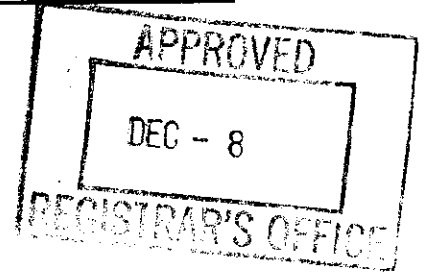


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EXAMINATION BOOK



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SUBJECT ADR

CLASS _____

SECTION _____

INSTRUCTOR Exon

DATE 12/08/05

11" x 8.5" 8 LEAVES 16 PAGES

Q1 = 2.0

Q2 = 2.5

Graded Assigns. = 3.7

Grade = 2.9

EXAM NUMBER 470

UNIVERSITY OF LA VERNE COLLEGE OF LAW

Course Name: Alternative Dispute Resolution

Instructors' Names: Professor Exon

Semester/Year: Fall 2005

Date of Exam: December 8, 2005

NO OF QUESTIONS 2
NO. OF PAGES 3
LENGTH OF EXAM 2 hours

DO NOT TURN BEYOND THIS COVER UNTIL INSTRUCTED TO DO SO BY PROCTOR.

Be sure your exam number is entered on this sheet and all bluebooks in which you write. Do not put your name on any materials.

No writing or typing will be permitted after time is called.

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SPECIAL INSTRUCTIONS: None

MATERIALS THAT MAY BE USED DURING THE EXAM ARE: None

IMPORTANT: Write on only one side of page in your bluebooks.

ALTERNATIVE DISPUTE RESOLUTION

FINAL EXAMINATION

Fall 2005

Professor Exon

Special Instructions

This examination consists of two one-hour essay questions. Each question counts 50% of the final grade. Watch your time carefully and spend approximately one hour per question.

You may not use any outside resources during this examination.

Pay attention to the call of each question and respond accordingly. Answers that employ a shot-gun approach are disfavored.

Each question takes place in a fictitious jurisdiction that has alternative dispute resolution laws identical to the California laws discussed in class. These include, but are not limited to, relevant:

- California rules of court and statutes relating to negotiation ethics;
- California Evidence Code sections relating to mediation confidentiality, and court opinions discussed in class that interpret the California Evidence Code sections;
- California's Ethical Standards for Mediators; and
- Arbitration authorities discussed in class.

To the extent that any of the California authorities differ from the ABA Model Rules of Professional Conduct that were discussed in class, be prepared to discuss and analyze the differences.

In addition to relevant legal authorities, you are responsible for discussing all relevant alternative dispute resolution principles and theories that were discussed in class and otherwise covered by the readings in the texts and in the supplemental Block Materials.

QUESTION I

**Counts for 50 % of Total Grade
Spend Approximately One Hour on this Question**

The big one finally hit – an 8.9 earthquake in southern California. Buildings, roads and all forms of infrastructure lay in ruin. Specifically, natural gas pipelines were broken, high voltage electric lines were down, several dams had broken causing flooding to certain areas, and many freeways and other roads were inaccessible.

Your town was not hit as hard as surrounding areas. Many buildings were damaged, but remain standing. Most utilities to your town are destroyed.

Your local officials have been working hard for several days to assist people to evacuate your town. The governor has authorized law enforcement to go house by house to persuade people to leave and to help them turn off all utility connections to homes because the utility companies refuse to begin working to rebuild their infrastructure and other service connections until service to all individual buildings and homes is shut off. It has come to your attention that people in several neighborhoods (involving approximately 200 people) in your town refuse to leave and refuse to allow law enforcement to enter their homes to ensure that utilities are turned off properly. This has become a critical situation.

As the chief of police for your town, you want to instruct your law enforcement personnel about specific negotiating techniques to use and about certain problems that they, the law enforcement personnel, may encounter as they try to persuade people to evacuate.

- 1. Relying on all of the negotiating techniques covered in class, be specific in your instructions and explain why certain techniques will work better than others.**
- 2. Provide information as to certain principles and theories that your personnel should be ready to work with as they negotiate with the homeowners and try to persuade them to evacuate. Explain why these principles and theories are important.**

QUESTION II

Counts 50% of Total Grade
Spend Approximately One Hour on this Question

A year ago, the state governor appointed Trish as his special assistant. Trish's job is quite visible and highly political as the governor embarks on identifying critical issues to reshape and improve the state's economy. The governor received a videotape, and had the following conversation:

Gov.: "I just received a videotape showing you engaged in sexual acts with another female. Are you a lesbian?"

Trish: "Yes, and I don't want anyone to know."

Gov.: "I am disappointed that you would hide something like that from me. I need to know that my close advisors will confide in me about everything. While I believe that individuals have a personal right to choose their own lifestyles and I am not personally offended by your lifestyle, I am afraid that if the public finds out, certain people will use that information to politically sabotage all of my efforts to improve our state economy. The economy was the main focus of my platform and I do not need any unnecessary publicity that could deter the public opinion polls. Therefore, although I value our friendship and your good work as my special assistant, I must ask for your resignation."

Trish: "Governor, this is a personal matter and I prefer to keep my lifestyle preferences private. Furthermore, I do not believe you have any legal right to have this discussion with me."

Gov.: "Under the law, you are correct. However, I am hoping you will resign out of respect for my political future and to salvage all of the good work that you have accomplished."

Trish: "I really love my work and do not want to be forced to resign. Please don't do this."

Gov.: "I am sorry, Trish. Since you won't resign, I am forced to fire you. Please gather your things and be out of the office in an hour."

Trish then comes to your law office. She is outraged over the incident and wants to sue the governor, but is afraid of what the publicity might do to her. Trish has not told anyone about her lifestyle. She wants to protect her female partner by preventing publicity of the video. However, she also is sick and tired of being treated "differently." Trish wants to figure out some way that she can be compensated for what the governor has done to her and at the same time serve as a role model for same-sex partners. Trish also is concerned about the governor's power and his management style. As Trish explains, the governor is not afraid to do what he wants, whenever he wants. The governor can become quite aggressive and adamant in his positions.

As Trish's attorney, advise her whether she should pursue litigation, arbitration or mediation. Explain the advantages and disadvantages of each type of dispute resolution process. Conclude by recommending one process. Be sure to justify fully your conclusion.

ID: 470 (Exam Number)
Exam Name: Alternate Dispute Resolution (Exon)
Instructor: Prof. Exon
Exam Date: December 8, 2005
File Name: 470-AlternateDisputeResolution(Exon)-051208.xmd

Grade: _____

1)

Conflict

Conflict is the interaction of interdependent people who perceive different goals and perceive interference by the other party in achieving those goals. Negotiation is a form of bargaining designed to resolve conflict. The successful negotiator uses a structured negotiating approach in resolving conflict; he or she plans for the negotiation; thoroughly analyzes the situation; and employs certain negotiating techniques in an attempt to resolve the conflict. *Good*

Getting to Yes

In this hypo, the conflict is between the government and its citizens. The chief of police, in instructing his officers, would do well to discuss with them the theories of "principled negotiation" in Getting to Yes. Principled negotiation is about four things: people; interests; generating options; and using objective criteria.

a) The officers need to focus first on the people, not the problem. The townspeople have been struck by disaster. They are in shock, probably hungry, and largely without water, power, and electricity. They are surrounded by death and destruction. The problem, getting the 200 citizens to leave, is obvious. Dealing with people in turmoil, however, is not so simple. The officers must take off their government hat and approach the people as a fellow, concerned citizen. As officers will likely discover, in focusing on the people, in going "below the line," the problem may very well resolve

itself.

b) How do the officers focus on the people? By concentrating on the "interests" of the citizens, not on their "position." Positions are simply "what people want." Interests are "why they want them." According to Getting to Yes, the officers must always ask themselves, "Why?"

The position of the citizens is apparent. They're not leaving and no one is going to make them. They are, in effect, ready to "take a stand" against the government. But why? Because they may have lost their homes. They may be without food. They may have even lost a family member in the earthquake. The interests of these people is in food, clothing, shelter, normalcy, and, most importantly, *security*. The officers should appeal to the interests of these 200 citizens. "If you leave now we can take you to shelter. We can get you something to eat. We can help you locate loved ones. We can get busy rebuilding your home so you can get your life back. We can make you safe." "We are not asking you to leave forever. We understand your position. We live here too and are just as anxious as you for things to return to normal."

c) The officers must be prepared, however, for a lack of response. Likely, because their offer may be perceived as "leave or get arrested." Or, "leave or die." This is where the third prong of principled negotiation comes in. Generate options. Options can be generated in many ways: nominal group subprocesses; single text negotiating instrument; the building block approach; hypotheticals; or experts. This is a relatively chaotic situation in an uncontrolled environment. As such, some of these techniques

Do you think these will really apply to this case here?

yes might be impractical. As the chief I might suggest the use of experts and hypotheticals. OK

Experts bring credibility and create trust. Here, they could be brought in to explain the dangers of staying behind. They could give estimates on rebuilding time. They could advise the citizens as to the availability of government aid. Legal experts could explain to citizens that they aren't "in trouble" and that the police aren't there to arrest them.

What kind of "experts"

The police could exchange hypotheticals with the citizens. What if we were to guarantee you federal aid? What if you could stay in a shelter close to your home? What other type of solutions do you propose?

d) Lastly, the officers should rely on objective criteria. The citizens must be assured that the government is trying to coerce them. Officers should thus make use of objective analysis, data, expert opinion. Perhaps, for example, a seismologist to discuss with the citizens the dangers of staying.

Bring newspaper

Integrative v. distributive bargaining

The officers would also have to choose between distributive and integrative bargaining, between "splitting up the pie" and "expanding the pie." Splitting the pie here is not the best solution. That is simply "leave or get arrested" or "leave or die." Getting to Yes is about expanding the pie - creating win/win solutions. The people are taken safely away, their homes are rebuilt more quickly, the citizens have security, and the officers have reduced the conflict.

Competiton v. cooperation

The dichotomy of negotiation is readily apparent: it is a struggle between cooperation and competition. The officers could have come in competitively, as "us against them." This would involve use of force, threats, arrest, perhaps violence. Competition is more closely associated with the lesser favored distributive bargaining technique. As noted supra, the approaching the negotition in the spirt of cooperation is more likley to result in a winning, integrative solution.

One writer suggests to approach with a cooperative spirit, but if the other side is competitive, to retaliate. If the other side then becomes cooperative, forgive. Be flexible, clear, and concise. I would suggest that this model, to the extent it even suggests retaliation, would not be the most productive in this instance due to the inherent imbalance of power between the police and the citizenry. There's no place for retaliation here. This situation calls for principled negotiation, focused on the people, with their interests in mind, generating options, and using objective means to convey the necessary information.

Hit for text

How should the officers prepare to deal w/ emotions, psychological barriers, anger, socioeconomic issues, etc.?

2)

Conflict is the interaction of interdependent people who perceive different goals and perceive interference by the other party in achieving those goals. Alternative dispute resolution processes help to resolve conflict outside the formal judicial arena. ADR processes flow along a continuum from more "needs based" (focused on interests) to more "rights based" (focused on legal rights). Trish has asked about mediation, arbitration, and litigation.

Mediation

Mediation is simply facilitated negotiation. It is further to the left on the continuum. That is, it is largely needs based and focused on enabling two parties to come to a mutually agreeable solution. A neutral mediator helps the parties find their own solution.

Mediation has a number of advantages.

It is generally voluntary. The parties must agree to mediate. The fact that two parties agree to convene in an attempt to negotiate a solution is a huge first step in resolving the conflict.

It is informal. There is no judge. There is no jury. There are no rules of court. This

informality can provide a level of comfort which may facilitate conflict resolution.

It is self-determinative. The parties generally set the rules. The mediator is in charge of the process but the parties negotiate on their own. The mediator may be evaluative (directive) - suggesting to the parties how he or she views the conflict and perhaps even their respective chances for success in court - or facilitative (elicitive) - simply helping the parties to communicate - but it is the parties themselves who will ultimately determine the outcome of the negotiation. There will be no resolution without mutual agreement.

It is relatively inexpensive. Parties are not forced into costs of discovery, court costs.

It is flexible. The parties can select the mediator. They can set the time and place to meet. They can decide how long they want the mediation to last.

It is empowering. The fact that mediation is voluntary, informal, self-determinative, and flexible, makes it empowering. Having control over the negotiation, both procedurally and substantively, may lift the parties and, in and of itself, may facilitate resolution.

It is confidential. Mediation is, by law, confidential. The Rojas case, and the California Evidence Code, make it clear. Nothing said "pursuant to, in the course of, or in preparation for" mediation may be disclosed, nor used in evidence in a court of law. Similarly, no writing made "pursuant to, in the course of, or in preparation for" mediation may be disclosed, nor used in evidence in a court of law. This confidentiality extends

both to the mediation itself and to any caucus (separate meeting between mediator and party). It applies to the mediator, the parties, and the attorneys. Of course, the underlying facts of the case, otherwise discoverable, are not protected. Nor is criminal activity. But the level of confidentiality provided by the law facilitates resolution as it enables the parties to speak freely, knowing that what they say in the room stays in the room and what they write in the room (pictures, maps, diagrams, etc.) stays in the room. .

Of course, there are disadvantages to mediation as well:

No law. The parties have no law to rely on. They must "make their case" to each other, based largely on fairness and equity.

*not necessarily
Parties (and attys. who do) may negotiate based on the law*

No guarantee of resolution - no agreement unless by mutual decision

Imbalance of power - while the mediator ensures procedural fairness, he or she does not ensure substantive fairness or good faith bargaining.

No. Too much flexibility can create chaos.

Arbitration

Arbitration is a hearing before a private tribunal. It is generally more "rights based" than mediation. However, the arbitrator is not bound by the law. He or she makes a decision based on principles of fairness and equity. The arbitrator is not required to

make a written decision.

Advantages:

The arbitrator is generally an expert in the field - he or she generally has more insight into the specific issue. This is the biggest advantage and helps ensure a just result.

Costs less than litigation.

Limited discovery.

No rules of evidence.

Confidential.

Private

Recovery of attorney's fees (in many jurisdictions)

Allows for attorney representation

A relatively shorter process

Disadvantages

No precedent.

Lack of full discovery

No right to appeal

No right to a jury trial

Litigation

Advantages

Precedent

Full discovery

Rules of evidence

Right to appeal

Right to a jury trial

Disadvantages

Cost

Length of time

Public proceeding

This case presents a gross imbalance of power - between a governor and his assistant. I'm afraid a mediation would be disadvantageous to the assistant - the mediator would likely be overwhelmed by the governor and the governor might well take over the process. While the assistant would maintain confidentiality, she wouldn't be able to "get the word out" or "make a statement." Also, she would have no assurance of resolution - why would the governor even bargain with his assistant in good faith? He could very well run all over her.

I would recommend non-binding arbitration in this instance. The issue is sexual discrimination, a highly charged issue. Privacy is important to the assistant. Arbitration keeps the details of the case secret. However, she also wants to be a role model and to have justice served. She could submit the issue to an arbitrator for his decision. If happy with the result, the decision remains private. She could then appeal. This would also allow the governor to save face. She would have the law on her side. She might

also, as part of the agreement to mediate, ask the governor for an agreement to make the decision public.

END OF EXAM

PEOPLE
INCREASES
OPTIONS
OBSERVE CARBON

OPTIONS: ✓ HYPERMETRICS
✓ EXTENTS

ANALYSIS

PLANNING - WHO, WHAT, WHERE, WHEN

POSITIONS v INTERESTS

ANALYSIS

BARGAIN

AREA

BARGAINING ZONE

FIND FIRST OPTIMUM RESOURCE DEADLOCK

✓ SINGLE TEXT NEGOTIATION INSTRUMENT

✓ BINDING BLOCK

✓ NON-MATURE GROUP PROCESS

DISCUSSION

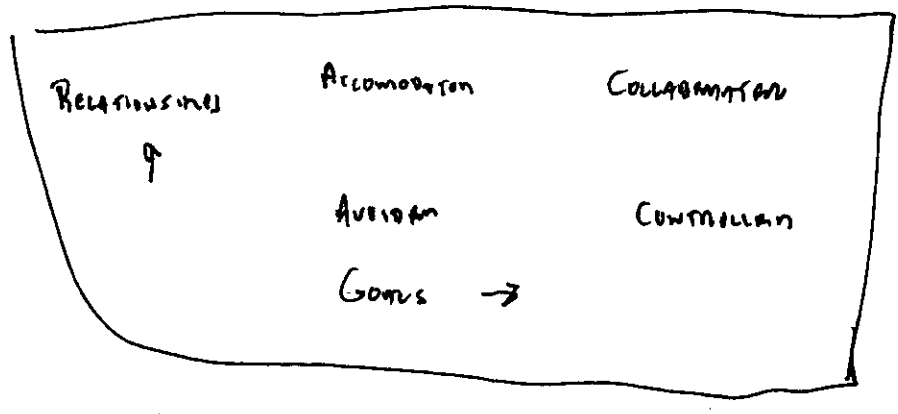
TECHNIQUE

DISTRIBUTION - SPLITTING THE PIE

INTEGRATIVE - EXPANDING THE PIE

• GETTING TO YES •

Principles
Negotiation



COOPERATION v COMPETITION

- 4 COOPERATION
- IF COMPETITIVE, RESISTANCE
- IF COOPERATIVE, FORTUNE
- FLEXIBLE
- CLEAR, CONCISE

EMPOWER
FACILITATE