

MEDIATION: DOES IT WORK?

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INTRODUCTION

Lawyers are generally unfamiliar with non-adversarial methods of dispute resolution. The subject is frequently not taught in law school, and the adversarial nature of our legal system encourages litigation to a large degree.

The recent law passed in Austin, Texas, encourages the use of mediation to resolve disputes.¹ Mediation has been an alternative dispute resolution mechanism available for some time, but its use has been limited. More widespread use of this method of resolving disputes is anticipated in the future, but little empirical study has been done to validate the efficiency and efficacy of mediation.

With this in mind, we set out to test the usefulness of mediation as a dispute resolution mechanism. A randomly chosen, actually litigated case was selected and submitted to mediation and the results of mediation were compared with the results of litigation.

FACTS

In our case, an employee who was hired by a pharmacy company in 1983 as its vice president was fired less than a year later.

The company claimed that the firing was with cause and the employee claimed that it was without cause. Upon termination, the company offered 13 weeks of severance pay. The original offer of employment letter had provided in relevant part:

¹ To be supplied

“1. Your salary will be \$55,000 per year.

2. Bonuses are to be jointly agreed upon, between you and I, for specific objectives and with specific measurable milestones.

3. In the event you are terminated without cause, your salary will be in continuance for 6 months.

4. During the next four years, you will receive or be allowed to purchase a minimum of 110,000 shares of Mastercare stock based upon an executive compensation package which is currently being prepared and is subject to approval by the Board of Directors. It is contemplated that the maximum purchase price for these shares will be \$1.00.”

The employee filed suit alleging breach of employment contract by the Company in refusing to give him severance pay and by denying him stock options. He also claimed fraud in the inducement for offering a bonus, seeking exemplary damages on this basis, and he sought recovery of his attorney's fees under Article 2226, Tex.Rev.Stat. Ann. The employer filed counterclaims for breach of contract and tortious interference with its business relating to the employee's use of confidential Company information, but the employer dismissed its counterclaims before trial.

The company was adamant in its position not to settle with the employee because it did not want to establish a precedent for settlement with terminated employees.

Before trial the Court bifurcated the stock-related claims for separate later trial, and after the jury's verdict they were severed from the action as not ripe.

The case was tried to a jury which answered two special issues as follows. The jury found that the employee was terminated without cause (thus entitled to the amount of severance set forth in the offer of employment letter, six months pay) and the jury found that the offer of employment letter was not fraudulent (thus, no exemplary damages). The jury also found that \$48,750.00 was a

reasonable legal fee for the employee to recover from defendant, plus a conditional award of \$7,000.00 for an appeal to the Court of Appeals and a conditional award of \$5,000.00 for an appeal to the Supreme Court of Texas. The litigation settled after an appeal was filed in the Court of Appeals.

METHODOLOGY

A group of 38 students at the University of Texas at Dallas, in a business law class, all junior-level or above, were randomly put into three (3) groups or teams: 13 "employers," 13 "employees," and 12 "mediators." None of the groups knew at first what the group designation was, just that they were in a group.

The mediators were immediately separated from the others and their "mediation training" began.

The other two (2) groups were given a 15 minute lecture on employer - employee law as it might be related to the facts of this case. Then they were given the facts and tried to negotiate settlements in teams for 90 minutes. They were told there was no special credit given for settlement.

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RESULTS

The results of our experiment were surprising. They showed a clear indication that mediation is a viable alternative for resolving disputes. Table No. 1 shows the gender of the participants in each of the three groups.

Eight (8) of the thirteen (13) groups were able to negotiate a settlement to this dispute. Table No. 2 summarizes the results of these negotiations. As you can see, each of these negotiations is roughly the same result as the litigation.

Of the five remaining groups, four were able to reach mediated results. Table No. 3 gives the results of the four (4) mediated settlements. As you can see, the mediated settlement results were also very similar to the results of litigation.

Only one (1) of the thirteen (13) groups was unable to reach either a negotiated or mediated settlement.

TABLE 1

	<u>Employer</u>	<u>Employee</u>
<u>Team #</u>		
Negotiated Settlements		
1	M	M
2	M	M
3	M	F
4	M	F
5	M	F
6	F	F
7	M	M
8	F	F
Mediated Settlements		
9	F	M
10	M	F
11	M	F
12	M	M

No Settlement

13 F M

Key: F=Female M=Male

<u>Mediators</u>	<u>Female</u>	<u>Male</u>
9	2	0
10	2	1
11	0	2
12	3	0
13	2	0

TABLE 2

Eight Negotiated Settlements - terms

1. 6 months severance
\$7,500.00 bonus
2. 6 months severance
buy back any stock purchased by employee
at fair market value
bonus paid on same basis as last year
3. 6 months severance
continue option to buy stock for 1 year
4. 6 months severance

\$2,500.00 bonus

continue option to buy stock

return of all confidential information

5. 6 months severance

6. 6 months severance

7. 6 months severance

1/3 of stock

8. 6 months severance

stock as originally promised

1 month medical benefits

TABLE 3

Four Mediated Settlements – terms

1. 6 months severance

favorable reference

return all confidential items

2. 6 months severance

some of stock originally offered

favorable reference

3. 6 months severance

bonus

favorable recommendation

confidentiality agreement

4. 6 months severance

favorable reference

confidentiality agreement

The most obvious initial result of the experiment is that every settlement included the 6 months severance pay awarded by the jury, and the one group which did not settle also reported this was not a sticking point.

Later in the article we will draw some further conclusions based on observations regarding social costs, optimal efficiency concerns, and mediation training.