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Examination No. _____

502 Contracts
Semester I, 2001-02

UNM School of Law
Final Examination

Four Credits

Professor Fred Hart
Professor Nathalie Martin
Professor Alfred Mathewson
Friday, December 14, 2001
1:30 p.m. to 4:30 p.m.

THREE HOURS

INSTRUCTIONS

1. This examination contains four essay questions, 2 1-hour questions, and 2 shorter 30-minute questions. The one-hour questions are worth twice as much as the 30-minute questions
2. You may bring into the examination any class materials, your own class notes, and other outlines or study aids you had a hand in preparing. You may have no other materials with you.
3. Write concisely and neatly. Remember, it is the quality (analysis, organization, etc.) and not the quantity of your answer that counts.

GOOD LUCK AND HAPPY HOLIDAYS!

(Examination begins on Page 1)

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QUESTION #1 (1 HOUR)

Dave Lockwood of Alamogordo was getting ready to take the CPA exam and boning up on review courses. He researched various courses, including the Stanley Koplan live course being offered in Las Cruces, the Stanley Kolpan on-line course, and a course offered by a competitor. His parents agreed to pay for whatever Dave ultimately decided to take.

The promotional material for the on-line course claimed that the on-line course was "more convenient than live courses," was "more user friendly than live courses", and had "the same pass rate, when used properly according to the directions, as the Koplan live course." Its promotional materials also said that the on-line course had "the added benefit of being available at any time of the day or night, perfect for people with full-time jobs or other daytime commitments." The promotional material also stated that "although we believe our products are the best available anywhere, we cannot guarantee any particular result." Ultimately, Dave decided to purchase the on-line course, so he could keep his daytime job as a bookkeeper and would not have to drive to Las Cruces. The cost of the course was \$1,000.

His mother purchased the course for him by getting onto the Koplan WEB site and using her own credit card number and name. While she was on line, she was required to answer several questions in order to determine whether the on-line course was likely to be useful to David. An interactive program purported to give advice about the type of person that could benefit most from the on-line course, as opposed to the live course. The program asked these questions, which she answered on behalf of David:

1. Do you work best with a lot of structure in your life?
2. Are you a self-starter?
3. Are you self-disciplined?
4. Are you motivated by talking and listening to other people?
5. Do you prefer to work alone or in the company of others?

After answering the questions, David's mother was allowed to purchase the course with her credit card, was given a password and was mailed a software package and some books to use in accessing the on-line course. She passed these along to David, who looked them over immediately and read all of the instructions for the on-line course.

David loaded the software and used the program to set up a recommended study schedule for the 6 weeks in which he would study for the exam. He was diligent and careful about following the program. The program also allowed him to download up to three practice exams and print them from his own computer. He downloaded two practice exams and took them, planning to take the third one during the days just prior to the exam. However, four days before the exam, he was unable to access the WEB site for any purpose. He

called customer service and tried everything else he could think of to gain access but was unable to do so. The site remained unavailable for both the fourth and the third day prior to the exam date. David was extremely agitated about this, as the program scheduling mechanism called these two days the most important “refresher days” for the exam and recommended that participants not work or do anything else on these days.

On the day two days before the exam, David suffered a bleeding ulcer and was hospitalized for two days, which cost \$5,000 and caused him to miss the exam. He lost \$1,000 in wages because he missed the following week of work. He was forced to register for the next exam at a cost of \$800 and registered for a competitor’s review course at a cost of \$500. Finally, he had to work at his old job as a bookkeeper for at least another 6 months until the exam was given again, rather than receiving a \$1,000 a month raise promised to him by his current employer once he passed the CPA exam.

Can Dave recover any damages from Koplun and if so which ones? Under what theory of recovery?

QUESTION #2 (1 HOUR)

Juan and Mary were happily married. He had a good job, paying over \$250,000 a year and she was an attorney working for legal aid at a modest salary. They married in 1980 and had no children.

In 1985, Mary went to a convention in New Orleans and was seduced by Tom, a prominent lawyer in Mary's city who was a guest speaker at the convention, Tom was a partner a large firm and made at least \$500,000 a year. Tom and Mary had know each other for several years. After Mary returned home, she discovered that she was pregnant.

Mary called Tom and told him. He responded, "Do you think that I'm the father?" She answered, "Well, you certainly could be." He expressed his sorrow, and said, "Don't worry. I will take financial responsibility for the child." She said, "No. I'm not asking for that. My husband and I have enough money, and I just don't want him to question whether he's the father. Please do not try to see the child or try to get any parental rights." Tom said, "OK, I trust that you also will not mention that I'm the father because it would hurt my reputation with my firm. I do want to do something for the child. I will give him \$100,000 when he is ready to go to college. I want to make certain that he goes to his school of choice." Mary said, "That would be great. We'll work out something so that Juan doesn't know the source of the money."

In due course the baby was born and turned out to be a girl. Juan and Mary named her Tess. Tom learned of the birth in the local newspaper. Thereafter, each year he would send an expensive present to Tess on her birthday. Mary always told Tom that the present was from her rich uncle who lived in Australia.

In 1995, Juan died suddenly. He did not believe in life insurance, and he and Mary had lived up to his income over the years. There was a substantial mortgage on their house, and they had many other debts. Tess, now 9 was attending an expensive school.

Mary, who had quit her job when Tess was born, sought work in the various city law offices and governmental agencies, but she received no reasonable job offers. Desperate, she called Tom.

Mary told Tom that she was at the end of her rope, and needed money. She told him that she could no longer pay the private school tuition and that she might lose her house. She said, "After all, Tess is your responsibility, and you should help her and me." Tom, who was now happily married, feared that if Mary told his wife, his wife would be upset and angry knowing that he had a child. He said, "OK. I truly feel sorry for you and Tess, and I will send you \$3,500 a month to help you out." Mary said, "That's very generous of you. We will be able to get along on that. I'm still looking for a job, and if I

get one I'll let you know and we can work out something to make it easier on you. You are really very generous. I remember your promise to help Tess with the costs of college." Tom responded, "I trust you will continue to enroll Tess in the private school. You know that I went to private schools all my life and I fondly remember my experiences."

For the next five years, Tom regularly sent Mary \$3,500 each month. Mary was unable to find a suitable full time job, but she sometimes worked for a law firm and she earned some money.

In the year 2000, Tom and his young wife went through an extensive medical examination to determine why they could not conceive a child. As part of the exam, the physician reviewed all of Tom's medical records since birth, and came to the conclusion that he had been sterile since a disease he contracted when he was five years old.

Tom called Mary and told her of the doctor's opinion. Mary immediately said, "Well, I hope that you don't expect to welsch on your contract. After all, I've been counting on your promises, and it's still your fault that I've had live with the situation. I don't care whether you are the father or not, you made a promise." Tom got angry and said, "Neither you nor Tess will ever see another penny of my money, and, besides, you better figure out a way to pay me back for everything that I've given to you and Tess.

Discuss the rights of the parties.

QUESTION #3 (30 MINUTES)

We represent Joe Shyster. He wants to file an action against Sue Rambo, a lawyer with whom he shares office space, for reneging on an agreement to pay him a referral fee. Please review the transcription of my initial interview with him.

Transcript of Interview of Joe Shyster

Q: What type of law practice do you have?

A: I am a probate lawyer. I draft a lot of wills and trusts and trust agreements. I do a lot of estate planning for my small business clients. I also litigate wills cases.

Q: How did you meet Nancy?

A: She came to my office seeking assistance in probating her father's estate. I expressed my condolences and asked her how he died. She told me he died in a car accident.

Q: What did you tell her?

A: I think you may have a wrongful death claim. I can refer you to a lawyer who specializes in those cases.

Q: What did she say?

A: Sure, whom do you have in mind?

Q: What did you tell her then?

A: I told her there is a lawyer across the hall who takes personal injury cases on a contingency fee basis. Her name is Sue Rambo. Why don't I take you over to see her?

Q. What did you tell Nancy would be the fee involved in your probate work?

A. I told her I charge \$150 an hour and I expected to spend approximately five to ten hours on her case, excluding court time. I told her I charged \$200 for time in court. I added that as to the possible wrongful death action, I would receive a referral fee from Rambo if there were a recovery.

Q: Then what happened?

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A: I called Sue to tell her about the case. Then I took Nancy to Sue's office and introduced them. I specifically told Sue I am referring her to you.

Q: Why did you tell her that?

A: We often have referred clients to each other. I have probate clients who need a personal injury lawyer and some of her personal injury clients need a probate lawyer. Our arrangement has been to pay 25 percent of the fee received.

Q: Is that 25 percent of the judgment or settlement?

A: No, 25 percent of the fee actually received.

Q: How did you determine that rate?

A: We asked around town and found that the going rate for referrals was 25 to 40 percent. We thought 25 percent was reasonable and decided to stick with it. After all we were not greedy. Well, at least I'm not but Rambo has changed.

Q: Was it your expectation that you would get the 25% this time?

A: Yes.

Q: Do you know how much Rambo received as a fee in Nancy's father's case?

A: Yes. The case settled for \$600,000. Her fee was \$200,000 and my referral fee should have been \$50,000.

Q: Why do you say, "Should have been?"

A: Because Rambo claimed that there was no referral and has refused to pay me. I have sent her a lot of work and this is the thanks I get. It's unprofessional I tell you.

Q: How much time did you spend on the wrongful death action?

A: Only what I told you before. It came up in the initial interview about the probate. I called Sue and then walked Nancy over and introduced them.

What causes of action should we file against Sue, what defenses do you expect Sue to raise and what is the likely outcome? Assume that any fee-sharing arrangement entered into by Joe and Sue is in compliance with the applicable Code or Rules of Professional Responsibility.

QUESTION #4 (30 MINUTES)

On May 1, Oppra and Bob negotiated a contract under which Bob was to build a house for Oppra and she was to pay him \$500,000. The plans had been drawn by an architect, Agatha. The house was to be completed on September 1st, and Oppra was to pay the \$500,000 upon completion. During the negotiations, Oppra mentioned at several times that she wanted a "perfect" house, and that cost was not important. She told Bob to get in touch with her if he had any suggestions for including additional features.

On July 1, Bob came up with the idea of putting a fireplace in one of the family rooms. He could not contact Oppra because she was traveling for pleasure in South Africa, and her cell phone did not work there. He talked with Agatha and she said that it was great idea, and that she thought that Oppra would like it. Because of the construction schedule, the fireplace had to be installed immediately, or it would be impossible to build it. Bob went ahead and added the fireplace at a cost to him of \$25,000. He anticipated adding his usual 10% fee to his costs and charging Oppra \$27,500 for the fireplace.

Oppra returned on August 1st and she and Bob went out to look at the progress on the house. When she saw the fireplace she became very agitated. She said that she didn't want it and would not pay for it. This annoyed Bob, and resulted in an acrimonious exchange between the two. The result was that he discontinued work on the house. It is difficult to determine who breached the contract, *i.e.* whether she fired him, or he quit.

By August 1st, Bob had spent \$400,000 in construction the house, not including the fireplace. It would have cost him \$50,000 to complete it. Oppra, however, got another contractor to finish the job for \$25,000, but it wasn't finished until October 1.

Part 1: Assume that Oppra was the breaching party. What are Bob's rights?

Part 2: Assume that Bob is the breaching party, what are Oppra's rights?