



Lessons Learned on the Bench: Not Everyone Loves a Jury Trial

**By Hon. Bonnie H.
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Those of us of a certain age likely remember the long-running sitcom “Everybody

Loves Raymond.” Each episode began with the voice of Raymond’s brother, Robert, glumly intoning the three words in the show’s title. We learned that Robert’s sibling envy was misplaced. Ray was neither perfect nor universally loved. Even his wife Debra frequently complained of Ray’s failings: his overspending, his chronic lateness, his insensitivity and his careless disclosure of private personal matters.

How, you might legitimately ask, do these musings of a retired judge about a long-retired television program relate to the subject of jury trials and mediation?

For many years, as lawyer and judge, this author viewed the jury trial as the crown jewel of the justice system. Practicing in that legal realm inspired admiration, respect and even envy. Who wouldn’t love to be part of a jury trial? This is an easy question for those who, by inclination and ability, have chosen this career path, and (like Ray’s wife Debra) are inured to its flaws. For trial judges, this is likewise an easy “affection.” The key participants in litigation, however, the parties have no established affinity with the jury process. How then can they fully understand what litigation entails? Hearing thousands of civil cases over 27 years, including the testimony of hundreds of parties, and participating as a judge in the settlement of cases prior to trial, have provided important lessons regarding the considerations that lead litigants to choose mediation.

Lesson One: Justice Delayed—Time Hurts

“Time can’t heal your wound when you keep poking at it and picking at the scab.” Not my words, but those of a juror when I went to thank the jury after a two-week wrongful death trial. While we did

not discuss the case or the verdict, I saw that the jury recognized the emotional toll that time had taken on all the parties. While the loss had occurred seven years earlier, the testimony of the plaintiffs, the decedent’s children, and the defendant doctors revealed, according to the juror, that “not a single party in this case has been able to move beyond the events because this trial loomed.”

Anyone who has experienced a significant loss or a traumatic event learns that grieving and moving on is a multi-stage process, involving many emotional shifts and adjustments. That juror understood that the length of the litigation process intensified the emotional toll on the parties and prevented that family and those physicians from moving ahead.

While steps to ensure firm trial dates have been largely successful, factors such as discovery issues, dispositive motions and the availability of witnesses account for difficulty in establishing trial dates. It is quite common for lawyers at a pretrial conference to consult their calendars and advise the judge that the earliest date of their mutual availability is in 18 months. This is merely a speed bump for judges and counsel with plenty of cases to hear and try. For the parties, the long wait for a trial is like proverbial salt. It hurts. Simply put, the more predictable and reasonable timetable that mediation provides will allow the injury to mend sooner.

Lesson Two: What Just Happened? Control is Crucial

News Flash! In a jury trial, somebody wins, somebody doesn’t. Nevertheless, as a verdict is read, one or both of the parties unflinchingly mirrors shock or surprise, either through a noisy outcry or a not-so-subtle, repeated headshaking. Although the clients insist from the start of the litigation that they “just want to tell [their] story,” and they “will accept the jury’s verdict, let the chips fall where they may,” they also want “justice” and to them that means winning. When they don’t, they feel betrayed.

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Let's not overlook those cases where "even when you win, you lose." These are the cases where the jury award will scarcely satisfy the plaintiff's medical liens; where the defendant prevails but the expense of defending the case has eaten up the children's college fund (examples of collateral damage that lawyers and judges see often). These litigants likewise feel let down.

A sense of betrayal or disillusionment can be averted only in a setting where the parties have a meaningful voice in the process and the outcome. Some judges have derived great satisfaction from their ability to assist in the settlement of cases, often on the eve of trial. That process essentially involved the judge and the lawyers conferring; the lawyers conveying the judge's thoughts to their clients; and the judge bringing the parties into the discussion to confirm that they understood and accepted the terms of the proposed agreement. Such is not the course of mediation, I have learned.

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Mediation puts the control of the process where it ought to be: with the parties. The flexibility it provides allows the parties to fashion remedies that are unavailable through litigation. A plaintiff in an employment matter may instruct a mediator that he "wants to feel respected again" after having been discharged. His opening demand is then in the mid-six figures. At the end of the day, he may accept a relatively small cash settlement, along with a private apology and a non-disparagement agreement. This flexibility extends to any case. In a commercial business dispute, for example, rather than the money damages initially sought, the parties may craft an alternative resolution addressing their greater interest of preserving an ongoing relationship.

Lesson Three: Privacy Please – Confidentiality Counts

A 25-year old plaintiff who burned more than 70 percent of his body struggles to describe a day in his life after multiple skin graft surgeries. His answers are halting and he asks for a break. With the jury out, the judge leans over and asks if he is all right. He tells her: "Judge, I don't know these #### people! I can barely tell my Mom how I feel."

That real-life scene speaks volumes about the public nature of trials and how the stress and anxiety created by the setting affects the ability of litigants to present their best case. The principle of confidentiality at the heart of the mediation process ensures that the parties may freely disclose to the mediator everything that they believe is important and relevant, including information that might be inadmissible at trial.

Sensitive private information and feelings are relayed to the mediator with the reassurance that they are confidential. Private matters stay private.

There will always be cases that need trying, and lawyers and judges willing to try them. These same lawyers recognize that, for many of their clients, mediation is often the better choice. ■

*Before joining JAMS, **Hon. Bonnie H. MacLeod (Ret.)** served on the Massachusetts trial court for over 27 years, first in the District Court from 1989-2002 and then, from 2002-2016, on the Superior Court, where she was a Regional Administrative Justice for civil business in Suffolk County. She can be reached at bmacleod@jamsadr.com.*