

Exam questions on formation and avoidance of contract

Question 1 (1.5 hours)

Dr. Byer is a dentist. Her dental offices are located in one wing of a house in which she and her family reside. On nights and weekends Dr. Byer and her family use the dental office waiting room as their family room (watching television, playing games, reading, conversation).

Dr. Byer wanted a new couch for the waiting room/family room. She noticed the following newspaper advertisement for a forthcoming sale at Interior Design: "Weekend sale. 25% off selected floor items." Because of the advertisement, she visited Interior Design and was greeted there by Seline, a salesperson at the store.

Dr. Byer found a style of couch ("Occidental") that she liked for the waiting room/family room. A large tag attached to the couch read: "Regular price \$1,600. Sale price \$1,200." When it sells the Occidental for \$1,600, Interior Design makes a \$600 profit.

While she liked the style of the Occidental, Dr. Byer didn't care for the fabric on the floor model. On a nearby fabric display stand she found two fabrics in which the couch could be upholstered by special order, but she wanted to take the two fabric samples with her to see how they would look in the waiting room/family room. She said to Seline: "I'm going on a two week vacation. Would it be possible for me to reserve the couch now, take the fabric samples for a few weeks, choose a fabric, and order the couch at the sale price when I come back?" Seline said: "We could do that if you want. Let's go to the main desk."

The two of them then walked to the store's main desk. In a binder entitled "Fabric checkout", kept at the main desk, Seline wrote the name and number of the two fabric samples and Dr. Byer's name, address, and telephone number. Dr. Byer signed her name next to this information. Without any further relevant conversation about the couch, Dr. Byer left with the two fabric samples.

The next morning, in a journal that Seline kept in her own personal desk at Interior Design, Seline wrote Dr. Byer's name, address, and telephone number accompanied by the notation "Occidental, 25% off, special order when customer chooses fabric." Next to that language she drew a smiling face (☺), something that she frequently used when leaving notes for her fellow salespersons who called her "smiley."

A month later Dr. Byer returned to Interior Design and walked up to Seline, who didn't immediately recognize Dr. Byer. Dr. Byer reintroduced herself and said: "I'm sorry for taking longer than I expected, but I finally chose one of these two fabrics." Seline then said: "Good, but if you want to order the couch I'm

afraid that it is going to be \$1,600. I forgot that the sale price didn't apply to special order items. But we still have the couch on the floor and even though the sale is over I can still sell that one to you at the sale price." Dr. Byer responded: "I'm sorry that you forgot, but I expect to get the couch for \$1,200 with the fabric that I've chosen. I passed up a similar couch for \$1,300 at another store because I was going to get a couch here."

Seline refused. Dr. Byer left. She found the identical couch elsewhere, with the fabric she liked, and bought it for \$1,500. She sued Interior Design in small claims court for breach of contract. Who should prevail and why?

Question 2 (1.5 hours)

Rivaldo is a well-known painter. His paintings typically sell for \$50,000 - \$75,000 each, and limited edition prints of each painting typically sell for \$1,000 each. His granddaughter Sissi is a teenager who just started her freshman year at Netting College Preparatory ("Netting"), a local all-girls private high school.

Much earlier in the year, before Netting had accepted Sissi's application for admission, Pele, Netting's Director of Development, phoned Rivaldo. Pele made the call because he knew that Rivaldo was the grandfather of a student who was applying for admission to Netting, and because he also knew that Rivaldo previously had made charitable contributions from the proceeds of the sale of his prints.

After initial introductions and pleasantries, the following conversation ensued:

Pele: "Netting is in the initial stages of a fund-raising campaign to raise funds to build a new building for the high school's fine arts program. The building will include a painting and sculpture studio and a performance hall. Because your granddaughter has applied for admission here, we thought that you might be willing to donate the proceeds from the sale of prints of your next painting to the campaign. You can see the plan for the building on our web site if you are interested."

Rivaldo: "Well, if I know that Sissi will get into Netting, I'd be happy to do that with prints from my next painting."

Pele: "That would be terrific. What is the range of proceeds that we might expect?"

Rivaldo: "In the last few years I've never gotten less than \$250,000."

Pele: "When do you anticipate completing your next painting?"

Rivaldo: "I'm working on a painting now titled *Fifa*. I should finish it in about a month. Prints usually start selling about six months later. When will Sissi hear about her application?"

Pele: "Normally she wouldn't hear for a couple of months. But I'll see to it that we process her application quickly and let her know in about 3-4 weeks."

Just prior to the conversation between Pele and Rivaldo, Netting's Board of Trustees decided to reduce the size of the building project, eliminating the painting and sculpture studio and building only a performance hall. The revised plans were posted on the web site at the time of Pele's conversation with Rivaldo, but Pele didn't find out about the revision until a few days after his conversation with Rivaldo. When Pele found out about the revised plans, he didn't remember that he had told Rivaldo that the building would include a painting and sculpture studio and thus he didn't call Rivaldo again to inform Rivaldo of the change.

Rivaldo never looked at the Netting web site.

Shortly thereafter, Netting arranged a \$5,000,000 construction loan with a local bank to fund construction of the new building. The terms of the loan required Netting to repay the entire amount of the loan, plus interest, no later than three months following the completion of construction. Based on pledges to the fund-raising campaign that Netting had obtained at the time that it received the construction loan, Netting expected to repay approximately 50% of the construction loan with money collected on those pledges. In making that calculation, Netting expected \$200,000 from Rivaldo. Netting intended to repay the balance of the construction loan with proceeds of a new long-term loan from another bank. [Just for information: repayment of part or all of a short-term construction loan with the proceeds of a long-term loan is typical for construction projects. The long-term loan is frequently referred to as a "take-out" loan.]

Rivaldo completed *Fifa* and gave the first \$100,000 from the sale of *Fifa* prints to Netting. Rivaldo then learned that Sissi had decided to transfer to a co-educational school. Thereafter, Rivaldo gave proceeds from the sale of additional *Fifa* prints to another charity and refused to give any more of the proceeds to Netting.

As a consequence of not receiving more money from Rivaldo, Netting had to get a larger take-out loan than it had anticipated. It has sued Rivaldo seeking the additional interest that it will be required to pay under the larger take-out loan (approximately \$150,000 over the 30-year period of the loan). Rivaldo denied liability and cross-complained against Netting seeking return of the \$100,000 he had given to Netting.

Who should prevail on the complaint and on the cross-complaint and why?

Question 3 (1.5 hours)

Shortly following the death of her husband George, Sarah Sterling, a resident of Santa Clara County, decided to sell her house and move closer to her children. She listed her house for sale with a real estate broker who told her that she would be lucky to get \$300,000 for the house.

The broker's prediction seemed to be correct. Sarah received only two offers for the house, both for \$275,000, during the first two months that it was listed for sale. Sarah rejected both offers. Then, on November 15, 2003, the broker received a telephone call from a man who introduced himself as Will Peterson. In the phone call, Peterson offered \$325,000 cash for Sarah's house "if my move to the area is approved, if the seller notifies me within 24 hours, escrow to close in two months." The broker asked Peterson what approval he was waiting for and also asked when Peterson would know about the approval. Peterson replied only that he would know within a week, and he gave the broker the telephone and FAX number of a hotel at which he was staying. The broker did not press Peterson for further information.

Flushed with her seeming good fortune, Sarah decided to sell the house to Peterson, but neither she nor her broker contacted Peterson within 24 hours of his telephone call. Instead, 36 hours after Peterson's call, Sarah signed and FAXED to Peterson a note saying: "Will take the \$325,000 for the house, to close in two months. If your move is approved we can sign a contract."

A few days after sending the FAX, Pat Sterling, Sarah's sister-in-law and next door neighbor, discovered and then told Sarah that Peterson was the infamous Billy Peterson, a former resident of San Francisco County who had just been paroled and released from prison after serving two years for torturing and maiming pets of his former neighbors. William Peterson was his given name, but he often went by the name "Billy" and that is how the media had reported his name when he was arrested, convicted, imprisoned, and paroled. Pat also told Sarah that a few days after Peterson had first called Sarah's broker, the parole board had approved Peterson's request to move to Santa Clara County. That, it turns out, was the approval for which Peterson was waiting.

Pat, concerned about the safety of her own pets, begged Sarah to get out of the deal. Sarah replied with great sympathy, but also told Pat that calling off the deal might cost as much as \$50,000, because the best offer that Sarah had received before Peterson's call was \$275,000. Pat replied: "If that happens, I would want to help you out with some of the money that George left me in his will because that is what George would want."

At Sarah's request, the broker telephoned Peterson. The broker spoke first. He said: "This is difficult for me, but Sarah asked me to call you about the deal." Peterson replied: "What timing! I was just about to call you to tell you that my approval came through and we can go ahead with the deal." The broker replied: "Well, Sarah doesn't want to go through with the deal because she found out about your conviction." Peterson objected, threatened a lawsuit, and hung up.

Sarah sold the house to another buyer for \$275,000. Peterson then sued Sarah for breach of contract. When Pat learned of the lawsuit, she wrote Sarah:

"Sarah - - I'm terribly sorry about the lawsuit. You have been a wonderful friend, sister-in-law, and neighbor. Your latest act of kindness is only one of many throughout the years that we have known each other. That's one of the reasons why George loved you so much. In appreciation, I will pay your legal expenses, up to \$25,000, in the Peterson lawsuit. Love, Pat"

Part A

Identify and evaluate Sarah's legal theories for avoiding liability to Peterson. Do not discuss the Statute of Frauds that is applicable to the sale of an interest in real estate.

Part B

Learning that Sarah had been unfaithful to George before George's death, Pat refused to pay any money to Sarah either to help out Sarah with the money lost on the sale of the house or to help defray Sarah's legal expenses. Identify and evaluate Sarah's legal theories for recovering money from Pat.

Question 4 (1.5 hours)

Lydia Perez decided to remodel part of her pet store by installing windows in one wall. Because she had once worked as an assistant on a house construction project, she knew how to demolish and re-frame the wall to accommodate the new windows. She didn't know how to install windows however.

Prior to starting demolition, Lydia visited Pellum Windows ("Pellum"). She and Pellum's sales representative orally agreed in the store that she would purchase 3 casement windows (windows that open outward from hinges), for \$750 each, and that Pellum would, for an additional \$750, measure the window openings, custom manufacture the windows to fit the window openings, and deliver and install them. The Pellum sales representative scribbled a few notes about the deal on a piece of scratch paper and told Lydia that he would send the paperwork in a day or two because he had to close the store for the evening.

A few days later, Pellum sent Lydia an invoice bearing Pellum's name and signed by an authorized Pellum representative that stated, in full:

“Confirming your order: Custom casement windows, \$3,000 including measurement, delivery, and installation at your store. Delivery within 3 weeks of your notification of completion of framing. Changes effective only if approved in writing by Pellum.”

After demolishing and re-framing the wall, Lydia notified Pellum. When Pellum’s representative arrived to measure the window openings, Lydia told them that she wanted single-hung windows (the bottom half of the window opens and closes by sliding up and down) rather than casement windows. The Pellum representative said that would be no problem and said that he would send Lydia a revised invoice.

Pellum’s representative forgot about Lydia’s requested change of window styles. Pellum therefore failed to send her any revised invoice and showed up at Lydia's store to install the casement windows that they had manufactured. Lydia refused them and told Pellum to come back with single-hung windows.

Pellum has consulted you for legal advice before deciding what to do. They have told you that they would be able to resell the casement windows made for Lydia only if another customer happened to want them in the same non-standard size. Pellum wants to know whether it or Lydia would be liable for breach of contract if Lydia continues to refuse the casement windows and Pellum refuses Lydia's demand for single-hung windows. Advise Pellum.

Question 5 (1.5 hours)

Claire needed to employ a chief financial officer (“CFO”) for her business. She started negotiations with Harrison, a certified public accountant whose resume also listed his master’s degree from the Kamen School of Business. After a few weeks of negotiations, Claire and Kamen had agreed to virtually all of the terms of an employment agreement (e.g. salary, benefits, length of employment, responsibilities of the position). They prepared a written employment agreement reflecting these terms.

The employment agreement also included the following term: “Harrison represents that he has not been the subject of any civil suit alleging fraud or financial mismanagement and that he has not been arrested for or convicted of any crime or been the subject of any criminal investigation.”

Before either of them signed the employment agreement, Claire wrote next to the lines for their two signatures the statement: “Subject to agreement on stock options.” After signing the agreement, Claire and Harrison scheduled a meeting for the following week to discuss whether, as part of the employment agreement,

Claire would give stock options to Harrison if Claire incorporated her business. Immediately after signing, Harrison declined offers of similar employment from two other companies with whom he had been negotiating.

Before the scheduled meeting, Claire reread Harrison's resume. This time she wondered about the Kamen School of Business and checked it out on the Internet. She discovered that the Kamen School of Business was an unaccredited offshore business school, most of whose students had been denied admission to accredited schools in the United States. When she had first read Harrison's resume, she had confused the Kamen School of Business with the Camin School of Business, a well-known, accredited business school in the United States.

After her discovery, Claire called Harrison and told him that she was terminating negotiations and looking elsewhere for a CFO. Harrison sued her for breach of contract. The two of them sat down to settle their dispute. They agreed that he would dismiss the lawsuit and release any claim against her for breach of contract in return for her promise to pay him \$150,000 in 30 days. They signed a written agreement to that effect.

Shortly before the \$150,000 payment was due, Claire discovered that Harrison had been indicted for tax evasion a few days after he had sued her and before the two of them had begun settlement negotiations. She then refused to pay Harrison anything under their settlement agreement.

You are the lawyer who filed the original lawsuit for Harrison and you have not yet dismissed the lawsuit. You discuss with Harrison the possibility of amending the lawsuit to include a cause of action for breach of the settlement agreement. He wants to know what his chances are of prevailing on this new cause of action and also his chances of prevailing on the original breach of contract cause of action. Provide the evaluation that he seeks.

Question 6 (1.25 hours)

Robert Corolla ("Corolla"), a resident of Hawaii, visited San Jose, California in search of work. He met with Barry Bruin ("Barry"), a representative of Bruin Motors ("Bruin"), a new car dealership. Barry was authorized to act on behalf of Bruin. On Monday, April 9, 1996, Barry offered Corolla a nine month contract to work for Bruin as its general sales manager, at a salary of \$10,000/month, beginning immediately. You may assume that Barry made an offer. After Barry made this offer, the following conversation ensued:

Corolla: "I could take the job if you pay for my moving and travel expenses from Hawaii."

Barry: "We couldn't afford to do that."

Corolla: "Well, then, can I have some time to think about it?"

Barry: "Sure, but get back to us by the end of the week. We'll hold the job for you until then."

While flying back to Hawaii, Corolla decided to take the job. He packed his personal belongings, abandoned his furnished apartment (breaching a 6 month lease and leaving himself liable for \$2,000 in rent), and, without having previously contacted Bruin, showed up at Bruin, ready for work, on Friday, April 13, 1996.

As Corolla walked into the dealership, he was greeted by Erica Wynalda ("Wynalda") who introduced herself by saying: "Hi. I'm Erica Wynalda, the new general sales manager. Can I help you with a car?"

Corolla asked to see Barry. When Barry greeted Corolla, Corolla said: "I thought you were going to hold the job for me. I want it." Barry replied: "I'm sorry, but Wynalda was just too good to pass up." Barry then offered Corolla temporary work as the assistant sales manager, at \$8,000/mo., until the regular assistant sales manager, who had been injured in an automobile accident, returned to work. Corolla took the job because he needed the money, but told Barry that he was doing so under protest because he believed he was entitled to the job of general sales manager. The parties did not execute any written document reflecting this temporary employment, but you should assume that there is no issue concerning the Statute of Frauds.

Corolla began work for Bruin, but Bruin fired Corolla after two months, before return of the regular assistant sales manager, because Corolla had telephoned the regular assistant sales manager with the false information that Corolla had been hired as a permanent replacement.

One week after being fired by Bruin, Corolla took a job as general sales manager with a new car dealership in San Francisco, at a salary of \$9,000/mo.

The San Francisco car dealership fired Corolla after three months because he repeatedly showed up for work drunk. Thereafter, Corolla was unable to secure comparable employment, notwithstanding diligent effort.

Corolla sued Bruin for breach of contract. One cause of action alleged Bruin's breach of a nine-month employment contract. In support of this cause of action, Corolla is prepared to offer in evidence a written document reading as follows:

4/9/96

"In consideration of \$100.00, we will hold general sales manager job (9 months, \$10,000/month) until Friday."

[Signed] Barry

In defense of this cause of action, Bruin is prepared to offer evidence that this written document is a forgery.

Assume that a trier of fact might find either that the written document quoted above is a forgery or that it is not a forgery, and assume that the \$100.00 referred to in the written document was never paid. Analyze and discuss whether Bruin breached a nine-month employment contract with Corolla when, on April 13, 1996, he refused to allow him to begin work as general sales manager.