



My beloved hiking boots--I wore them hiking to the bottom of the Grand Canyon and I treasure these boots and the trails we covered together. But they also symbolize what happens to all of us at a mediation. Many times mediation is a long, hard, uphill slog through the snow, mud and rocks. Mediation can seem interminable; an all-uphill hike filled with false hopes that the end is just around the corner. Ah, but that feeling at the end of a case when the mediation succeeds is well worth it.

I was reminded of the slog after reading a recent Illinois decision over how to divide up the estate between the decedent's four children and second wife. After 13 hours of mediation, the five parties tentatively reached an agreement. A written "Memorandum of Settlement" was prepared but it was so late that everyone left without signing. One party explicitly asked if she could "sleep on it." Another party had previously left the mediation after "only" nine hours. So at ten o'clock at night, this very diligent mediator, very tired attorneys and probably exhausted parties all agreed to review the Memorandum of Settlement in the morning. The group had reached a muddy turn in the path. As you might imagine, after the sun rose the next day, some of parties refused to sign off on any settlement agreement and the others moved to enforce the oral settlement.

On appeal, the Fifth District refused to enforce the Oral Settlement. Under the Agreement to Mediate, which was signed by the parties before beginning the mediation, the parties contemplated an executed settlement agreement with all promises made prior to that executed settlement agreement considered confidential and privileged. So the Court sent the case back for trial. It turns out the long slog through mediation was the shortcut compared to the uber-long trail this case took up on appeal and then back to the trial court.

The moral of the story is that probably this mediation should have recessed and everybody come back for round two. Some complicated cases will be set for mediation on several consecutive days or even separate mediation sessions between one side only when there are multiple parties on that one side. Consider the age and health of the parties. The parties were not young in this case and were not able to meaningfully participate as the mediation wore on. However, this is my view from the top of the canyon looking back in. So easy to make suggestions from hindsight. Next time I am pushing my way through an uphill hike in a mediation, I will take a deep breath and remind the parties that we are on a winding, rocky climb but we're in it together.

By KIM L. KIRN