

## ALTERNATIVE DISPUTE RESOLUTION

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### PAPER 2

#### INSTRUCTIONS

This paper is due from graduating seniors on Wednesday April 29, and for all others on Wednesday May 13. You may submit it by sliding a hard copy under the door to my office (Room 476) no later than 11:59 pm or the latest time the Law School remains open, whichever is earlier. If you submit a hard copy this way, you should keep an extra copy for yourself in case the submitted one goes missing.

As an alternative, you may submit your paper by email, by emailing no later than 11:59 pm on the due date and following these rules: The paper should be in Word or pdf format. The **file name** you use for the paper must include **your last name** and the term **ADR Final Paper**. (They don't need to be italicized or bolded.) If you submit by email, you must also submit a hard copy by mail to me at the Law School (123 Washington Street, Newark, NJ 07102) postmarked no later than the day after the due date.

If you want me to return a copy with comments, you may give me two copies of the paper and a stamped, self-addressed envelope to send one copy back to you.

The paper is limited to 3,000 words, excluding title, your name, date and page numbers and the word count itself. Put the word count at the end. For papers that do not state the number of words, and appear to be slightly over the word limit, I will stop reading at what I judge to be 3,000 words. For papers that appear to be substantially over the word limit I will stop reading at what I judge to be 3,000 words and will deduct 10 points from the paper's grade. Double spacing would be appreciated.

I would like you to use the book, the material on Blackboard, and our class discussions and exercises as a rich source of concepts and techniques. Thus, no matter how insightful and cogent your paper is, it will be even more effective if you refer to material in the book, material on Blackboard, and your role play experiences to support – or to contrast with – your analysis. It often helps to review the book's detailed table of contents, both before and after you've written. Of course, with the 3,000 word limit, you won't be able to use all of the material in the book, but a review should help you avoid missing important ideas, find new angles, enrich, and maybe even rethink.

The citation form for Paper 1 may be used here – only the page number to reference something written by the editors of the casebook, only name of the author of an excerpt in the casebook you refer to (with a page number if you want a pinpoint cite) or a single identifying name for a case. If you are citing material from Blackboard, it is sufficient to give a shorthand version of its title and, if it's a case, one party's name from the case caption.

I will accept questions about the paper up until the end of the day Sunday April 26. If I think the question and my response might be of interest to others, I will post the question and response on Blackboard, without identifying you. By asking a question, you are giving me permission to do so. I will not review outlines or drafts of your papers.

You may notice that the first issue described below sounds a lot like the third mediation exercise you did in class (the employment dispute) as seen from the supervisor's perspective. But this is NOT the same situation, despite some apparent similarity. At this point, we do not know what the employee thinks happened or wants us to do. The specific private facts of the employee in the prior mediation, and whatever the mediator or the supervisor learned during that exercise, may not be at all pertinent here. Your experience doing and reflecting on that mediation, however, may help you plan for this one.

## **THE PROBLEM**

Memo

To: Hardworking Associate  
From: Supervisor Jon  
Re: The Current ConEx Matter

Please write me a memo, not to exceed 3,000 words, on the following two issues presented to us by our client ConEx. It's up to you to decide how to allocate your space between the two issues.

### **ISSUE ONE**

Three weeks ago Charles Rogers, the manager in charge of the software design department, fired Rae Smith. Smith was a group leader in the "correction" section of the department. That section deals with correcting coding or design flaws that customers run into as they use ConEx software. Smith failed to appear at work for three consecutive days and never even called to inform Rogers of the fact that she would be absent and tell Rogers why. We have since learned that Smith claims that she was caring for a sick child.

Rogers reports that Smith generally did a good job except for this infraction and except for a record of being somewhat insolent and disrespectful to her co-workers and supervisors. Her failure to call in (in Rogers' view) was simply one more incident of her lack of courtesy and appreciation of proper protocol. When Rogers initially became her supervisor, he invited her out to dinner. Rogers says that he normally invites most new employees to lunch, but he had had a long day and thought it would be fun to spend the evening getting to know a new employee. Smith declined the invitation in a fashion that Rogers thought was insulting, suggesting that he was interested in a relationship with Smith. While Smith has done a generally adequate job, ConEx and Rogers value a collegial and cooperative atmosphere and found Smith's attitude utterly unacceptable.

There could be no excuse for a failure to contact work for *three* days! How hard could it have been to phone, text or send an email?

Additionally, Rogers' department is downsizing, and this incident gives ConEx a convenient way to make necessary adjustments.

However, several of Smith's friends are complaining about the peremptory action that was taken, and ConEx employees have heard that Smith is threatening a lawsuit. We don't yet know the possible legal grounds for such an action. Possibilities include sex discrimination (Smith was the only woman in the "correction" section; there is only one other woman in the software design department out of twenty five employees; the dinner incident may suggest a claim that ConEx had an environment that was hostile to women or that she was fired for not going to dinner with a man), the Family Medical Leave Act (if health care was really the reason for Smith's absence and she gave the required notices), and breach of contract (if there was some contractual understanding that would excuse her absence, or that would prevent ConEx from discharging without first giving her a warning or a less severe sanction.) We don't know if Smith has gone so far as to talk to a lawyer, but some of the gossip is that she was talking to Alicia Florick, who represented another employee, Juliette Barnes, in a dispute some time ago. The whole matter has caused tension and discontent in the design department, and there's a risk it could become explosive and bad for morale unless it is resolved quickly.

Rogers not want Smith back. He feels it would disrupt the already weak morale in the office, and Smith is a troublemaker. Rogers seems to feel badly that he fired Smith without a warning to her first, but insists that Smith's conduct was inexcusable. ConEx lost business as a result of Smith's absence and Rogers feels Smith should pay. However, he feels badly about the illness of his/her child.

Rogers' own annual evaluation is coming up. He seems to be interested in finding a way to resolve it neatly and quickly, and that would be in the interest of ConEx as well. ConEx does not want to have a lawsuit on its record, nor does Rogers. Having this kind of problem looks bad. It would be nice if Smith would stop bad-mouthing Rogers and ConEx and creating trouble.

Smith made \$1,500 a week. The savings from the termination will be very helpful in the "correction" section's budget for next year. However, a lawsuit could easily offset the gains made by this payroll deduction.

I am giving you the responsibility for trying to resolve this matter, short of litigation if possible. Write me your analysis of how to proceed, and try to be specific about what you expect to do.

You should consider both negotiation and mediation, and maybe even hybrid processes. If negotiation, you should describe the opportunities and risks of negotiation, your goals and tasks, and the ways you plan to carry them out. You should also tell me whether you want to negotiate on your own with Smith's own lawyer, lawyer to lawyer,

or whether you want to negotiate with Smith present and someone from ConEx present, in addition to the lawyers. Who would that be from ConEx? Rogers? Rayna James, the CEO? Both?

If mediation, you should tell me what mediation would add that we couldn't accomplish through unassisted negotiation. Also, we would have to choose a mediator. We have six to choose from. The four of them – Frank Scardilli, Lela Love, J.S. Levy (we'll assume that's the mediator depicted in the Fly on the Wall example), and Eric Galton – are described in the book. The two others – Len Riskin and Gary Friedman – appear in the videos on the library website and accessed through the urls indicated in Blackboard/Mediation. Tell me your first and second choices for a mediator, and why you prefer them to the others. This should describe the styles or approaches to mediation you think would be best, and why.

We should *not* use Owen Wilson and Vince Vaughn, who are shown in the movie clip referenced on the same Blackboard site.

For the mediation, tell me whether you and Smith's lawyer should participate in the mediation or only Smith and someone from ConEx. If the lawyers participate, tell what you see as your tasks and how you anticipate carrying them out. And, as with negotiation, who from ConEx should be there and why?

I have one further question about mediation. It's sometimes said that we should not be the first to propose mediation because opposing counsel with think we believe our case is weak. Do you agree? If you think the benefits of mediation outweigh that risk, how will you propose and handle the mediation so as to minimize that risk or disabuse them of that belief?

If you think a hybrid process would be helpful, you should say what it is and why you recommend it. But if it doesn't seem useful to you, you needn't discuss it.

## **ISSUE TWO**

ConEx has an arbitration provision in its standard employment terms, which were given to Smith when they were implemented and which she signed. (Smith was an employee at will, so her continued employment after the promulgation of the arbitration provision, particularly with her seeing and signing it, would constitute her agreement.) If the matter is not resolved by agreement in negotiation or mediation, we will try to use the arbitration provision to require arbitration rather than a court trial. (Procedurally, Smith would either make a demand for arbitration, or file a lawsuit in court. If she files a lawsuit, we will move to dismiss or stay the lawsuit pending arbitration under the agreement. And, of course, if she tries to bring the matter back to court after the arbitration, the court's scope of review would be constrained by the limited terms for judicial review provided by the Federal Arbitration Act.)

Here are the terms of the arbitration provision:

**Arbitration:** In the event of any claim or dispute between Employee and ConEx related to this Agreement or to Employee's employment at ConEx, or the termination thereof, the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. The parties shall agree on a single arbitrator to resolve the dispute. The matter may be arbitrated either by the Judicial Arbitration Mediation Service or American Arbitration Association, as mutually agreed upon by the parties or selected by the party filing the claim. The arbitration shall be conducted in the New Jersey county in which ConEx maintains the office or facilities where Employee works or worked (if terminated). Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction. The conduct of the arbitration shall be subject to the then current rules of the arbitration service. The costs of arbitration, excluding legal fees, will be split equally or be born by the losing party, as determined by the arbitrator. The parties shall bear their own legal fees.

Is this provision valid and effective for this case under New Jersey law? If not, what do we need to do to make it effective in the future? Be specific.

Even if currently ineffective under New Jersey law, what do you think is the likelihood that it will nevertheless be determined to be valid and enforceable because of federal law? Explain why you think that.

As noted above, I don't want you to rely on any material other than the material in the casebook or on Blackboard. That material sometimes refers to other cases or other external material. I don't expect you to read that additional external material or go beyond the descriptions contained in the casebook and Blackboard material you already have.