

## **Memorandum**

To: Partner

From Examinee

Re: Bella v. Sharon & Ethics

This memo addresses any claims Bella may assert against Sharon, any potential defenses Sharon may raise, assesses the likely outcome of each, and discusses any potential ethical issues related to Laura representing Bella.

### **1. Bella's breach of contract claim against Sharon**

#### **Formation**

##### Governing Law

Contracts for the sale of goods are governed by the Uniform Commercial Code. Goods are movable items at the time of identification to the contract

*Here, because a photograph is a movable item, so it qualifies as a good. Therefore, the UCC governs this contract.*

##### Formation

A contract is a legally binding agreement between two or more parties. A contract is formed by an offer, an acceptance of the offer, and consideration. An offer is the presentation or holding out of terms to another party for acceptance. Under the UCC, the offer and acceptance must match as to the essential terms. Essential terms are the parties, subject matter, and quantity. Consideration is the bargained-for exchange or benefit, or the legal detriment a party bargains to obtain or take on as part of the contract.

In a contract between merchants, an additional term included in an acceptance becomes part of the contract terms, unless the new term: (a) materially alters the contract, (b) the merchant required express acceptance of the original offer, or (c) the other party objects within the proper time (10 days). A merchant is one in the business of selling goods of the type contemplated in the contract or anyone who regularly deals in such goods.

*Here, because Bella called and expressed an interest in purchasing the photograph of the panthers hunting that was displayed last summer, and because Sharron replied with an offer to sell the photograph of panther's hunting (Panther One) for a price of \$22k, this constituted an offer with the essential terms because it identified the subject matter and the price. Further, because Bella replied, okay it is a deal, there was acceptance of an offer. The contract is supported by consideration because Bella took on the obligation to pay the purchase price and Stella took on the obligation to deliver the photograph. Therefore, a contract was formed.*

#### **Breach**

##### Perfect Tender Rule

The UCC requires perfect tender as performance. Imperfect tender is construed as a breach of contract. If perfect tender does not occur, the buyer can accept or reject the nonconforming goods. The seller may cure any defect before the time set for final delivery. If the seller delivers nonconforming goods on the delivery date, the seller does not have the right to cure unless the seller reasonably believed the buyer would accept the nonconforming goods.

*When Bella arrived at Sharon's studio on April 10, Bella tendered a photograph called "Panther 2". This was imperfect tender because it was not the photograph of panthers hunting that was agreed upon in the contract.*

*Therefore, Bella can bring an action against Sharon for breach of contract.*

## **Defenses**

### **Improper Acceptance**

An offeror can specify or limit the manner in which acceptance can be communicated. If the offeror specifies or limits the manner of communicating acceptance, then the communication of acceptance must be made in that manner. Otherwise, there has been no acceptance.

*In this case, Sharon may argue that the contract was not formed because Bella did not sign and return the writing as required. However, since the writing was simply meant to restate the terms of a contract that had already been formed when Bella accepted Sharon's offer, this argument is unlikely to be successful.*

### **Conditional Acceptance**

Acceptance must be an unconditional assent to the essential terms. An acceptance that is conditional is not an acceptance, and no contract is formed.

*In this case, Sharon may argue that Bella did not accept her offer because she said, "Send me the paperwork," after saying, "Okay, it's a deal," and that Bella conditioned her acceptance on Sharon sending the paperwork. However, this argument is unlikely to be successful. As soon as Bella said, "Okay, it's a deal," she expressed assent to the offer. The request to send the paperwork was simply a later request for Sharon to provide a written confirmation of the terms of the contract they had just formed.*

### **Statute of Frauds, Merchants Memo**

The text you provided generally presents its argument clearly, but there are a few areas where clarity can be improved or where minor adjustments can enhance the overall readability. Here's a revised version that corrects some potential issues and improves flow:

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A contract for the sale of goods over \$500 must be evidenced by a writing signed or acknowledged by the party against whom enforcement is sought. When both parties are merchants, a confirmation memorandum that is sufficient to allow the contract to be enforceable against the sender will also

suffice to make the contract enforceable against the recipient merchant if it is not objected to within 10 days. The signature or authentication requirement is satisfied if the writing bears sufficient indicia to identify the sender. A memorandum on letterhead is generally sufficient to satisfy the signature requirement.

*Sharon could make a Statute of Frauds defense because Bella did not sign and return the document, and the sales price exceeds \$500.*

*Here, Bella is an art dealer, and Sharon is a renowned photographer who maintains exhibitions of photographs. Both Bella and Sharon regularly engage in buying and selling photographs, and both qualify as merchants.*

*Therefore, because Sharon is the party against whom enforcement of the contract is being sought, and because the letter sent on March 10 was on Sharon's letterhead, it bears indicia sufficient to identify the sender. This means the terms of the contract are sufficiently evidenced by a writing.*

*Consequently, a Statute of Frauds defense will not be successful.*

#### Parol Evidence

The parol evidence rule provides that when the parties reduce their agreement to writing with the intent that the writing reflects the final terms of the agreement, the terms in the writing cannot later be contradicted with extrinsic evidence. The parol evidence rule does not exclude extrinsic evidence designed to show the meaning of, or the parties' understanding of, unclear or ambiguous terms. A latent ambiguity is not apparent on the face of the document.

*Here, Sharon could make a defense that the writing does not specify which Panther photograph is the subject of the sale and lists a sales price of \$32,000, not \$22,000.*

*The writing states that the sale would be of "my panther photograph," but because, four months after Bella saw Panther One, Sharon took another photo called Panther Two, the reference to "panther photograph" is ambiguous. This is a latent ambiguity; it is not immediately apparent from reading the document but becomes clear based on the circumstances and the existence of two different panther photographs.*

*Because the term "panther photograph" is ambiguous, extrinsic evidence or parol evidence can be used to clarify the meaning of this term. Further, because Bella stated the photograph of panthers hunting, and the one present at a specific exhibition, at which time Panther One was the only panther painting that existed, the extrinsic evidence demonstrates that the reference should be understood to refer to the Panther One photograph.*

*Therefore, a defense based on the ambiguous reference to the photograph in the writing is unlikely to be successful.*

#### Reformation of Mutual Mistake: wrong price term in writing

Reformation is a judicial modification of a written contract. Reformation is designed to give correct expression to the parties' intent. Reformation is available to rectify a mistake in drafting or transcription, such as a typo or scrivener's error. The party seeking reformation must prove that the parties reached a specific agreement that was incorrectly expressed in the written contract.

*Here, because the facts are clear Sharon stated \$22k was the asking price and Bella agreed, the agreed upon amount is \$22k. Further, because the \$32k price was typo by Sharon's assistant, and both Sharon and Bella did not notice the error, this is a mutual mistake that is the result of a typo, and the court can reform the writing to match the agreement of the parties.*

*Therefore, a defense based on the incorrect price term will not be successful.*

## **Damages**

### Liquidated Damages

Liquidated damages provisions are enforceable if damages would be difficult to ascertain or determine and the provision reflects the parties' reasonable estimate of what damages would be. An unreasonably large liquidated damages provision will not be enforced because such a provision will be construed as a penalty rather than a reasonable estimate of damages.

*Here, because S is the breaching party, S's demand for the liquidated damage amount will not be successful. As it relates to Bella, although the value of possession of the painting and the detriment or lost expectation from not being able to possess the painting due to the breach is difficult to determine, liquidated damages may be appropriate. However, because \$5k is nearly 25% of the total purchase price, this may be construed as a penalty and may not be enforced.*

*Therefore, the liquidated damages clause is likely not enforceable by either party.*

### Expectation Damages

Contract damages are designed to put the non-breaching party in the position he or she would have been in but for the breach.

*Here, Bella had the expectation of being able to have possession of the Panther One painting for \$22,000 and the court should award damages that are sufficient to allow Bella to obtain a photograph equivalent to the Panther One painting for not more than \$22,000. Bella will be able to retain the \$22,000 amount and be compensated for any costs incurred in negotiating with S and driving to pick up the photograph.*

## **2. Ethical Issues**

### Conflict of Interest

Attorneys have an ethical obligation to avoid conflicts of interest. An attorney must not agree to take on the representation of a client who has interests that are adverse to those of a current client or when the duty of loyalty to a current or former client will limit the lawyer's ability to represent the prospective client. A lawyer may not use information learned through

representing a client against that client. Lawyers may not represent clients with conflicting or adverse interests. Conflicts of interest are imputed to a lawyer's firm. When a lawyer at a firm wishes to represent a client and another lawyer at the firm would have a conflict, that conflicted lawyer must be screened from the representation. A lawyer must disclose conflicts and obtain informed consent.

Here, because Andrew represented Sharon, Andrew owes duties to Sharon. Because Andrew works for Laura, this conflict is imputed to Laura's firm. Therefore, Andrew must be screened from participating in the matter. Additionally, because Laura knew about Andrew's past work for Sharon, Laura should have disclosed this conflict, and her ability to take on the matter may be limited. The extent of the conflict is a factual question that hinges on the extent of Andrew's knowledge. If Andrew had simply formed an LLC for Sharon, his knowledge is likely very limited. However, it is unclear what the nature or scope of the "other matters" Andrew was involved in or how much of that knowledge has been passed on to Laura.