WINTER 2018

JAMS BOSTON NEWSLETTER

Employment Q&A: "Workplace Enforcement in Flux"

"I was honored to moderate and participate in such an insightful discussion with so many distinguished experts."

—Maria C. Walsh, Esq.
JAMS Mediator and Arbitrator

On October 24, JAMS Boston hosted an exciting employment law panel discussion co-presented by *Massachusetts Lawyers' Weekly*. **Jenny Yang,** Commissioner of the Equal Employment Opportunity Commission (EEOC), and **Sunila Thomas George**, Chairwoman of the Massachusetts Commission Against Discrimination (MCAD), were joined by a panel of experts addressing new developments in wage and hour litigation, discrimination, collective actions and private settlements. JAMS neutral **Maria Walsh, Esq.** moderated the program and shares with us a few of her key questions.

Q. Commissioner Jenny Yang, could you share what the status is for EEO-1 filing requirements in light of OMB's review?

A. On August 29th, the Office of Management and Budget (OMB) issued a memorandum informing the Equal Employment Opportunity Commission (EEOC), that OMB initiated a review and immediate stay of the effectiveness of the pay data collection aspects of the EEO-1 form that was revised on September 29, 2016. OMB did not stay the portion of the EEO–1 report that filers have submitted in the past, which requires data on the race, ethnicity, and sex of workers, by job category. The EEOC will continue to collect the earlier approved EEO-1 form from all filers during OMB's review and stay. Employers should plan to comply by the previously set filing date of March 2018. I strongly believe that pay data

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"I strongly believe that pay data collection is a vital step in addressing the persistent problem of pay discrimination."

—Jenny R. Yang, Esq.
Commissioner, EEOC

WHAT'S INSIDE:

SPOTLIGHT ON. . .

Boston Neutral Hon. Malcolm R. Graham (Ret.)

Available in Boston, New York, Washington D.C. and nationwide

To schedule your case or learn more, contact: Jeffrey M. Poirier, Esq. at 617.228.9121 or jpoirier@jamsadr.com

Full-time Arbitrator, Mediator and Neutral Evaluator

- **Justice Graham joined JAMS after a distinguished judicial career that spanned more than 30 years,** including nearly two decades as a Massachusetts Superior Court Judge and a decade as an Associate Justice of the Massachusetts Appeals Court. He is known for his intellectual integrity, careful consideration, courteous demeanor and extensive knowledge of the law—all of which allow him to provide a full and frank assessment of the issues.
- **The Justice is an expert in numerous areas of the law,** including construction defect, personal injury, insurance and indemnification coverage, business commercial disputes, labor and employment, real property and sports and entertainment.
- **Justice Graham believes early use of negotiation and mediation is a critical exercise** to reduce the length and expense of protracted litigation. He places special weight on the parties' ability to achieve a full and fair hearing.
- **Justice Graham served as a member of the Massachusetts Superior Court ADR Committee,** was President of the Massachusetts Black Judges Conference and was the recipient of the Massachusetts Judges Conference Award for Judicial Excellence (President's Award).
- Prior to his impressive career on the bench, **Justice Graham was an Academic All-American Basketball Player** and a member of two Boston Celtics World Championship teams. He has received numerous awards and recognition for his academic, professional and civic accomplishments.

A Note from the Editor

We are pleased to share this edition of the JAMS Boston newsletter, where you will find practical ADR tools and updates as well as recent JAMS Boston developments. If you have any ideas for future articles, comments or questions about the newsletter or JAMS Boston specifically, please feel free to contact us.

Sincerely,

Jeffrey M. Poirier, Esq., Business Manager
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Complimentary CLE Programs

JAMS is dedicated to staying active in the Boston and Massachusetts legal community by sponsoring bar associations, attending local events and providing continuing legal education courses.

Our updated CLEs highlight different types of ADR formats and ethics in ADR. For more information about complimentary CLE programs delivered by our neutrals at our office or yours, please visit our CLE Menu.

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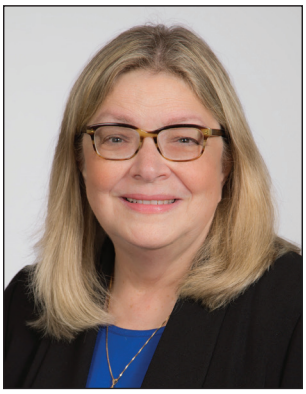

Lessons Learned on the Bench: Not Everyone Loves a Jury Trial

By Hon. Bonnie H. MacLeod (Ret.)

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 meditation?

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 unfailingly 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.

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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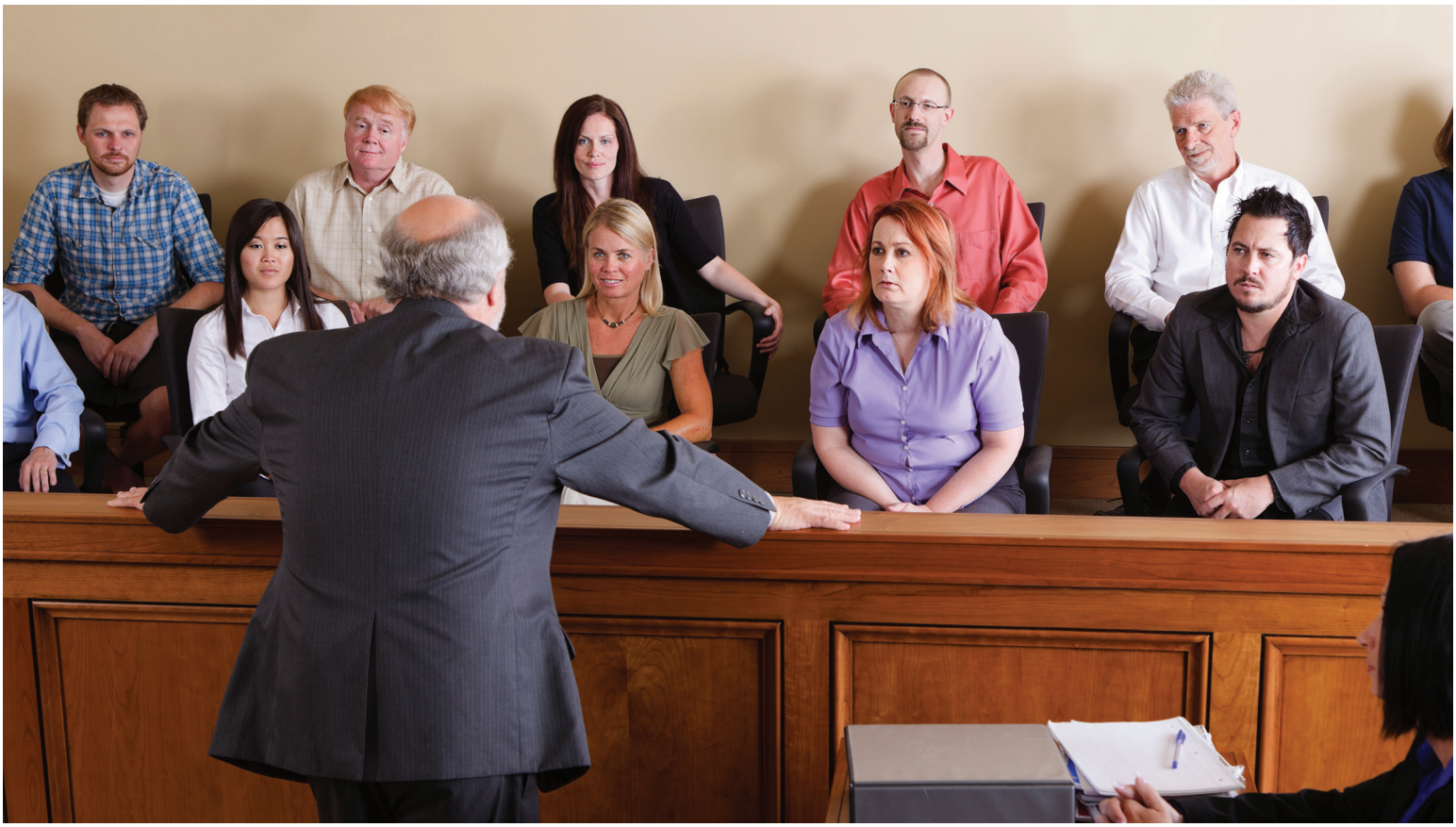

Mediation puts the control of the process where it ought to be: with the parties. The flexibility it provides allows the parties to fashion remedies that are unavailable through litigation. A plaintiff in an employment matter may instruct a mediator that he "wants to feel respected again" after having 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.

"For the parties, the long wait for a trial is like proverbial salt. Simply put, the more predictable and reasonable timetable that mediation provides will allow the injury to mend sooner."

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.*

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collection is a vital step in addressing the persistent problem of pay discrimination. It is essential for the Commission to make it a priority to timely finalize a robust pay data collection.

"In 2018, the MCAD will be issuing revised and dramatically updated Procedural Regulations."

—Sunila Thomas George, Esq.
Chairwoman, MDAC

Q. Chairwoman Sunila Thomas George, could you share with us what the MCAD's strategic priorities will be in 2018 in support of, and coordination with the EEOC in MA?

A. MCAD is poised to have a landmark 2018. With the new leadership team in place, we Commissioners are prioritizing a multifaceted approach to addressing and preventing discrimination in the Commonwealth. We seek to dismantle lingering discriminatory practices in all of our jurisdictions: employment, housing, public places, access to education, credit, and lending. In addition to the prioritization of the timely completion of investigations, in 2018 the MCAD will be issuing revised and dramatically updated Procedural Regulations (804 CMR 1.00), which will include holding hearings for public comment in multiple venues across the Commonwealth. This is a massive undertaking, evidenced by the regulations having not been revised this extensively in over a decade. Additionally, in an effort to prevent discrimination before it happens, the MCAD has hired a new Director of Training and we are expanding the Commission's training and outreach initiatives in order to offer a wider array of educational programs that reach new demographics within Massachusetts.

Q. Michael Mankes, what are the most important state of law updates for mandatory arbitration and class action waivers?

A. The U.S. Senate recently confirmed Peter Robb, a management-side labor attorney, as the National Labor Relation Board's General Counsel. The General Counsel acts as the Board's chief prosecutor and plays a large role in determining which matters the Board will address. It will be interesting to see if the confirmation of General Counsel Robb, alongside a Republican-controlled labor board, will lead to a reversal of the Obama Board's position that mandatory arbitration agreements that contain a class action waiver restrict concerted activity and violate the National Labor Relation Act, and how such a reversal may affect the cases addressing this issue that are currently pending before the U.S. Supreme Court.

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"The Supreme Court announced it will review three consolidated FLSA cases to resolve a split in the appeals courts on class-action waivers in arbitration agreements."

—Michael Mankes, Esq.
Shareholder, Littler

"Recent case law suggests that the 20% rule (a tipped employee cannot spend in excess of 20% of their work time performing side work) applies to claims under Massachusetts law."

—Hillary Schwab, Esq.
Principal, Fair Work P.C.

Q. **Hillary Schwab**, can you tell us one thing about tipped/non-tipped work and the 20% rule that we don't know?

A. Recent case law suggests that the "20% rule," i.e., the rule that tipped employees who spend more than 20% of their time doing non-tipped work must be compensated for that non-tipped work at the full minimum wage, applies to claims under Massachusetts law. Two significant implications are: (1) employees who have been required to do excessive non-tipped work at the tipped rate may seek damages under Massachusetts law, which includes greater protections than the FLSA, such as automatic trebling of damages, prejudgment interest at 12% per year, and a three-year statute of limitations; and (2) whereas the FLSA typically does not apply in the banquet setting, the Massachusetts law does protect workers' entitlement to banquet gratuities and service charges, meaning that claims invoking the 20% rule under Massachusetts law may also occur in the context of being required to set up and break down for weddings and other events.

Q. **Andrea Kramer,** how can the Mass. Pay Equity law be used as a defense to pay inequity claims?

A. Unlike under the Federal Equal Pay Act, 9 U.S.C. § 206(d)(1), which includes a catch-all defense for "any other factor other than sex, the new Massachusetts Pay Equity Law that goes into effect July 1, 2018, strictly limits employers' defenses to six specifically defined defenses. Thus, while federal law permits employers to defend on the basis of a legitimate business reason, under the new Massachusetts law, once an employee proves that men and women are paid differently for "comparable work," the only defenses to liability are that the difference is due to differences in (1) seniority if the employer has a system that rewards seniority (2) merit where there is a merit system, (3) production where there is a system in which earnings are tied to quantity or quality of production, sales, or revenue, (4) geography that justifies pay differentials, (5) education, training, or experience, and (6) amount of travel required by the job if the travel is a regular and necessary condition of the particular job. Note that for the seniority defense, the statute expressly provides that "time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority," which is different from how seniority is often treated in other statutes and by employers. Also, the statute limits the defense for differences in education, training, or experience only to those situations "where such factors are reasonably related to the particular job in question." Thus, an employer cannot defend on the basis that a man, for example, is "overqualified" for the position by virtue of additional experience if that experience is not reasonably related to the job. Quite importantly, the statute expressly eliminates prior salary as a defense. As such, even beyond the fact that the law prohibits employers from asking about a person's salary in a previous job, even where the employer obtains that information, it uses it as a basis for differences in pay at its peril. ■

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—Andrea Kramer, Esq.
Partner, Kramer Frolich