

Appendix A: Sample Exam Questions for a Large Class

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Question I.

(approximately 60 minutes)

Attached to this examination as Exhibit A is a transcript of portions of the opening session of the mediation of a legal dispute. **(TAKEN FROM A MEDIATION VIDEO)** Please read it carefully, and prepare to answer the following questions.

QUESTIONS

[A] BASED ON THE OPENING SESSION EXCERPT, WHAT ARE THE MOST LIKELY REASONS THAT THIS CASE HAS NOT YET SETTLED?

[B] ASSUME THAT YOU ARE THE MEDIATOR IN THIS DISPUTE. EXPLAIN HOW YOU WOULD ATTEMPT TO RESOLVE THESE TWO MOST LIKELY PROBLEMS THROUGH THE MEDIATIVE PROCESS.

[C] NOW ASSUME THAT YOU ARE THE LAWYER FOR THE CORPORATION WHICH IS SUING THE ARCHITECT, EXPLAIN HOW YOU WOULD ATTEMPT TO RESOLVE THESE PROBLEMS IF YOU WERENOT IN MEDIATION, THROUGH NEGOTIATION WITH THE OTHER SIDE.

OUTLINE

Question II

(40 minutes)

You are a member of an Ames Bar Association (ABA) Committee that is drafting advisory standards for the use of mediation in the settlement of civil litigation. The Committee's work covers both court-connected and private mediation, in all kinds of civil disputes.

A member of the Committee has proposed a standard stating that mediators should never conduct private caucuses with parties. This is inappropriate, she says, because mediators give evaluations of the merits as part of their work. More generally, she

believes that ex parte discussions with litigants are fundamentally inconsistent with American principles of justice.

QUESTION

GIVE YOUR COMMENTS ON THE PROPOSAL. DO YOU AGREE OR DISAGREE WITH IT? ARE THERE CIRCUMSTANCES, OR TYPES OF DISPUTES, IN WHICH IT WOULD BE MORE OR LESS APPROPRIATE, OR ENTIRELY PERMISSIBLE OR IMPERMISSIBLE, FOR A MEDIATOR TO MEET IN PRIVATE CAUCUS WITH A PARTY?

PLEASE EXPLAIN THE REASONS FOR WHATEVER POSITIONS YOU TAKE. GIVE EXAMPLES TO SUPPORT YOUR VIEWS IF THIS WOULD HELP TO EXPLAIN THEM.

Question II. (Approximately 45 minutes)

Federal Judge Thomas Jackson recently issued findings of fact in the case of *U.S. v. Microsoft, Inc.* He found, in essence, that Microsoft had an effective monopoly over the operating systems used in personal computers worldwide and that the Company had used its monopoly power in improper ways. It had threatened and hindered legitimate competitors and had blocked the development of competing products in ways that retarded the rate of innovation in computer software, increased prices, and decreased the range of choice available to consumers. In particular, Jackson found that Microsoft had used threats and other illegal methods to promote its Windows browser against competitors such as Netscape. Although Judge Jackson has not yet issued his rulings of law, his findings of fact make it clear that Microsoft will be held liable for violating antitrust law.

The Justice Department has indicated that it will seek strong, even draconian, remedies against the Company, including so-called "structural" relief, i.e., an order breaking up Microsoft into smaller companies, similar to the way that the Bell System was broken up into "Baby Bells." These new entities, says Justice, would be able to compete with each other and with other companies without the ability or temptation to engage in the abusive tactics identified by Judge Jackson. Microsoft is also expected to be sued by competitors and consumers, who will use Judge Jackson's findings as launching pads for large damage claims. Microsoft has responded by touting its record of successful innovation in the field of computing, pointing out the rapidly changing nature of the field and the multitude of thriving and well-capitalized competitors, and

suggesting that breaking up the company would be akin to killing a goose that, although sometimes bad tempered, has laid very golden eggs.

Perhaps because of the difficulty and sensitivity of fashioning an injunctive remedy, Judge Jackson decided last month to appoint a mediator in the case. He chose Judge Richard Posner, a former professor of antitrust law who is now Chief Judge of a Circuit Court of Appeals. Judge Posner is a renowned scholar in the field of law and economics, and has argued that the law should be shaped with careful attention to economic forces, in particular whether legal rules serve to promote a vibrant free market economy. Both Justice and Microsoft have said that they welcome Judge Posner's assistance, and have designated their chief trial counsel to meet with him at his convenience.

QUESTION

YOU ARE A LAW CLERK TO JUDGE POSNER. HE HAS ASKED FOR ADVICE ABOUT (1) WHAT OBSTACLES HE IS LIKELY TO ENCOUNTER IN CARRYING OUT THIS MEDIATION AND (2) WHAT TACTICS AND APPROACHES MIGHT BE EFFECTIVE IN OVERCOMING THESE BARRIERS. PLEASE ADVISE HIM.

IN DOING SO, ASSUME THAT JUDGE POSNER UNDERSTANDS THE GENERAL PRINCIPLES OF NEGOTIATION AND MEDIATION. DON'T WASTE TIME GIVING HIM A "PRIMER" ON THE SUBJECT. INSTEAD, FOCUS ON THE MICROSOFT DISPUTE.

YOU MAY MAKE FACTUAL ASSUMPTIONS AS NEEDED, BUT PLEASE STATE ANY SUCH ASSUMPTIONS IN YOUR ANSWER.

OUTLINE

Question I (approximately 45 minutes)

Assume that you are the lawyer for Hi-Tech. You believe that it would make sense to attempt to negotiate with Prosando before going on to a more formal approach to dispute resolution. However, Prosando was purchased two months ago by Osaka Nihi, a Japanese company. Osaka's management appears very similar in their approach and thinking to _____, the company that involved in the _____ negotiation.

QUESTION

DESCRIBE THE NEGOTIATION STRATEGY THAT YOU WOULD USE IN NEGOTIATING FOR HI-TECH WITH PROSANDO ABOUT THIS DISPUTE.

AS PART OF YOUR ANSWER, CONSIDER ANY PROBLEMS THAT MIGHT ARISE IN THE NEGOTIATION AND EXPLAIN HOW YOU WOULD DEAL WITH THOSE PROBLEMS ON BEHALF OF HI-TECH.

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