Alternative Dispute Resolution
Final Examination
Fall 1995

Question #1. (25 points). Following your graduation from St. Mary's University School of Law, unemployed and suffering under the usual debt burden, you have returned to your hometown of Backwater, Texas (population 20,000) to start your solo practice. You have just finished hanging your diploma and license when an unexpected visitor pulls up in a stretch limousine bearing vanity plates: "$ TLKS." A rather portly gentleman in a white doubled breasted suit and wearing a white Stetson hat emerges from the back of the limousine. He introduces himself to you as James Robert Snopes ("J.R." to his friends). J.R. is interested in obtaining your assistance in connection with a pending transaction that he is considering.

J.R. wants to buy the Compson Farm. As far as you or anyone else in Backwater knows, the Compson Farm is a 40 acre patch of worthless dirt. However, J.R. informs you that he has recently obtained information from his confidential sources at Texas A & M that indicates that the farm is sitting on top of a rich vein of uranium ore.

You are familiar with the Compson family even though you don't know them that well -- you even attended high school with their two oldest kids, Quentin and Caddy. The family never has really been able to make much money on the farm. Even in good years they were generally known to be dirt poor. Cliff Compson who inherited the farm from his father, Digger, has been extremely disappointed with the farm and wants to sell it. Cliff has not been able to grow any crops on the land and people living on the farm keep getting sick all the time.

J.R. wants you to handle negotiations with Cliff Compson. He is willing to pay $1.2 million for the farm. However, he would like to get it for as close to $40,000.00 as possible. He does not want you to reveal to Cliff or anyone else that he is the potential purchaser. There is some very bad blood between the Compsons and the Snopes arising from the fact that J.R.'s daddy, Jock, allegedly swindled from Cliff's daddy, Digger: (1) a large ranch in Dallas; (2) control over a successful wildcat drilling operation; and (3) royalties from the syndication of a successful television program based on Jock and Digger's life story. J.R. is sure that Cliff would not sell the land to him for all the money in the world.

J.R. is offering to pay you handsomely for your participation in the negotiations and indicates that, if the deal goes through successfully, he and you "kin do business in the future, pardna."

If you take this job, what difficulties to you perceive in negotiating the transaction with Cliff Compson on behalf of J.R. Snopes and how do you propose to overcome them?

Question #2. (25 points). You represent Dr. Rock N. Ahardplaze, an general practitioner. Dr. Rock N. Ahardplaze has been sued by an HMO patient for medical malpractice based on Dr. Ahardplaze's failure to diagnose a case of cervical cancer. According to the patient's allegations, Dr. Ahardplaze delayed referring her to a specialist until it was too late to treat her cancer.

Dr. Ahardplaze has a contract with the patient's HMO. Pursuant to the contract, Dr. Ahardplaze receives a monthly payment for each patient who is assigned to his care. Notwithstanding how many of the patients actually utilize his services, each month the payment will be the same. The contract also provides that the HMO will withhold 20% of the monthly payment owed to Dr. Ahardplaze each month. The HMO has established a fund for payment of in-patient hospital services and the services of specialists to whom the general practitioners refer patients for specialized treatment. The 20% of Dr. Ahardplaze's fees that are withheld are applied against the payment of the specialists' fees and the hospital in-patient fees. At the end of the year, if the payments for in-patient hospital services and specialists' services are under the HMO's established budget, Dr. Ahardplaze is entitled to recoup some or all of the fees that were withheld. If the payments exceed the budget established by the HMO, however, Dr. Ahardplaze is not entitled to recoup any of the withheld fees back.

You are considering bringing a third party claim against the HMO for comparative responsibility. This would serve two purposes. First, it might deflect some of financial responsibility from Dr. Ahardplaze if the HMO, which is a deep pocket, is brought into the picture. In addition, in your practice you frequently run across these types of provisions in HMO contracts. You are sure that the withhold arrangement is illegal but you haven't had an appropriate case to test your legal theory. This case might provide an excellent opportunity.

Your review of state law indicates that the Penal Code punishes commercial bribery. The commercial bribery statue makes it an offense to offer any remuneration to a fiduciary with the intent to alter the behavior of the fiduciary with respect to a beneficiary without obtaining the beneficiary's consent. The commercial bribery statute also applies to a fiduciary who solicits or accepts such an inducement. It is not clear that a physician is a fiduciary for the purposes of this law, however, you are fairly confident that the characteristics of a patient/physician relationship would convince a judge that a physician is a fiduciary.

There is also a Department of Insurance regulation that prohibits an HMO from granting any financial inducement to a physician for the purpose of limiting "medically necessary services." The Department of Insurance regulations, however, do not define "medically necessary services." The regulations also provide that no private cause of action arises from a violation of the regulations.

The HMO patient's attorney does not yet have a copy of Dr. Ahardplaze's HMO contract, but you are sure that she will be able to obtain it through discovery. You are fairly certain that once the plaintiff's attorney obtains a copy of the contract, she will probably want to add the HMO to the lawsuit as well. One problem, however, is that the HMO contracts with Dr. Ahardplaze as well as its contracts with patients require that the parties submit any disputes involving the HMO to binding arbitration.

The arbitration clause provides that the arbitration shall be held before a panel of arbitrators from the American Arbitration Association ("AAA") and pursuant to the rules of the AAA. The arbitrator is prohibited from assessing punitive damages and is prohibited from providing a written opinion.

Is it possible to obtain an judicial determination that the arbitration clause is not enforceable? Would it be in your client's best interest to obtain such a determination?

Question #3. (25 points). William P. Clinton, Robert L. Dole and Newton F. Gingrich are up to their old tricks again. After the first impasse on the federal budget, the parties agreed to a temporary spending measure which would allow the government to operate until December 15th. During the interim, the parties were to negotiate a budget with the goal of balancing the federal budget by the year 2002. As part of the budget package, however, the parties were to give due consideration to the Democrats' budgetary concerns with social programs.

The parties have failed to agree on anything and it appears that the federal government is going to shut down again. A noted Harvard law professor, Roger Fisher, has suggested that the parties participate in a mediation in order to attempt to break the impasse over the budget.

What are the possible arguments against this advice and how would you counter them?

Question #4. (25 points). Your firm represents Faux Pas against Wine Institute de National Oenology ("WINO") in a contract interpretation lawsuit. WINO is the preeminent wine-maker in France and Faux Pas is the preeminent vineyard expert in France. According to their contract, WINO and Faux Pas agreed to joint venture for the development of a vineyard and winery in West Texas on lands owned by the University of Texas ("U.T."). Pursuant to the contract, Faux Pas was to use its best efforts to develop a strain of grapes that would be suitable for growing in West Texas. After the grapes, were successfully developed WINO would build and operate a winery capable of producing 68,000 gallons of wine a year.

It was not certain that anyone could develop a grape which would be sufficient to produce the quantity of wine required under the contract. Therefore Faux Pas could expend substantial sums of money on research and development and not be able to recoup any of it. To protect Faux Pas against this contingency the contract provided that, in the event that Faux Pas was not able develop the grapes by utilizing its best efforts, WINO would reimburse Faux Pas for 25% of Faux Pas' reasonable expenditures in developing the grapes. The contract also contained a *force majeure* clause, which provided that if the joint venture could not be carried out for reasons beyond the control of either party, neither party would be liable to the other.

After Faux Pas had spent $4 million attempting, without success, to develop a strain of grapes that would be suitable for the West Texas climate, U.T. announced that it was not going to go forward with the project. It appears that certain members of U.T.'s Board of Regents were adverse to U.T. making money from the sale of alcoholic beverages. The Texas Alcoholic Beverage Commission also announced that the Commission could not issue a winery permit to companies which were not wholly owned by residents of the State of Texas.

Following these announcements, Faux Pas requested $1 million from WINO pursuant to the contract. WINO responded that it did not believe that the money was due under the contract because: (1) Faux Pas had not used best efforts to develop the grapes; (2) Faux Pas had padded its expenditures; and (3) U.T. and the Texas Alcoholic Beverage Commission's actions relieved WINO from any responsibility to Faux Pas under the contract pursuant to the *force majeure* clause.

Faux Pas is arguing that it did use "best efforts." Upon your firm's advice Faux Pas has obtained the services of 3 vineyard experts to testify on its behalf. The expenditure padding issue is being thrashed out in discovery. WINO's accounting experts have spent hundreds of hours pouring over Faux Pas' books and records with no end in sight.

Faux Pas is also arguing that the *force majeure* clause does not apply because: (1) the parties did not intend the clause to apply WINO's obligation of reimbursement; (2) U.T.'s actions, which amount to a breach of contract for which damages are available, is not the type of contingency contemplated under the *force majeure* clause; and (3) the Alcoholic Beverage Commission's actions were based on a predictable reading of Texas statutes that were in effect at the time that the Faux Pas and WINO entered into the contract and therefore WINO was charged with knowledge of the law.

The case has been in litigation for two and a half years due to the extensive amount of discovery required, including depositions of each side's expert witnesses and anyone in any manner connected to any expenditure by Faux Pas in development of the wine-grapes. The litigation has been very antagonistic. This is primarily due to the fact that in-house counsel for WINO and Faux Pas who negotiated the contract are each accusing the other of bad faith, and improper motives and\or senile dementia. There have been several hearings on discovery disputes during the litigation.

It appears that the case is still one year away from being set for trial and that the trial will consume three weeks of the court's time. The judge has requested a conference to determine whether it would be appropriate for the judge to order the parties to conduct a mini-trial or summary jury trial.

Are you in favor of a mini-trial or summary jury trial for this matter? Are there alternatives that would be preferable to you?

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Answer Key

Question 1. This situation requires the attorney to explore a number of issues related to representation of clients in negotiation. If the attorney decides to take J. R.'s case the attorney will need to decide whether the attorney will have any ethical obligation to reveal information regarding the identity of the buyer. Note that not revealing the identity could be considered fraudulent if that identity is material. It appears in this case that it would be material given the history between J.R. and Cliff. If the attorney decides that the attorney will not have any ethical obligations the attorney will need to decide whether the manner in which J.R. wants to effect this transaction violates the attorney's personal integrity. If the attorney has serious personal problems with J.R.'s proposed negotiation tactics, this will create a conflict of interest between the attorney and the client. The attorney has an additional conflict because Backwater is a community in which the attorney hopes to thrive. If word gets around that he helped J.R. swindle Cliff, this could be damaging to his reputation in the community. The attorney would need to decline the representation unless he could get J.R. to agree that he can reveal J.R.'s identity to Cliff.

Question 2. Is it possible to get the arbitration provision overturned? Your client, the physician, might be able to get the arbitration provision overturned if he can draw the court's attention to the substantial public policy implications involved in the arrangements in the managed care agreements. There is the important issue of whether a state criminal statute is being customarily violated. Note that ADR is not as attractive to individual disputes or to the courts if there is a need to establish a precedent.

Even if the physician cannot get the arbitration overruled, it is highly likely that it the plaintiff's attorney would be able to void the arbitration clause. States have by legislation indicated a reluctance to allow arbitration clauses to be effective for personal injuries if the agreements are entered into prior to the time that the injury has occurred. See, for example the Texas General Arbitration statute which specifically prohibits such arbitration agreements. In addition, this may be a situation that the court deems to be unconscionable regardless on the existence of a statute.

It may not be in your client's best interest to overturn the arbitration clause. Arbitration is attractive because it is primarily an emotionally neutral forum. Notwithstanding the physician's claims about the HMO contract provision, the physician will look bad before a sympathetic jury. In fact introducing the evidence of the financial aspects might in fact injure rather than help your client by increasing the amount of damages that the jury might assess. It appears that Your interest in obtaining a precedent may be in conflict with the physician's interest.

Question 3. The arguments against mediation of the budget debate would be: (2) difficulty in finding a unbiased third party because everyone has some interest in the matter of the federal budget; (2) difficulty in finding someone trusted by both parties, because each party would believe that any candidate chosen by the other must have a political agenda; and (3) parties appear to want the matter to be fought in the media rather than resolved in private. Issue number two

would probably be easy to overcome if the parties are made aware about the role of the mediator, particularly if the parties opt for a mediator who is non directive. If the parties understand that the mediator will not influence the outcome and that the parties retain the control over the outcome perhaps the difficulty with finding a mediator they both trust would be alleviated. In this situation it would probably be best to suggest a co-mediation with perhaps the use of a mediator from each side of the political spectrum in order to assure neutrality and trust. with respect to item 1, mediators run into situations in which they may have bias going into the mediation or develop one as the mediation progresses. Part of the mediators training is to not allow the personal bias' influence the mediator's conduct. The style of non-directive mediation would be the best safeguard that mediator bias would not influence this procedure.

Question 4. Mini-trial looks better than a summary jury trial for this case. The conditions are right for a mini-trial in that there are two companies in which it will be possible to find an executive who is not involved in the conflict. One problem with the summary jury trial is that it is expensive and the parties may decide that the opinion of one particular jury is not dispositive o the dispute. the mini-trial offers some flexibility in that the parties will be able to determine what type of role they which the third party neutral to assume. The third party neutral may act as a mediator to assist the executive of the companies in hammering out a settlement; the third party neutral may act as a neutral evaluator and render an advisory opinion about the probable outcome of the case. All the parties would obtain from the summary jury trial would be the opinion of the jury. This may or may not be valuable.