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# PURE PAST MEDIATION OR NEGOTIATION

## Teaching Note for the Pure Past Suite

Pure Past is a tried and true mediation simulation and a favorite of this author because it packs a good deal of complexity and emotion into short role instructions. We have also used as a straight negotiation exercise, testing the attorneys' abilities to exchange information about interests as well as negotiate the numbers.

Pure Past is based on a real case I mediated many years ago, with great lawyers and entirely likeable parties on both sides. That mediation had a happy ending. It has always worked very well in my law school courses and professional workshops, with students as well as practicing lawyers and mediators. It is easy to relate to the parties' and their predicaments. The simulation includes some built in "misunderstandings" – parties divergent interpretations of each other's intent as the dispute brewed. While it is possible to resolve on dollars alone, it's easier and better to bridge a gap with a creative option. (And that was true in real life.)

The separate roles for the parties include some information unknown to the lawyers and their lawyers' information includes more legal analysis. It works well to teach this with an initial phase in which the lawyer prepare the parties for mediation, both as to how the process works, how they might negotiate, and what their clients' broader interests and capabilities are.

The problem also builds in a choice for the defendant regarding who should attend as its representatives, Will it make matters worse to have the person by whom the plaintiff feels betrayed? On the other hand, will the plaintiff be able to settle without confronting him and perhaps receiving an acknowledgement? Should the defendant bring a representative who was or wasn't involved in the termination decision? Would it be wise for the defense attorney to raise this question with the mediator or the plaintiff's attorney? This makes for a good class or workshop discussion as to the role of mediators and mediation advocates in determining who will sit (and speak) at the mediation table.

The mediator's information states that they have already been selected to mediate, other than that, it is the same as the General Information provided to the parties' and their lawyers. If using the case in a workshop, with little prep time, I give this information to all, say their mediators have been selected and have the same general information.

However, if you are using this case in a course or a workshop with a longer time span, you can skip handing out the mediator's role information, and set it up so the mediator knows nothing. The lawyers would confer about the characteristics of a preferred mediator – that can be debriefed and discussed. Then you might set up an introductory telephone, Zoom, or in-person meeting between the mediator and the lawyers, presumably to learn the case background. the mediator has the general information.

The basic plot line

Plaintiff Chris Tillem had been a lab manager for an immunologist at a university, Dr. Jenkins, and



left with him and another immunologist, Dr. Karp, to form ImmunoGro, pharmaceutical company producing ImmunoPure, an intravenously delivered drug for immune-compromised patients. Tillem set up and ran ImmunoGro's first lab, but Karp and Jenkins invested capital and were ImmunoGro's owners.

All was well until after BioPharm, a large multi-national pharmaceutical company bought the company. Tillem was initially the BioPharm lab manager, until BioPharm scientists developed an alternative (cheaper) patch technology for delivering ImmunoPure. BioPharm moved ImmunoPure responsibility to its patch division. Tillem and six other BioPharm employees were terminated.

Unfortunately, this was all happening during the time that Tillem began suffering serious health problems. Starting about eighteen months ago, Tillem began experiencing double vision, severe headaches, and tremors and spasticity in his limbs. His physician said it may be multiple sclerosis or another neurological illness. Anticipating illness episodes and many tests before a definitive diagnosis, Tillem informed his supervisor and requested FMLA leave. The supervisor sent Tillem to HR, where Tillem asked about the FMLA and obtained FMLA paperwork. The HR Director (and the supervisor) said BioPharm would work with Tillem to accommodate occasional flare ups and tests and suggested saving FMLA for future lengthier absences.

When the patch division took over ImmunoPure and Tillem was terminated, Tillem sued for age and disability discrimination and retaliation for exercising FMLA rights. Tillem alleges people terminated were over 40, and those hired into the patch division were younger. Though the formal diagnosis of MS wasn't made until some months after termination, Tillem showed signs of a severe illness. Tillem claims the BioPharm supervisor expressed discomfort with Tillem's symptoms and shut him out of important meetings before termination.

Suit was filed in federal district court. Discovery is largely complete. BioPharm anticipates moving for summary judgment but has not yet filed. Nine months after termination (three months ago), Tillem was hired as a lab technician at the state forensics laboratory, earning \$24,000 a year less than at BioPharm. Tillem's attorney has emphasized that emotional distress is an enormous factor in this case, far more than in most termination cases. Both attorneys recommended and the clients agreed to try to settle the case in mediation.

#### Hidden or Less Obvious Facts and Twists

- Addressing sources of emotion (and liability)

Tillem continues to be upset and angry because he was told the BioPharm supervisor had asked someone if his speech was ever slurred, because "people with neurological issues can be hard to understand." He began to notice BioPharm meetings being scheduled at times they knew he couldn't attend. He feels he was being ridiculed and shut out.

The BioPharm supervisor will (sincerely) say that they had been thinking to invest in a good voice recognition software for Tillem, to alleviate the need to type. That's why they were concerned about his speech patterns. With respect to the meetings, the supervisor will testify that they did understand Tillem tended to tire late in the day. They did deliberately try to accommodate him by scheduling important meeting early and meeting where his presence wasn't needed later in the day. These facts are important for two reasons. Emotionally, if he believes it, Tillem may feel better knowing that his colleagues weren't plotting against him all along. From a plaintiff's lawyer's perspective, it's helpful to know what the defense testimony will be.



Betrayal is another underlying theme in the case. There's not much the mediator can do but acknowledge it. Tillem feels betrayed by Dr. Jenkins, who he believes could have intervened on his behalf. (He has a point, in my not-so-neutral view.)

Tillem might say that he wants his job back, but the truth is that he is happy in the new job, even if the salary is lower. Going back to BioPharm would be emotionally difficult for him.

- A Difficult Topic – Emotional Distress and Front Pay

Related to betrayal, is that BioPharm terminated Tillem at the worst of all possible times. He had an obvious serious illness or condition, soon to face a devastating diagnosis: that's when they terminate him!!!! How could they?!! How cruel!!

To have to navigate a diagnosis and medical coverage, while suddenly unemployed was unspeakably terrifying. Forget patch technology, as human beings couldn't they have kept him on knowing what he was going through.

Tillem had moved to a more expensive part of town to be nearer to BioPharm and faced possible foreclosure on his house before he found the new job. Now he's working with the bank on accrued penalties and fees. But he faced foreclosure, unemployment, and an MS diagnosis during those six months. That was severe emotional distress.

At the same time, some analytical juror could wonder how much of Tillem's emotional distress was from the MS symptoms and diagnosis – BioPharm wasn't responsible for that. Can or should that be separated from the stress of termination. Even though those were dark days, Tillem is now employed.

A related sensitive topic is "front pay." It's true that Tillem earns about \$24,000 less per year at the new job. Theoretically, a damages estimate would bring that forward, but how far? How many more years can Tillem be expected to work, given his diagnosis?

If you are teaching or training mediators or lawyers, it's worth discussing whether or how anyone would bring up these issues. (I say sensitively, eliciting insight from Tillem, not forcing it.)

### Creative Option

Chris Tillem is very concerned about his ability to afford to stay in his home. He had moved to be closer to BioPharm and, while not extravagant, the new house was more expensive. Moving back is not a stated interest. However, if Chris Tillem's financial insecurity seems to be a real problem, BioPharm could theoretically buy the house, but let him live there. Tillem doesn't have any heirs mentioned in the simulation. Another possible option would be for BioPharm to cover some of Tillem's bank penalties and fees or offer a low or zero interest mortgage.

In the real case, and suggested in the simulation, Tillem is concerned about the paying to retrofit his home to accommodate his condition over time. He has obtained estimates of the cost for installing ramps, railings, etc. BioPharm could offer to cover this: if BioPharm employees carpenters etc., they might do the job. BioPharm could hire a contractor and oversee it. Or, BioPharm could offer to pay, but let Tillem oversee it.



In the real case, BioPharm had its manager oversee the project, using an outside carpenter. There was a dollar cap. That was a phenomenal relief to Chris Tillem, who was relieved that they would do this for him. In fact, the BioPharm folks liked Chris Tillem and were happy to relieve his stress. The case settled for a dollar amount, plus BioPharm taking on the retrofitting project. If I remembered the exact dollar amount, I would say so. Interestingly, the actual cost of BioPharm's undertaking the retrofitting project for the plaintiff's house was not nearly as large as the dollar negotiating gap when we initially explored that option. The fact that BioPharm would undertake it was meaningful to the plaintiff. And BioPharm somehow felt better about increasing their offer to cover that because they understood the impact of the plaintiff's disease on her. (In the real case, the plaintiff was female.)

#### Additional related resources

This case works also works well for mediation advocacy, client counseling about settlement, and straight negotiation. For that reason, I have created an alternative version that doesn't reference a mediator. The facts and characters are otherwise identical. The title and the header identify it as a negotiation rather than a mediation.

My colleague and frequent collaborator, Professor Dwight Golann and I worked with the Department of Justice on a mediation advocacy video based on the underlying facts of this case, under the name Tillem v. US. In the DOJ version, a government agency produces ImmunoPure and a DOJ attorney represents the agency. By way of strong disclaimer, one goal was to teach DOJ attorneys how to represent their client well where the mediator is NOT following best mediation practice. Thus, in the mediator role, we sometimes make choices we would never make in our own practices. That video is available at <http://www.adrvideo.org/mediation-advocacy/>. The ID and password for access to the videos is "adrteacher" (without quotation marks).

Working with Dwight Golann, we also created a video of a straight negotiation in Pure Past on Zoom, though it focused *entirely* on the dollars and the distributive aspect of the case. That video can be found at <https://www.adrvideo.org/new-videos/>, again with a password: adrteacher.

I also created a video demonstrating how a lawyer could use decision tree analysis to counsel a client in preparation for a mediation session. A link to that video is available on the Riskandrigo.com site, <https://www.riskandrigo.com/videos-2>. Or, you can find it directly at [https://uclaw.mediaspace.kaltura.com/media/DTA+Pure+Past+Counseling+copy/1\\_6no2gtl3](https://uclaw.mediaspace.kaltura.com/media/DTA+Pure+Past+Counseling+copy/1_6no2gtl3). Decision trees created for the video are also available at Riskandrigo.com, at [https://www.riskandrigo.com/files/ugd/6fe7b7\\_8a63082156d0491d984fc5aee3709d8e.pdf](https://www.riskandrigo.com/files/ugd/6fe7b7_8a63082156d0491d984fc5aee3709d8e.pdf).