

**Alternative Dispute Resolution
Final Examination
Fall 1994**

Question #1.

There is no joy in Mudville today. No, Mighty Casey didn't strike out. He didn't even show up at the park. No one did, because the players have been out on strike since August 12, 1994. The strike led to cancellation of the 1994 baseball season, including the play-offs and the World Series (which has been played every year since 1905). The entire 1995 season is still in jeopardy.

Major league baseball generates revenues of \$1.78 billion per year. On one level this dispute is about how to divvy up the money. The controversy arose because of the owners' proposal to (1) place a salary cap on player incomes (a team would not be allowed to spend more than a certain dollar amount on salaries) and (2) reduce the percentage of revenues devoted to players' salaries from 58% down to 50% of revenues. The proposal includes a stipulation that the players would be guaranteed at least \$1 billion annually unless revenues dropped.

The owners claim that the proposal is necessary to save baseball because 19 of the 28 major league teams are operating at a loss. The owners argue that unlimited player salaries put teams in smaller markets at a disadvantage because such teams are not able to compete for the higher priced players or to keep talented players. In order to make baseball more competitive, the owners would redistribute to the poorer teams the savings resulting from the limitation on the players' salaries. In addition, the owners believe that because of shrinking revenues from television contracts, there is less money to be made.

The players are suspicious about the owners' claims because the owners refuse to open up their books in order to verify their claims. In addition, it appears that baseball franchises continue to be sold for extraordinary prices.

Salary caps have been implemented in other major sports. Basketball has the longest history with salary caps and basketball players' salaries are comparable to the salaries for baseball players. There are 700 baseball players. Their average salary is \$1.2 million and the minimum salary is \$109,000.00. There are 330 basketball players. Their average salary is \$1.5 million and the minimum salary is \$140,000.00..

Baseball has been plagued by periodic strikes over the past years, however, the current strike is the longest and the most devastating. It is estimated that the owners lost \$5 million per day due to the cancellation of the regular season and an additional \$140 million due to cancellation of the post season and the World Series. The players also are not immune. Bobby Bonilla, the highest paid player lost \$31,148.00 per day and even the lowest salaried player lost \$589.00 per day.

Baseball enjoys a unique immunity from antitrust laws. This was implemented in a Supreme Court decision in 1922. Congress, however, could legislatively eliminate the exemption. Bills have been introduced which would do this. Until the antitrust exemption is legislated away, however (and this would be a major political undertaking), this leaves the owners with a great deal of power to act in concert.

In order to deal with the baseball players union on this issue, the owners have agreed that acceptance of any proposal that does not include a salary cap would require the approval of at least 21 of the 28 teams. They have implemented this rule because in previous negotiations over player salary issues, the players union has taken advantage of differences among the owners. The divisions between the rich teams and the poor teams have historically prevented the owners from standing their ground for very long.

The players' lead negotiator is Don Fehr, executive director of the players union. He has held the position for over 10 years. During his tenure the players have made extraordinary gains. Their salaries have increased from an aggregate of \$240 million (representing 40% of baseball's revenues in 1984) to more than \$1 billion. The players union is one of the richest in the nation and is glad to pay Fehr's \$1 million annual salary.

Don Fehr's adversary is Dick Ravitch, a real estate tax lawyer and successful entrepreneur. Ravitch was elected as President of the owner's Player Relations Committee by the interim executive director of baseball, Bud Selig. (Baseball has operated without a real executive director since the owners fired the last director, Faye Vincent, in 1993. Bud Selig is the owner of one of the poor teams.) Dick Ravitch was supposed to be the owners' latest "Great White Hope," the man who might knock out the players union. Each of his four predecessors, four in the previous six years, had been carried from the ring, groggy and cross eyed.

Fehr and Ravitch are both highly intelligent but they each have a different style. Don Fehr permits baseball players to sit in on the negotiations, whereas Dick Ravitch prohibits any of the owners from attending the negotiations. Each publicly accuses the other of manipulating statistical data to mislead the public. Fehr questions Ravitch's motives for not allowing any of the owners to sit in on the negotiations; he doubts that they are getting an accurate picture from Ravitch. At the same time, Ravitch questions the point of Fehr's inviting players into the sessions; he suspects Fehr of political grandstanding.

Apparently, the players timed the strike to do maximum damage. At the time that the players called the strike, they had already received 2/3rds of their salaries. However, the owners don't derive their best revenues come until the play-offs and the World Series. The players also built up a \$200 million strike fund.

You have been called in as a negotiation analyst. Your task is to determine what went wrong with the negotiations and to determine whether there is anything that can be done to salvage the negotiations without intervention by a third party.

Question #2.

Refer to Question #1. How would you advise the owners and the players to proceed in the event of a stalemate in negotiations? What can they do to keep this type of disaster from reoccurring in the future?

Question #3.

Your client is an African American female law professor, Anita Hill. She has come to you with a claim involving allegations of sexual harassment by a tenured member of the St. Mary's School of Law. She is interested in filing a claim against the school. However, her employment contract required her to submit any claims against the school to binding arbitration. She has gone through the arbitration proceeding and she lost. The arbitration clause in her employment contract reads as follows:

The employee hereby agrees that any and all disputes between the employee and the employer shall be submitted to binding arbitration. The arbitrator shall be selected by the employer from among the senior tenured law faculty at a similar institution as St. Mary's. The decision of the arbitrator shall be final and binding. There shall be no discovery permitted. The arbitrator's final decision shall be in writing, however, the arbitrator is not required to issue detailed findings of law.

Prof. Clarence Thomas, III, of the Baylor University School of Law, served as the arbitrator. Prof. Thomas ('Trey' to his friends) is a noted scholar in the area of Free Speech. He has written several controversial law review articles in which he has argued that the First Amendment places some restraints on what type of speech or behavior can be actionable as sexual harassment. In his view "procreative speech" should be as protected under the Constitution as political or commercial speech.

Anita wants to know if there is anything that she can do to overturn the arbitrator's ruling.

Question #4.

Your client is a 27 year old AIDS victim, James Crenshaw. Because he is bedridden you agree to meet him at his parents' house. James appears to be in a fairly weakened condition, however, he becomes more and more animated when he relates his story to you. He wants to bring a lawsuit against his former employer, Happy Notes, a regional music retailer with several stores located in Central Texas.

James claims that Happy Notes discriminated against him in violation of the American's with Disabilities Act (ADA). The ADA is a federal statute that prohibits discrimination on the basis of disability. AIDS is defined as a disability under the ADA.

James claims that:

- (1) Prior to the time that James' illness became known, Happy Notes provided health insurance for all of its full time employees by subsidizing the premiums for a group health insurance policy;
- (2) The group health policy had a lifetime maximum benefit of \$1 million per employee (any employee was covered to the extent of \$1 million);

- (3) After James' condition became known, Happy Notes dropped the group health policy and decided to self insure for the first \$100,000.00 of medical expenses per year (coverage for claims in excess of \$100,000 would be covered through an excess umbrella policy purchased from a insurance carrier); and
- (4) In connection with the conversion to self insurance, Happy Notes altered the coverage provided by reducing the lifetime maximum benefit to \$25,000.00 for AIDS but retained the \$1 million benefit for all other illnesses.

The effect of this change is that James no longer has insurance coverage for his treatment because his expenses have already exceeded the \$25,000.00 threshold. He has also exhausted all of his sick leave and disability benefits.

The law in this area is in a state of uncertainty. It is clear that prior to the enactment of the ADA employers had the ability to make changes like the ones that Happy Notes made. However, the ADA makes it clear that the employer cannot discriminate in the provision of health coverage for employees. The ADA does permit the employer to exclude coverage of health costs that present actuarially proven risks to the fiscal integrity a self insurance health plan.

The lawyer for Happy Notes argues that Happy Notes' decision to self insure is not in violation of the ADA. The lawyer also argues that Happy Notes' decision regarding the coverage limitations were based on actuarial data which indicated that given the probability of the occurrence of AIDS in Happy Notes' work-force and the cost of treating AIDS, coverage for AIDS would quickly cause the health claims to exceed the \$100,00.00 self insurance threshold. The lawyer argues that the effect of this would be that in the future Happy Notes would either have to: (1) self insure to a greater extent; (2) pay higher premiums for the umbrella policy; or (3) reduce the health benefits available to its employees.

The issue is a matter of some debate. The EEOC has pursued several employers based on similar caps placed on coverage for AIDS. The EEOC has gotten settlements in some of the cases, but other employers have preferred to take their chances in the courts.

The lawyer for Happy Notes has indicated that Happy Notes is interested in resolving the claim. She wants you to consider taking this matter to Med\Arb. Would you recommend this to James?

ADR Final Examination
Fall Semester 1994
Professor Andre' Hampton
Model Answer

Question #1. The negotiations resulted in a strike because of the parties' use of a competitive, distributional, value claiming approach to negotiation. Some factors that show that the parties used this approach are: (1) focus on the persons and not the problem, as evidenced by the allegations by the lead negotiators; (2) failure to reveal information necessary to evaluate claims, as indicated by the owners' refusal to reveal the information about teams that were losing money; (3) use of perceived power, as evidenced by the baseball players striking at time designed to do maximum damage to the owners and (4) the lack of trust on each side. The parties have adopted this tactic due to the history of their negotiations. It seems that the owners have lost face in the past and now intend to even the score. In addition, the parties have focused on one issue -- the money. They believe that revenues are static or shrinking. This history and perception encourage a win - lose or distributional style of negotiation.

To get the negotiations past the stalemate, it is necessary to have the parties approach this negotiation in a collaborative, integrative, value creating fashion. Although the parties have focused on the money there are additional issues that suggest that the competitive approach may not be ideal for this negotiation. Note that this is not a dispute settlement negotiation. The task is not to resolve a breach of contract. This is a deal making negotiation because it involves the parties' future relationship. The parties have a continuing relationship.

The parties need each other. Neither party has a good best alternative to negotiated settlement. The players prospect of prevailing in any litigation is dim because of the Supreme Court precedent. Lobbying for a change in the law is uncertain because of the politics involved. The players strike fund of \$200,000.00 is going to deplete. The players are losing money. The owners BATNA is also not good. They could hire scabs. It is uncertain whether this would generate any interest. They are also losing money.

Given these conditions, although the situation seems to preordain a value claiming approach, a value creating approach may be more appropriate. To get this turned around it may be first necessary to change lead negotiators for one or both of the parties. These negotiators seem to have personal stakes in the negotiation that may make it difficult to detach themselves emotionally. Don Fehr has a track record which justifies a \$1million salary. He probably does need to grandstand to a degree, which may account for his allowing players to attend the negotiations. Dick Ravitch is the "Great White Hope" who Bud Selig has chosen. Because Bud Selig is the owner of a revenue poor team, there is a question about whether Ravitch is working for the best interest of all of the teams. To whom does he owe his allegiance? Is his negotiation style hampered by too much personal involvement or conflict of interest?

With or without the new negotiators, the negotiators need to agree to ground rules about the clients' participation in the negotiations. This is an emotionally charged dispute. In these situations, sometimes it is better to operate through emotionally detached representatives. However, the presence of the clients can also ensure that the emotions are acknowledged and addressed. The degree of mistrust between the parties indicates that the clients should attend the sessions if the negotiators can handle the emotions that are likely to be revealed. It is just

questionable whether Fehr and Ravitch are capable of doing this. It would not be feasible to have all of the clients present, however, therefore, the parties will need to select representatives besides the negotiators.

In using the value claiming approach the negotiators need to rely on objective standards. The caps have worked in basketball and other sports. Therefore, basketball's example would provide a starting point from which to objectively evaluate the proposed salary cap for baseball. In addition, it will be impossible to apply objective criteria to the owners' allegations about the financial condition of the teams unless the owners open their books. This will also be necessary to build trust. The parties also need to critically evaluate their BATNA. This negotiation has been conducted in the media. This needs to stop because it diverts the parties' attention away from dealing with the issues.

Question #2. If negotiations reach a stalemate what is the next step? It would be important to first attempt to use those alternatives that allow the parties to maintain the most control over the outcome and the process. Therefore, the next step would be to attempt mediation. However, we need to make some decisions about the mediator and the type of mediation. Mediators can be directive or facilitative. What kind of mediator does this dispute best suit for this dispute? The negotiators, Fehr and Ravitch, have strong personalities. It is possible that a directive mediator will be necessary to overcome these strong personalities. On the other hand, the dispute is emotionally charged. A facilitative mediator is more likely to be able to defuse the emotions. If the mediator is going to be directive, the mediator needs to be one who has (1) each party's respect and (2) substantive knowledge about the controversy. The mediator will also apparently need to effectively use the caucus model. This is because at least one of the parties has information that it does not wish to reveal to the other party. In addition, the mediator can invoke the caucus to defuse emotions and to engage in intense reality checking with the disputants without causing them to lose face.

In order to prevent strikes from occurring in the future the parties need to institutionalize a dispute resolution process in their agreement. This process should incorporate a system wherein the parties first attempt to resolve any dispute pursuant to negotiations and then mediation. In the event that these procedures fail the parties should be required to submit the matter to arbitration.

Question #3. There was nothing in the fact pattern to suggest that this was an adhesion contract. In addition, despite whether it is an adhesion contract, the courts will still need to examine whether Ms. Hill suffered any prejudice by undergoing the arbitration. In fact there are very limited grounds under which the court will overturn the arbitrator's decision. The Gilmore decision suggests that the court will review the manner in which the arbitration agreement was entered into, the procedural fairness of the arbitration agreement and the fairness of the outcome. However, it is apparent that unless there are extreme facts, the fairness surrounding entering into the agreement will not cause the court to overturn the decision. In addition, the court does not require that the arbitration be conducted with the same procedures as a trial. Therefore, the lack of discovery and the fact that St. Mary's chose the arbitrator, will not provide a basis for overturning the arbitrator's decision. The court will need evidence of an unfair outcome. There

will need to evidence of a "manifest disregard" for the law. This is a difficult standard to prove. It will require a showing that Thomas knew the law and disregarded the law.

In this case, the potential for bias is evident in: (1) the manner in which the University has stacked the deck (the arbitrator will be a member of the tenured law faculty at a school similar to St. Mary's) and (2) the particular arbitrator chosen (Clarence Thomas, III, proponent of First Amendment protection for "procreative" speech). The fact that there is a potential for bias, however, does not indicate that Prof. Hill has suffered any prejudice. We don't know if Prof. Thomas opinions played any part in his decision.

Our ability to prove whether bias did play a part in his decision is hampered because the arbitrator is not required to issue a legal finding supporting his decision. The lack of a written finding, however, is not typically fatal to the validity of the arbitrator's decision. In this case, however, given the high degree of potential for abuse and the court's concern about arbitration of statutorily created causes of action involving personal rights, perhaps a court could be persuaded to look into the matter.

Question #4. The benefits and detriments of med\arb are generally well known. The process combines mediation and arbitration. It has the advantage of saving time. However, the danger is that it stifles discussion. One solution is to use a different mediator and arbitrator. Both attend the mediation, however, only the mediator attends the private caucus with the parties.

The more pressing issue is whether any type of ADR is desirable. The company's attorney has suggested mediation\ arbitration. What are their motives for doing this and are these motives counter to your clients interests? Are they hoping that James will make some damaging revelation during the mediation which would be used against him in the arbitration? Are they merely interested in seeking to delay? Are they hoping that he will die before he can to bring public attention to their actions? Are they seeking some way to settle this for cheaply and quietly to prevent a precedent in this area?

Generally, ADR is preferable to litigation because of the time, expense, emotional trauma and loss of control over the process and the outcome involved in litigation. It also appears that here these factors would suggest that ADR would be preferable. James may be running out of time and may not be around for a long drawn out court battle. James does not have any money. Therefore he can't afford a long court battle unless you decide to handle this case on a contingent fee basis or pro bono. (Your decision in this regard depends on your assessment of his chances in prevailing or your altruism). In James' weakened condition, he may not be able to withstand the rigors of litigation. It would appear that unless James has some overriding interest, some type of ADR may be preferable to litigation.

Notwithstanding what you think about their motives or your own view about the merits of ADR, it is important to examine James' interests. His interests are the key to determining whether any type of ADR is appropriate here. What does James want? He is looking for money to be to cover the cost of his treatment? If so, ADR is preferable to litigation. On the other hand, does he feel wronged and feel a need to publicly shame Happy Notes or to obtain personal vindication. If so, his interest may be better served through litigation. Is he is looking for a large money judgment? If so, depending on how you view his case, whether a judge or jury would decide the issues and whether James makes a sympathetic victim, litigation might be the proper alternative. If James' interests appear to align themselves with the need for litigation, you need to

remind him that most cases settle before trial and that litigation takes along time. He may not be around to enjoy the results.