

MASSACHUSETTS SCHOOL OF LAW

**FINAL EXAM - Alternative Dispute Resolution (2002)**

PROFESSOR FREDERICK T. GOLDER

781-592-4000

Email: ftgolder@aol.com

**Hypothetical Case 1**

You are a new associate in a large law firm; the shareholders know that you have a strong background in dispute resolution (From taking this course). A partner comes to ask your advice about the following situation. She is representing the plaintiff, an 18-year-old woman, in a large and complex products liability claim. She is asserting that a defect in a lawn mower manufactured by the defendant caused an accident that resulted in a severe injury to her client's foot, which has impaired her ability to dance, thus dooming her career aspirations to be a ballerina. (She has been studying ballet since age five and has performed in several high school productions; one week after the accident she was scheduled for an audition for admission to the school associated with a major national ballet company.)

The complaint asks for \$100,000 for medical expenses, \$2,000,000 in lost future earnings, \$500,000 for pain and suffering, and \$2,000,000 in punitive damages. The shareholder tells you that there is a pretty good chance of establishing the existence of a dangerous defect and causation. She says, however, that the law in the relevant jurisdiction is unclear as to whether a plaintiff's negligence—if it was not foreseeable to the defendant—could bar recovery, and there is some chance that her client could be shown to be negligent in an unforeseeable way (she was practicing pirouettes while mowing the lawn). Some discovery has taken place, but the defendant has been unwilling to produce certain internal documents the plaintiff's side thinks will establish knowledge of the defect, which would improve chances of recovering on the punitive damages claim. The defendant has offered to cover medical expenses, but argues that there is no defect and that the plaintiff's other damages are entirely speculative. Trial, which is likely to take one week, is scheduled to begin in 30 days.

The partner tells you that the defendant's lawyer called today and proposed submitting the case either to non-binding arbitration or to early neutral evaluation under the local court program. Under that program, if the attorneys agree on a dispute resolution process, the court will propose a list of three volunteers who can conduct the chosen process. The parties can jointly pick one; if they cannot agree, each is entitled to strike one neutral.

At this point the partner's secretary enters and says that the partner has an emergency telephone call. A few minutes later the partner returns to explain that she has been called out of town on urgent business of another client. She tells you that she does not know much about ADR and is not quite sure what these two processes are and how they differ from one another or from litigation. She asks you do some research and prepare and fax a memorandum to her that will help her decide how to respond to the defense lawyer's proposal. Specifically she asks you to deal with the following questions:

What are those processes, and how do they compare and differ? What are their potential advantages and disadvantages compared with each other and with litigation? How should the choice among the three processes—non-binding arbitration, ENE, and litigation—be made?

**LIMIT: FOUR (4) PAGES**

### Hypothetical Case 2

Recently you took a mediation training program that emphasized a facilitative-broad approach, and you were captivated by the potential inherent in that approach for developing interest-based agreements that can improve the parties' relationship--and perhaps the parties themselves. You would like to try out this approach in a real case. Fortunately, one of your fellow students in the mediation course, a local lawyer named Tom Hart, whom you had not known before you took the training program, called you shortly after the course ended and asked if you would consider mediating a case in which he represented the defendant. Hart said that the plaintiff had agreed to have you serve in this capacity. You were thrilled to accept.

During the opening session the plaintiff, a 50 year-old woman of Hispanic descent named Dixie Minoso, was not represented by a lawyer; she told you she could not afford a lawyer and wanted to try to work this out informally, without filing a lawsuit or a claim with the EEOC. She also stated that she had been involved in other mediations (as she had worked as a legal secretary) and, based on those experiences, she expected you to predict how her claim would fare in the EEOC and in court. Before you could respond, Tom hart said that evaluations were not part of mediation and that he did not want you to make predictions.

Describe and analyze the various ways in which a mediator in your situation might respond—in word and deed. Be sure to identify and discuss the potential advantages and disadvantages of the potential responses and any dilemmas you would face in deciding what to do.

**LIMIT: THREE (3) PAGES**

### **Hypothetical Case 3**

Another shareholder in the law firm in which you are a new associate comes into your office and asks you to write a memorandum to him explaining the difference between mediation and arbitration. He says he knows how the definitions differ, but he wants you to tell him how the two differ in practice. He wants this information so he can help prepare a presentation for a panel on which he will appear at a continuing legal education program sponsored by the state bar.

**LIMIT: TWO (2) PAGES**

### **Hypothetical Case 4**

A company discharged a line employee who tested positive for drugs following what it deemed to be a workplace accident, and the union grieved. The company had a policy of testing for drugs and alcohol when a workplace accident resulted in an injury requiring medical treatment or damage to company property and called for discipline or discharge for positive test results.

The employee had been experiencing a difficult recovery from knee surgery. He had returned to work despite continued pain and swelling, most of the time wearing a homemade protective device. He was not wearing the device when a co-worker squeezed past him in an aisle with a forklift, and he bumped his knee. In extreme pain, the employee asked to go home. But the company's records incorrectly showed that his point score under its attendance policy was higher than it actually was, and he was told that he would lose his job if he left.

His supervisor denied his request to take an absence to be credited toward his Family and Medical Leave Act leave for his condition based on the surgery and stated that the incident would have to be treated as an on-the-job injury.

Prior to the surgery, he had told his friend and night shift manager that he had a problem with marijuana use and was referred to the employee-assistance program. However, he could not take off work for treatment because he already had used too much FMLA leave.

After the employee's supervisor told this manager of the situation, the manager sent the employee home, and the employee smoked some marijuana that night. However, the company concluded that the manager was mistaken in his belief that the employee's pre-existing medical condition made the incident something different than a workplace accident. The next day, the employee worked for two hours before he was taken for a medical examination, which included the drug test. He later entered drug treatment, stopped taking drugs, and began to attend Alcoholics Anonymous regularly.

You have been chosen as the arbitrator in this case. Please write a decision and provide the basis and rationale for your decision.

**LIMIT: THREE (3) PAGES**

**ALL ANSWERS MUST BE IN YOUR BLUE BOOK. PUT THE NAME OF THE COURSE, THE DATE, AND YOUR IDENTIFICATION NUMBER ON YOUR BLUE BOOK. GOOD LUCK!**