

CONFIDENTIAL PROCEEDING

Honorable Jacqueline A. Connor (Ret.)
 ADR SERVICES, INC.
 1900 Avenue of the Stars, Suite 250
 Los Angeles, California 90067
 (310) 201-0010 PH
 (310) 201-0016 FAX
 Emergency Arbitrator

ADR SERVICES, INC.

IN RE THE MATTER OF THE ARBITRATION BETWEEN

EC, LLC,

Claimant,

v.

PEGGY PETERSON,

Respondent

) ADRS Case No. 18-1118-JAC

) TEMPORARY RESTRAINING ORDER

By written emergency application with exhibits pursuant to Rule 24 of the ADR Services, Inc. Arbitration Rules, Claimant EC, LLC has requested an emergency order precluding Respondent Peggy Peterson ("Ms. Peterson") from (i) disclosing or inducing, promoting or actively inspiring anyone to disclose Confidential Information, as defined in the "Confidential Settlement Agreement and Mutual Release: Assignment of Copyright and Non-Disparagement Agreement," effective October 28, 2016 (the "Settlement Agreement") whether in the media, court filings, or otherwise, (ii) disclosing or inducing, promoting, or actively inspiring anyone to disclose the fact of the commencement and pendency of this Arbitration and any details relating thereto, including, but not limited, to the existence of this Emergency Application and any emergency order issued in response to that application (the "Emergency Application").

ADR Services, Inc. has appointed the undersigned, Honorable Jacqueline A. Connor (Ret.), as the Emergency Arbitrator to hear the emergency application. Having reviewed the emergency application, including the parties' Settlement Agreement and other exhibits, the

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Emergency Arbitrator finds that the Settlement Agreement expressly authorizes issuance of an *ex parte* restraining order without the requirement of advance notice to Ms. Peterson in the event she has breached or threatened to breach the confidentiality obligations expressly agreed upon in the Settlement Agreement.

Upon due consideration, the Emergency Arbitrator issued a tentative ruling and order, which was accepted on submission without oral argument by Claimant and Claimant's counsel.

NOW, THEREFORE, upon Claimant's application, it is hereby ORDERED that the Emergency Application is GRANTED, in part, as follows:

1. Pending further determination by the selected or appointed Arbitrator(s), Ms. Peterson is precluded from disclosing or disclosing or inducing, promoting or actively inspiring anyone to disclose Confidential Information, as defined in the "Confidential Settlement Agreement and Mutual Release: Assignment of Copyright and Non-Disparagement Agreement," effective October 28, 2016 (the "Settlement Agreement") whether in the media, court filings, or otherwise; and

2. Pending further determination by the selected or appointed Arbitrator(s), Ms. Peterson is precluded from disclosing or inducing, promoting, or actively inspiring anyone to disclose the fact of the commencement and pendency of this Arbitration and any details relating thereto, together with all proceedings and papers filed herein including, but not limited, to EC's Emergency Application and this Order; and

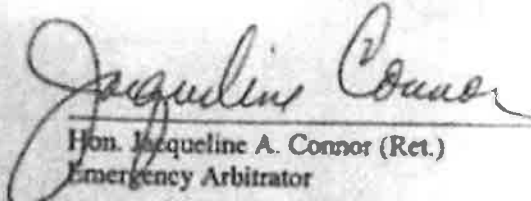
3. The foregoing shall not apply if, in accordance with Paragraph 4.4.1 of the Settlement Agreement, Ms. Peterson is compelled to disclose Confidential Information to another person or entity by valid legal process, including without limitation, a subpoena duces tecum or similar legal compulsion. Ms. Peterson shall not make any such disclosure unless she has first provided DD with notice of such order or legal process not less than ten (10) days in advance of the required date of disclosure pursuant to the Written Notice provisions set forth in the parties' Settlement Agreement, providing DD with an opportunity to intervene and with full and complete cooperation should such disclosure be opposed. If the valid legal process can be stopped by Ms. Peterson's consent or at her behest, Ms. Peterson shall use best efforts to avoid the disclosure of the Confidential Information.

CONFIDENTIAL PROCEEDING

1 The Emergency Arbitrator retains the power to modify or reconsider this interim order
2 until the appointment of an arbitrator or arbitration panel for consideration of the entire matter.
3 (ADRS Rule 24.)

4
5 IT IS SO ORDERED.

6
7 DATED: February 27, 2018

8 
9 Hon. Jacqueline A. Connor (Ret.)
Emergency Arbitrator

COPY

1 Michael J. Avenatti, Bar No. 206929
 2 AVENATTI & ASSOCIATES, APC

CONFORMED COPY
 ORIGINAL FILED
 Superior Court of California
 County of Los Angeles

MAR 06 2018

Shera R. Carver, Executive Officer/Clerk
 By: Charletta Robinson, Deputy

3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 Attorneys for Plaintiff Stephanie Clifford
 a.k.a. Stormy Daniels a.k.a. Peggy Peterson

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 8
 9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 10 FOR THE COUNTY OF LOS ANGELES

11 STEPHANIE CLIFFORD a.k.a. STORMY
 12 DANIELS a.k.a. PEGGY PETERSON, an
 individual,

Case No.

BC 696568

Plaintiff,

COMPLAINT FOR DECLARATORY
RELIEF

vs.

15
 16 DONALD J. TRUMP a.k.a. DAVID DENNISON,
 an individual, ESSENTIAL CONSULTANTS,
 17 LLC, a Delaware Limited Liability Company, and
 DOES 1 through 10, inclusive

Defendants.

1 Plaintiff Stephanie Clifford a.k.a. Stormy Daniels a.k.a. Peggy Peterson ("Ms. Clifford" or
2 "Plaintiff") hereby alleges the following:

3
4 **THE PARTIES**

5 1. Plaintiff Ms. Clifford, an individual, is a resident of the State of Texas.

6 2. Defendant Donald J. Trump a.k.a. David Dennison ("Mr. Trump"), an individual, is a
7 resident of the District of Columbia (among other places).

8 3. Defendant Essential Consultants, LLC ("EC") is a Delaware limited liability company
9 formed on October 17, 2016.

10 4. Mr. Trump and EC together shall be referred to hereafter as "Defendants."

11 5. The true names and capacities of the defendants DOES 1 through 10, inclusive,
12 whether individual, plural, corporate, partnership, associate or otherwise, are not known to Plaintiff,
13 who therefore sues said defendants by such fictitious names. Plaintiff will seek leave of court to
14 amend this Complaint to show the true names and capacities of defendants DOES 1 through 10,
15 inclusive, when the same have been ascertained.

16 6. Plaintiff is also informed and believe and thereon alleges that DOES 1 to 10 were the
17 agents, principals, and/or alter egos of Defendants, at all times herein relevant, and that they are
18 therefore liable for the acts and omissions of Defendants.

19
20 **JURISDICTION AND VENUE**

21 7. Jurisdiction for this matter properly lies with this Court because Plaintiff seeks
22 declaratory relief.

23 8. Venue is appropriate in the County of Los Angeles, and this Court has personal
24 jurisdiction over Defendants and each of them, by reason of the fact that, among other things, (a) the
25 alleged agreement that is at issue in this Complaint was purportedly made and negotiated, at least in
26 substantial part, in the County of Los Angeles, and (b) many of the events giving rise to this action
27 arose in California, including within the County of Los Angeles.

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FACTUAL BACKGROUND

9. Ms. Clifford began an intimate relationship with Mr. Trump in the Summer of 2006 in Lake Tahoe and continued her relationship with Mr. Trump well into the year 2007. This relationship included, among other things, at least one "meeting" with Mr. Trump in a bungalow at the Beverly Hills Hotel located within Los Angeles County.

10. In 2015, Mr. Trump announced his candidacy for President of the United States.

11. On July 19, 2016, Mr. Trump secured the Republican Party nomination for President.

12. On October 7, 2016, the Washington Post published a video, now infamously known as the *Access Hollywood Tape*, depicting Mr. Trump making lewd remarks about women. In it, Mr. Trump described his attempt to seduce a married woman and how he may start kissing a woman that he and his companion were about to meet. He then added: "I don't even wait. And when you're a star, they let you do it, you can do anything . . ."

13. Within days of the publication of the *Access Hollywood Tape*, several women came forward publicly to tell their personal stories about their sexual encounters with Mr. Trump.

14. Around this time, Ms. Clifford likewise sought to share details concerning her relationship and encounters with Mr. Trump with various media outlets.

15. As a result of Ms. Clifford's efforts aimed at publicly disclosing her story and her communications with various media outlets, Ms. Clifford's plans came to the attention of Mr. Trump and his campaign, including Mr. Michael Cohen, an attorney licensed in the State of New York. Mr. Cohen worked as the "top attorney" at the Trump Organization from 2007 until after the election and presently serves as Mr. Trump's personal attorney. He is also generally referred to as Mr. Trump's "fixer."

16. After discovering Ms. Clifford's plans, Mr. Trump, with the assistance of his attorney Mr. Cohen, aggressively sought to silence Ms. Clifford as part of an effort to avoid her telling the truth, thus helping to ensure he won the Presidential Election. Mr. Cohen subsequently prepared a draft non-disclosure agreement and presented it to Ms. Clifford and her attorney (the "Hush Agreement"). Ms. Clifford at the time was represented by counsel in California whose office is located in Beverly Hills, California within the County of Los Angeles.

1 17. The parties named in the Hush Agreement were Ms. Clifford, Mr. Trump, and Essential
2 Consultants LLC. As noted above, Essential Consultants LLC ("EC") was formed on October 17,
3 2016, just weeks before the 2016 presidential election. On information and belief, EC was created by
4 Mr. Cohen with Mr. Trump's knowledge for one purpose – to hide the true source of funds to be used
5 to pay Ms. Clifford, thus further insulating Mr. Trump from later discovery and scrutiny.

6 18. By design of Mr. Cohen, the Hush Agreement used aliases to refer to Ms. Clifford and
7 Mr. Trump. Specifically, Ms. Clifford was referred to by the alias "Peggy Peterson" or "PP." Mr.
8 Trump, on the other hand, was referred to by the alias "David Dennison" or "DD."

9 19. Attached hereto as Exhibit 1 is a true and correct copy of the Hush Agreement, titled
10 Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-
11 Disparagement [sic] Agreement. Exhibit 1 is incorporated herein by this reference and made a part of
12 this Complaint as if fully set forth herein.

13 20. Attached hereto as Exhibit 2 is a true and correct copy of the draft Side Letter
14 Agreement, which was Exhibit A to the Hush Agreement. Exhibit 2 is incorporated herein by this
15 reference and made a part of this Complaint as if fully set forth herein.

16 21. Importantly, the Hush Agreement imposed various conditions and obligations not only
17 on Ms. Clifford, but also on Mr. Trump. The agreement also required the signature of all parties to the
18 agreement, including that of Mr. Trump. Moreover, as is customary, it was widely understood at all
19 times that unless all of the parties signed the documents as required, the Hush Agreement, together
20 with all of its terms and conditions, was null and void.

21 22. On or about October 28, 2016, only days before the election, two of the parties signed
22 the Hush Agreement - Ms. Clifford and Mr. Cohen (on behalf of EC). Mr. Trump, however, did not
23 sign the agreement, thus rendering it legally null and void and of no consequence. On information and
24 belief, despite having detailed knowledge of the Hush Agreement and its terms, including the
25 proposed payment of monies to Ms. Clifford and the routing of those monies through EC, Mr. Trump
26 purposely did not sign the agreement so he could later, if need be, publicly disavow any knowledge of
27 the Hush Agreement and Ms. Clifford.
28

1 23. Despite Mr. Trump's failure to sign the Hush Agreement, Mr. Cohen proceeded to
2 cause \$130,000.00 to be wired to the trust account of Ms. Clifford's attorney. He did so even though
3 there was no legal agreement and thus no written nondisclosure agreement whereby Ms. Clifford was
4 restricted from disclosing the truth about Mr. Trump.

5 24. Mr. Trump was elected President of the United States on November 8, 2016.

6 25. In January 2018, certain details of the draft Hush Agreement emerged in the news
7 media, including, among other things, the existence of the draft agreement, the parties to the draft
8 agreement, and the \$130,000.00 payment provided for under the draft agreement. Also in January
9 2018, and concerned the truth would be disclosed, Mr. Cohen, through intimidation and coercive
10 tactics, forced Ms. Clifford into signing a false statement wherein she stated that reports of her
11 relationship with Mr. Trump were false.

12 26. On or about February 13, 2018, Mr. Cohen issued a public statement regarding Ms.
13 Clifford, the existence of the Hush Agreement, and details concerning the Hush Agreement. He did so
14 without any consent by Ms. Clifford, thus evidencing Mr. Cohen's apparent position (at least in that
15 context) that no binding agreement was in place. Among other things, Mr. Cohen stated: "In a private
16 transaction in 2016, I used my own personal funds to facilitate a payment of \$130,000 to Ms.
17 Stephanie Clifford. Neither the Trump Organization nor the Trump campaign was a party to the
18 transaction with Ms. Clifford, and neither reimbursed me for the payment, either directly or
19 indirectly." Mr. Cohen concluded his statement with lawyer speak: "Just because something isn't
20 true doesn't mean that it can't cause you harm or damage. *I will always protect Mr. Trump.*"
21 (emphasis added).

22 27. Importantly, at no time did Mr. Cohen claim Ms. Clifford did not have an intimate
23 relationship with Mr. Trump. Indeed, were he to make such a statement, it would be patently false.

24 28. Because the agreement was never formed and/or is null and void, no contractual
25 obligations were imposed on any of the parties to the agreement, including any obligations to keep
26 information confidential. Moreover, to the extent any such obligations did exist, they were breached
27 and/or excused by Mr. Cohen and his public statements to the media.
28

1 29. To be clear, the attempts to intimidate Ms. Clifford into silence and “shut her up” in
2 order to “protect Mr. Trump” continue unabated. For example, only days ago on or about February
3 27, 2018, Mr. Trump’s attorney Mr. Cohen surreptitiously initiated a bogus arbitration proceeding
4 against Ms. Clifford in Los Angeles. Remarkably, he did so without even providing Ms. Clifford with
5 notice of the proceeding and basic due process.

6 30. Put simply, considerable steps have been taken by Mr. Cohen in the last week to
7 silence Ms. Clifford through the use of an improper and procedurally defective arbitration proceeding
8 hidden from public view. The extent of Mr. Trump’s involvement in these efforts is presently
9 unknown, but it strains credibility to conclude that Mr. Cohen is acting on his own accord without the
10 express approval and knowledge of his client Mr. Trump.

11 31. Indeed, Rule 1.4 of New York Rules of Professional Conduct governing attorneys has
12 required Mr. Cohen *at all times* to promptly communicate all material information relating to the
13 matter to Mr. Trump, including but not limited to “any decision or circumstance with respect to which
14 [Mr. Trump’s] informed consent [was] required” and “material developments in the matter including
15 settlement or plea offers.” Moreover, this same Rule required Mr. Cohen *at all times* to “reasonably
16 consult with [Mr. Trump] about the means by which [his] objectives are to be accomplished” and to
17 “keep [Mr. Trump] reasonably informed about the status of the matter.”

18 32. Accordingly, unless Mr. Cohen flagrantly violated his ethical obligations and the most
19 basic rules governing his license to practice law (which is highly unlikely), there can be no doubt that
20 Mr. Trump *at all times* has been fully aware of the negotiations with Ms. Clifford, the existence and
21 terms of the Hush Agreement, the payment of the \$130,000.00, the use of EC as a conduit, and the
22 recent attempts to intimidate and silence Ms. Clifford by way of the bogus arbitration proceeding.

23 33. Because there was never a valid agreement and thus, no agreement to arbitrate, any
24 subsequent order obtained by Mr. Cohen and/or Mr. Trump in arbitration is of no consequence or
25 effect.
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FIRST CAUSE OF ACTION

Declaratory Relief

(Against all Defendants)

34. Plaintiff restates and re-alleges each and every allegation in Paragraphs 1 through 33 above as if fully set forth herein.

35. This action concerns the legal significance, if any, of the documents attached hereto as Exhibit 1, entitled Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-Disparagement [sic] Agreement, and Exhibit 2, entitled Side Letter Agreement.

36. California Code of Civil Procedure section 1060 authorizes declaratory relief for any person who desires a declaration of rights or duties with respect to one another. In cases of actual controversy relating to the legal rights and duties of the respective parties, such a person may seek a judicial declaration of his or her rights and duties relative to an instrument or contract, or alleged contract, including a determination of any question of construction or validity arising under the instrument or contract, or alleged contract. This includes a determination of whether a contract was ever formed.

37. An actual controversy exists between Plaintiff and Defendants as to their rights and duties to each other. Accordingly, a declaration is necessary and proper at this time.

38. Specifically, Plaintiff seeks an order of this Court declaring that the agreements in the forms set out in Exhibits 1 and 2 between Plaintiff and Defendants were never formed, and therefore do not exist, because, among other things, Mr. Trump never signed the agreements. Nor did Mr. Trump provide any other valid consideration. He thus never assented to the duties, obligations, and conditions the agreements purportedly imposed upon him. Plaintiff contends that, as a result, she is not bound by any of the duties, obligations, or conditions set forth in Exhibits 1 and 2. Moreover, as a further result, there is no agreement to arbitrate between the parties.

39. In the alternative, Plaintiff seeks an order of this Court declaring that the agreements in the forms set out in Exhibits 1 and 2 are invalid, unenforceable, and/or void under the doctrine of unconscionability. Plaintiff contends that, as a result, she is not bound by any of the duties,

1 obligations, or conditions set forth in Exhibits 1 and 2. Moreover, as a further result, there is no
2 agreement to arbitrate between the parties.

3 40. In the further alternative, Plaintiff seeks an order of this Court declaring that the
4 agreements in the forms set out in Exhibits 1 and 2 are invalid, unenforceable, and/or void because
5 they are illegal and/or violate public policy. Plaintiff contends that, as a result, she is not bound by
6 any of the duties, obligations, or conditions set forth in Exhibits 1 and 2. Moreover, as a further result,
7 there is no agreement to arbitrate between the parties.

8 41. Defendants dispute these contentions.

9 42. Accordingly, Ms. Clifford desires a judicial determination of her rights and duties with
10 respect to the alleged agreements in the forms set out in Exhibits 1 and 2.

11
12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, declaring
14 that no agreement was formed between the parties, or in the alternative, to the extent an agreement
15 was formed, it is void, invalid, or otherwise unenforceable.

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17 **ON THE FIRST CAUSE OF ACTION**

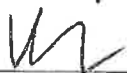
18 1. For a judgment declaring that no agreement was formed between the parties, or in the
19 alternative, to the extent an agreement was formed, it is void, invalid, or otherwise unenforceable.

20 2. For costs of suit; and

21 3. For such other and further relief as the Court may deem just and proper.
22

23 DATED: March 6, 2018

24 AVENATTI & ASSOCIATES, APC

25
26 
27 MICHAEL J. AVENATTI
28 Attorneys for Plaintiff

TMZ

Exhibit 1

**CONFIDENTIAL SETTLEMENT AGREEMENT
AND MUTUAL RELEASE; ASSIGNMENT OF
COPYRIGHT AND NON-DISPARAGEMENT
AGREEMENT**

1.0 THE PARTIES

1.1 This Settlement Agreement and Mutual Release (hereinafter, this "Agreement") is made and deemed effective as of the 24 day of October, 2016, by and between "EC, LLC" and/or DAVID DENNISON, (DD), on the one part, and PEGGY PETERSON, (PP), on the other part, ("EC, LLC," "DD" and "PP" are pseudonyms whose true identity will be acknowledged in a Side Letter Agreement attached hereto as "EXHIBIT A") This Agreement is entered into with reference to the facts and circumstances contained in the following recitals.

2.0 RECITALS

2.1 Prior to entering into this Agreement, PP came into possession of certain "Confidential Information" pertaining to DD, as more fully defined below, only some of which is in tangible form, which includes, but is not limited to information, certain still images and/or text messages which were authored by or relate to DD (collectively the "Property", each as more fully defined below but which all are included and attached hereto as Exhibit "1" to the Side Letter Agreement).

2.2 (a) PP claims that she has been damaged by DD's alleged actions against her, including but not limited to tort claims proximately causing injury to her person and other related claims. DD denies all such claims. (Hereinafter "PP Claims").

(b) DD claims that he has been damaged by PP's alleged actions against him, including but not limited to the alleged threatened selling, transferring, licensing, publicly disseminating and/or exploiting the Images and/or Property and/or other Confidential Information relating to DD, all without the knowledge, consent or authorization of DD. PP denies all such claims. (Hereinafter "DD Claims").

(c) The PP Claims and the DD Claims are hereinafter collectively referred to as "The Released Claims."

2.3 DD desires to acquire, and PP desires to sell, transfer and turn-over to DD, any and all tangible copies of the Property and any and all physical and intellectual property rights in and to all of the Property. As a condition of DD releasing any claims against PP related to this matter, PP agrees to sell and transfer to DD all and each of her rights in and to such Property. PP agrees to deliver each and every existing copy of all tangible Property to DD (and permanently delete any electronic copies that can not be transferred), and agrees that she shall not possess, nor directly nor indirectly disclose convey, transfer or assign Property or any Confidential Information to any Third Party, as more fully provided herein.

2.4 It is the intention of the Parties that Confidential Information, as defined herein, shall remain confidential as expressly provided hereinbelow. The Parties expressly acknowledge, agree and understand that the Confidentiality provisions herein and the



representations and warranties made by PP herein and the execution by her of the Assignment & Transfer of Copyright are at the essence of this Settlement Agreement and are a material inducement to DD's entry into this Agreement, absent which DD would not enter into this Agreement. DD expects and requires that PP never communicate with him or his family for any reason whatsoever.

2.5 The Parties wish to avoid the time, expense, and inconvenience of potential litigation, and to resolve any and all disputes and potential legal claims which exist or may exist between them, as of the date of this Agreement including but not limited to the PP Claims and/or the DD Claims. The Parties agree that the claims released include but are not limited to DD's Claims against PP as relates to PP having allowed, whether intentionally, unintentionally or negligently, anyone else other than those listed in section 4.2 herein below to become aware of the existence of and content of the Property, to have gained possession of the Property, and to PP's having allegedly engaged in efforts to disclose, disseminate and/or commercially exploit the Images and/or Property and/or Confidential Information, and any harm suffered by DD therefrom. The Parties agree that the claims released include but are not limited to PP's Claims against DD as relates to DD having allowed, whether intentionally, unintentionally or negligently, anyone else to have interfered with PP's right to privacy or any other right that PP may possess.

2.6 These Recitals are essential, integral and material terms of this Agreement, and this Agreement shall be construed with respect thereto. The Parties enter into this Agreement in consideration of the promises, covenants and conditions set forth herein, and for good and valuable consideration, the receipt of which is hereby acknowledged. It is an essential element of this Settlement Agreement that the Parties shall never directly or indirectly communicate with each other or attempt to contact their respective families. This matter, the existence of this Settlement Agreement and its terms are strictly confidential.

NOW, THEREFORE, the Parties adopt the foregoing recitals as a statement of their intent and in consideration of the promises and covenants contained herein, and further agree as follows:

///

///

///


PP


DD

3.0 SETTLEMENT TERMS

3.0.1.1 EC, LLC SHALL PAY TO PP [REDACTED] AS FOLLOWS:

- 3.0.1.1.1 \$130,000.00 USD shall be wired into PP's Attorney's Attorney Client Trust Account on or before 1600 hrs. PST on 10/27/16. (Hereinafter "Gross Settlement Amount"). PP's Attorney's Wiring Instructions are:

Bank Name:
Bank Address:

ABA Routing No:
Beneficiary Account Name:

Beneficiary Account No:
Beneficiary Address:

SWIFT Code:

- 3.0.1.1.2 Keith M. Davidson, Esq. shall receive the Gross Settlement Amount in Trust. No portion of the Gross Settlement Amount shall be disbursed by Attorney for PP unless and until PP executes all required Settlement Documents.

3.1 Undertakings & Obligations by PP. PP will do each of the following by 11/01/16:

- (a) PP shall execute this Agreement and return a signed copy to DD:

(b) PP shall transfer and/or assign any and all rights in and to the Property to DD (as set forth hereinbelow), and execute an Assignment & Transfer of Copyright, in the form attached hereto, and return a signed copy of same to DD's counsel;

(c) PP shall deliver to DD every existing copy of all tangible Property. PP shall completely divest herself of any and all artistic media, impressions, paintings, video images, still images, e-mail messages, text messages, Instagram message, facebook posting or any other type of creation by DD. PP shall transfer all physical, ownership and intellectual property rights to DD;

(1) PP shall deliver to DD any and all non-privileged correspondence concerning or related to DD between PP and any 3rd party.

(d) PP shall not, at any time from the date of this Agreement forward, directly or indirectly disclose or disseminate any of the Property or any Confidential Information (including confirmation of the fact that it exists or ever existed, and/or confirming any rumors as to any such existence) to any third party, as more fully provided herein.

(e) PP shall provide to DD (to the extent not already done so and set forth in paragraph 4.2 hereinbelow), summary details disclosing to whom PP (or anyone else on PP's behalf) disclosed, displayed to, disseminated, transferred to, provided a copy to, and/or


PP


DD

distributed, sold, licensed or otherwise sought to have commercially exploit, the Images and/or Property and/or any Confidential Information.

(f) PP shall provide to DD's counsel the names and contact information of each and any persons or entities who: (i) PP has provided to or who otherwise obtained possession of the original and/or any copies of any of the Images and/or any Property, if any, (ii) to whom PP has scanned the Images and/or any Property at any time, and (iii) to whom PP knows had, has or may potentially have possession of a copy of the Images and/or any Property at any time, including but not limited to the present time (and specify with detail to which of the referenced categories (i.e., possession, shown, past, present, etc.) any name corresponds, the name so relates).

(g) PP shall provide to DD's counsel copies of any agreements and/or other documentation in PP's possession, custody or control, if any, regarding (e) and/or (f) above, that evidences who has or may have been provided a copy of any of the Property.

3.2 Transfer of Property Rights to DD. In further consideration for the promises, covenants and consideration herein, PP hereby transfers and conveys to DD all of PP's respective rights, title and interest in and to the Property, and any and all physical and intellectual property rights related thereto. Without limiting the generality of the foregoing, PP does hereby sell, assign, and transfer to DD, his successors and assigns, throughout the universe in perpetuity, all of PP's entire right, title, and interest (including, without limitation, all copyrights and all extensions and renewals of copyrights), of whatever kind or nature in and to the Property, without reservation, condition or limitation, whether or not such rights are now known, recognized or contemplated, and the complete, unconditional and unencumbered ownership and all possessory interest and rights in and to the Property, which includes, but is not limited to the originals, copies, negatives, prints, positive, proof sheets, CD-roms, DVD-roms, duplicates, outtake and the results of any other means of exhibiting, reproducing, storing, recording and/or archiving any of the Property or related material, together with all rights of action and claims for damages and benefits arising because of any infringement of the copyright to the Property, and assigns and releases to DD any and all other proprietary rights and usage rights PP may own or hold in the copyright and/or Property, or any other right in or to the Property. PP assigns and transfers to DD all of the rights herein granted, without reservation, condition or limitation, and agrees that PP reserves no right of any kind, nature or description related to the Property and contents therein. Notwithstanding the foregoing, if any of the rights herein granted are subject to termination under section 203 of the Copyright Act, or any similar provisions of the Act or subsequent amendments thereof, PP hereby agrees to re-grant such rights to DD immediately upon such termination. All rights granted herein or agreed to be granted hereunder shall vest in DD immediately and shall remain vested in perpetuity. DD shall have the right to freely assign, sell, transfer or destroy the Property as he desires. DD shall have the right to register sole copyright in and to any of the Property with the US Copyright Office. DD shall also have the right, in respect to the Property, to add to, subtract from, change, arrange, revise, adapt, into any and all form of expression or tangible communication, and the right to combine any of the Property with any other works of any kind and/or to create derivative works with any of the Property, and to do with it as she so deems. To the fullest extent allowable under the applicable law, PP shall irrevocably waive and assign to DD any of PP's so-called "moral rights" or "droit moral" (laws for the protection of copyrights outside of the United States), if any, or any similar rights under any principles of law which PP may now have or later have in the Property. With respect to and in furtherance of the above, PP agrees to and shall execute and deliver to DD an

PP

DD

"Assignment & Transfer of Copyright", in the form attached hereto as Exhibit "B". For greater certainty the foregoing assignment shall be applicable worldwide.

3.2.1 Notwithstanding the foregoing paragraph 3.2, and without in anyway limiting or diminishing from the full transfer and assignment of rights therein without reservation, the Parties understand the purpose of the transfer of rights is to provide DD the fullest possible ability and remedies to prevent and protect against any publication and/or dissemination of the Property.

3.3 Delivery of the Property to DD. Concurrently upon execution of this Agreement, PP, as applicable, shall deliver to DD, by delivery to his counsel herein, all of the Property which is embodied in tangible form (all originals and duplicates), whether documents, canvasses, paper art, digital copies, letters, prints, electronic data, films, tapes, CD-Roms, DVD-Roms, Images recording tapes, photographs, negatives, originals, duplicates, contact sheets, audio recordings, Images recordings, magnetic data, computerized data, digital recordings, or other recorded medium or any other format of embodying information or data. Without limiting the generality of the foregoing, such tangible Property shall include all documents as defined by California Evidence Code §250 which contain any of the Property. PP represents and warrants that the materials delivered pursuant to the terms of this Paragraph 3.3 comprise the totality of all existing originals and duplicates of all Property in any tangible form, whether within their possession, custody or control, and including otherwise (and that PP knows of no other copies or possible or potential copies not in PP's possession and control and delivered pursuant to this paragraph), and that upon such delivery to DD, PP shall not maintain possession, custody or control of any copy of all or any portion of any tangible Property. The Property Delivered under this Paragraph shall become Exhibit 1 to the Side Letter Agreement. For avoidance of any doubt, PP, nor her attorney are entitled to retain possession of said Property after execution of this Agreement. The retention of said Property by PP is a material breach of this agreement.

3.3.1 This Agreement is conditioned on PP's compliance with each and every term of the Settlement Agreement including Paragraph 3.3 and the personal verification by DD or his attorney of the Images and that the Images are comprised of and captures the content previously represented to his counsel to exist and be captured therein (i.e., text messages between PP and DD)), all of which terms are essential and material.

4.0 CONFIDENTIALITY & REPRESENTATIONS & WARRANTIES.

4.1 Definition of Confidential Information. "Confidential Information" means and includes each and all of the following:

(a) All *intangible* information pertaining to DD and/or his family, (including but not limited to his children or any alleged children or any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct or related matters),and/or friends learned, obtained, or acquired by PP, including without limitation information contained in letters, e-mails, text messages, agreements, documents, audio or Images recordings, electronic data, and photographs;

(b) All *intangible* information pertaining to the existence and content of the Property;


PP


DD

(c) All *intangible* private information (*i.e.*, information not generally available to and/or known by the general public) relating and/or pertaining to DD, including without limitation DD's business information, familial information, any of his alleged sexual partners, alleged sexual actions or alleged sexual conduct, related matters or paternity information, legal matters, contractual information, personal information, private social life, lifestyle, private conduct, (all information/items in 4.1 "(a)", "(b)" and "(c)" are sometimes collectively referred to as, "Intangible Confidential Information");

(d) All *tangible* materials of any kind containing information pertaining to DD learned, obtained, participated or acquired by PP, including without limitation letters, agreements, documents, audio or Images recordings, electronic data, and photographs, canvas art, paper art, or art in any other form on any media. The Images and Photos and all information/items in 4.1(d) are collectively referred to as, the "Property" and/or the "Tangible Confidential Information");

4.2 PP's Representations & Warranties Regarding Prior Disclosures of Tangible Confidential Information. PP represents and warrants that prior to entry into this Agreement, PP has directly or indirectly disclosed any *Tangible* an/or Intangible Confidential Information (*i.e.*, any of the Property), to any Third Party, including without limitation disclosure or indirect disclosure of the content of such Confidential Information in tangible form, other than the following persons or entities to whom PP has made such prior disclosures (herein "PP Disclosed Individuals/Entities"):

- a) _____
- b) _____
- c) _____
- d) _____
- e) _____
- f) _____
- g) _____
- h) _____
- i) _____

PP shall not be responsible for any subsequent public disclosure of any of the Confidential Information (a) attributable directly to each of them; and/or (b) not disclosed hereinabove as a previously disclosed PP Disclosed Individuals/Entities, and any such disclosure shall be deemed a breach of this Agreement by PP. For greater clarity, PP must not induce, promote or actively inspire anyone to disclose Confidential Information.


PP

4.3 Representations & Warranties and Agreements.

(a) Representations & Warranties and Agreements By DD. The following agreements, warranties and representations are made by DD as material inducements to PP to enter into this Agreement, and each Party acknowledges that she/he is executing this Agreement in reliance thereon:

(b) DD warrants and represents that, as relates to or in connection with any of PP's attempts to sell, exploit and/or disseminate the Property prior to the date of this Agreement, DD and his counsel will refrain (i) from pursuing any civil action against PP, and/or (ii) absent a direct inquiry from law enforcement, from disclosing PP's name to the authorities. Notwithstanding the foregoing, if DD is informed that or should or if it is believed that either of PP has possession, custody and/or control of any of the Property after the date of this Agreement and/or transferred any copies to any Third Party, and/or it is believed that any of PP, whether directly or indirectly, intends the release, use, display, dissemination, disclosure or exploitation, whether actual, threatened or rumored, of any for the Property, then DD and his counsel shall be entitled to, at DD's sole discretion, (i) contact the respective member of PP, including with legal demands and related statements of liability and legal action, and/or (ii) advance a civil action against the respective member of PP, and/or (iii) disclose any of PP's name to the authorities.

4.3.2 Representations & Warranties and Agreements By PP. The following agreements, warranties and representations are made by PP as material inducements to DD to enter into this Agreement, without which DD would not enter into this Agreement and without which DD would not agree to pay any monies whatsoever hereunder, and with the express acknowledgment that DD is executing this Agreement in reliance on the agreements, warranties, and representations herein which are at the essence of this Agreement, including, the following:

(a) PP agrees and warrants and represents that PP will permanently cease and desist from any efforts to and/or attempting to and/or engaging in and/or arranging the use, License, distribution, dissemination or sale of any of the Confidential Information and/or Property, including any Tangible and/or Intangible Confidential information created by or relating to DD;

(b) PP agrees and warrants and represents that PP will permanently cease and desist from any posting or dissemination or display of the Confidential Information, Tangible and/or Intangible Confidential information created by or relating to DD and/or Property, including the Images (including, but not limited to, to any form media outlet, on any blog or posting board, on the Internet, or otherwise);

(c) PP agrees and warrants and represents that PP will permanently cease and desist from using or disseminating or disclosing any information to any Third Persons (including, but not limited to, to any media outlet, on any blog or posting board, on the Internet, or otherwise) about any details of or as to the contents of the Confidential Information, Tangible and/or Intangible Confidential information created by or relating to DD and/or Property, including any Text Messages, and/or as to any other personal details of or about or pertaining to DD and/or his family and/or friends and/or social interactions;

(d) PP agrees and warrants and represents that PP will permanently cease and desist from and will not, at any time, make any use of or reference to the name, image or likeness


PP


DD

of DD in any manner whatsoever, including without limitation, through any print or electronic media of any kind or nature for any purpose, including, but not limited to, on any websites;

(e) PP agrees and warrants and represents that any and all existing copies of the Images, Text Messages and any Property (other than as expressly specified in paragraphs 3.2 and 3.3 herein) have been turned over and provided to counsel; and PP further warrants and represents that the only copy of the Images and Property that has ever existed, at any time, has been turned over to DD's counsel pursuant to this Agreement, and the Images and any Property has never been transferred to or existed in any other form, including not in electronic form, nor on any computer, or electronic device and other storage media;

(f) PP warrants and represents that PP has not provided any copies, whether hard-copy or electronic copies, of the Property to anyone other than as specified in paragraph 4.2 herein);


(g) PP warrants and represents that the information PP is obligated to provide pursuant to the terms herein will be complete and truthful;

(h) PP warrants and represents that PP has not omitted or withheld any information that PP is obligated to provide pursuant to the terms herein;

(i) PP warrants and represents that PP has not contracted to earn and/or collect any monies as compensation from the sell, license and/or any other exploitation of the Images and/or any Property and/or any Confidential Information, Tangible and/or Intangible Confidential information created by or relating to DD nor any monies as compensation or an advance for any efforts to sell, license and/or any other exploitation of the Images and/or any Property and/or any Confidential Information or any Tangible and/or Intangible Confidential information created by or relating to DD;

(j) PP warrants and represents that PP has not assigned nor transferred, either in whole or in part, any purported rights in or to the Images and/or any Property to any other person or entity, other than to DD pursuant to this Agreement.

4.3.3 Agreement By PP Not to Disclose/Use Confidential Information, Tangible and/or Intangible Confidential information created by or relating to DD. As further material inducements for DD to enter into this Agreement, PP agrees, represents and warrants that she shall not directly or indirectly, verbally or otherwise, publish, disseminate, disclose, post or cause to be published, disseminated, disclosed, or posted (herein "disclose"), any Confidential Information or Tangible and/or Intangible Confidential information created by or relating to DD to any person, group, firm or entity whatsoever, including, but not limited to, family members, friends, associates, journalists, media organizations, newspapers, magazines, publications, television or radio stations, publishers, databases, blogs, websites, posting boards, and any other enterprise involved in the print, wire or electronic media, including individuals working directly or indirectly for, or on behalf of, any of said persons or entities ("Third Parties" and/or Third Party"). In no event shall PP be relieved of such party's confidentiality obligations herein by virtue of any breach or alleged breach of this Agreement. In no event shall any dispute in connection with this Agreement relieve PP of her confidentiality obligations arising pursuant to this Agreement, and any disclosure of Confidential Information and/or Tangible and/or Intangible Confidential information created by or relating to DD in connection with any such


PP

proceeding or dispute shall constitute a breach of this Agreement. PP shall use their best efforts to prevent the unauthorized disclosure of Confidential Information in connection with any such proceeding or dispute.

4.3.4 Any direct or indirect disclosure of Confidential Information or Tangible and/or Intangible Confidential information created by or relating to DD to any Third Party by PP and/or any of her representatives, heirs, agents, children, family members, relatives, confidants, advisors, employees, attorneys, transferors, transferees, successors or assigns, and/or any friend of any of PP (collectively "PP Group"), after the date of this Agreement, shall be deemed a disclosure by PP in breach of the terms of this Agreement, entitling the non-breaching Party to all rights and remedies set forth herein.

4.3.5 PP separately and further warrants and represent that, prior to entering into this Agreement, that she has not written, published, caused to be published, or authorized the writing, publication, broadcast, transmission or public dissemination of any interview, article, essay, book, memoir, story, photograph, film, script, Images tape, biography, documentary, whether written, oral, digital or visual, whether fictionalized or not, about the opposing Party to this Agreement or their family, whether truthful, laudatory, defamatory, disparaging, deprecating or neutral, which discloses any Confidential Information and/or which includes any description or depiction of any kind whatsoever whether fictionalized or not, about any Party to this agreement or their respective family, other than as expressly disclosed by PP hereto in writing and as set forth herein in paragraph 4.2 above.

4.3.6 Agreement By PP Not to Disparage DD. PP hereby irrevocably agrees and covenants that she shall not, directly or indirectly, publicly disparage DD, nor write, publish, cause to be published, or authorize, consult about or with or otherwise be involved in the writing, publication, broadcast, transmission or dissemination of any book, memoir, letter, story, photograph, film, script, Images, interview, article, essay, biography, diary, journal, documentary, or other written, oral, digital or visual account or description or depiction of any kind whatsoever whether fictionalized or not, about DD or his family, whether truthful, laudatory, defamatory, disparaging, deprecating or neutral. PP further warrants and represents that PP has not and will not enter into any written or oral agreement with any third party purportedly requiring or obligating PP to do so. For greater clarity PP will never discuss with anyone the contents of this Settlement Agreement, nor will she voluntarily confirm the existence of this Settlement Agreement.

4.4 Disclosure Of Confidential Information Is Prohibited: The Parties to this Agreement hereby recognize and agree that substantial effort and expense have been dedicated to limit the efforts of the press, other media, and the public to learn of personal and business affairs involving DD. PP further acknowledges that any future disclosure of Confidential Information to any Third Party would constitute a serious and material breach of the terms of this Agreement, and shall constitute a breach of trust and confidence, invasion of privacy, and a misappropriation of exclusive property rights, and may also constitute fraud and deceit. Some of the Confidential Information may also constitute and include proprietary business information and trade secrets which have independent economic value. The Parties hereto acknowledge that any unauthorized use, dissemination or disclosure of Confidential Information, or the fabrication and dissemination of false and/or misleading information, about DD would result in irreparable injury to him, and would be injurious to a reasonable person, and/or would constitute an injurious violation of the right of privacy or publicity, and/or would be injurious to his business,


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DD

profession, person, family and/or career. The Parties acknowledge that substantial and valuable property rights and other proprietary interests in the exclusive possession, ownership and use of Confidential Information, and recognizes and acknowledges that such Confidential Information is a proprietary, valuable, special and unique asset which belongs to DD and to which the PP has no claim of ownership or other interest.

4.4.1 Disclosures Permitted By PP. Notwithstanding the foregoing, PP shall only be permitted to disclose Confidential Information to another person or entity only if compelled to do so by valid legal process, including without limitation a subpoena duces tecum or similar legal compulsion, provided that PP shall not make any such disclosure unless PP has first provided DD with notice of such order or legal process not less than ten (10) days in advance of the required date of disclosure pursuant to the Written Notice provisions set forth hereinbelow, providing DD with an opportunity to intervene and with full and complete cooperation should she choose to oppose such disclosure. PP agrees that if the valid legal process can be stopped by her consent or at her behest then PP shall agree to use best efforts to avoid the disclosure of the Confidential Information.

5.0 REMEDIES

5.1 DD's Remedies for Breach of Agreement. Each breach or threatened breach (e.g., conduct by PP reflecting that said person intends to breach the Agreement), including without limitation by breach of any representation or warranty, by failing to deliver to DD all tangible Property as required, by the disclosure or threatened disclosure of any Confidential Information to any Third Party by PP (herein "Prohibited Communication"), or otherwise, shall render PP liable to DD for any and all damages and injuries incurred as a result thereof, including but not limited to the following, all of which rights and remedies shall be cumulative:

5.1.1 Disgorgement of Monies: In the event an Arbitrator determines there has been a breach or threatened breach of this Agreement by PP, PP shall be obligated to account to, and to disgorge and turn over to DD any and all monies, profits, or other consideration, or benefits, which PP, or anyone on PP's behalf or at PP's direction, directly or indirectly derive from any disclosure or exploitation of any of the Confidential Information; and

5.1.2 Liquidated Damages: PP agrees that any breach or violation of this Settlement Agreement by either of PP individually or the PP Group by his/her/their unauthorized disclosure of any of the Confidential Information (as defined in paragraphs 4.1(a), (b), (c), and (d)) to any Third Party, and/or any unauthorized exploitation or prohibited use of the same, and/or by the breach of and/or by any false representations and warranties set forth in this Agreement, and/or any public disparagement of DD by PP (collectively, the "LD Breach Terms"), shall result in substantial damages and injury to DD, the precise amount of which would be extremely difficult or impracticable to determine, even after the Parties have made a reasonable endeavor to estimate fair compensation for such potential losses and damages to DD. Therefore, in addition to disgorgement of the full amount of all monies or other consideration pursuant to paragraph 5.1.2, in the event an Arbitrator determines there has been a breach of the LD Breach Terms of this Agreement by PP individually or the PP Group, PP shall also be obligated to pay, and agree to pay to DD the sum of One-Million Dollars (\$1,000,000.00 as a reasonable and fair amount of liquidated damages to compensate DD for any loss or damage


PP

resulting from each breach, it being understood that the Liquidated damages calculation is on a per item basis. The Parties agree that such sum bears a reasonable and proximate relationship to the actual damages which DD will or might suffer from each breach of the terms of this Agreement and that this amount is not a penalty. Alternatively, at DD's sole discretion, DD may seek to recover actual damages proximately caused by each such breach, according to proof. Any other breaches not a LD Breach Terms shall be subject to a claim for actual damages according to proof; furthermore, any monies held in Trust by PP's Attorney shall be frozen and shall not be disbursed to PP until the Arbitrator finally resolves the allegation of Breach.

5.1.3 Injunctive Relief. PP acknowledges and agrees that any unauthorized disclosure to Third Parties of any Confidential Information will cause irreparable harm to DD, which damages and injuries will most likely not be measurable or susceptible to calculation. PP further acknowledges and agrees that any breach or threatened breach of this Agreement due to the unauthorized disclosure or threatened disclosure by PP to Third Parties, of any Confidential Information shall entitle DD to immediately obtain, either from the Arbitrator and/ or from any other court of competent jurisdiction, an *ex parte* issuance of a restraining order and preliminary injunction or other similar relief (herein "Injunctive Relief") without advance notice to any of PP, preventing the disclosure or any further disclosure of Confidential Information protected by the terms hereof, pending the decision of the Arbitrator or Court. The Parties further acknowledge and agree that in connection with any such proceeding, any Party may obtain from the Court or Arbitrator on an *ex parte* application or noticed motion without opposition, an order sealing the file in any such proceeding, and the Parties stipulate to the factual and legal basis for issuance of an order sealing the file in any such proceedings. The rights and remedies set forth in this Injunctive Relief Section are without prejudice to any other rights or remedies, legal or equitable, that the Parties may have as a result of any breach of this Agreement.

5.2 Dispute Resolution. In recognition of the mutual benefits to DD and PP of a voluntary system of alternative dispute resolution which involves binding confidential arbitration of all disputes which may arise between them, it is their intention and agreement that any and all claims or controversies arising between DD on the one hand, and PP on the other hand, shall be resolved by binding confidential Arbitration to the greatest extent permitted by law. Arbitration shall take place before JAMS ENDISPUTE ("JAMS") pursuant to JAMS Comprehensive Arbitration Rules and Procedures (including Interim Measures) ("JAMS Rules") and the law selected by DD, (such selection shall be limited to either, California, Nevada or Arizona), or before ACTION DISPUTE RESOLUTION SERVICES ("ADRS") pursuant to the ADRS Rules (including Interim Measures) and the law selected by DD (whichever the claimant elects upon filing an arbitration), in a the location selected by DD, and will be heard and decided by a sole, neutral arbitrator ("Arbitrator") selected either by agreement of the Parties, or if the Parties are unable to agree, then selected under the Rules of the selected arbitration service. The costs and fees associated with any Arbitrator and/or Arbitration service shall be split equally among the parties to any such dispute. The Parties shall have the right to conduct discovery in accordance with the California Code of Civil Procedure Section 1283.05 *et. seq.* or any similar provision existing in the jurisdiction selected by DD and the written discovery requests and results of discovery shall be deemed to constitute Confidential Information. The Arbitrator shall have the right to impose all legal and equitable remedies that would be available to any Party before any governmental dispute resolution forum or court of competent jurisdiction, including without limitation temporary, preliminary and permanent injunctive relief, compensatory damages, liquidated damages, accounting, disgorgement, specific performance, attorneys fees and costs,


PP


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and punitive damages. It is understood and agreed that each of the Parties shall bear his/its own attorneys' fees, expert fees, consulting fees, and other litigation costs (if any) ordinarily associated with legal proceedings taking place in a judicial forum, subject to the Arbitrator's reassessment in favor of the prevailing party to the extent permitted by law. Each of the Parties understands, acknowledges and agrees that by agreeing to arbitration as provided herein, each of the Parties is giving up any right that he/she/it may have to a trial by judge or jury with regard to the matters which are required to be submitted to mandatory and binding Arbitration pursuant to the terms hereof. Each of the Parties further understands, acknowledges and agrees that there is no right to an appeal or a review of an Arbitrator's award as there would be a right of appeal or review of a judge or jury's decision.

6.0 MUTUAL RELEASES

6.1 Except for the rights and obligations of the Parties set forth in this Agreement, DD, for himself, and each of his representatives, agents, assigns, heirs, partners, companies, affiliated companies, employees, insurers and attorneys, absolutely and forever releases and discharges PP, individually, and all of PP's heirs, and PP's attorneys, and each of them ("PP Releasees"), of and from any and all claims, demands, damages, debts, liabilities, accounts, reckonings, obligations, costs (including attorney's fees), expenses, liens, actions and causes of actions of every kind and nature whatsoever, whether known or unknown, from the beginning of time to the effective date of this Agreement, including without limitation any and all matters, facts, claims and/or defenses asserted or which could have been asserted in the Matter, or which could have been asserted in any other legal action or proceeding, except as may be provided herein (the "DD Released Claims").

6.2 Except for the rights and obligations of the Parties set forth in this Agreement, PP, for herself, and her representatives, agents, assigns, heirs, partners, companies, affiliated companies, employees, insurers and attorneys, absolutely and forever release and discharge DD, individually, and each of his representatives, agents, assigns, heirs, partners, companies, affiliated companies, subsidiaries, employees, attorneys, successors, insurers, and each of them ("DD Releasees"), of and from any and all claims, demands, damages, debts, liabilities, accounts, reckonings, obligations, costs (including attorney's fees), expenses, liens, actions and causes of actions of every kind and nature whatsoever, whether known or unknown, from the beginning of time to the date of this Agreement, including without limitation any and all matters, facts, claims and/or defenses asserted or which could have been asserted in the Action, or which could have been asserted in any other legal action or proceeding (the "PP Released Claims").

6.3 The subject matter referred to in paragraphs 6.1 and 6.2, above (i.e., the DD Released Claims and PP Released Claims), are collectively referred to as the "Released Matters."

6.4 The Parties hereto, and each of them, hereby warrant, represent and agree that each of them is fully aware of §1542 of the Civil Code of the State of California, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."


PP

The Parties, and each of them, voluntarily waive the provisions of California Civil Code § 1542, and any other similar federal and state law as to any and all claims, demands, causes of action, or charges of every kind and nature whatsoever, whether known or unknown, suspected or unsuspected.

6.4.1 For avoidance of any doubt, by virtue of this Settlement and this Settlement Agreement, the parties hereby waive any unknown claims against each other individually, and each of their representatives, agents, assigns, heirs, partners, companies, affiliated companies, subsidiaries, employees, attorneys, successors, insurers, and each of them.

6.5 Each of the Parties hereto acknowledges and agrees that this Agreement constitutes a settlement and compromise of claims and defenses in dispute, and shall not be construed in any fashion as an admission of liability by any party hereto.


7.0 CONFIDENTIALITY OF THIS AGREEMENT

7.1 The Parties, respectively, shall not to disclose the terms of this Agreement, either directly or indirectly, to the media or to anyone else other than their respective attorneys and representatives and/or as may be required by law. PP may not comment or make any press releases or otherwise discuss the resolution of the subject of this Agreement.

8.0 MISCELLANEOUS TERMS

8.1 Entire Agreement. This Agreement constitutes the entire agreement and understanding concerning the Released Matters hereof between the Parties hereto and supersedes any and all prior negotiations and proposed agreement and/or agreements, written and/or oral, between the Parties. Each of the Parties hereto acknowledges that neither they, nor any other party, nor any agent or attorney of any other party has made any promise, representation, or warranty whatsoever, expressed or implied, written or oral, which is not contained herein, concerning the subject matter hereof, to induce it to execute this Agreement, and each of the Parties hereto acknowledges that she/he has not executed this Agreement in reliance on any promise, representation, and/or warranty not contained herein. This Agreement shall be binding on and inure to the benefit of the Parties, the Releasees, and each of their respective successors and assigns and designees.

8.2 DD's Election of either California, Nevada or Arizona Law & Venue. This Agreement and any dispute or controversy relating to this Agreement, shall in all respects be construed, interpreted, enforced and governed by the laws of the State of California, Arizona or Nevada at DD's election. Attorneys' Fees in the case of a Dispute. In the event of any dispute, action, proceeding or controversy regarding the existence, validity, interpretation, performance, enforcement, claimed breach or threatened breach of this Agreement, the prevailing party in any resulting arbitration proceeding and/or court proceeding shall be entitled to recover as an element of such Party's costs of suit, and not as damages, all attorneys' fees, costs and expenses incurred or sustained by such prevailing Party in connection with such action, including, without limitation, legal fees and costs.


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8.3 Attorney Fees and Costs in Formation of this Agreement. The Parties shall each bear their own costs, expert fees, attorneys' fees and other fees incurred in connection with the creation this Settlement Agreement.

8.4 Waivers: Modification. This Agreement cannot be modified or changed except by written instrument signed by all of the Parties hereto. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

8.5 Scope of Provisions/Severability/Headings. None of the Parties hereto shall be deemed to be the drafter of this Agreement, but it shall be deemed that this Agreement was jointly drafted by each of the Parties hereto. Should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this Agreement in favor of or against any party herein, but rather construing the terms of this Agreement as a whole according to their fair meaning. In the event that any provision hereof is deemed to be illegal or unenforceable, such a determination shall not affect the validity or enforceability of the remaining provisions thereof, all of which shall remain in full force and effect. Notwithstanding the foregoing, if a provision is deemed to be illegal the Parties agree to waive any defense on said grounds. In the event that such any provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law. The captions appearing at the commencement of certain paragraphs herein are descriptive only and for convenience of reference. Should there be any conflict between any such caption or heading and the paragraph at the caption of which it appears, the paragraph, and not such caption, shall control and govern.

8.6 Advice of Counsel and Understanding of this Binding Agreement. Each of the Parties represents, acknowledges, and declares that she/he has received the advice of legal counsel of his/her own choosing regarding the form, substance, and effect of this Agreement. Each of the Parties represents, acknowledges, and declares that she/he has carefully read this Agreement, knows and understands this Agreement's contents, and signs this Agreement freely, voluntarily, and without either coercion or duress. Each of the Parties represents and warrants that she/he is fully competent to manage his/her business affairs, and that she/he has full power and authority to execute this Agreement, and to do any and all of the things reasonably required hereunder; and that this Agreement, when signed by all Parties, is a valid and binding agreement, enforceable in accordance with its terms.

8.7 Further Execution. In order to carry out the terms and conditions of this Agreement, PP agrees to promptly execute, upon reasonable request, any and all documents and instruments necessary to effectuate the terms of this Agreement.

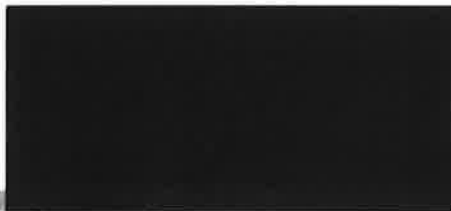
8.8 Notice Provisions. Any notice, demand or request that one Party desires, or is required to give (including service of any subpoena, court pleadings, summons and/or complaint), to the other Party must be promptly communicated to the other Party by using their respective contact information below, by both (i) e-mail or facsimile; and (ii) telephone. Either Party may change his or her contact information by notifying the other Party of said change(s) pursuant to the applicable terms herein.


PP

8.8.1 To DD as follows:

ESSENTIAL CONSULTANTS, LLC
C/O: MICHAEL BROWN, ESQ.
500 PARK AVENUE 40A
NEW YORK, NY 10022

8.8.2 To PP, as follows:



8.9 . This Agreement may be executed with one or more separate counterparts, each of which, when so executed shall be deemed to be an original and, together shall constitute and be one and the same instrument. Any executed copies or signed counterparts of this Agreement, the Declaration, and any other documentation may be executed by scanned/printed pdf copies of signatures and/or facsimile signatures, which shall be deemed to have the same force and effect as if they were original signatures.

IN WITNESS WHEREOF, by their signatures below, the Parties each have approved and executed this Agreement as of the effective date first set forth above.

DATED: _____, 2016

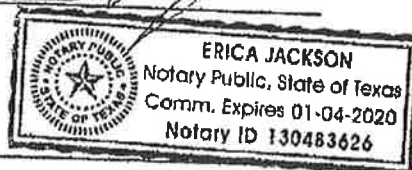
DD

DATED: Oct 28, 2016

PP

DATED: 10/28, 2016

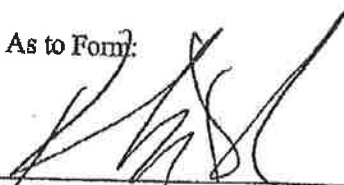
EC, LLC



[Signature]
PP

DATED: 10/3/16, 2016

As to Form:



Keith M. Davidson, Esq., Attorney for PP


DATED: _____, 2016


As to Form:

Attorney for DD

DATED: 10/28, 2016

As to Form:



Michael D. Cohen, Esq.
Attorney for 
ESSENTIAL CONSULTANTS, LLC



PP

TMZ

Exhibit 2

**EXHIBIT "A" TO THE CONFIDENTIAL
SETTLEMENT AGREEMENT AND RELEASE;
ASSIGNMENT OF COPYRIGHT AND NON-
DISPARAGEMENT AGREEMENT**

SIDE LETTER AGREEMENT

DATED 10/28/2016.

To Whom It May Concern:

This Side Letter agreement is entered into by and on behalf of the Parties with respect to the Confidential Settlement Agreement and Mutual Release entered into by and between them on or about Oct 28, 2016 ("Settlement Agreement"), in which Stephanie Gregory Clifford a.k.a. Stormy Daniels, is referred to by the pseudonym, "PEGGY PETERSON," and [REDACTED] is referred to by the pseudonym "DAVID DENNISON."

It is understood and agreed that the true name and identity of the person referred to as "PEGGY PETERSON" in the Settlement Agreement is Stephanie Gregory Clifford a.k.a. Stormy Daniels and that any reference or designation to PEGGY PETERSON shall be deemed the same thing as referring to Stephanie Gregory Clifford a.k.a. Stormy Daniels by her true name as identified herein.

It is understood and agreed that the true name and identity of the person referred to as "DAVID DENNISON" in the Settlement Agreement is [REDACTED], and that any reference or designation to DAVID DENNISON shall be deemed the same thing as referring to [REDACTED] by his true name as identified herein.

It is understood and agreed that the true name and identity of the entity referred to as "EC, LLC" in the Settlement Agreement is [REDACTED] LLC and that any reference or designation to EC, LLC shall be deemed the same thing as referring to [REDACTED] LLC, by ~~his~~ its true name as identified herein.

It is further acknowledged and agreed by the parties that notwithstanding the provisions of Paragraph 7.1 of the Settlement Agreement (which provides that the Settlement Agreement constitutes the entire agreement between the Parties with respect to the matters herein and in supersedes all prior and contemporaneous oral and written agreements and discussions pertaining to the matters herein), this Side Letter agreement shall be deemed part of the agreement between the Parties. Accordingly, Paragraph 7.1 of the Settlement Agreement is hereby amended via supplanting to provide as follows:

"8.1.1 Integration. The Side Letter agreement entered into by the Parties concurrently with their entry into this Agreement shall be deemed part of this Agreement, and this Agreement and the Side Letter agreement together constitute the entire agreement between the Parties with


respect to the matters herein and supersedes all prior and contemporaneous oral and written agreements and discussions pertaining to the matters herein."

For avoidance of doubt, it is further agreed that this Side Letter agreement shall constitute Confidential Information as defined in the Settlement Agreement, that neither this Side Letter agreement nor any portion hereof may be disclosed to anyone except as and to the extent expressly provided in the Settlement Agreement, and that any unauthorized disclosure or use of this Side Letter agreement or any portion hereof shall constitute a material breach of the confidentiality provisions of the Settlement Agreement.

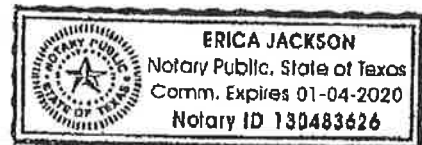
It is further agreed that neither party shall keep a copy of this document, and that only Keith M. Davidson, Esq. AND [REDACTED] (counsel for the parties herein), shall maintain possession of it or access to this Side Letter agreement. FOR AVOIDANCE OF DOUBT, THE PARTIES HERETO AGREE AND CONFIRM THAT THIS SIDE LETTER AGREEMENT IS DEEMED "ATTORNEY'S EYES ONLY."

This Side Letter agreement may be executed in counterparts and when each Party has signed and delivered one such counterpart to the other Party, each counterpart shall be deemed an original, and all counterparts taken together shall constitute one and the same Agreement, which shall be binding and effective as to the Parties. The Agreement may be executed by facsimile or electronic PDF signatures, which shall have the same force and effect as if they were originals.

By signing below, each of the Parties signifies their agreement to the terms hereof and each of their respective counsel signify their approval as to the form of this letter agreement.

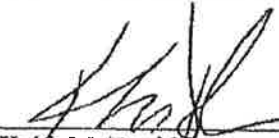

PEGGY PETERSON a.k.a. Stephanie Gregory
Clifford a.k.a. Stormy Daniels

10/28/16
date



DAVID DENNISON a.k.a. _____

date


Keith M. Davidson, Esq.

10/31/16
date


_____, Esq.
[REDACTED]

10/28/16
date

Donald Trump and Stormy Daniels

An Arbitration Case Study

By Brian Farkas

Some law professors have all the fun. Our tumultuous political climate provides endless lecture topics for constitutional law professors. Ditto for those who teach criminal law. And immigration, administrative, and environmental law. Since President Donald Trump took office, these fields have seen an unyielding barrage of policy making, orders, and debates. Whatever one might think of the policies' merits, students are glued to their seats, hanging on their professors' every word.

Pity the poor souls who teach arbitration. How *dry*. How *specific*. How *irrelevant*. In the midst of these deeply consequential discussions about liberty and democracy, arbitration faculty have had seemingly little to contribute to public discourse.

That changed in early 2018, when the press reported that Michael Cohen, President Trump's longtime personal lawyer and lawyer for the Trump Organization, paid \$130,000 to Stormy Daniels (a.k.a. Stephanie Clifford) for her silence about her alleged affair with Trump a decade earlier. In exchange for the payment, Daniels signed a non-disclosure agreement containing a sweeping arbitration clause. This clause mandated absolute confidentiality and said that any disputes would be resolved through private arbitration. Yet Daniels sidestepped the arbitration clause and ignored an order issued by an emergency arbitrator, filing a public lawsuit seeking to invalidate the

entire agreement. Suddenly, arbitration came front and center into the political discussion.

Not only does the Daniels case hold students' attention, but it also illuminates several significant arbitration policy issues.

Brief Factual and Procedural Background

The tale begins in the summer of 2006, when Trump and Daniels allegedly began a year-long intimate relationship.¹ (Trump had married his current wife, Melania, in 2005, and their son, Barron, was born in 2006). Daniels did not discuss the alleged affair for years after it occurred, though sometime in 2011, she disclosed it during an interview with *In Touch Weekly*. *In Touch* declined to publish the story after Cohen purportedly threatened the magazine with a defamation lawsuit. Subsequently that same year, Daniels claimed that an ominous man approached her in a Las Vegas parking lot, urging her to maintain her silence about Trump. For five years, she did just that.

Trump announced his presidential candidacy in June 2015 and won the Republican Party nomination in July 2016. In October 2016, the *Washington Post* published the now-famous *Access Hollywood* tape in which Trump made various lewd remarks about women. Soon afterwards, several women came forward to tell their stories about Trump. Daniels decided that she, too, wanted to share her experience.

Cohen became aware of Daniels' intentions to disclose the affair. He quickly approached her to offer a lump-sum payment of \$130,000 in exchange for her ongoing silence. Daniels now alleges that the explicit purpose of this arrangement was to ensure that the story did not come to light in the weeks before the 2016 election.

“Not only does the Daniels case hold students' attention, but it also illuminates several significant arbitration policy issues.”

Daniels agreed to Cohen's terms. The parties memorialized their agreement in a document entitled "Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Non-Disparagement Agreement" dated October 28, 2016 (NDA). A separate "Side Letter Agreement" (Side Letter) gave the confidential names of the parties identified only by initials in the NDA: "DD" was Donald Trump, "PP" was Stephanie Clifford, and "EC" was Essential Consulting, LLC, a limited-liability company established by Cohen apparently for the sole purpose of making a settlement payment. Both the NDA and the Side Letter were signed by Daniels and her lawyer at the time, and the NDA was signed by Cohen on behalf of EC. Neither document was signed by Trump, although each had a line for a signature by DD.

Section 4 of the NDA mandated absolute confidentiality with respect to various information

"In recognition of the mutual benefits to DD and PP of a voluntary system of alternative dispute resolution which involves binding confidential arbitration of all disputes which may arise between them, it is their intention and agreement that any and all claims or controversies arising between DD... and PP... shall be resolved by binding confidential Arbitration to the greatest extent permitted by law. Arbitration shall take place before JAMS ENDISPUTE ("JAMS") pursuant to JAMS Comprehensive Arbitration Rules and Procedures... and the law selected by DD... in a location selected by DD, and will be heard and decided by a sole neutral arbitrator ("Arbitrator") selected either by agreement of the Parties, or if the Parties are unable to agree, then selected under the Rules of the selected arbitration service. The costs and fees associated with any Arbitrator and/or Arbitration service shall be split equally among the parties to any such dispute. The Parties shall have the right to conduct discovery in accordance with the California Code of Civil Procedure Section 1283.05 et. seq. or any similar provision existing in the jurisdiction selected by DD and the written discovery requests and results of discovery shall be deemed to constitute Confidential Information. The Arbitrator

"pertaining to DD and/or his family" and Section 3.2 mandated that Daniels deliver to Trump copies of any existing confidential information, in any medium, by November 1, 2016. In multiple sections, the NDA mandated that neither the underlying confidential information nor the NDA could be made public.

Section 5.2 of the NDA governed dispute resolution among the parties. The full text of Section 5.2, which is reproduced below, provided that the parties agree to binding confidential arbitration by JAMS, that the parties will split the costs of the arbitration equally, that they will have the right to discovery, that the arbitrator can impose damages, and that the parties understand they are giving up their right to trial and their right to appeal any award. The last part was highlighted in bold type.

In February 2018, claiming to be inspired by the Women's March and the emergence of the #MeToo

shall have the right to impose all legal and equitable remedies that would be available to any Party before any governmental dispute resolution forum or court of competent jurisdiction, including without limitation temporary, preliminary and permanent injunctive relief, compensatory damages, liquidated damages, accounting, disgorgement, specific performance, attorneys fees and costs and punitive damages. It is understood and agreed that each of the Parties shall bear his/its own attorneys' fees, expert fees, consulting fees, and other litigation costs (if any) ordinarily associated with legal proceedings taking place in a judicial forum, subject to the Arbitrator's reassessment in favor of the prevailing party to the extent permitted by law. **Each of the Parties understands, acknowledges and agrees that by agreeing to arbitration as provided herein, each of the Parties is giving up any right that he/she/it may have to a trial by judge or jury with regard to the matters which are required to be submitted to mandatory and binding Arbitration pursuant to the terms hereof. Each of the Parties further understands, acknowledges and agrees that there is no right to an appeal or a review of an Arbitrator's award as there would be a right of appeal or review of a judge or jury's decision."**

movement, Daniels purportedly threatened to breach the NDA and publicize her affair with Trump. In response, on February 22, 2018, Essential Consulting filed an emergency arbitration proceeding in Los Angeles pursuant to Section 5.2 of the NDA seeking a temporary restraining order. An emergency arbitrator was appointed — Hon. Jacqueline A. Connor, a retired California state court judge. On February 27, 2018, Connor issued an order prohibiting Daniels from violating the NDA by, among other things, disclosing any of the confidential information covered by the NDA to the media or through court filings.²

Notwithstanding the arbitrator's order, Daniels filed a lawsuit in the Superior Court of California, Los Angeles County, on March 6, 2018. Both the NDA and a partially redacted version of the Side Letter were filed as exhibits.

The lawsuit does not seek money damages but rather a declaratory judgment that the NDA is not an enforceable contract.³ Daniels' argument has two prongs: First, the NDA is not a valid contract because Trump never signed it. Second, even if the NDA were a contract, it should be held unenforceable on public-policy grounds.

On March 16, 2018, Essential Consulting's attorneys quickly filed a Notice of Removal pursuant to 28 U.S.C. § 1441(b) to move the case to the federal court in the Central District of California.⁴ On April 2, 2018, Essential Consulting then filed a motion to compel arbitration pursuant to Section 5.2 of the NDA — in other words, a motion seeking an order requiring Daniels to bring her claims in private arbitration rather than court.⁵ Trump joined that motion the same day.⁶

The arbitration agreement and subsequent lawsuit about its enforceability — both still pending before

“Daniels' argument has two prongs: First, the NDA is not a valid contract because Trump never signed it. Second, even if the NDA were a contract, it should be held unenforceable on public policy grounds.”

the California federal court — reveal at least four important topics for arbitration advocates and scholars to consider.⁷

Is arbitration confidential?

A common subject of confusion is whether arbitration is a confidential proceeding. The short answer is that while arbitration is private, it is not always confidential unless explicitly agreed by the parties.⁸

Arbitration is private in the sense that the case is not filed on a public docket. In arbitration, unlike in state or federal litigation, the public cannot see the names of the parties, the names of the neutral(s), or any filed documents. The date, time, and location of trials are public; not so in arbitration. And while jury verdicts and judicial opinions are public, arbitral awards are private.

If an attorney is concerned about the confidentiality of the proceeding, she should include language in the arbitration clause itself providing that any dispute that may arise shall be entirely confidential, including the existence of that dispute, filings and testimony related to that dispute, and any resulting award. There should be penalties (liquidated damages) built into that agreement, so that neither party is likely to breach.

Indeed, this is precisely what the Daniels NDA does. Section 5.1.2, entitled “Liquidated Damages,” explicitly provides that each breach of the agreement shall result in a payment of \$1,000,000 from Daniels to Trump as the “reasonable and fair value to compensate DD [Trump] for any loss or damage resulting from each breach....”

Yet even when there is agreement on confidentiality, a party seeking to escape an arbitration clause can do exactly what Daniels did here — file a complaint in a public court asking the court to void the contract. This is effectively an end run around the process, because even if the party following the agreement (here, Essential Consulting) opposes the lawsuit, it has already “lost,” as the confidentiality has been violated. Once the contract has been made public, the media has access to it, as we know very well from the extensive reporting on the subject.

The only remedy is to seek massive punitive damages in the arbitration proceeding, assuming Daniels loses the court battle to invalidate the agreement. In her interview with Anderson Cooper on *60 Minutes*,

Daniels herself acknowledged that she was taking a significant financial risk by filing the lawsuit and appearing on television. (Cooper asked, "For sitting here talking to me today, you could be fined a million dollars. I mean, aren't you taking a big risk?" She replied, "I am.... [But] it was very important to me to be able to defend myself").

The distinction between a private process and a confidential one is critical for many parties concerned about the publicity of their dispute. Daniels shows the ways in which one party can subvert the other's desire for secrecy.

Which is the better venue: state or federal court?

As students learn about the statutory framework surrounding arbitration, they often confront a deceptively simple question: What's the difference between arbitration-related state and federal laws? The long answer involves a complex discussion of federalism and the ability of individual states to establish their own procedural laws. The shorter and more practical observation is that some states show greater skepticism toward arbitration in their statutes and common law.

Arbitration scholars are keenly aware that federal courts — led by the US Supreme Court — will invalidate state laws that run counter to the Federal Arbitration Act (FAA).⁹ With its generally liberal laws aimed at protecting consumers and employees from certain types of arbitration agreements, California has been a frequent target for the Supreme Court, which has repeatedly held that the FAA preempts such statutes.¹⁰

When Daniels filed her lawsuit, she and her lawyer were careful to do so in California state court. Within a week of that filing, Essential Consulting, LLC, transferred venue to the Central District of California federal court in Los Angeles. Why? Obviously, each party thought its chosen forum would be strategically advantageous. Daniels' attorneys probably anticipated that California's state courts would be more hostile to the enforcement of the arbitration clause, particularly given the public policy concerns raised.

After venue was transferred to the federal district court, Essential Consulting's motion to compel arbitration reveals Cohen's rationale for preferring federal

“ The distinction between a private process and a confidential one is critical for many parties concerned about the publicity of their dispute. Daniels shows the ways in which one party can subvert the other's desire for secrecy. ”

court: "The strong policy favoring arbitration set forth by Congress in the [FAA] dictates that this motion be granted, and that [Daniels] be compelled to arbitration, as she knowingly and voluntarily agreed to do."

Litigators regularly consider whether to file arbitration-related motions in state or federal court, taking into account the various procedural and political differences. The Daniels case offers a heightened example of such considerations.

Is this dispute arbitrable?

Arbitrability refers to the question of whether arbitrators or courts have the power to rule on the arbitrators' jurisdiction. When one party does not want to be bound by an arbitration agreement or does not believe that the "agreement" is enforceable, a problem arises: Do the arbitrators decide whether they have jurisdiction, or must a judge rule instead? Arbitrability is a somewhat confusing topic, replete with doctrinal complexities.¹¹

The Daniels case makes the topic easy to understand. The NDA containing the arbitration clause was between three parties: Essential Consulting, Daniels, and Trump. Cohen signed the agreement on behalf of Essential Consulting, and Daniels signed it herself. Trump did not sign.

Is it a valid contract? Daniels argues no, because Trump's acquiescence was material to her agreement. Cohen argues yes, because Daniels accepted the \$130,000; under the common law course-of-performance doctrine, the contract should be deemed ratified. Both have legal arguments as to the contract's validity, but the question is, which tribunal should hear the arguments and decide? The arbitrators or the court?

The federal court will issue a determination on this gateway question as it considers Essential Consulting's motion to compel.

How should the #MeToo movement impact arbitration policy?

The dispute between Stormy Daniels and Donald Trump illuminates another active conversation within arbitration: the intersection of confidential arbitration clauses and the #MeToo movement. Many argue that there should be a public policy exception to the enforcement of confidential arbitration clauses when there are allegations of sexual harassment. Such clauses, these voices contend, are used to silence victims and protect predators.

Others disagree, worrying that such a public policy exception could effectively "undo" arbitration clauses in employment contracts, giving many employees an avenue to escape arbitration whenever it doesn't suit them, even if they have previously agreed to arbitrate. Some scholars have also cautioned that a confidential arbitration process can be — at least in some cases — preferable for accusers as well as the accused.¹²

The Daniels case provides a window into this debate. On the one hand, Daniels is a successful producer and savvy businesswoman who voluntarily signed a contract with an arbitration clause. On the other hand, she found herself alone in a hotel room with a wealthy and powerful celebrity, and was allegedly subject to intimidation prior to the execution of the NDA.

For her part, Daniels explicitly rejected any association with the #MeToo movement during her *60 Minutes* interview: "This is not a 'Me Too,'" she told Anderson Cooper. "I was not a victim. I've never said I was a victim. I think trying to use me to further someone else's agenda does horrible damage to people who are true victims."

To what extent does Daniels fit into the #MeToo movement, consciously or not? Should the arbitration clause contained in her NDA be voided if she was subjected to physical, emotional, or situational intimidation prior to its execution? Or should she be held to the agreement as a matter of contract law and assessed liquidated damages for her breach of the agreement? These public policy questions extend far beyond Daniels' particular case; they are relevant for

“When Daniels filed her lawsuit, she and her lawyer were careful to do so in California state court. Within a week of that filing, Essential Consulting, LLC, transferred venue to the Central District of California federal court in Los Angeles.”

countless employees, particularly women, with such arbitration clauses in their employment agreements.

Concluding Thoughts

The Stormy Daniels case is replete with salacious details and political intrigue. But it also raises familiar and quotidian issues for scholars and practitioners. Confidentiality, federalism, arbitrability, and the #MeToo movement are all at the forefront of arbitration policy debates. So while constitutional law professors may have the most to say about our current administration, those who study arbitration can now see their work reflected in the headlines, too — for good or for ill. ■

Endnotes

1 This article relies on the allegations in Daniels' complaint, as well as various public reporting. The facts of this dispute were quickly evolving at the time that *Dispute Resolution Magazine* went to press. One of the most significant open factual questions is whether President Trump ever reimbursed Cohen for the \$130,000, and if so, whether he knew the reason for the reimbursement or the existence of the unsigned agreements.

2 Arbitrator Connor's February 27, 2018, temporary restraining order against Daniels is available at <https://www.nytimes.com/files/stormy-Daniels-restraining-order.pdf>.

3 Daniels' March 6, 2018, lawsuit, with the NDA and Side Letter as exhibits, is available at <http://www.chicagotribune.com/news/nationworld/>



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ct-stormy-daniels-lawsuit-20180306-htmlstory.html.

4 Essential Consulting's March 16, 2018, Notice of Removal is available at <https://www.politico.com/f/?id=00000162-3136-d513-a767-ffb3e740000>.

5 Essential Consulting's April 2, 2018, Motion to Compel Arbitration is available at <https://www.courthousenews.com/wp-content/uploads/2018/04/Trump-Stormy-ARBIT.pdf>.

6 Trump's April 2, 2018, Joinder in Essential Consulting's Motion to Compel Arbitration is available at <https://www.politico.com/f/?id=00000162-88dd-d2e5-ade3-c9ffa5cf0002>.

7 The factual and procedural background above relates only to the dispute over the enforceability of the arbitration clause pending in California and does not delve into the also-pending criminal case involving Michael Cohen in the US District Court for the Southern District of New York, in which Daniels has sought to intervene.

8 Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211 (2006) ("Arbitration is private but not confidential. This is a paradox to the extent that it is seemingly contradictory, but states a truth. Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the

process may become public").

9 Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?*, 42 SW. L. REV. 131 (2012) (cautioning that "[t]he Court has embraced a preemptive federal arbitration procedural paradigm that expands arbitrator jurisdictional power, minimizes judicial arbitration oversight and marginalizes the role of state contract law and arbitration procedure rules").

10 See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

11 See, e.g., Mark Berger, *Arbitration and Arbitrability: Toward an Expectation Model*, 56 BAYLOR L. REV. 753 (2004) (discussing procedural issues with arbitrability); Kristen M. Blankley, *Arbitrability After Green Tree v. Bazzle: Is There Anything Left for the Courts?*, 65 OHIO ST. L.J. 697 (2004) (outlining U.S. Supreme Court doctrine on arbitrability).

12 Jeannie Suk Gersen, "Trump's Affairs and the Future of the Nondisclosure Agreement," *The New Yorker* (March 30, 2018) (noting the bargaining power created by NDAs, as well as potential benefits of confidential dispute resolution mechanisms for victims).

MEDIATION WEEK

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- ABA 2011 Resolution 108, a call for action to make meaningful steps to enhance the constructive role of lawyers in promoting a more civil public discourse.
- Civility and the Legal Profession, A model CLE program for state and local bar associations.
- Instructions for how to register your own Mediation Week event.
- A list of events in your area and around the globe.

ABA Mediation Week celebrates mediation as one of several appropriate dispute resolution processes.

www.americanbar.org/dispute

APPENDIX B
Dispute Resolution Processes: Theory and Practice
Spring 2018
Professor Ellen E. Deason

Policy Debate: An Airing of Views before a Congressional Committee

A fictional Congressional Committee is convening a hearing for the purpose of considering potential changes to the law on the enforcement of pre-dispute arbitration agreements and the class action waivers that often accompany them. Those testifying should start with a short introduction of their organization and its interests and then speak in favor or against proposals that are relevant to their organization.

The Committee will consider the following possibilities:

1) Enact legislation identical to the Arbitration Agreement Rule issued in 2017 by the **Consumer Financial Protection Bureau** (which in reality was disapproved by a joint resolution of Congress in November 2017 under the Congressional Review Act).

<https://www.consumerfinance.gov/arbitration-rule/>

Background: The rule applied to the consumer finance sector (banks, credit card issuers, loan transactions, etc.), not in other consumer or employment contexts. It allowed these companies to include arbitration clauses in their contracts, but prevented them from precluding group actions.

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/>

The rule built on a major study of arbitration by the CFPB, which concluded that arbitration agreements with class prohibitions act as claim-suppression devices. Because most consumer claims are small value, they cannot afford to try to vindicate their claims individually.

<http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015/>

Press release on the report: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/>

For an alternative view of the data:

https://www.americanbar.org/publications/blt/2017/05/07_lampley.html

All comments on the proposed CFPB regulation can be viewed here:

<https://www.regulations.gov/docket?D=CFPB-2016-0020>

2) Enact the **Arbitration Fairness Act** of 2017 – S. 537; H.R. 1374.

<https://www.congress.gov/bill/115th-congress/senate-bill/537/text>

Background: The Act would prohibit enforcement of pre-dispute arbitration agreements that require arbitration of a consumer, anti-trust, employment, or civil rights dispute. Similar legislation has been introduced repeatedly in Congress, but it has never been reported out of committee.

3) Enact the **Fairness in Nursing Home Arbitration Act**
110th Congress (2007-2008) S. 2838

Background: The Act would bar enforcement of pre-dispute arbitration agreements between nursing homes or long-term care facilities and their residents.

See Senate Report (2008):

<https://www.congress.gov/congressional-report/110th-congress/senate-report/518/1>

In 2016, the Centers for Medicare & Medicaid Services (CMS) issued a rule that prohibited pre-dispute agreements for binding arbitration and listed requirements nursing facilities must follow if they propose arbitration post-dispute. Litigation ensued.

[https://www.ahcancal.org/News/news_releases/Documents/CMS%20Arbitration%20Rule%20-%20complaint%20\(10-16-16\).pdf](https://www.ahcancal.org/News/news_releases/Documents/CMS%20Arbitration%20Rule%20-%20complaint%20(10-16-16).pdf)

In 2017, CMS proposed revisions that removed the prohibition on pre-dispute arbitration agreements.

<https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2017-Fact-Sheet-items/2017-06-05.html>

4) Enact the **Restoring Statutory Rights and Interests of the States Act** of 2017 – S. 550; H.R. 1396

<https://www.congress.gov/bill/115th-congress/senate-bill/550>

Background: The Act amends the Federal Arbitration Act to invalidate pre-dispute arbitration agreements in certain contracts for claims brought by individuals and small businesses for claims arising from federal or state statutes, the U.S. Constitution, or a state constitution.

5) Enact the **Safety over Arbitration Act of 2017** – S. 542

<https://www.congress.gov/bill/115th-congress/senate-bill/542>

Background: For claims that concern hazards relevant to public health and safety, the Act would amend the Federal Arbitration Act to require parties to agree in writing to arbitration after the claim arises. Arbitrators would be required to provide a written explanation of the award, which could not be sealed.

6) Enact the **Court Legal Access and Student Support (CLASS) Act** of 2017 – S. 553; H.R. 2301

<https://www.congress.gov/bill/115th-congress/senate-bill/553>

Background: Amends the Federal Arbitration Act to make it inapplicable to enrollment agreements between students and certain institutions of higher education.

7) Enact the **Ending Forced Arbitration of Sexual Harassment Act** of 2017 – S. 2203; H.R. 4734

<https://www.congress.gov/bill/115th-congress/senate-bill/2203>

see also H.R. 4570 <https://www.congress.gov/bill/115th-congress/house-bill/4570>

Background: Amends the Federal Arbitration Act to make pre-dispute arbitration agreements invalid and unenforceable if they require arbitration of a sex discrimination dispute.

commentary: <https://www.lexology.com/library/detail.aspx?g=9cbfe97f-1410-4fe3-a349-38ea74f43a13>

8) Maintain the status quo with full enforcement of pre-dispute arbitration agreements and class action waivers.

Appearing at the Hearing

AARP (represents retirees and senior citizens)

<https://www.aarp.org/caregiving/health/info-2017/trump-nursing-home-arbitration-fd.html>

Alliance for Justice

<https://www.regulations.gov/document?D=CFPB-2016-0020-4224>

<https://www.afj.org/?s=arbitration>

https://www.afj.org/wp-content/uploads/2014/10/AFJ9679_Lost_Brochure.pdf

American Bankers Association

<https://www.aba.com/Press/Pages/071017CFPBArbitrationRule.aspx>

American Bar Association Section of Dispute Resolution

<https://www.regulations.gov/document?D=CFPB-2016-0020-5905>

American Health Care Association (federation of organizations that represent assisted living and nursing facilities—sued & obtained a preliminary injunction to block the initial 2016 CMS rule)

https://www.ahcancal.org/advocacy/issue_briefs/Issue%20Briefs/Arbitration_IB.pdf

Carlson, Gretchen (former Fox News anchor)

<https://www.rollingstone.com/tv/news/watch-samantha-bees-incisive-look-at-forced-arbitration-sexual-assault-w516203>

The Century Foundation

<https://tcf.org/content/report/how-college-enrollment-contracts-limit-students-rights/>

Consumer Bankers Association

<http://www.consumerbankers.com/cba-media-center/media-releases/cba-statement-president%E2%80%99s-signing-arbitration-cra>

Heritage Foundation

<https://www.heritage.org/report/the-unfair-attack-arbitration-harming-consumers-eliminating-proven-dispute-resolution-system>

<http://fortune.com/2017/10/26/senate-vote-on-arbitration-rule/>

House Liberty Caucus

<https://www.americanbanker.com/opinion/cfpb-arbitration-rule-is-an-undeniable-win-for-consumers>

Microsoft Corporation

https://www.washingtonpost.com/news/wonk/wp/2017/12/20/microsoft-just-handed-metoo-a-major-victory/?utm_term=.4b6b8aa4d8ab

https://www.washingtonpost.com/opinions/microsoft-has-had-its-metoo-moment-your-turn/2017/12/22/b0e5123e-e699-11e7-ab50-621fe0588340_story.html?utm_term=.b98e04f448d0

National Association of Attorneys General

<http://thehill.com/regulation/administration/373715-all-us-ags-demand-congress-end-mandatory-arbitration-in-sexual>

see also:

<https://www.regulations.gov/document?D=CFPB-2016-0020-4245> (Minnesota)

<https://www.regulations.gov/document?D=CFPB-2016-0020-4223> (Iowa)

<https://www.regulations.gov/document?D=CFPB-2016-0020-4237> (6 states)

National Consumer Law Center

<https://www.nclc.org/issues/forced-arbitration.html>

<https://www.regulations.gov/document?D=CFPB-2016-0020-5831>

<http://www.studentloanborrowerassistance.org/>

NELA: National Employment Lawyers Association

<https://www.nela.org/index.cfm?pg=mandarbitration>

National Organization for Women

<https://now.org/about/conference-resolutions/2014-national-now-conference-resolutions/#arbitration>

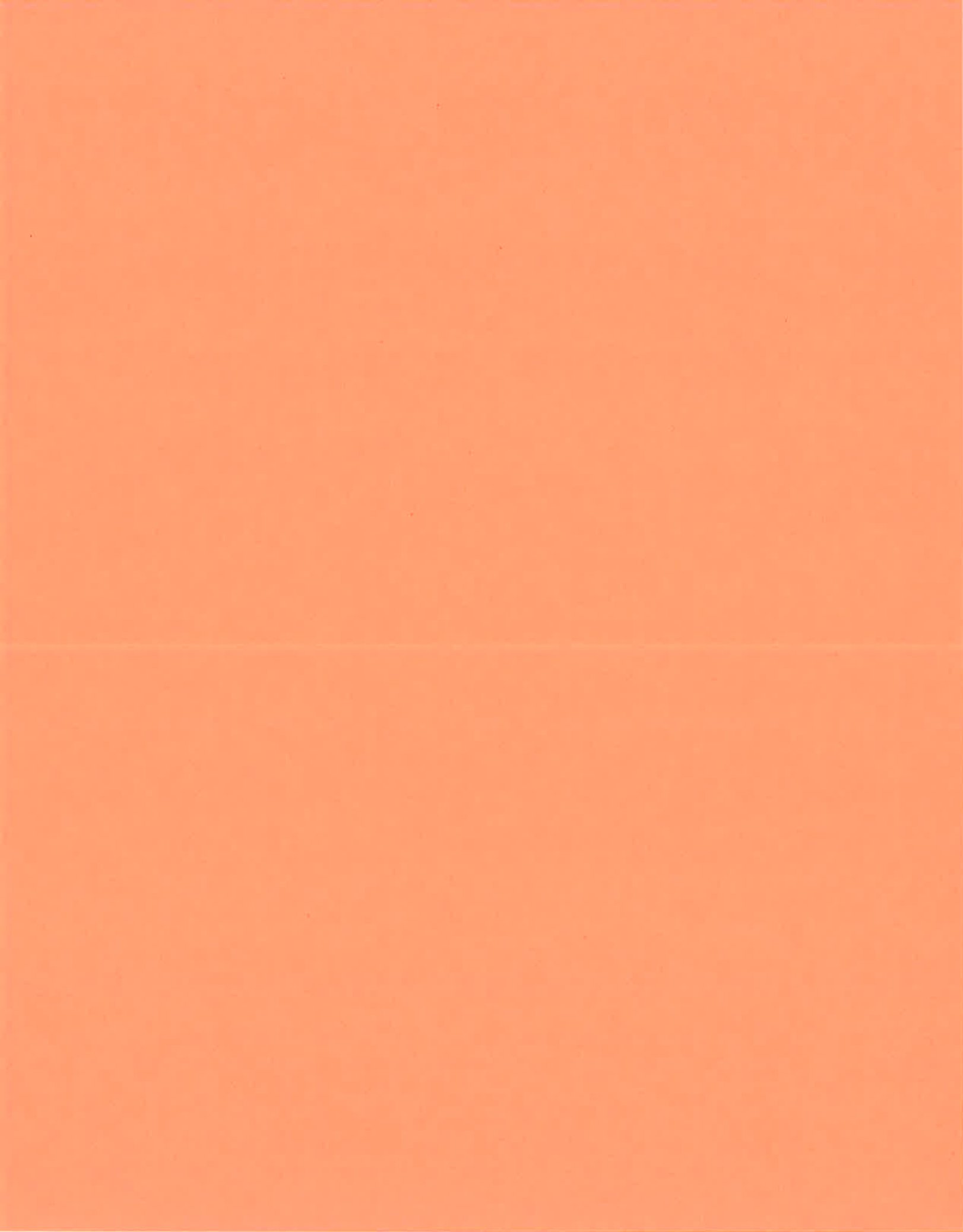
U.S. Chamber of Commerce

<https://www.regulations.gov/document?D=CFPB-2016-0020-3941>

<https://www.uschamber.com/series/above-the-fold/agency-goes-rogue-arbitration-rule>

<https://www.uschamber.com/litigation-update/us-chamber-files-legal-challenge-cfpbs-anti-arbitration-rule>





Appendix C

Jill Gross

*Associate Dean for Academic Affairs and Professor of Law
Elisabeth Haub School of Law, Pace University*

Hamilton and ADR

ABA DR Spring Conference, April 12, 2019

Alexander Hamilton

- born 1755/57, Nevis, British West Indies
- killed 1804, NYC, in a duel with Aaron Burr.
- the New York delegate to the Constitutional Convention (1787)
- major author of the *Federalist* papers,
- first Secretary of the Treasury of the United States (1789–95), who was the foremost champion of a strong central government for the new United States.
- Also, a practicing lawyer when he wasn't a politician, practiced both criminal and civil law. His civil practice included mediation and arbitration.

Lin Manuel-Miranda wrote an award-winning Broadway musical about his life, based on the biography by Ron Chernow. If you haven't seen it, I highly recommend it!

Many of the songs and scenes involve themes critical to the field of dispute resolution. For example:

- “Meet Me Inside” – Hamilton wants to fight in the army; Washington orders Hamilton to go home to be with his pregnant wife - arbitration
- Yorktown - war; violent battle
- “Cabinet Battle #1” - persuasive advocacy; oral debate
- “Say no to this” – conflict between loyalty to wife and desire; lead to blackmail
- Schuyler Defeated - Burr ran for senator to unseat Schuyler; Jefferson resigned to run for President to have his views prevail
- One Last Time: resign to allow nation to move on and stop partisan fighting
- Use of writings to resolve conflict: Federalist Papers - writings to defend constitution; Reynolds Pamphlet to expose Hamilton’s affair
- “Burn” - burn letters; Eliza erases herself from the narrative

Today, I share a bit more in depth two of the most meaningful songs to me, in terms of how they resonate with our field of ADR.

“The Ten Duel Commandments”

Duels, an illegal process in most places where two people resolve a dispute about one’s honor (a values-based disagreement impinging on someone’s integrity or identity), emerged in early modern Europe and were typically fought between men from the upper classes. The song recounts a duel between Lt. Colonel John Laurens and Major General Charles Lee as a result of disparaging remarks by Lee about George Washington. Alexander Hamilton is Laurens’ “second,” and Aaron Burr is Lee’s “second.”¹ In the actual duel, Laurens “won,” after wounding Lee.

¹ In actuality, Major Evan Edwards, not Burr, was Lee’s second.

The song sets out the ten rules of dueling in that era, which were part of the **dispute system's design** to reduce the chance of death, to validate and articulate norms, and to promote apologies. In addition to the biblical Ten Commandments, Miranda drew inspiration from the rap song "Ten Crack Commandments," which served as a guide to illegal activities during the 1990s.

The popularity of dueling in the US began to decline by the start of the Civil War – ultimately it was public opinion, not anti-duel laws, that ended the practice. Often people would not really shoot each other but would instead fire into the air, or not fire at all. The point was to demonstrate your seriousness about the insult by committing yourself and the other to a life-or-death contest.

[LISTEN TO SONG and READ LYRICS at:

<https://www.youtube.com/watch?v=Pu-qAVddo7g>]

The rules envision three opportunities for peaceful resolution where the alleged offender can apologize – at steps 1, 3 and 8.

Step 1: "The challenge; demand satisfaction, if they apologize no need for further action"

Step 2: Role of the second: "Negotiate a peace - or negotiate a time and place." Serve as negotiators.

Step 3: explicit requirement of seconds to negotiate

"Most disputes die and no one shoots" – negotiation settles most disputes

Step 4: Doctor: paid in advance, otherwise he might not come). Treated with civility and doesn't watch, because his involvement would betray Hippocratic oath and might subject him to criminal liability.

Steps 5-7: Preparation for duel including location and confess sins. Happens in the morning (before the sun is in the sky), in a "high and dry" place.

Step 8: "Last chance to negotiate, send in your seconds to set the record straight"

Step 9 and 10: Duel

Banter between seconds:

* Burr: dumb, immature, absurd to pay for an insult with one's life (duels are irrational, dangerous, emotional)

** Hamilton: you have to answer for your words (duels promote self-reliance, responsibility, alignment between word and deed)

[Show how the Ten Duel Commandments fit in basic rules of Dispute Systems Design – build in feedback loops and repeated opportunities to settle.

Design principles [developed by DS designers]

- Focus on values and interests (dignity; clearing name; reputation)
- Build in "loop-backs" to negotiation (steps 1, 3 and 8)
- Provide low-cost rights and power backup mechanisms (seconds, doctor)
- Build in consultation before and feedback after (Washington gives feedback to Hamilton right after duel)
- Arrange procedure in a low-to-high cost sequence (talk first, "seconds" try to negotiate, then duel)
- Provide disputants with necessary motivation, skills and resources (doctor; witnesses; in NJ where legal)

Second song: **Room Where it Happened:**

In order to push his plan through for the economy, which involved a strong centralized banking system and the federal gov't's assumption and consolidation of the states' war debt and was opposed by many, he made a deal with Thomas Jefferson, then Secretary of State, for his support and the South's support in exchange for his agreement to move the capital of the US to the banks of the Potomac, on land we now call Washington DC.

In the song, Aaron Burr expresses regret that he wasn't part of that negotiation and compromise, and expresses the well-understood view of ADR that you have to be at the table – present in the room – to participate meaningfully in a negotiation. LMM used a jazz-inspired musical style, complete with banjo, and meant to be a show-stopping number. It evokes the classic back room politics where shady deals get made.

PLAY SONG and LYRICS at https://www.youtube.com/watch?v=_vIjtHjoXhE

Point out that the lyrics of the song include ADR terminology including “getting to yes,” “negotiate time and place,” where “the sausage gets made” – all connected to the concept of integrative bargaining.

Also, the importance of setting, location, who is at the dinner table.

APPENDIX D

MEMORANDUM

To: The Professor's Future Teaching Assistants
From: Former Research Assistant
Re: Alternative Dispute Resolution Quiz and Team-Based Learning Overview

I. Introduction

Team-Based Learning (TBL)¹ is an ideology that implements teams in the classroom setting to better mimic the professional world. Applying TBL to this course takes several steps, but in the end furthers the essential lawyering skills learned through the Alternative Dispute Resolution (ADR) course. Generally, in this course, students will be working in team of 5-6 throughout the semester. Teams work on quizzes together for students to develop lawyering skills in a real-time situation and provides an opportunity for immediate feedback.

This memo is designed to help future TA's for the Professor quickly understand the actions necessary to make this class function properly. The following are areas of importance to ensure proper functionality: team creation, quiz creation, quiz administration, quiz appeals, and peer evaluations at the end of the semester. In addition to this memo, there should be a shared file of old quizzes and spreadsheets that were used during past courses. These resources together should help the TA assisting the Professor administer the course.

II. Team Creation

Team creation is the first, and likely the most important, step in the course. Teams will be together for the entirety of the semester working together on numerous projects in addition to the quizzes. Therefore, it is extremely critical to take ample time to ensure that each team is diverse and representative of a real-world working team.

Diversity amongst a team can come in different forms: teams can be diverse in the colleges or universities they attended, degrees and areas of study, and even based on personal interpretations of who is a friend and who is not a friend. On or before the first day of class, it is imperative to have pictures of the students in class printed out through Seatgen as one-sided "flashcards" on Avery index cards (#5388). These flashcards will help the TAs collect information and ensure that each team is as diverse as possible.

On the first day of class, distribute the flashcards and have each student fill in the following information on the back:

¹ For more information on Team-Based Learning, see Melissa H. Weresh, *Uncommon Results: The Power of Team-Based Learning in the Legal Writing Classroom*, 19 LEGAL WRITING: J. LEGAL WRITING INST. 49 (2014).

- College/University Attended
- Major(s) Obtained
- 2L or 3L
- Any professional work experience
- Whether or not they are pursuing the ADR certificate, or any other certificate
- Any other question(s) the Professor deems relevant, which may include:
 - How many siblings do you have/what number are you in the birth order;
 - Political information—if willing to disclose;
 - Favorite movie category;
 - What their “walk-up” song is;
 - What they want to do once they graduate; or
 - This list can go on and change as the years change.

Once the TAs have collected the flashcards, the next step is to create the teams. When creating the teams it is important to use the information on the flashcards to diversify each group with as many differences as possible. As stated above, this means diversifying students in groups with different majors, different backgrounds, and different friend groups (this is subjective to the TAs, which hopefully have some insight on the inner-dealings of the law school).

Once teams are preliminarily created, they are subject to the Professor’s approval. After teams have been approved, the TAs are to create a spreadsheet with the students names and team numbers grouped together to be read off in the following class. Students will undoubtedly forget their team number or they will not be present for the class, so it is fundamental to keep the spreadsheet for the duration of the semester.

A spreadsheet with name and team member should be provided to the Professor for posting on the course website. This not only helps the Professor and the TAs understand who is on what team, but also limits the amount of questions regarding team construction. This spreadsheet will also become handy in quiz scoring—this is addressed below.

III. Quiz Creation

Overall, if there are any questions regarding quiz creation, there should be a quiz bank available to the TAs via the Professor’s files. The quizzes there should give the TAs an idea as to what was covered on each quiz of the semester prior. As a reference with this memo, the syllabus quiz (used as the test quiz to get everyone comfortable with the format) is attached as Exhibit A.

A. Directions

First, each quiz will have essentially the same cover sheet—the only piece to change will be the header at the top of the page indicating the information on the quiz and the semester/year the quiz was administered. For example, the top of the syllabus quiz denotes that it is in fact the

syllabus quiz, as well as the fact that it is being administered in the Fall of 2018. There is also a spot for the students to write in their names and teams numbers.

<div style="border: 1px solid black; border-radius: 50%; width: 80%; margin: 0 auto; padding: 10px;"><p>Alternative Dispute Resolution Syllabus Quiz Fall 2018</p></div>	
Name: _____	Team Number: _____
<u>INDIVIDUAL QUIZ DIRECTIONS</u>	

Next, as mentioned, the quiz directions will be the same for each quiz. The quiz directions should be straight forward enough for students to understand on their own. However, the Professor will go over them in detail during the first quiz (the syllabus quiz) so that everyone is on the same page. This also allows for the students to take advantage of all the allotted time taking the quiz and not spending time reading the same directions each quiz. Quiz directions will be explained in Section IV, below, but for now the most important piece to remember is that the quiz directions will be the first page of every quiz and should just be copied and pasted.

B. Quiz Content

The next step in quiz creation is actually creating the content for the students to be quizzed on. This is typically a fairly fluid process that should be done initially between the TAs and proper use of the quiz bank. Once the quiz is preliminarily created between the TAs, the Professor will (most likely) have comments and changes to certain questions.

Quiz content can come from any source that was used in class. This includes readings, movies, and any other mediums that the Professor would like to be included for the students to be quizzed on.

The most vital piece of quiz creation is to **ensure that the quiz answers match with the answers provided on the quiz answer sheets**. On the bottom corner of each group answer scratch-off paper, there is an answer key number (i.e., #D010). This number has a corresponding answer key.

To the right is an example of an IF-AT team quiz sheet:

As you can see, there is space on each quiz for the team to place their team number and to scratch off the answer they believe is correct. The point of these specific testing models is to allow for the immediate feedback for the team answer. When the correct answer is scratched off, a small star will appear within the box. The sheet also allows space for the TAs to properly score each question, which keeps the quiz scores together outside of just the spreadsheet—mentioned later.

Here is an example of the bottom portion of the IF-AT sheet that will designate which column of the answer sheet the quiz relates to:

Below is the answer sheet to match the above mentioned number at the bottom of the IF-AT quiz sheet:

SERIES D: 10-Item (A-D) IF AT KEYS				
QUESTION #	D009	D010	D011	D012
1	B	B	D	A
2	A	B	B	A
3	C	C	D	D
4	D	A	B	C
5	B	B	D	A
6	D	A	D	D
7	B	B	C	B
8	B	B	B	B
9	C	C	C	A
10	A	C	D	A

Lastly, to ensure consistency, each quiz is saved with the following format:

[Title/Subject of Quiz]_[Date Created]_[Answer Key Number]

For example:

Arbitration-Concepts and Models Quiz_11.08.18_D011

IV. Quiz Administration

Most important for this section is the fact that each quiz is to be administered at the beginning of a particular class session. Therefore, it is important prior to quiz day to ensure that each of the following steps have been completed:

- A copy of the quiz is printed for each student in the class, plus at least 3 extra just in case
- A scantron has been obtained for each student, plus at least 3 extra (for more on this see Section VII: Duties of Others)
- The scantrons for each student are divided into their respective groups with at least one copy of the quiz for each student paperclipped with the stack of scantrons

These steps are important to an efficient quiz day. Each group will be sitting together, which is why it is required for the scantrons of each student be separated out into their groups.

As mentioned in the previous section, the directions for each quiz are on the first page of the quiz. This does not change, no matter the quiz—this is to ensure consistency throughout the course. There are three different sets of directions for each quiz (1) individual quiz instructions, (2) team quiz instructions, and (3) question appeal instructions. This section will explain in detail the directions associated with individual and team quizzes. Section V will address information regarding appeals to quiz questions.

A. Individual Quizzes

Below is a screenshot of the individual quiz instructions required to be on the first page of **every** quiz:

INDIVIDUAL QUIZ DIRECTIONS

- I. You will have 15 minutes to complete this quiz. This is a closed-book quiz.
- II. Before you begin, please make sure you have put your name and team number on the test. Your name should already be preprinted on the individual answer sheet.

- III. Fill in the **BEST** possible answer on the individual answer sheet for each of the following questions. If additional information is added, it is only for the purpose of answering that question unless expressly stated otherwise. It is recommended that you copy your answers onto this quiz packet for the team quiz discussion.
 - IV. Once you have completed your individual quiz, please turn in the **scantron answer sheet only** to a TA at the front of the room.
 - V. **Make sure to keep this question packet for your team quiz immediately following this portion.**
 - VI. Return to your seat and remain quiet for those that are still completing the individual quiz.
-

First, notice that each student has 15 minutes to complete the individual portion of the quiz. Second, because the students will need the quiz for both the individual and team portion of quiz day, it is important to collect the scantrons once the individual portion is complete. The students are encouraged to both keep and record their answers on their copy of the quiz to take with them to team discussions—so students can quickly identify their answer for team discussions.

During the individual quiz portion, it is the TAs responsibility to ensure that everyone in the room has a #2 pencil for the scantron. It is also the TAs responsibility to collect the scantrons once the 15-minute time limit is complete. Once the TAs have collected the scantrons, they should pass out one “IF-AT” (see Section III (B) at page 3) team scratch off for the team portion of quiz day.

B. Team Quizzes

Below is a screenshot of the team quiz instructions required to be on the first page of **every** quiz:

TEAM QUIZ DIRECTIONS

- I. You will have 15 minutes to complete this quiz. This is a closed-book quiz.
- II. Now that you have taken this quiz individually, you will take the same quiz as a team. Talk amongst your team members to agree on an answer selection that is the BEST possible answer. Remember that the team quiz requires a consensus among the team for each answer selected. You will be scored based on the following criteria:
 - a. 10 points if the answer is correct the first time
 - b. 7 points if the answer is correct the second time
 - c. 4 points if the answer is correct the third time
 - d. 0 points if the answer is correct the fourth time

- III. Once you have completed the team quiz please return this quiz packet and the team answer sheet to a TA at the front of the room. If quizzes or quiz pages are missing, the entire team earns 0 points—both individually and as a team.
-

First, again, notice that each group has 15 minutes to complete the quiz and turn in their sheets. The important piece about the team quiz portion is that each team is scored based on the number of answers scratched off on their team IF-ATs. As noted in the directions, it is 10 points per question if there is only one answer scratched off. If there are two answers scratched off for a question, the question is scored as a 7; 3 scratches equals 4 points; and, if there happens to be 4 scratches (or no answer at all) that equals 0 points.

Once the teams have completed their quizzes, the TAs should walk around the room and collect and score each quiz. When a TA collects a team's quiz, they should make sure that the team number is listed on the team's answer sheet for scoring later. As stated earlier, appeals to questions will be addressed in Section V, but make sure that if a team has decided to appeal a question that it is noted for later discussion amongst the panel (the TA's and the professor).

C. Quiz Scoring

Quiz scoring is a two-part process because there are two quiz scores that need to be recorded. First, the individual quiz is graded on the scantrons through the university—see Section VII: Duties of Others. Technically, law school students cannot see the individual grades of others, so the individual scores of students in the course will never be shown to the TAs. However, team scores are perfectly fine—to our knowledge—so long as the TAs do not abuse this power, since the students see their scores the minute they are done with the team quiz.

To score the team portion of the quiz, the TAs should use the spreadsheet created for team organization to keep track of what group scores are. It is recommended that at this point, the TAs transfer the student's last name, first name, and group number into the Excel spreadsheet title "BLANK_TeamScores_Template". This is a sheet that was put together at the inception of the class to make team scoring easier. When using this sheet (and there are instructions in the sheet, as well) make sure to only fill in spots that are color-coded as green. These cells are meant to be changed without changing the formulas so that this sheet can be used year after year.

Creation of the spreadsheet should include the student's names along with their group numbers, as below:

	Last	First	Team #
A		Student	10
B		Student	11
C		Student	1
D		Student	12
E		Student	9

The above image should look familiar as a TA should have already separated the students into groups and listed the groups they belong to. As the sheet above suggests, it is important to have the students in alphabetical order by last name. This makes it easier for the Professor and her assistant to complete the grades at the end of the semester.

Once information about the students and their corresponding team are filled into the spreadsheet, the TA should move to the scoring sheet in the same spreadsheet and input the proper scores for each team. As the spreadsheet details, the information from the score sheet should automatically populate the first sheet for the corresponding quiz number. Below is a sample of the quiz scoring sheet:

	Team #	Quiz #1	Quiz #2	Quiz #3
	1	84	100	74
	2	90	97	77
	3	90	100	80
	4	87	100	77
	5	90	100	77

These scores represented above will be automatically populated, which should look as follows:

	Last	First	Team #	Quiz #1	Quiz #2	Quiz #3
A		Student	2	90	97	77
B		Student	3	90	100	80
C		Student	1	84	100	74
D		Student	5	90	100	77
E		Student	4	87	100	77

At the end of the semester, the sheet should be provided to the Professor and her assistant to assist in grading the team quiz portion of the course.

i. Student Absent on Quiz Day

As is almost always the case throughout the course of a semester, there will likely be a day (or more) where student's will not be able to attend class on a quiz day. When a student misses a quiz, they are to notify the Professor so that they can set up a meeting time that they would be able to take the quiz in the Professor's office. The student will only take the individual portion of the quiz.

Once the student has completed the individual portion of the quiz, following the same instructions as stated above, they turn it in to the Professor, one of the TAs (if they happen to be there), or the Professor's assistant. After the student turns in the quiz, the score is calculated by averaging the individual score and the team score—this score will count as both the team and individual score for this individual for that specific quiz.

For example, say Student A receives an 8/10 on the individual portion of the quiz in the Professor's office. But, the team scores a 10/10 on the team quiz on quiz day. These scores are averaged to become a 9/10 for both scores in the student's specific grading column.

V. Appeals Process

Every quiz provides the opportunity for teams to appeal a question on the quiz. The instructions for a proper appeal are on the front of every quiz, and they are as follows:

Appeals:	As a team, you may appeal the answer to a quiz question. You may appeal <u>only</u> if the team got the answer wrong. Appeals must be in writing and submitted by the end of the quiz time period. If a team appeals and is successful, only that team and any individuals of that team will receive full points for the accepted alternative answer. In the appeal, you must identify the answer your team chose, and <i>why</i> that answer is the best answer. If an individual gets the answer correct, and the team appeals, the individual still gets full points. Appeal results will be announced next class.
-----------------	---

As one can read, the opportunity for the appeal can only happen if the group gets the answer wrong on their first/second/third try at an answer. There cannot be an individual that appeals a question on their specific quiz, nor can there be an appeal by a team that gets the question correct on their first attempt.

Additionally, appeals must be written either on the back of the quiz or on a separate sheet of paper within the time limit of the team quiz. Once the appeals are received by the Professor and the TAs, they are to evaluate the appeals on their merit. This is generally done through panel discussion by all the parties involved with the course, but the Professor has the final say on any decision. Once the verdict is rendered, the Professor should email the team members and tell them the panel's decision along with a brief reasoning.

Lastly, if an appeal is granted, the team that was granted the appeal is now allotted the full amount of the points to their total score. For example, if Team 1 receives a 9/10, but is granted their appeal of the question they got wrong their new score is a 10/10. This score will then be reflected on the team quiz score spreadsheet mentioned in Section IV.

VI. Peer Evaluations

The last step in the course, which will be done in conjunction with course evaluations, is peer evaluations. Peer evaluations are a great tool for the Professor to not only gain an understanding of what the students learned from TBL, but also provides a space for the Professor to evaluate the students on class participation within the teams. An example of the form is attached as Exhibit B.

The form starts with asking the students to put their name and their team number on the top of the sheet to better sort the information. Next is a quick text (shown below) instructing the students on what this sheet is for.

Peer Evaluation

This peer evaluation is to help assess how your teammates performed during quizzes and other team projects. Please assign each team member the score you believe represented their contribution this semester and provide a brief comment explanation. Do not fill out an evaluation for yourself. Consider such things as:

Preparation: Were they prepared when they came to class?

Contribution: Did they contribute to the team discussion and work?

Facilitation: Did they help others contribute?

Flexibility: Did they listen when disagreements occurred?

1 – Generally unprepared and not so helpful during team conversations

2 – Generally prepared and is helpful during team conversations for the most part

3 – Exceptionally well-prepared and a great team member who listens and facilitates the team's discussions

As one can notice, this direction piece provides all the information needed to complete the form. Students should be informed that a "2" is a general middle ground allowing for over-achieving team members to receive a "3" while under-achieving team members should receive a "1".

The final piece of the evaluation form is at the bottom of the sheet where the students provide two things that they have taken away from working in teams during the semester. This, again, is a tool that allows the Professor to better evaluate the quiz taking process and TBL, but also allows for the Professor to grade class participation more effectively.

Once evaluations are completed, it is the duty of the TA to put the evaluations into their respective groups and help with the comments to whatever degree the Professor requires.

VII. Duties of Others

This section is intended to serve as a final place for other people to have their pieces of information that the TA may not know about that should serve as a reminder for the parties involved in the course.

A. The Professor

The Professor has the following responsibilities:

- Writing and final approval of all quizzes, i.e., questions, formatting, etc.
- Administration of all quizzes in class with TA's
- Final decision making on quiz appeals

B. The Professor's Assistant

The Professor's assistant will be responsible for facilitating much of the quiz process which is not explained in detail here. First, they are usually responsible for running all class copies, including the quiz; however, on some occasions this may fall to TAs. Most important in relation to quizzes, the assistant will need to request the scantrons, through the University's Testing Scoring, Analysis & Recording System (also referred to as TSAR). This is done via Form 1 which is attached as Exhibit C. This needs to be filled out completely and correctly, again see attached example, (Date, Faculty Name, Email, Additional Authorized person(s), Exam Number (1-7), Testing Date, Course Subject, Course Number, Section Number, Number of Answer Key Sheets Requested (usually only 1), Additional Blank Key Sheets Requested (usually 3), Essay Point Question? (No), Printed with MUID and Name)). This request can be done via email by sending Form 1 to TSAR@marquette.edu. When the scantrons have been run, a response will be sent from TSAR regarding scantrons are ready to be picked up at the Help Desk. The Help Desk is located in Cudahy Hall, on the 2nd floor. You have the option to have them delivered to the Law School, but should **never** choose this option because campus mail is unreliable and they have the potential of arriving late or being lost. It is always best to pick up. Once the scantrons have been picked up, remove the answer key for use later and handover the scantrons, including blank extras to The Professor or TAs for the next step (which includes attaching scantrons and quizzes together for sorting and passing out).

After the quiz has been taken by all students (if anyone has missed class, assistant should hold off on submitting the quiz for grading until everyone has taken it) the quiz will need to be submitted for grading with Form 2 (which is included here as Exhibit D) again to TSAR at the Help Desk in Cudahy Hall. Once the exams have been scored, TSAR will again email to inform you they are ready to be picked up. That email will include a sharepoint link with various reports. The most important reports will be the Excel sheet containing scores which is where final quiz grades will be pulled from for the final grade and the SummaryStatistics, which is

exactly that, a summary of the class's grades on that particular quiz so that the Professor may report to the students what the statistics show, such as median grade.

At the end of the semester, all of the quizzes and final exam should be stored together if anyone should want to review them after their grades have been posted. These must be retained for one year.

Alternative Dispute Resolution
Syllabus Quiz
Fall 2018

Name: _____

Team Number: _____

INDIVIDUAL QUIZ DIRECTIONS

- I. You will have 15 minutes to complete this quiz. This is a closed-book quiz.
- II. Before you begin, please make sure you have put your name and team number on the test. Your name should already be preprinted on the individual answer sheet.
- III. Fill in the **BEST** possible answer on the individual answer sheet for each of the following questions. If additional information is added, it is only for the purpose of answering that question unless expressly stated otherwise. It is recommended that you copy your answers onto this quiz packet for the team quiz discussion.
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 - d. 0 points if the answer is correct the fourth time
- III. Once you have completed the team quiz please return this quiz packet and the team answer sheet to a TA at the front of the room. If quizzes or quiz pages are missing, the entire team earns 0 points—both individually and as a team.

Appeals: As a team, you may appeal the answer to a quiz question. You may appeal only if the team got the answer wrong. Appeals must be in writing and submitted by the end of the quiz time period. If a team appeals and is successful, only that team and any individuals of that team will receive full points for the accepted alternative answer. In the appeal, you must identify the answer your team chose, and *why* that answer is the best answer. If an individual gets the answer correct, and the team appeals, the individual still gets full points. Appeal results will be announced next class.

1. The acronym TBL stands for what education philosophy you will be using this semester?
 - a. Team Based Linguistics
 - b. Team Based Learning
 - c. Turn Based Learning
 - d. None of the above
2. True or False: Laptops are allowed in class.
 - a. True
 - b. False
3. What is the team-based v. individual percentage divided for your grade?²
 - a. 40% team & 60% individual
 - b. 45% team & 55% individual
 - c. 55% team & 45% individual
 - d. 60% team & 40% individual
4. How many quizzes will there be for this course?
 - a. 7
 - b. 6
 - c. 3
 - d. 8
5. What is my amazing, most awesome assistant's name?³
 - a. Terry
 - b. Carrie
 - c. Larry
 - d. Courtney

² Note: This will likely be different for each year.

³ Note: Unfortunately, may also be different from year to year.

Name: _____

Team Number: _____

Peer Evaluation

This peer evaluation is to help assess how your teammates performed during quizzes and other team projects. Please assign each team member the score you believe represented their contribution this semester and provide a brief comment explanation. Do not fill out an evaluation for yourself. Consider such things as:

Preparation: Were they prepared when they came to class?

Contribution: Did they contribute to the team discussion and work?

Gatekeeping: Did they help others contribute?

Flexibility: Did they listen when disagreements occurred?

1 – Generally unprepared and not so helpful during team conversations

2 – Generally prepared and is helpful during team conversations for the most part

3 – Exceptionally well-prepared and a great team member who listens and facilitates the team's discussions

Team Member Name: _____ **1** **2** **3**

Comments: _____

Team Member Name: _____ **1** **2** **3**

Comments: _____

Team Member Name: _____ **1** **2** **3**

Comments: _____

Team Member Name: _____ **1** **2** **3**

Comments: _____

Team Member Name: _____ **1** **2** **3**

Comments: _____

Two things you will take away from working in teams this semester:



INFORMATION TECHNOLOGY SERVICES

MARQUETTE OPTICAL SCANNING & SCORING FORM 1: PRINTED EXAM SHEETS REQUEST FORM Two Business Days Turnaround

IMPORTANT: To assure prompt processing, this form must be filled out completely.
Scanning is processed Monday through Friday between 8 a.m. and 3:30 p.m.
Scanning requests will be completed within two business days from time of submission.
Please bring your MUID for pickup.

Date:	August 23, 2018		
Faculty Name (please print):	Andrea Kupfer Schneider		
Department:	Law School	Telephone:	4142885373
Faculty Email Address:	andrea.schneider@marquette.edu		
Faculty Signature:			
Additional person(s) authorized to pick up forms:		Carrie Kratochvil	
Additional person(s) authorized to access Sharepoint site:		Carrie Kratochvil	

MORE THAN ONE SECTION?

If you want multiple sections graded together, list all section numbers together on a single form.
If you have multiple sections that will be graded separately, fill out additional forms.

Exam Number (single value):	1	Testing Date:	August 30, 2018
Course Subject (ex. ENGL):	LAW		
Course Catalog Number (ex. 1001):	7105		
Course Section Number (ex. 101):	101		
Number of Answer Key Sheets Requested (max 9):		1	
Additional Blank Answer Sheets Requested:		5	
Essay Point Questions? (Yes/No)	No	If yes, total possible essay points, e.g. 123.5:	
For classes with less than 50 students, Student Answer sheets are preprinted with MUID and Name.			
Are there more than 50 students in your class? (Yes/No)		Yes	
For classes with more than 50 students only: Student Answer sheets preprinted (with/without) MUID and Name		With MUID and Name	



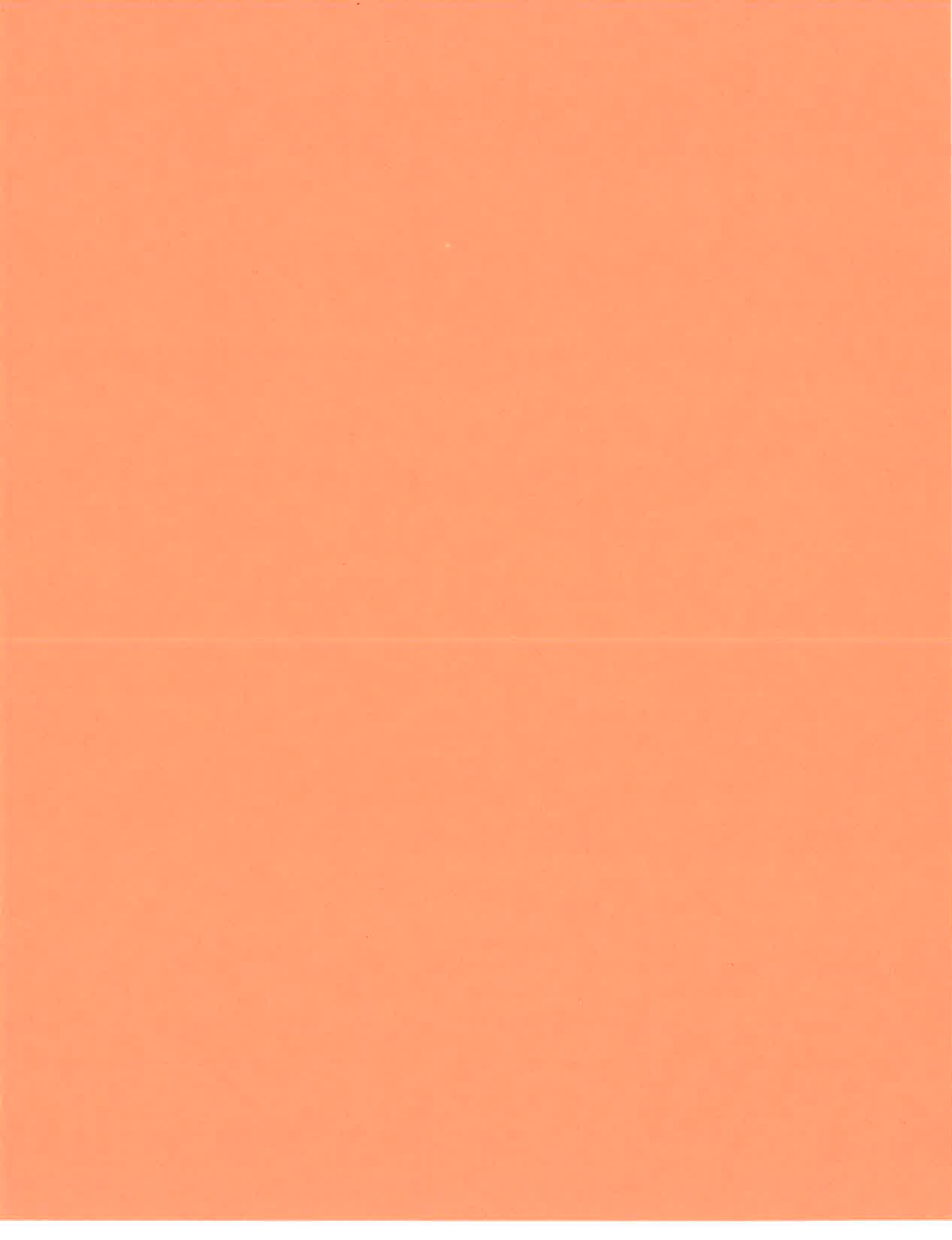
INFORMATION TECHNOLOGY SERVICES

MARQUETTE OPTICAL SCANNING & SCORING FORM 2: SCAN AND SCORE EXAMS REQUEST FORM One Business Day Turnaround

IMPORTANT: To assure prompt processing, this form must be filled out completely.
Scanning is processed Monday through Friday between 8 a.m. and 3:30 p.m.
Scanning requests will be completed within one business day from time of submission.
Please bring your MUID for pickup.

Date:	11-28-18		
Faculty Name (please print):	Andrea Schneider		
Department:	Law	Telephone:	4142885373
Faculty Email Address:	andrea.schneider@marquette.edu		
Additional person(s) authorized to pick up forms:		Carrie Kratochvil	
Additional person(s) authorized to access Sharepoint site:		Carrie Kratochvil	
Exam Number (single value):		7	
Course Subject (ex. ENGL):		LAW	
Course Catalog Number (ex. 1001):		7105	
Course Section Number (ex. 101):		101	
Number of Answer Key Sheets Submitted (max 9):		1	
How many items on test:	9	Points per item on test, e.g. 1.25:	10
Essay Point Questions? (Yes/No)	No	If yes, total possible essay points, e.g. 123.5:	
Return Forms via campus mail? (Yes/No)	No	If Yes, specify location:	
Please note we are unable to guarantee turnaround time when sent via campus mail.			
Special Instructions:			





Mackie and Remington v. Caleb Corporation – General Factsⁱ

Background:

After a mediation where the parties signed a settlement agreement in the form of a term sheet in which the individual plaintiffs agreed to accept stock in Caleb Corporation as part of the settlement, the deal fell apart during negotiation of the final settlement documents. The two plaintiffs, Mackie and Remington, allege that Caleb Corporation fraudulently misrepresented the value of stock in the company during the mediation in violation of the securities laws, and therefore the settlement agreement is unenforceable.

The case is pending in federal court and by stipulation is governed by the Uniform Mediation Act as adopted in Illinois.

It is also important to know that the parties signed a Confidentiality Agreement prior to the mediation which stated:

...All statements made during the course of this mediation or in a mediator follow-up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions... and are nondiscoverable and inadmissible for any purpose including in any legal proceeding... No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding.

Get in groups of three and divide the roles of plaintiffs' attorney, Caleb Corporation's attorney and the judge.

Caleb Corporation has filed a motion to enforce the settlement agreement. Take 5-10 min. put together an argument for and against Caleb Corporation's motion to enforce the settlement agreement. (The judge should use this time becoming familiar with the UMA.)

The judge should give each side 5 min to make an argument. Caleb Corporation argues first because it is Caleb Corporation's motion.

Judges *write down* rulings: motion granted or denied

ⁱ Simulation by Teresa F. Frisbie, Loyola University Chicago School of Law tfrisbie@luc.edu

Exercise (30 min): Confidentiality in Mediation (based on Facebook opinion)

Teresa Frisbie, Loyola University Chicago School of Law
tfrisbie@luc.edu

Learning Objectives:

- Explore the sources of confidentiality in mediation
- Gain familiarity with the Uniform Mediation Act
- Understand how to help a client keep mediation communications confidential

Instructions:

- Divide students into groups of three or have them divide themselves by birthday (first bday of year is judge, next bday is R&M and last bday is Caleb)
- Hand out sim without telling them based on Facebook litigation ("**Mackie and Remington v. Caleb Corporation**" simulation) The sim contains the confidentiality agreement language from the case.
- Explain that the plaintiffs are claiming that defendant misrepresented the value of stock to the two plaintiffs during a mediation allegedly in violation of securities laws – accepting stock to settle the case. (Clarify it is a civil case.)
- Give them a copy of relevant portion of the Uniform Mediation Act for your state.
- Instruct them to take 5 - 10 min. to put together argument for or against the corporation's motion to enforce the settlement agreement based upon the UMA and the Confidentiality Agreement. (The judge should use this time becoming familiar with the UMA.)
- The judge should give each side 5 min to make an argument. Defendant Caleb goes first as it is Caleb's motion. Judges *write down* your rulings.

Debrief: Describe FB case result. 640 F 3d 1034. (Explain much more litigation has ensued but this case illustrates many helpful issues related to confidentiality.)

(Court upheld the settlement agreement because of the settlement agreement language. Plaintiffs were sophisticated parties -- 6 lawyers plus Dad. Court excluded evidence of what said during the mediation based on ADR local rule on confidential information. Ninth Circuit said not subject to this because used a private mediator. Nevertheless, right to keep out evidence of what said because of the language of the confidentiality agreement.)

Ask class: If somebody wants some information from a mediation, how does one determine if confidential or privileged? What are some sources of law you need to consider?

- Contract law
- Court rules
- Administrative agency rules
- Orders
- Statutory privileges
- Statutes regarding confidentiality
- Duties to disclose and duties to maintain public access
- Rules of procedure re: discovery
- Rules of evidence
- Common law doctrines on public access and limits on enforceability of secrecy agreements

Clarify Facebook opinion based on different law – applying CA law, no UMA, using local dist ct rule...

What should result be in your state with this Confidentiality Agreement? UMA silent on confidentiality as to third parties, but addresses privilege (agreement would govern)

What if no agreement, just UMA?

This exercise is also a good opportunity to talk about the practicalities of arguing motions, how to write up a court order in the local state court, etc. While it is unlikely that a court would hold five-minute arguments and decide such a motion without briefs, this is a fun classroom exercise.

TOURO LAW CENTER

Paperclip Negotiation Instructions and Log¹

Fall, 2016-Revised

Professor Hal Abramson

habramson@tourolaw.edu

The goal of this exercise is for you to negotiate a series of five or more trades starting with a paperclip and ending with something more valuable. For example, you may be able to trade your paperclip for a pencil, the pencil for a pen, the pen for a book, the book for a CD, the CD for a DVD, the DVD for a rocking chair, and so forth.

The exercise is based upon Kyle MacDonald's One Red Paperclip Project, and his book called "One Red Paperclip." MacDonald bartered his way up from a red paperclip to a house in 14 trades within one year.

On the day of the de-briefing of this exercise, bring to class the last item that you acquired or a picture of it, if it is too big. The class will vote on the most valuable object. During class, we will discuss the negotiation strategies that led to obtaining the most valuable objects, as well as the strategies that did not generate value.

RULES

1. Conduct at least **FIVE** trades. Your receipt of the paperclip with these instructions does not count toward the five trades.
2. Do not trade with relatives, your significant other, anyone under 18 years old, or a classmates in this class.
3. For at least **three** trades, do **not** disclose that you are doing these trades as a class exercise.
4. For at least **two** trades, you must trade with an acquaintance or stranger.
5. For at least **one** of the two trades with an acquaintance or stranger, you should **not** disclose the exercise.
6. You **cannot receive** any **monetary** payments for a trade (cannot receive cash, checks, etc). **No** trades can include doing **something later** (no IOUs or agreements to perform services later.)
7. Complete the Trade Log after each trade; write the Conclusion when you are done.

¹ These instructions and log are based on an exercise designed by the Dispute Resolution Research Center, Kellogg School of Management, Northwestern University (drrc@kellogg.northwestern.edu). They were modified and tailored to elicit the lessons in a law school negotiation course taught by Professor Hal Abramson, habramson@tourolaw.edu.

INSTRUCTION for REPORT

Put your EXAM NUMBER on your submission, not your name.

Your **GRADE** will be based on:

A. Trade Log (20 Points):

Your analysis of the log questions-Negotiation Analysis (10 points); What Worked (5 points); and What Hurt (5 Points).

B. Conclusion (30 points): Your answers to the questions under Conclusion.

WORD LIMITATIONS

Record word counts at beginning of each Log section and beginning of Conclusion.

Any words that exceed the word count will not be read or considered when grading your answer.

For each log trade section: **Maximum** of 300 words.

For the Conclusion: **Maximum** of 1000 words

Warning: If your answer sounds like something that could have been written before taking the course, you are probably not applying the insights learned in the course.

A. Trade Log

Keep track of your trades using the Negotiation Log and carefully record and analyze each negotiation in the comments section of the Log. You should **record in the Log after each trade** rather than waiting until the end of all of the trades.

After your Log entries and analyses, you also are asked to prepare a Conclusion by answering each of the specific questions at the end of the Log. See B.

ANALYSIS. Your LOG entries should focus on analysis, NOT on describing the negotiations. You should track the topic headings in the Negotiation Modules and Questions handout, which summarizes key lessons in the course.

Your analysis should use the terms (negotiation vocabulary) learned in the course. When using a term, you should explain the term so that it is clear that you are using the term correctly. For example, when you label your move as a good practice, tactic, or trick, be sure to explain how the move was a good practice, tactic or trick.

Illustrations of dos and don'ts when analyzing.

For example, do not simply say "Sheila traded me something for the paper clip because we are very good friends." You should analyze why she did based on what you learned in class. Any analysis would consider rapport building and interests of both you and the other person.

For example, do not simply say “After I shared information about the exercise and class assignment, she was willing to make the trade.” You should analyze WHY that information induced her to trade.

For example, do not simply say “I had a weak BATNA so I accepted the offer.” Instead you should explain why you think you had a weak BATNA and how that insight caused you to try to improve your BATNA or lead you to believe you had no choice but to accept the trade. You might say: “Because I had a weak BATNA due to no apparent alternative to trading the paperclip for a pen, I tried to improve my BATNA by exploring other alternatives to the pen offer before accepting the pen offer.”

Note: If the other person offers you something without expecting anything in return, you should analyze why the person did this, using negotiation concepts and lessons from this course.

B. Conclusion

In addition to filling-in the Trade Log, write a Conclusion by answering the questions at the end of the Log.

Item Received (include approx. monetary value)	Date of Trade	First Name of Person You Traded With	Your Relationship to the Person You Traded With [Indicate whether friend, acquaintance, or stranger AND whether disclosed exercise]
0. Highlighter (< \$1)	1/28/xx	Hilary	Roommate-friend/disclosed exercise
<p>[278 words] Negotiation Analysis of the Trade (Example)</p> <p>I wanted to make a big jump from the paperclip to something of much greater value. However, I could not justify my trade due to the large objective difference in values. Because I didn't disclose the exercise, Hilary seemed perplexed by my proposals. She refused to trade her book for my paperclip, and my aspiration goal was too high to trade my paperclip for the pencil she offered. We reached a data impasse over the value of each trade.</p> <p>A week later, I was more desperate to trade. My BATNA was extremely weak with time running out and no promising alternative to this negotiation. I went back to Hilary with an offer: I asked if she would trade two of the yellow highlighters for my paperclip. I also explained that these trades are for a class assignment and then showed her my paperclip, noting that it was nicer and more colorful than most. Hilary laughed because I still had my paperclip, and counter-offered with one highlighter. This time I took it. I had no better option after trying to create one with another person.</p> <p>What Worked: We had a good rapport as roommates. I tried to show her how this paperclip might meet her interest in receiving a distinctive paperclip without giving up something of great value to her. She also had an interest in helping a friend with a class assignment. I made an offer for two highlighters, which left space for her counteroffer of one.</p> <p>What Hurt: I had a weak BATNA with no alternative to this negotiation, and Hilary knew this. Ultimately, she had little interest in the paperclip. I should have shared the information about the exercise earlier.</p>			
1.			
<p>Negotiation Analysis of the Trade</p>			

<p><i>What Worked and Why:</i> <i>What Hurt and Why:</i></p>			
2.			
<p>Negotiation Analysis of the Trade</p> <p><i>What Worked and Why:</i> <i>What Hurt and Why:</i></p>			
3.			
<p>Negotiation Analysis of the Trade</p> <p><i>What Worked and Why:</i> <i>What Hurt and Why:</i></p>			
4.			
<p>Negotiation Analysis of the Trade</p> <p><i>What Worked and Why:</i> <i>What Hurt and Why:</i></p>			
Item	Date of Trade	First Name of Person You Traded With	Your Relationship to the Person You Traded With [Indicate whether friend, acquaintance, or stranger AND whether disclosed exercise]
5.			
<p>Negotiation Analysis of the Trade</p> <p><i>What Worked and Why:</i> <i>What Hurt and Why:</i></p>			
<p><i>If you make more than 5 trades, complete additional entries below.</i></p>			
6.			
<p>Negotiation Analysis of the Trade</p>			

<i>What Worked and Why:</i> <i>What Hurt and Why:</i>			
7.			
Negotiation Analysis of the Trade			
<i>What Worked and Why:</i> <i>What Hurt and Why:</i>			
8.			
Negotiation Analysis of the Trade			
<i>What Worked and Why:</i> <i>What Hurt and Why:</i>			

Conclusion (Maximum 1000 words) (30 points): When you have completed your negotiations and trades, write a two-three page summary of what you learned across the entire series of negotiations. **When preparing your Conclusion, answer these questions using the negotiation terms learned in class and be careful to use the terms correctly.** In your Conclusion, number each answer 1-5.

Note the word count at the beginning of your Conclusion. Any words that exceed the word count will not be read or considered when grading your answer.

1. (5 points) How did the understanding of the interests of the other party aid in moving negotiations forward? Please be sure to include one or more illustrations from your trades.
2. (5 points) How did the use of objective standards help you move the negotiations forward? Please be sure to include one or more illustrations from your trades.
3. (5 points) How did your understanding of trades based on you gaining an item that is worth more to you than the other party (trading based on valuing the same item differently) aid in moving negotiations forward? Please be sure to include one or more illustrations from your trades.
4. (5 points) How did your BATNA affect the outcome across your negotiations? Please be sure to include one or more illustrations from your trades.

You will recall that your BATNA (Best Alternative to a Negotiated Agreement) is what happens if you do NOT complete your trade. Your BATNA affects your bargaining power. Your power is based on whether you have a better alternative than the trade under consideration.

Your BATNA is NOT the value of your item. The value of your item is relevant only when figuring out your BATNA. For example, if the item you have is worth \$50, you should trade for something that is worth more than \$50 on the assumption that you can get something worth \$50 by turning to your BATNA and making an even trade.

Your BATNA focuses on whether you can get a better deal elsewhere. If you cannot, you have a weak BATNA and have little bargaining power. If you can do better elsewhere, you have some leverage to ask for more from the person you are negotiating with because if you cannot get it, you can resort to your BATNA (Best Alternative to a Negotiated Agreement).

5. (10 points) Based on this negotiation experience, which techniques were the most effective ones to use and that you are likely to use in future negotiations? Please be sure to include two to three illustrations from your trades.

BE PREPARED TO DEBRIEF YOUR NEGOTIATION EXPERIENCES IN CLASS

CLASS PREPARATION NEGOTIATION

Negotiation requires substantial preparation. Accordingly, your performance in, and your experience of, the class and the negotiation role-play simulations we do in and out of class will be significantly enhanced if both you and your negotiation counterpart are well prepared.

Even though negotiations benefit from significant preparation by both sides, we typically cannot control how well our counterparts prepare for a negotiation. But, as this is a course on negotiation, you will have the opportunity to influence your classmates' (and your own) degree of preparation by negotiating both the *degree* to which class preparation will affect the course grade, and also the *metrics* for assessing that preparation.

Specifically—as a class—you will negotiate answers to the following questions:

1. **What percentage of the final grade will class preparation represent?** (The options are 5%, 10%, or 20%.)
2. **If class preparation does count toward the final grade, how will preparation be assessed?**

APPENDIX G

- a. Who will evaluate preparation (the professor, your peers, or a combination)?
- b. What constitutes “preparation”? (E.g., reading course readings, individual and/or group preparation for negotiations, etc.)
- c. What objective evidence of preparation, if any, must be submitted? (E.g., preparation worksheets, peer evaluation of counterpart’s preparation, written commentary on readings, etc.)
 - i. Who must submit this objective evidence (the negotiator or the counterpart)?
 - ii. By when must it be submitted?
 - iii. How must it be submitted? (E.g., upload to Moodle, bring hard copy to class, etc.)
 - iv. What penalties, if any, will there be for late submissions or failure to submit?
- d. What scale will be used to grade preparation and/or objective evidence of preparation? E.g.:
 - i. “Excellent”/“Satisfactory”/“Unsatisfactory”
 - ii. Letter grade (A – F)
 - iii. Numerical scale (1 – 6, 1 – 100, etc.).

The following ground rules for this negotiation will apply:

1. You may negotiate an agreement using any means of communication you wish (in-person negotiation, phone, text, email, etc.).
2. You must select one class representative, who will deliver to me your negotiated proposal.
3. Your negotiated proposal must be reduced to writing and must be signed by at least 85% of the students registered in the class (physical signature or pdf of physical signature).
4. Your negotiated proposal must be delivered to me in hard copy or emailed to me no later than 10 a.m. on Thursday, February 7.
5. If you cannot reach a negotiated proposal acceptable to at least 85% of the students registered in the class by 10 a.m. on February 7, class preparation will count toward 5%

of the final grade (i.e., Option 1 under “Grades,” below), and I will choose the method(s) of evaluation.

6. I will deliver a written response to your negotiated proposal to the class representative no later than 10 a.m. on Monday, February 11. I may (a) accept your proposal, (b) reject your proposal, or (c) accept your proposal with modifications.
7. If I (a) accept your negotiated proposal with modifications or (b) reject your proposal, we will negotiate the terms of a revised proposal via a mutually acceptable process.
8. Any final agreement must be in writing and must be signed by me and at least 85% of the students registered in the class (in each case, by physical signature or pdf of physical signature) no later than 10 a.m. on Monday, February 18.
9. Any written agreement signed by me and at least 85% of the students registered in the class by 10 a.m. on Monday, February 18 will be incorporated into this Syllabus and will be binding upon all parties as part of this Syllabus. Any such written and signed agreement will be posted on our Moodle course page a reasonable time after it is signed by the relevant parties.
10. If we fail to reach an agreement signed by me and at least 85% of the students registered in the class by 10 a.m. on Monday, February 18, class preparation will count toward 5% of the final grade (i.e., Option 1 under “Grades,” below), and I will choose the method(s) of evaluation.

Class preparation will account for 5%, 10%, or 20% of your final grade, depending upon the outcome of the class preparation negotiation. See “Grades,” below.

The Five Minute First Aid kit



Grab a box!

Decorate It!

Make it your own. Express yourself! Feel free to get out of the box and glue something to the outside! Let your creativity flow! Creativity can reduce stress!

<http://reset.me/study/study-creativity-can-reduce-stress-and-become-a-habit/>





Fill it with items to interrupt the fight or flight reaction. (These are suggestions. Add your own ideas!)

- Photos: Favorite places, family, friends, vacations, inspiring people. (Postcards can be used in exercise)
- Memorabilia
- Favorite quotations or poems
- Affirmations
- Word magnets
- Small toys – stress balls, silly things
- Stones
- Charms
- Essential oils
- Fabric patterns
- Chocolate
- Pain Reliever
- Calming tea
- Crayons, markers, a small notepad
- Flash drive of favorite music, meditations, photos, videos
- Card deck

Put the box in a safe place but where it is handy.

When you've had a bad day in court, a client has yelled at you, or you've yelled at someone, recognize it is time to take a break. Five minutes with your box will clear your mind, shift your attitude, and help you be more productive for the rest of the day.



Recommended sources of supplies:

Boxes: \$1.27 each

<https://www.consumercrafts.com/store/details/catalog/kids-craft-basics-supplies/2406-91>

Or: \$3.79 for 3

<http://www.michaels.com/artminds-paper-mache-square-box-set/10367441.html>

Essential oils: \$1.00 each.

<https://www.essentialoil.com/collections/samples>

Popular Toys:

<https://www.amazon.com/gp/product/B078S42XGD> -cutest ever

<https://www.amazon.com/gp/product/B01KSXYR8E> - stress balls

<https://www.amazon.com/gp/product/B003WSTKDU/> - worry dolls

<https://www.amazon.com/gp/product/B005EG4VO6> - bubbles

Engage the Senses

Your box can have positive triggers or reminders to engage all your senses. In your Five-Minute Break, try these:

Sight

Doodle, sketch, illustrate your ideas. Pictures are easier for the brain to process and remember.

Sound

Music can entertain, shift our mood, relieve stress, heal, promote cognitive development, make us better at recognizing emotion in sound. Listening to music activates various parts of the brain related to planning, expectation, language, motivation, pleasure. Perhaps a flash drive with your favorite music or a guided meditation.

Smell

The sense of smell is the only one of the five senses directly linked to the limbic system – the center of emotions in the brain. (Lavender oil is especially calming.)

Touch

Redirecting attention to parts of the body with gentle touch helps alleviate pain and stress by changing the brain's cortical body maps. This is the same portion of the brain responsible for the “phantom limb” phenomenon.

(Maybe put a business card for a spa or massage therapist in your box to remind you to schedule an appointment!)

Kinesthetic

Let your body guide you when you need to make a decision. If you experience muscle tension, a “pit” in your stomach, or a sudden headache, perhaps, your body is telling you that you are moving in the wrong direction.

Take a deep breath and imagine what else you can do.