNON (RET.)** was also nominated for this award. Named after the late Judge Jerrold S. Oliver, a JAMS mediator and arbitrator and a "founding father" in using ADR to resolve construction claims, this award recognizes an individual who is outstanding or has contributed to the betterment of the construction community with the same spirit of commitment, loyalty and trust as displayed by Judge Oliver. Previous JAMS recipients include **BRUCE A. EDWARDS, ESQ., ROSS W. FEINBERG, ESQ.** and **GERALD A. KURLAND, ESQ.**
- **LINDA DeBENE, ESQ.** was elected as a member of the Board of Directors and as Membership Chair of the national Academy of Court Appointed Masters at its recent Annual Meeting in New Orleans.
- **JOHN W. HINCHEY, ESQ.** has been appointed to serve on the Editorial Board of the U.K. Institution of Civil Engineers' Journal of Management, Procurement and Law.

UPCOMING EVENTS

- On July 12, 2011, **PHILIP L. BRUNER, ESQ.** will make a presentation on "Construction Disputes" at a seminar sponsored by the Masters Institute in Construction Contracting at Hilton Head Island, South Carolina. On September 30, 2011, Phil will be addressing the Construction Law section of the Utah Bar Association in Park City on "Trying the Construction Case in Arbitration and Court"; and on October 7, 2011, he will make a presentation to the Construction Law section of the Montana Bar Association in Bozeman on "Arbitrating the Complex Construction Case."
- On August 4-9, 2011, **PHILIP L. BRUNER, ESQ.** and **HARVEY J. KIRSH, ESQ.** will participate in a Dispute Resolution Section panel titled "Resolving Construction Disputes in Canada and the U.S - Looking Back, Looking Forward," at the American Bar Association's 2011 Annual Meeting 2011 in Toronto. Other participants on the panel will include the Honourable Mr. Justice J. Edgar Sexton of Canada's Federal Court of Appeal, and Duncan W. Glaholt, Esq., of Glaholt LLP (Toronto), a senior attorney and mediator and arbitrator of construction industry disputes.

JAMS GLOBAL CONSTRUCTION SOLUTIONS

Leading ADR Developments from The Resolution Experts

Newsletter Board of Editors

PHILIP L. BRUNER, ESQ.*
Director, JAMS Global Engineering and Construction Group

HARVEY J. KIRSH, ESQ.*
JAMS Global Engineering and Construction Group

JOHN J. WELSH, ESQ.
JAMS Executive Vice President and General Counsel

BRIAN PARMELEE
JAMS Vice President - Corporate Development/Panel Relations

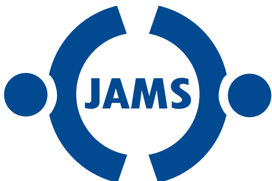
JAMS Global Construction Solutions seeks to provide information and commentary on current developments relating to dispute resolution in the construction industry. The authors are not engaged in rendering legal advice or other professional services by publication of this newsletter, and information contained herein should not be used as a substitute for independent legal research appropriate to a particular case or legal issue.

JAMS Global Construction Solutions is published by JAMS, Inc. Copyright 2011 JAMS. Photocopying or reproducing in any form in whole or in part is a violation of federal copyright law and is strictly prohibited without the publisher's consent.

Additional members of the
JAMS Global Engineering and Construction Group

M. Wayne Blair, Esq. • Viggo Boserup, Esq.
Hon. William J. Cahill (Ret.) • George D. Calkins II, Esq.
Richard Chernick, Esq.* • Zela "Zee" G. Claiborne, Esq.
Robert B. Davidson, Esq.* • Linda DeBene, Esq.
Bruce A. Edwards, Esq. • David Geronemus, Esq.
Kenneth C. Gibbs, Esq.* • Jesse B. (Barry) Grove III, Esq.*
Katherine Hope Gurun, Esq.* • William E. Hartgering, Esq.
John W. Hinchey, Esq.* • Gerald A. Kurland, Esq.
HH Humphrey LLoyd QC* • Hon. Clifford L. Meacham (Ret.)
Joseph T. McLaughlin, Esq. • Craig S. Meredith, Esq.
Roy S. Mitchell, Esq. • James F. Nagle, Esq.
Douglas S. Oles, Esq. • Donald R. Person, Esq.
Alexander S. Polsky, Esq. • Barbara A. Reeves Neal, Esq.
Carl M. Sapers, Esq. • Thomas J. Stipanowich, Esq.*
Michael J. Timpane, Esq. • Eric E. Van Loon, Esq.
Hon. Curtis E. von Kann (Ret.) • Catherine A. Yanni, Esq.
Michael D. Young, Esq.

**GEC Advisory Board Member*



THE RESOLUTION EXPERTS®

JAMS Global Engineering and Construction Group
1920 Main St. • Suite 300
Irvine, CA 92614

Presorted First Class
U.S. Postage
PAID
Permit No. 510
Santa Ana, CA