UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

25th Annual

LABOR AND EMPLOYMENT
LAW CONFERENCE

May 10-11, 2018

Austin, Texas

Mediation of Employment Disputes

The Road to a Good Deal

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What Is Mediation?

The idea of mediation has been around for at least 2,000 years or more. Indeed, mediation is mentioned several times in the Bible.[1] Mediation really got underway in Texas with the passage of the Texas Alternative Dispute Resolution Act in 1987, 31 years ago.[2] The concept took hold and is now an integral part of every employment litigator's practice.

Mediation is simply a process under which an impartial person (the mediator) facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. The mediator may suggest ways of resolving the disputes, but the mediator may not impose his own judgment or that of the parties on any issues in the dispute.

Mediation is not arbitration. The mediator has no authority to decide any issues for the parties, but just tries to facilitate the voluntary resolution of the disputes by the parties. To do this, the mediator may conduct joint and separate meetings with the parties and may offer suggestions to help the parties achieve a resolution.

Does Mediation Work?

Mediation works more often than not.[3] Most employment cases settle in mediation, or soon thereafter. My practice is to try to follow those cases I have mediated which fail to settle to determine the final outcome. The final outcomes are always fascinating, sometimes (but not always) fitting my prediction of what likely would happen.

A study of New York civil lawsuits published in the September 2008 issue of the *Journal of Empirical Legal Studies* concluded that in most instances, settling is better than going to trial. The *New York Times* began an article about this study with the statement: "Note to victims of

[1] *See, e.g.*, 1 Timothy 2:5.
[2] Tex. Civ. Prac. & Rem. Code Ann., Chapter 154.
[3] Most lawyers agree that mediation has been a positive development for Texas litigants. It has reduced the case load of both state and federal courts.

accidents, medical malpractice, broken contracts, [employer mistreatment] and the like: When you sue, make a deal."[4]

This study found that most of the plaintiffs who decide to pass up a settlement offer and go to trial, end up getting less money than if they had taken the settlement offer. According to Randall Kiser, a co-author of the study and an analyst at DecisionSet, "The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant's offer to be half a loaf when in fact it is an entire loaf or more."[5]

The study reports that defendants made the wrong decision in going to trial less often, in 24% of the cases. Plaintiffs made the wrong choice in 61% of the cases. In 15% of the cases, both sides were correct in going to trial, meaning that the defendant paid less than the plaintiff had wanted but the plaintiff got more than defendants had offered. On average, getting it wrong cost the plaintiffs about $43,000 each time.

The reality is that law schools rarely teach new lawyers how to handicap trials. That is still best learned by experience. Moreover, lawyers often fail to develop the important skill of telling the client that a case is not necessarily a winner. Clients dislike hearing that bad news.

Most parties to litigation believe they are entirely correct. It takes a good lawyer, perhaps with the help of a skilled mediator, to diplomatically tell a client that a judge or a jury might see a case differently than they do.

Making the Best of Mediation

Since mediation essentially is a formalized negotiation process with the help of an experienced lawyer or maybe a retired judge, and since the mediator cannot force anyone to do anything, how can advocates make the best of the process?

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[4] Jonathan D. Glater, Study Finds Settling Is Better Than Going to Trial, *New York Times*, August 8, 2008.
[5] *Id.*

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Also available as part of the eCourse
2018 Labor and Employment Law eConference

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25th Annual Labor and Employment Law Conference session
"ADR Advantages, Disadvantages and Techniques: The Smoothest (Mostly) Road to Yes… or at Least to Closure"