The Role of Appellate Mediation in an Era of Thermonuclear Verdicts and Continuing Challenges to Settled Precedent

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With apologies to Aldous Huxley, personal injury lawyers have entered a "brave new world" in which they confront a largely unprecedented confluence of factors impacting their decision-making and advice to clients. Decades ago, so-called "runaway verdicts" were considered outliers warranting only limited consideration in the assessment of risk. In today's litigation environment, "runaway" has been replaced by consideration of verdicts deemed "nuclear" in excess of $10 million, and "thermonuclear" when they surpass the $100 million level. In the first two months of 2024 alone, Pennsylvania juries awarded $38.5 million based upon the death of two teenage girls; $24.5 million to two women who were the surviving victims of a human trafficking ring; $183 million to the family of an infant who suffered lifelong brain damage during a traumatic birth; and an incredible $2.25 billion to a plaintiff diagnosed with lung cancer allegedly caused by a well-known weed killer.

Lawyers are trained from their first days of law school to apply settled precedent in their analysis of the issues before them. The meaning of "settled precedent" has been cast very much in doubt, however, since the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), overturning the

precedent long considered "well-settled" in *Roe v. Wade*, 410 U.S. 113 (1973). In less than two years since *Dobbs* was announced, additional challenges to established precedent in health care, as well as the well-known *Chevron* Doctrine of administrative law, among others, have appeared repeatedly in state and federal appellate dockets.

In Pennsylvania, personal injury lawyers have evaluated medical malpractice liability claims through the lens of corporate negligence first announced in *Thompson v. Nason Hospital,* 527 Pa. 330, 591 A.2d 703 (1991). The contours of that doctrine and its application to differing health care settings is beyond the scope of this article, but its status as "settled precedent" is not. In December 2023, the Pennsylvania Superior Court, sitting en banc, split 5-4 and issued three separate opinions explaining its application of the corporate negligence doctrine in *Corey v. Wilkes-Barre Hospital,* 2023 PA Super 262, 307 A.2d 701 (Pa. Super. 2023). A petition for allowance of appeal filed in *Corey* remained pending when this article was submitted for publication, but there are multiple Pennsylvania trial and appellate cases also litigating the doctrine in equally challenging factual scenarios.

In this context, where jury exposure analysis now includes terminology more common to "Oppenheimer" and uncertainty impacts the applicable, governing law, the option of pursuing appellate mediation may offer litigators on both sides an alternate—and well informed—course to resolve their differences.

Mediation's Traditional Role

From the outset of the modern alternative dispute resolution era in 1976, arbitration and mediation have primarily been viewed as means to resolve cases at the trial court level.

Arbitration involves, of course, decision-making imposed by a selected third party. In contrast: "Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute. Mediation serves various purposes, including providing the

opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired." See "Preamble, The Model Standards of Conducts for Mediators" (2005).

The rationale for mediation is both well established and well known to most practitioners. In the assessment of conflicting perspectives, plaintiff vs. defense, the applicable interests and relevant evidence are generally disclosed during the discovery process and equally available to the parties. As discovery is advanced and evidence revealed, the suitability of a case for mediation is generally a decision which can be made within the context of a single court record. Newly introduced into the analysis is the potential for a verdict far exceeding the expectations of either party. Not to be ignored is the significant factor that mediation at the trial court level is a process largely controlled by the parties, each of whom has the power to accept or walk away from a negotiated outcome. That power is substantially diminished once a verdict is reached and appellate rules come into play.

Mediation in the Appellate Process

The rules of appellate procedure in our state and federal courts reflect standards of review and specific guidelines governing both briefing and oral argument that differ substantially from trial court practice. The initial burden of compliance with these guidelines falls upon the appellant, the party aggrieved by a trial court judgment. The prevailing party in the "lower court" is buoyed by standards of review which often, but not always, favor its position in the appellate proceedings (for example, a "clearly erroneous" standard of review for findings of fact compared to "de novo" review on issues of law).

Having advanced this far, why consider mediation during the appeal process? Again, multiple factors weigh in the analysis—time is one. Trial court verdicts are often subject to post-trial motion practice even before a notice of appeal is filed. Routine processing of an "uncomplicated" appeal, if such a record any longer exists, may require six to 18 months from the issuance of a briefing schedule to an argument date,

depending on the appellate court's caseload. Predicting the time from argument to decision is, at best, problematic even for experienced appellate specialists. A party dissatisfied with a panel decision then has the option of filing for en banc review followed, in most cases, by the filing of a permissive or discretionary appeal with the next level of the state or federal appellate judiciary. The years of litigation experienced at the trial level may easily be matched, and sometimes exceeded, by the course of appellate litigation. In this context, the option of meeting once more with an experienced mediator may offer both sides a less expensive and far less time-consuming alternative to final resolution.

There are, however, even more persuasive factors in today's environment to consider appellate mediation. An experienced mediator, one familiar with appellate practice, can bring greater meaning to the understanding of different perspectives, identification of relevant interests and possible solutions set forth in the "Preamble" quoted above. In this respect, I compare the appellate mediator's role to that of amicus curiae, only here serving as "friend to the parties" rather than to the court. In today's litigation environment, where "settled precedent" must be considered as anything but, litigators must recognize the potential for an unexpected outcome during the appellate process. This potential "wild card" becomes increasingly more problematic in direct relation to the visibility of the legal issues presented on appeal. The Supreme Court was inundated with amicus briefs during its consideration of *Dobbs*, a tactic now increasingly employed by public interest groups with no direct involvement in any specific case under appellate review. No "direct involvement" should not be equated with no "direct interest," and it is here that the appellate mediation process can be of great value to parties otherwise unfamiliar with the potential paths of resolution for their individual case. Experienced appellate lawyers are sensitive to the potential for any given case to increase in magnitude—and potential precedential value—if a factual context or legal issue long considered "generic" or "mundane" takes on increased status due to a changing social or political environment. Such lawyers, serving as mediators, can increase the understanding and scope of analysis that may resolve an

appeal early in its development while avoiding the risk of an outcome unexpected by the parties.

More than 40 years ago, the conflict between a strictly judicial assessment of the appellate record, as compared to one influenced by outside sources (amicus curiae for purposes of this article) was very capably described by the late U.S. Circuit Judge, Ruggero J. Aldisert, as follows:

"Judges face the perennial problem of balancing the need for stability against the need for adaptability to changing social needs. Judges generally confine themselves to a frozen record, analyzing the interests presented in the specific case before them, with facts established and issues framed by advocates who seek only to convince the appellate court that their litigant should prevail. The amicus looks beyond, and thaws, the record, adds a pinch of new facts, dissects the mutually self-serving arguments of counsel, makes some philosophical, economic or sociological value judgments of his own and recommends a broad solution based upon a sort of materialistic advice: 'Take it now. Swallow it. It's good for you. You'll see.'" See Aldisert, "The Role of the Judicial Process: Revisited," 49 U. Cinn. L. Rev. 1, 36 (1980).

With the value of stare decisis now open to question, and the potential of significant personal injury matters now unpredictable at best, the value of informed decision-making facilitated by experienced appellate mediators has become increasingly self-evident. It is an alternative to the expense, duration and uncertainty of appellate decisions well worth consideration.

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