

## The First Outdoor Mediation in Pennsylvania?

What I love about being a lawyer is that every day is different. When I was pre-med and changed to law in my junior year of college I thought, "This would be much more interesting than dealing with sick people." I spent an evening at Kings County Hospital with some residents, watching them wrestle with a man suffering from delirium tremens. While the staff physician stood around, the residents and nurses held the man down while somebody gave him a shot of Demerol. It was my decision that it was better to wrestle with difficult and challenging legal principles than with obstreperous people. What I found is that there are plenty of obstreperous people in the law, such as clients, staff, other lawyers, judges, and occasionally even ourselves.

Every once in a while something happens in the law so marvelous and entertaining that the first glass of wine at home in the evening is even more satisfying. That was my feeling after what may have been the first outdoor mediation in Pennsylvania's long and illustrious history.

Now this was not the first out-of-doors experience I have had as a lawyer. One time, Judge Muir, in a bench trial involving the federal government, had all counsel agree to a "view of the premises" and heard some testimony outside. While Judge Muir was well known for his seriousness and organizational skills, he loved nature and enjoyed long walks with his law clerks. In one "view," Judge Muir and I drove out to Buck Hill Falls and walked the Falls. Judge Muir and I ultimately disagreed as to whether an environmental impact statement needed to be issued in connection with a possible adverse effect to the Falls, but he was, after all, the Judge!

The outdoor mediation which took place in Bellefonte was certainly not planned that way. Counsel appeared before the cordial, well-mannered and professional Judge Jonathan Grine for a pretrial and to argue a potpourri of motions in limine in connection with an upcoming trial. We had tried to agree on a date for mediation, but alas there were too many lawyers to land on any one particular date.

In the course of the initial stages of the pretrial, the court handed out yet another list of potential dates for mediation with another judge in the courthouse, or perhaps the senior judge. One of the intrepid defense lawyers pointed out that August 3<sup>rd</sup> would really be too late, and was anything else possible?

At that point, Judge Grine walked out of the courtroom to see if his father, Senior Judge David E. Grine, was available. We have all had very positive experiences with Senior Judge Grine as well, and agreed to have him perform the task. Judge Grine was not available, but Judge Lunsford was; and hence the mediation began immediately.

None of the lawyers appeared to have a great deal of experience with Judge Lunsford. Therefore, the usual technique of emailing and calling our friends to get the “skinny” on the mediator was impossible. Mediation submissions? There would not be time for that. In fact, Judge Lunsford would not even have time to read the pretrials, although presumably Judge Grine gave him some idea of what this complex medical liability case was all about.

After calling the relevant clients and telling them to hustle down to the courthouse as soon as possible, we marched over to the annex where Judge Lunsford’s lovely rural courtroom resides. We never went into the courtroom, but rather, Judge Lunsford welcomed us to his “outside office.” Counsel looked at each other quizzically, wondering, I am sure, what this quixotic arrangement would be like. There may have even been some initial discomfort. As the mediation progressed, the different parties claimed different street corners. Defendants were on the side of the street adjacent to the beautiful, stately main courthouse, statues and American flag. Plaintiffs, always the underdog, assumed the more modest street corner adjacent to the annex. Fortunately, all of these areas had the appropriate number of benches so that even Defendants could separate when they needed to plot against one another.

Since Plaintiffs were on a corner, we could use the front of the street to talk with the Judge, and then go around the corner to speak with our clients. The Judge roved from place to place, speaking either to groups of lawyers, the clients, individual lawyers, or friendly passersby. At one point, I noticed the Judge and some defense counsel moseying over to a construction site where the distraction proved useful for the Judge to engage in some “out of the box” thinking.

As time wore on, the weather became warmer, the lawyers became more physically uncomfortable, and the parties seemed to reach an impasse. It was clear to me that this mediation was going to fail, and I believe the Defendants arrived at the same conclusion. Nevertheless, there was something magical about being outside on a gorgeous North Central Pennsylvania day, and an element of relaxation was introduced into the proceedings that kept everybody around. Where else could anyone go that was more pleasant and easy to be? Bellefonte, after all, does mean “pleasant springs,” and that pleasantness was in full view at our out-of-doors mediation.

In terms of how mediations work, the content of the procedure was not much different than sitting in an overly air-conditioned, windowless office in Philadelphia. However, circumstances do make a difference. Ambiance has its affect. Lawyers who are cordial, professional, inherently decent with a competent mediator can overcome great obstacles.

There was one particular lawyer who was carrying the heavy oar in the negotiations for the defense side. I have known this man for a long time, but an incident occurred that impressed me greatly. While we were doing our mediation, discussions and back-and-forth, he noticed a very sad looking woman. She clearly was malnourished, had no teeth in her mouth, and she represented an element of society easy to ignore. Not only was this defense

lawyer extremely pleasant to this woman who crossed our path, but he noticed that her shoelace was untied and he urged her to tie it so she would not fall and hurt herself. It may seem like a small incident, but as Justice Souter once said to me over a beer at the Loews Hotel in Philadelphia, "What the law is all about is how we treat other people." This particular incident did not settle the case, but it was part of the external circumstances which seemed to put everyone in a better mood.

By five o'clock, all the parties twisted and tortured themselves enough to effectuate a settlement, which was put on the record as the bell tolled 5 p.m. Nobody was thrilled about the settlement and probably a few people were upset about it. I for one went home feeling happy that the children of the woman who died will receive money they need for their education and other necessary expenses, and via settlement the defense lawyers were able to cap their clients' exposure as well.

To what extent did the out-of-doors mediation result in the resolution of a difficult and stressful litigation that has been rambling along for years? No one could tell, but, on the other hand, no one can argue that psychology plays a major role in how malleable lawyers and their clients will be. Maybe the out-of-doors, the magnificence of the day and the skills of the mediator kept us all from walking away. Perhaps one of the lawyers was simply principled enough to stick with it, do something unusual on short notice, and make the effort necessary to maintain civility and decorum. There probably is not any one element, but in the law there is always room for innovation.

So if you have a difficult case, with capable and energetic lawyers and an intelligent, thoughtful mediator, think about going out-of-doors! Noise? Well, noise could be an issue, and there was noise of construction, trucks and the like. The way we dealt with that at New York University was to go across the street and have a lecture in Washington Square Park. There are parks in Philadelphia and in Pittsburgh. While the first out-of-doors mediation (that I know of) took place in central Pennsylvania, certainly the practice need not be restricted to rural counties.

Who said there is nothing new under the sun? Ecclesiastes, but perhaps in this case the prophet was wrong.

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