Chapter 1
Nature of Traditional and E-Contracts

The movement of the progressive societies has hitherto been a movement from status to contract.
Sir Henry Maine

I. Teacher-to-Teacher Dialogue

We like to open the overview of contracts law by identifying two main teaching objectives from this chapter. The first objective is to introduce the notion of apparent versus hidden "parties" to a contract. By apparent, of course, we are talking about the actual participants or signatories to the contract. These are the persons or entities whose rights and obligations we are about to examine and ascertain. By "hidden" parties, we stress the point that a contract is not, in the end, all that private. What elevates a bare agreement between two or more private parties into a legally recognized contract is the willingness of the public, through its courts, to enter the fray and enforce the contract rights and duties. Thus, the first objective is to interject the notion of public policy participation and support of the contracting process.

The second objective is to introduce students to some of the working vocabulary of contract law. As is the case with all specialized forms of endeavor, a contract has a language all its own, and a basic knowledge of some of the key terms used in contracts is essential. The key contract terms used tend to be dichotomous, and you can use that dichotomy as a learning tool. Take, for example, the number of parties to a contract. At least two parties are required in all contracts. One of those two parties has to initiate the contract formation process. The person starting the mutual assent process with a promise is the *offeror*, the other person is the *offeree*. Next, look at the dichotomy of the promises being used: Is it a bilateral promise or is it a promise for a unilateral act? Have these promises been expressly made or can they somehow be implied from the circumstances? Does the form that this agreement is taking require certain formalities, such as a negotiable instrument, or can it be done in any informal manner chosen by the parties as long as the elements of contract are met?

Once the parties have formed an agreement, are the performance obligations already fully met or executed, or are there still remaining executory performance obligations on the part of one or more of the parties? In addition, you may have to examine issues of enforceability. If all the elements are in place, the agreement is now considered a valid contract. If one or more of the essential elements is missing, the agreement is not raised to the status of contract and may be legally void. There are also certain situations where a contract is created, but it will not be enforced. If a legal defense is found to be in place,

such as a writing requirement, the contract may be an unenforceable contract. Sometimes, certain persons are given a legally recognized power to avoid a contract after it has been entered into. These contracts are voidable, and examples of this sort of situation can be found in cases involving young people with limited mental capacity.

II. Chapter Objectives

Define *contract*.

- List the elements necessary to form a valid contract.
- Distinguish between bilateral and unilateral contracts.
- Describe and distinguish between express and implied-in-fact contracts.
- Describe and distinguish among valid, void, voidable, and unenforceable contracts.

III. Key Question Checklist

- What body of contract law will control the formation, rights, duties, and remedies of this agreement?
- Are the four elements of a contract in place?
- How is this contract defined? Formal or informal? Executed or executory?
- Are there any defenses that make the contract unenforceable?

IV. Text Materials

Contracts are the basis for most of our activities. They are voluntarily entered into and the terms become a form of private law between the parties. Most are legally enforceable, with the breaching party being subject to damages ordered by the courts.

Section 1: Contract Overview

A contract is an agreement that is enforceable by a court of law or a court of equity.
Parties to a Contract – The offeror makes the offer to the offeree. The contract is created when the offeree accepts the offer.
Elements of a Contract – Enforceable contracts require that there be an offer and acceptance, which form an agreement between the parties. To be a contract the agreement must show mutual assent, consideration, capacity, and legality.
Defenses to the Enforcement of a Contract - There are two defenses to the enforcement of a contract: genuineness of assent and writing and form.
The Evolution of the Modern Law of Contracts – This fits in nicely with the notions of private versus public participants in the contract process as discussed in the teacher-to-teacher dialogue at the beginning of this chapter. It also allows you to get students thinking early on about the "battle of forms" and how the extensive use of forms has severely limited the real bargaining power of the average lay person.

Section 2: Sources of Contract Law

The Common Law of Contracts – This source of contract law developed from primarily state court decisions that became precedent.
The Uniform Commercial Code (UCC) – The UCC has been adopted, in whole or in part, by every state, and takes precedence over common law. Article 2 deals with sales and Article 2A deals with leases.
The Restatement of the Law of Contracts – The Restatement, currently in its second edition, is not law, but merely serves as guidance to the legal community.
Objective Theory of Contracts – This theory applies the reasonable person standard to contracts.

Case 1.1: *City of Everett v. Mitchell*, 631 P.2d 366 (Wash. 1981).

Facts: Al and Rosemary Mitchell owned a small secondhand store. At an auction, they purchased a used safe and were told by the auctioneer that the inside compartment of the safe was locked and that there was no key for it. The safe was part of Sumstad Estate. The Mitchells had the safe opened, and found over $32,000 in cash in it. The locksmith who opened the safe called the City of Everett Police, who impounded the money. The City of Everett commenced an interpleader action against Sumstad Estate and the Mitchells. The trial court entered summary judgment in favor of Sumstad Estate. The court of appeals affirmed. The Mitchells appealed.

Issue: Was a contract formed between the seller and buyer of the safe?

Decision: Yes.

Reason: The state supreme court held that under the objective theory of contracts, a contract was formed between the seller and buyer of the safe. The decision was reversed in favor of the Mitchells.

Case 1.2 *Welles v. Acad. Of Motion Picture Arts & Sci.*, No. CV 03-05314 DDP (JTLx), 2004 U.S. Dist. LEXIS 5756, at *1 (C.D. Cal. Mar. 4, 2004).

Facts: The right of ownership of Orson Welles' Academy Award Oscar from the Academy of Motion Picture Arts and Sciences for the Best Original Screenplay for the 1941 film *Citizen Kane* passed to his daughter Beatrice Welles. In 1988, Welles requested a duplicate Oscar from the Academy, stating that her father had lost the original Oscar many years ago. The Academy provided her with a duplicate Oscar, and she signed a Receipt and Addendum acknowledging that the receipt of the duplicate Oscar did not entitle her to any copyright, trade-mark and service mark of the statuette.

In 1994, Welles found the orignal Oscar and wanted to sell it at public auction through Christie's. The Academy objected; and Welles sued for the right to sell it. She argued that the language of the Addendum "Any member of the Academy …" did not apply to her because she was not a member of the Academy. The Academy responded that it intended that the language should apply to Welles and asked the court to reform the Receipt and Addendum to apply to Welles and to order that the Academy had a right of first refusal to purchase the original Oscar for $1.00.

Issue

Does the Receipt and Addendum prohibit Welles from selling the original Oscar?

Decision: No.
Reason: Here, the Academy failed to ensure that the Addendum applied to Welles. The court applied the objective theory of contracts and decided that the Academy's subjective belief that the Addendum applied to Welles did not change the express language of the contract. Therefore, the Academy did not have a right of first refusal in Welles's original Oscar. The court held that Welles had unrestricted property rights in the original Oscar, which she could dispose of as she wished.

Uniform Electronic Commerce Act Adopted – The Uniform Computer Information Transactions Act (UCITA) establishes uniform legal rules for the formation and enforcement of electronic contracts and licenses. The Uniform Electronic Transactions Act (UETA) provides a legal framework for electronic transactions.

Section 3: Classifications of Contracts

Bilateral and Unilateral Contracts – A bilateral contract is a promise for a promise. The exchange of promises creates the enforceable contract. A unilateral contract is one where the offer can be accepted only by the performance of an act by the offeree.
Incomplete or Partial Performance – Offers can be revoked by the offeror at any time before the offeree has begun performance.
Express and Implied-in-Fact Contracts – Express contracts may be either oral or written, whereas implied-in-fact contracts are implied by the activities of the parties. Implied-in-fact contracts require that the plaintiff supply property or services to the defendant that they expected to be paid for, and that the defendant had an opportunity to reject the property or services and failed to do so.

Case 1.3: *Wrench LLC v. Taco Bell Corporation*

Facts: Rinks and Shields created a "Psycho Chihuahua" cartoon character that they promoted through their company, Wrench LLC. They were approached by Taco Bell to adapt the character for use in their advertising. Later, the idea was adjusted to include a real dog that was digitally manipulated. Rinks and Shields created several ads, including one in which a male dog passes up a female dog to get to the Taco Bell food. Taco Bell did not enter into an express contract with them, but, a few weeks later, hired Chiat/Day to produce the same style ads, one of which was the male dog passing on up a female dog to get the Taco Bell food. Wrench, Rinks, and Shields sued for breach of an implied contract. The District Court granted summary judgment to Taco Bell, and the plaintiffs appealed.

Issue: Did the plaintiffs state a cause of action for the breach of an implied-in-fact contract?

Decision: Yes.

Reason: The U.S. Court of Appeals held that Taco Bell understood that if they used the "Psycho Dog" concept, it would have to pay the plaintiffs. They found that there was strong circumstantial evidence that Taco Bell was using the

concept, and reversed and remanded the case back for trial.

Quasi-Contracts (Implied-in-Law Contracts) – This is an equitable remedy that allows a court to award monetary damages to prevent unjust enrichment and unjust detriment in the case where there is no enforceable contract between the parties.

> **Case 1.4:** ***Wrench LLC v. Taco Bell Corp.*****, 256 F.3d 446 (6th Cir. 2001).**
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> **Facts:** Plaintiffs created the "Psycho Chihuahua" cartoon character, which they promoted, marketed, and licensed through their company. Taco Bell employees approached Plaintiffs at a trade show about the character; later asked them to create art boards for a campaign using the character. After focus group input, the Plaintiffs suggested that Taco Bell use a live Chihuahua dog in the campaign. Just after Plaintiff's presentation, Taco Bell hired a new outside advertising agency, Chiat/Day. Taco Bell gave Chiat/Day materials received from Plaintiff regarding the Psycho Chihuahua character.
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> Three months later, Chiat/Day proposed using a Chihuahua dog in Taco Bell commercials. The campaign became an instant success. Taco Bell paid nothing to Plaintiffs for the campaign. Plaintiffs sued defendant Taco Bell to recover damages for breach of an implied-in-fact contract.
>
> **Issue:** Do the plaintiffs have a cause of action for the breach of an implied-in-fact contract?
>
> **Decision:** **Yes.**
>
> **Reason:** The court found that the plaintiffs (appellants here) had presented sufficient evidence to survive summary judgment on the question of whether an implied-in-fact contract existed under Michigan law.

Formal and Informal Contracts – Contracts may be formal, such as negotiable instruments, letters of credits, recognizances, and contracts under seal, or informal or simple contracts, like leases, sales contracts, and service contracts. The distinction is that formal contracts require a special format or method.

Valid, Void, Voidable, and Unenforceable Contracts – Valid contracts meet all the essential elements and are enforceable by at least one of the parties. A void contract has no legal effect, and neither party can enforce it. Contracts where at least one party can avoid their contractual obligations are voidable contracts. If there is a legal defense to the enforcement of a contract, it is called an unenforceable contract, but the parties may choose to voluntarily perform the contract.

Executed and Executory Contracts – Contracts that have not yet been fully performed by either side are called executory contracts; those that have been completed are executed contracts.

V. Case Scenario Revisited Case

This Case Scenario is based on case of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

In Casey and Tom's case, the court would focus on whether an implied-in-fact contract can result from the conduct of unmarried persons who live together. An

implied-in-fact contract arises where (1) the plaintiff provided property or services to the defendant, (2) the plaintiff expected to be paid for the property or services, and did not provide the property or services gratuitously, and (3) the defendant was given an opportunity to reject the property or services, but failed to do so.

In the *Marvin* case, the court found that the plaintiff provided services while the defendant provided property. As a result, there was no reason to presume that services were contributed as a gift. The court found that in these cases is better to presume that the parties intended to deal fairly with each other. To hold otherwise would disproportionately enrich one partner at the expense of the other. Therefore, the court held that courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied-in-fact contract.

VI. Sample Answer To Hands-On Drafting Exercise

NON-DISCLOSURE AGREEMENT
THIS NON-DISCLOSURE AGREEMENT, is entered into this 26th day of August, 2011, between "All You Can Eat Ice Cream Buffet, Inc.", an Ohio corporation, of Toledo, Ohio, hereinafter referred to as "Employer", and all hired employees, hereinafter referred to as "Employees."
Employees hereby acknowledge that they mutually understand the importance of the covenanted secret of the Employer's ice cream.
THEREFORE, as part of the content of this Non-Disclosure Agreement, the parties hereby agree to maintain complete confidentiality and shall not disclose to any other individual, entity, or party the ingredients of Employer's ice cream, EXCEPT in the event of a Court Order, whereby the parties may disclose any and all evidence in their possession as commanded.

Employer
BY_____

Employee
BY_____

WITNESSES:

_____

_____

VII. Answers to Critical Legal Thinking Cases

Bilateral or Unilateral Contract

Case 1.1. ***Bickham v. Wash. Bank & Trust Co.*****, 515 So. 2d 457 (La. App. 1987).**

The contract is a bilateral contract. A contract is bilateral if the offeror's promise is

answered with the offeree's promise of acceptance. The court found that the agreement between Mr. Bickham and the bank on January 23, 1974, was a bilateral agreement. Bickham agreed to do his banking in return for the bank's agreement to make loans at 7 1/2 percent. If Bickham had said "If you promise to loan me money at 7 1/2 percent, I will do all my banking with your bank," the offer would have been to create a unilateral contract.

The court further held that bilateral contracts can only be altered with the consent of both parties and that the bank acted unilaterally in changing the interest rates on the loans. Therefore, the Appellate Court upheld the trial court's ruling that the bank had breached its contract.

In addition, the court held that each of the subsequently executed notes were bilateral contracts. The court stated that although the agreement was silent at the time, it would impute a "reasonable time" into the agreement.

VIII. Answers to Ethics Cases

Case 1.1. *Chenard v. Marcel Motors*, 387 A.2d 596 (Me. 1978).

The contract is a unilateral contract. A unilateral contract is one in which the offer can only be accepted by the performance of an act by the offeree. Here, there is no contract until the offeree performs the requested act. The offer cannot be accepted by Chenard promising to get a hole-in-one. This would constitute a bilateral agreement. The court held that where Chenard, the offeree, shot a hole-in-one, he had accepted the offeror's offer of a unilateral contract thereby obligating performance of the promise. Accordingly, the Appellate Court upheld the Superior Court's ruling that Chenard is entitled to the car.

Case 1.2. *Winkel v. Family Health Care, P.C.*, 668 P.2d 208 (Mont. 1983).

No, Winkel does not receive the profit-sharing bonus. Under the equitable doctrine of quasi-contract, a court may award monetary damages to a plaintiff for providing work or services to a defendant even though no actual contract existed between the parties. This doctrine does not apply where there is an enforceable contract between the parties. In this case, there was a written employment contract between the parties. Thus, for Winkel to be entitled to the profit-sharing bonus the court must find that the written employment contract was altered in writing or by an executed oral contract.

Winkel testified that the agreement to receive profit-sharing was an oral agreement. Thus, the question becomes whether the oral agreement was executed, i.e., fully performed. The court held that because Winkel had not been paid his salary and bonus, the contract was not executed. Accordingly the appellate court reversed the trial court's holding that Winkel was entitled to his bonus.

IX. Terms

- bilateral contract—A contract entered into by way of exchange of promises of the parties: a "promise for a promise."
- common law of contracts—Contract law developed primarily by state courts.
- equity—A doctrine that permits judges to make decisions based on fairness, equality,

moral rights, and natural law.

- executed contract—A contract that has been fully performed on both sides: a completed contract.
- executory contract—A contract that has not been fully performed. With court approval, executory contracts may be rejected by a debtor in bankruptcy.
- express contract—An agreement that is expressed in written or oral words.
- formal contract—A contract that requires a special form or method of creation.
- implied-in-fact contract—A contract where agreement between parties has been inferred from their conduct.
- informal contract—A contract that is not formal. Valid informal contracts are fully enforceable and may be sued upon if breached.
- legally enforceable contract—If one party fails to perform as promised, the other party can use the court system to enforce the contract and recover damages or other remedy.
- objective theory of contracts—A theory that says the intent to contract is judged by the reasonable person standard and not by the subjective intent of the parties.
- offeree—The party to whom an offer to enter into a contract is made.
- offeror—The party who makes an offer to enter into a contract.
- quasi- or implied-in-law contract—An equitable doctrine whereby a court may award monetary damages to a plaintiff for providing work or services to a defendant even though no actual contract existed. The doctrine is intended to prevent unjust enrichment and unjust detriment.
- Restatement of the Law of Contracts—A compilation of model contract law principles drafted by legal scholars. The Restatement is not law.
- unenforceable contract—A contract where the essential elements to create a valid contract are met, but there is some legal defense to the enforcement of the contract.
- Uniform Commercial Code—Comprehensive statutory scheme that includes laws that cover most aspects of commercial transactions.
- unilateral contract—A contract in which the offeror's offer can be accepted only by the performance of an act by the offeree: a "promise for an act."
- valid contract—A contract that meets all of the essential elements to establish a contract: a contract that is enforceable by at least one of the parties.
- void contract—A contract that has no legal effect: a nullity.
- voidable contract—A contract where one or both parties have the option to avoid their contractual obligations. If a contract is avoided, both parties are released from their contractual obligations.

Chapter 2
Agreement

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master – that's all."

Lewis Carroll

I. Teacher-to-Teacher Dialogue

The concept of mutual assent can sometimes be a rather nebulous ideal for students who want their knowledge handed to them in some sort of lock-step manner. We try to accommodate students by starting with the elements of contract and how these various subcomponents are formulated in the contracting process.

The first element of contract is finding mutual assent between the contracting parties. Mutual assent is defined as a reciprocal agreement based on a meeting of minds of all of the parties to a contract. The steps leading to mutual assent start with the offer and acceptance process. These steps can be broken down into subparts, and a familiarization of those subparts is essential to the study of contract law.

The offer is broken down into three main subcomponents: intent, certainty, and communication. As an alternate memorization device, students may consider using an anagram called the QQC test. The first Q represents quality of the offer. In the eyes of the offeree, does this offer sincerely represent an objective intent to be bound? The second Q stands for quantity of the offer. If necessary, can a court, looking at this offer, find a basis upon which it could be measured, i.e., is the quantity of the offer readily determinable? The C represents communication. The offer must be communicated to the offeree in order to be effective.

Once a good offer is made, the other player must make his or her opening response. Remember, that response is dictated in many ways by the terms of the offer. Under the traditional common law mirror image rule, the acceptance must reflect the terms of offer. If it fails to do so, it may be deemed to be a rejection of the offer. And if it brings new terms to the table, it may be deemed a counteroffer. A counteroffer is, in fact, a new offer and sets the whole cycle of play into motion again from the reverse angle. The original offeror is now the new offeree.

Once we have a good offer, coupled with a good acceptance, the first element of contract, agreement or mutual assent, is arrived at. There are many variations on this basic theme as illustrated by the common law rules on advertising, auctions, and implied contracts based on the actions of the parties. They all have one common denominator: Sooner or later some sort of basis for mutual assent must be found before a court will go forward with enforcement of the agreement.

II. Chapter Objectives

- Define *offer* and *acceptance*.
- Identify the terms that can be implied in a contract
- Understand *special offers* like auctions and advertisements.
- Define *counteroffer* and describe the effects of counteroffers.
- Describe how offers are terminated.
- Describe auctions.
- Understand how an offer can be accepted, including *acceptance by silence.*

III. Key Question Checklist

- Who has the power to make an offer?
- If a statement or promise is made, does it constitute a good offer, using the elements of the QQC test (quality, quantity, communication)?
- If the offeree wants to accept the offer, what moves should he or she make?
- Is the proposed acceptance valid?

IV. Text Materials

Section 1: Agreement

Agreement is created when an offeror's offer is accepted by the offeree.

Case 2.1: *Marder v. Lopez*, 450 F.3d 445 (9th Cir. 2006).

Facts: Paramount Pictures Corporation used information from Maureen Marder, a nightbclub dancer, to create the screenplay for the movie *Flashdance*. Paramount paid Marder $2,300 and Marder signed a General Release releasing Paramount from numerous claims relating to the movie. Paramount released the movie *Flashdance*, which grossed over $150 million in domestic box office and is still shown on television and distributed through DVD rentals. Subsequently, Sony Music Entertainment paid Paramount for release of copyright and produced a music video for the Jennifer Lopez song "I'm Glad." The video featured Lopez's performance as a dancer and singer. Marder believed that the video contained recreations of many well-known scenes from *Flashdance*.

Marder brought a lawsuit in U.S. district court against Paramount, Sony, and Lopez. Marder sought a declaration that she had rights as a co-author of *Flashdance* and a co-owner with Paramount of the copyright to *Flashdance*. She sued Sony and Lopez for allegedly violating her copyright in *Flashdance*. The district court dismissed Marder's claims against Paramount, Sony, and Lopez. Marder appealed.

Issue: Was the General Release signed by Marder an enforceable contract?
Decision: Yes.

Reasoning: The Release's language was exceptionally broad and the court

found that it was fatal to each of Marder's claims against Paramount. The Release of "each and every claim" covers all claims within the scope of the language. Accordingly, the law imputed to Marder an intention corresponding to the reasonable meaning of her words and acts. Here, Marder released a broad array of claims relating to any assistance she provided during the creation of a Hollywood movie. Thus, the court found that theonly reasonable interpretation of the Release was that it encompassed the various copyright claims she asserted in the lawsuit.
The court acknowledged that agreement appeared to be unfair to Marder – she only received $2,300 in exchange for a release of all claims relating to a movie that grossed over $150 million – however, the court found there was simply no evidence that her consent was obtained by fraud, deception, misrepresentation, duress, or undue influence.

Section 2: Offer

There are three elements for an offer to be effective: the offeror must have intended to have been bound by the offer, the terms must be reasonably certain, and the offer must have been communicated to the offeree.
Objective Intent - The objective theory of contracts asks the question of whether a reasonable person would conclude that the contracting parties intended to be bound by the terms of their agreement.
Definiteness of Terms – The terms of a contract must be clear and unambiguous, including the names of the parties, the subject matter and quantity, the consideration, and the time of performance.
Implied Terms – Under common law, if an essential term was omitted from the contract, the courts held that no contract had been made. Under the *Restatement*, the terms need only be "reasonably certain." The court can imply missing terms.
A Contract is a Contract is a Contract - The designer of the Mighty Morphin Power Rangers was paid only $250 to transfer his copyright ownership in the logo. He subsequently sued and lost because he was bound by the agreement he signed. The moral? Be careful not to sign your rights away.
Communication – An offer must be communicated to the offeree before it can be accepted.

Section 3: Special Offers

Advertisements – These are treated as invitations to make an offer, unless they are so definite as to make it apparent that the advertiser had a present intent to bind themselves by the advertisement.

Case 2.2: *Mesaros v. United States*, 845 F.2d 1576 (Fed. Cir. 1988).
Facts: The Mesaroses received an advertisement from the United States Mint for certain limited edition coins. They responded to the advertisement by placing an order for certain coins by the deadline stated in the advertisement. The demand for a certain gold coin exceeded the limited supply, and the Mint notified them

that they were unable to fill their order. The coin greatly increased in value, and the Mesaroses sued for breach of contract. The lower court decided for the Mint, and the Mesaroses appealed.
Issue: Was the advertisement an offer?
Decision: The advertisement was a solicitation of an offer, not an offer.
Reasoning: Generally advertisements are not offers. The test is whether a reasonable offeree would reasonably believe the advertisement was an offer or a solicitation. The wording of the advertisement was such that a reasonable offeree would not reasonably believe it was an offer. Therefore, the decision of the lower court was affirmed.

Rewards – An offer to pay a reward is treated as an unilateral contract. In order to be able to collect the reward, the offeree must have knowledge of the offer and have performed the requested act.
Auctions – Sellers can offer goods for sale through an auctioneer. These auctions with reserve are usually considered as an invitation to make an offer. The seller may refuse the highest bid and withdraw the goods, and the bidder may withdraw their bid at any time prior to when the gavel is brought down by the auctioneer. If the highest bid does not meet the minimum set, the seller does not have to sell the item.
If the auction is announced as an auction without reserve, the seller is considered the offeror and the bidders, the offeree. The seller must accept the highest bid.

Case 2.3: *Lim v. The.TV Corp. Int'l*, 121 Cal. Rptr. 2d 323 (Ct. App. 2002).
Facts: The dotTV Corporation, acting as an agent for the island of Tuvalu, offered the domain name golf.tv for auction on its Web site. It was bought by Lim for just over a thousand dollars, and he was sent an e-mail confirmation and instructions. A little later, he received a release from bid, and was instructed to disregard the earlier communication. The dotTV Corporation then offered the same domain name at an opening bid of $1 million. dotTV claimed that it's original communication with Lim was regarding a domain named - -golf.TV, but Lim argued that dashes are not recognized on the Internet. Lim sued for breach of contract, but the trial court dismissed the case.
Issue: Did Lim state a cause of action for breach of contract against dotTV?
Decision: Yes.
Reasoning: The court determined that the announcement was an invitation to offer and that Lim's bid was an offer that was accepted by the confirmation e-mail. The Court of Appeals held that Lim had properly pled a cause of action and reinstated the case.

Section 4: Termination of Offers

Revocation of an Offer by the Offeror – An offer may be revoked at any time prior to its acceptance by the offeree by an express statement or an act that is inconsistent with the offer. The revocation is generally not effective until it has been received by the offeree or their agent.
Rejection of an Offer by the Offeree – An offer is terminated if the offeree rejects it,

even against subsequent acceptances by the offeree.
Counteroffer by the Offeree – Counteroffers simultaneously terminate an offeror's offer and create a new offer.
Destruction of the Subject Matter – An offer terminates if the subject of the offer is destroyed prior to the acceptance by the offeree**.**
Death or Incompetency of the Offeror or Offeree – Because capacity is a requirement for a valid contract, death or incompetency will terminate an offer.
Supervening Illegality – Offers terminate if the object of an offer is made illegal prior to the offer's acceptance.
Lapse of Time – Offers expire. If a specific date is given, they expire on that date; if the offer is for a certain number of days, the days start to run when the offer is received. If no time is stated, then it is for a "reasonable time" period.
Option Contracts - An offeree can prevent the offeror from revoking his or her offer by paying the offeror compensation to keep the offer.

Case 2.4: ***McLaughlin v., Heikkila*****, 697 N.W.2d 231 (Minn. Ct. App. 2005).**
Facts: Wilbert Heikkila listed eight parcels of real property for sale. David McLaughlin submitted written offers to purchase three of the parcels. Three printed Purchase Agreements were prepared and submitted to Heikkila with three earnest-money checks from McLaughlin. Writing on the Purchase Agreements, Heikkila changed the price of one parcel from $145,000 to $150,000, the price of another parcel from $32,000 to $45,000, and the price of the third parcel from $175,000 to $179,000. Heikkila also changed the closing dates on all three of the properties, added a reservation of mineral rights to all three, and signed the Purchase Agreements.

McLaughlin did not sign the Purchase Agreements to accept the changes before Heikkila withdrew his offer to sell. McLaughlin sued to compel specific performance of the Purchase Agreements under the terms of the agreements before Heikkila withdrew his offer. The district court granted Heikkila's motion to dismiss McLaughlin's claim. McLaughlin appealed.
Issue: Did a contract to covey real property exist between Heikkila and McLaughlin?
Decision: The court of appeals held that because McLaughlin did not sign or otherwise accept in writing Heikkila's counteroffers, there was no contract for the sale of land between the parties. The court of appeals affirmed the district court's grant of summary judgment in favor of Heikkia.

Reasoning: A written offer does not evidence a completed contract and a written acceptance is required. Minnesota has followed the "mirror image rule" in analyzing acceptance of offers. Under that rule, an acceptance must be coextensive with the offer and may not introduce additional terms or conditions. The district court correctly concluded that Heikkila's alterations of the Purchase Agreements constituted a rejection and counteroffer. Heikkila withdrew the counteroffer before McLaughlin provided a written acceptance, as he was entitled to do. Only a written acceptance by McLaughlin of the written terms proposed by

Heikkila on the Purchase Agreements would have created a binding contract for the sale of land. Without a written acceptance and delivery to the other party to the agreement, no contract was formed.

Section 5: Acceptance

The offeree's assent to the terms of the offer is considered an acceptance.
Who Can Accept an Offer? – Only the offeree can accept an offer and form a legally binding contract.
Unequivocal Acceptance – The mirror image rule establishes that the offeree must accept the terms as stated in the offer.

Case 2.5: Montgomery v. English, 902 So. 2d 836 (Fla. Dist. Ct. App. 2005).
Facts: Norma English made an offer to purchase a house from Michael and Lourie Montgomery. English included in her offer a request to purchase several items of Montgomerys' personal property. After the Montgomerys received English's offer, they made several changes to the document, including (1) deleting certain items from the personal property section of the offer, (2) deleting a provision regarding latent defects, (3) deleting a provision regarding building inspections, and (4) adding a specific "AS IS" rider. The Montogomerys signed the counteroffer and delivered it to English. English initialed some, but not all, of the Montgomerys's changes. When the Montgomerys refused to sell the house to English, English sued for specific performance of the contract. The trial court held in favor of English and ordered specific performance. The Montgomerys appealed.
Issue: Was an enforceable contract made between English and the Montgomerys?
Decision: The court of appeals held that no contract had been created between the parties. The court of appeals reversed the trial court's order of specific performance and remanded the case to the trial court with instructions to enter summary judgment in favor of the Montgomerys.
Reasoning: The Montgomerys argued that the trial court erred in denying their motion for summary judgment because the record demonstrated that there had been no meeting of the minds between the parties as to the essential terms of the contract. The court of appeals agreed. Florida employs the "mirror image rule" with respect to contracts. Under this rule, in order for a contract to be formed, an acceptance of an offer must be absolute, unconditional, and identical with the terms of the offer. Applying the mirror image rule to these undisputed facts the court held that, as a matter of law, the parties failed to reach an agreement on the terms of the contract and, therefore, no enforceable contract was created.

Silence as Acceptance – Silence is not an acceptance unless the offeree has indicated that silence means assent, they have signed an agreement indicating acceptance of delivery as in the case of book-of-the-month club, there were prior dealings between the parties indicating that silence means acceptance, or if the offeree takes the benefit of the

goods knowing that the offeror expects to be compensated.

Time and Mode of Acceptance – Under common law, acceptance occurs when the offeree has been properly dispatched the acceptance. This is called the mailbox rule. The acceptance may have to be by express authorization, which means that it is made by a specified means of communications. If there are no specified terms, then implied authorization will be inferred from the customary methods for that type of transactions.

Case 2.5: Ellefson v. Megadeth, Inc., No. 04 Civ. 5395 (NRB), 2005 U.S. Dist. LEXIS 545, at *1 (S.D.N.Y. Jan. 12, 2005).

Facts: Appellants David Mustaine and David Ellefson were original members of the heavy metal rock band Megadeth. In 1990, the parties formed a corporation, Megadeth, Inc., with Mustaine owning eighty percent of the corporation and Ellefson twenty percent. Approximately thirteen years later, Ellefson sued Mustaine and Megadeth, Inc., alleging that the defendants (collectively Mustaine) had defrauded Ellefson out of his share of the corporation's profits. In October 2003, Ellefson and Mustaine entered into negotiations to settle the case. Both parties were represented by attorneys.

Mustaine sent a proposed Settlement and General Release to Ellefson whereby Mustaine would purchase Ellefson's interest in the corporation and various licensing and recording agreements. The settlement offer was received by Ellefson on April 16, 2004.

Negotiations over the proposed settlement continued uneventfully for the next four weeks. Mustaine imposed a five o'clock deadline on Friday, May 14, 2004, for completion of the settlement. On May 13, Mustaine e-mailed Ellefson that the offer to Ellefson terminated as of 5 PM PST on Friday 5/14/04. The following day, Friday, May 15, the attorneys for both sides traded e-mails proposing changes to the offer. At 4:45 PM, minutes prior to the expiration of Mustaine's offer, Mustaine e-mailed Ellefson an execution copy (read only) copy of the settlement agreement, reiterated the five o'clock deadline, and stated that he reserved the right to make further changes to Exhibits A and B the following week. Ellefson signed a copy of the settlement agreement and faxed the signature page to Mustaine. Mustaine alleges that Ellefson's faxed signature page was received before the five o'clock deadline. Ellefson alleges that his fax was not sent by the five o'clock deadline.

On Thursday, May 20, 2004, Mustaine sent Ellefson fully-executed copies of the settlement agreement by regular mail. On May 24, Ellefson e-mailed Mustaine that he was withdrawing from the negotiations and was withdrawing all proposals. Mustaine responded that there was a signed Settlement Agreement in place which Ellefson had faxed on May 15, 2004.

On June 2, 2004, Ellefson received the finalized Settlement Agreement that had been sent by Mustaine by regular mail on May 20, 2004.

Mustaine argued that there was an enforceable Settlement Agreement between the parties. Ellefson argued that there was not an enforceable Settlement Agreement between the parties.

Issue: Was there an enforceable settlement agreement reached between the parties?

Decision: Yes.

Reasoning: The issue is whether the exchange between Ellefson and Mustaine fulfilled the requirements of offer and acceptance. Contracts are often formed after receipt of a defective acceptance. This is because an acceptance that does not unequivocally comply with the terms of original offer is considered a counteroffer. Any new terms or modified terms in the defective acceptance are treated as new terms of the counteroffer, which the original offeror may then choose to accept or reject. A late acceptance is a form of defective acceptance, and therefore is considered a counteroffer which the original offeror can decide to either accept or reject. Therefore, in order for a contract to exist after receipt of a late acceptance, the original offeror must accept the offeree's counteroffer.

Mustaine's last offer to Ellefson stated that Mustaine reserved the right to make "further changes pending our finalizing Exhibits A and B and the full execution of the agreement early next week." Ellefson's counteroffer signaled his willingness to comply with these terms, including completion by the Mustaine the following week. Therefore, the court found that Mustaine's mailing of the fully-executed contract the following Thursday was consistent with these terms, and reasonable under the circumstances. The court found that an enforceable contract was formed on May 20, 2004, prior to Ellefson's attempted withdrawal.

Nondisclosure Agreements – NDAs are enforceable contracts that swear the signer to secrecy.

V. Case Scenario Revisted

This Case Scenario is based on case of *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

The court would likely find this contract enforceable. Intent to contract is judged by whether a reasonable person would conclude that the parties intended to create a contract after considering the words and conduct of the parties as well as the circumstances surrounding the agreement. The undisclosed intention of a party is immaterial. In *Lucy v. Zehmer,* the court held that where the contract was under discussion for at least forty minutes and appeared to be complete, there could be no intent other than to enter into a binding contract. The court found that it was irrelevant that the Zehmers were secretly not serious in transaction.

VI. Sample Answer To Hands-On Drafting Exercise

REAL ESTATE PURCHASE AGREEMENT

THIS REAL ESTATE PURCHASE AGREEMENT (this "Agreement") is made this **2nd** day of September, 2011, by and between ABC Company, 1234 Main Street, Sylvania, Ohio 43560 ("Seller") and All You Can Eat Ice Cream Buffet, Inc., a corporation in Toledo, Ohio ("Buyer").

RECITALS

A. Seller owns that certain property located in the City of Sylvania, County of Lucas, State of Ohio, more particularly described in **Exhibit A** (warehouse building) , attached hereto and made a part hereof.
B. Seller desires to sell, transfer and convey such property and Buyer desires to purchase such property all according to the provisions hereinafter set forth.

1. PURCHASE PRICE AND PAYMENT TERMS.

The purchase price to be paid by Buyer to Seller for the Property (the "**Purchase Price**") shall be One Million and No/100 Dollars ($1,000,000.00). The Purchase Price shall be payable in the following manner:

(a) Earnest Money. Within two (2) business days of the execution of this Agreement, Buyer shall deposit with First American Title Company, located at 123 Any Street, Sylvania, Ohio, as escrowee (the "**Escrowee**"), an amount equal to Two Hundred Thousand and No/100 Dollars ($200,000.00) (the " **Earnest Money**"). The Earnest Money shall be held under the standard escrow instructions currently in use by the Escrowee. All Earnest Money and interest earned thereon, if any, shall be applied toward the Purchase Price at Closing, provided the transaction contemplated herein proceeds through Closing.

(b) Disbursement of Earnest Money. The Earnest Money shall be returned to Buyer or delivered to Seller in accordance with the terms hereof. The parties hereto agree to promptly direct the Escrowee to deliver the Earnest Money in accordance with the terms hereof.

(c) Cash. The balance of the Purchase Price, plus or minus prorations set forth herein, shall be paid by wire transfer or official bank check on the Closing Date, to be determined.

IN WITNESS WHEREOF, the undersigned, being duly authorized, have executed this Agreement as of the date first written above.

SELLER:

ABC COMPANY, an Ohio corporation

By:_____
Adam B. Collingwood, President

BUYER:

ALL YOU CAN EAT ICE CREAM BUFFET, INC.
an Ohio corporation

By:_____
Grace Full, President & Owner

By:_____

Emma Rauld, Vice President & Owner

By:_____
Jack Sprat, Treasurer & Owner

VII. Answers to Critical Legal Thinking Cases

Case 2.1. Terms of Contract. *Hunt v. McIlory Bank & Trust*, 616 S.W.2d 759 (Ark. Ct. App. 1981).

No, there was not an oral contract for long-term financing. In order to make a contract, there must be a meeting of the minds as to all terms. A court cannot make a contract for the parties. The court found that the total amount of loan proceeds was never decided and that no interest rate or repayment terms were ever agreed upon. There was apparently some discussion as to long-term financing; however, the parties never agreed on any essential terms. Such terms were left to future determination.

In addition, the court stated that there was no way that it could take the general terms discussed between Hunt and the bank and be asked to enforce the contract without supplying the necessary terms essential to the formation of the contract. Accordingly, the trial court's judgment in favor of the Bank was affirmed.

Case 2.2. Implied Terms. *Edmond's of Fresno v. MacDonald Group, Ltd.*, 217 Cal. Rptr. 375 (Ct. App. 1985).

Edmond's of Fresno will be successful in limiting the mall, and any subsequent expansion, to not more than two jewelry stores. Under the modern view of contracts, if a contract term is missing and a reasonable term can be implied, the court can supply the missing term. The contract must be interpreted so as to give effect to the mutual intention of the parties at the time of contracting. Furthermore, when the contract is reduced to writing, the intention of the parties should be ascertained from the writing alone, viewing the contract as a whole, and not upon any clause standing alone.

The lease at issue here was silent as to any subsequent expansions of the mall. The court held that the lease impliedly incorporated any future development within the designation "Fresno Fashion Fair." Had MacDonald intended to exclude any future development, it could have explicitly done so in the lease. Moreover, the court applied the rule that in construing a lease any uncertainties will be resolved strictly against the party who drafted the document. Accordingly, the Appellate Court affirmed the lower court's holding that the restrictive covenant applies to all of the Fresno Fashion Fair, including any subsequent expansions.

Counteroffer

Case 2.3. Counteroffer. *Glende Motor Co. v. Superior Court*, 205 Cal. Rptr. 682 (Ct. App. 1984).

No, there has not been a settlement of the lawsuit. A valid acceptance of an offer must be absolute and unqualified. A qualified acceptance that contains terms or conditions materially different from those in the original offer constitutes a counteroffer that terminates the power of the original offeree to accept the offer.

In the instant case, the court held that the process of settlement is best served by allowing the law of contracts to control. Thus, the court held that the tenant's qualified acceptance of the settlement offer, conditioned upon the execution of a new lease, constituted a counteroffer that terminated its ability to accept the settlement offer. The trial court's denial of the tenant's motion to compel entry of judgment due to the existence of the settlement was therefore affirmed.

Acceptance

Case 2.4. Acceptance. *J.C. Durick Ins. v. Andrus*, 424 A.2d 249 (Vt. 1980).

Andrus wins and does not have to pay the premiums on the insurance policy. To constitute a contract there must be a meeting of the minds between the parties, an offer by one, and an acceptance by the other. Generally, silence is not considered acceptance even if the offeror states that it is. The offeror cannot force the offeree to speak or be bound by his silence. The court found that the prior policy was a separate and independent agreement that came to an end by its own terms. It contained no automatic renewal clause and failed to bind the parties in any way after the expiration of the original policy. None of the communications amounted to an acceptance.

In addition, the court held that silence could be considered acceptance where the prior dealings between the parties so indicate or where the recipient retained the benefit of valuable services. The court, however, found that the past dealings of the parties established no course of conduct between the parties and that since the second policy was never in effect, Andrus never retained any benefit. The trial court's judgment in favor of Durick was therefore reversed.

Mailbox Rule

Case 2.5. Mailbox Rule. *Jenkins v. Tuneup Masters*, 235 Cal. Rptr. 214 (Ct. App. 1987).

Yes, the notice exercising the option to renew the lease was effective, thereby extending the lease for the next five years. Acceptance of a bilateral contract occurs at the time the offeree dispatches the acceptance by an authorized means of communication. Under this rule, the acceptance is effective when it is dispatched, even if it is lost in transmission. The court found that the lease notice provision required notice to be sent by "registered or certified United States mail." The court went on to state that the risk of loss of the notice of extension had transferred to the addressee once the notice reached the custody of the U.S. Postal Service, notwithstanding that the notice was not deposited in an officially designated receptacle.

In addition, the court held that the tenant's habit and custom regarding mailing practices was sufficient to affirm the trial court's holding that the tenant's renewal notice had been properly mailed under the terms of the lease. Accordingly, in the landlord's unlawful detainer action, the trial court correctly rendered judgment in favor of the

tenant, thereby extending the lease for the next five years.

VIII. Answers to Issues in Ethics Cases

Case 2.1. *Cerdes v. Wright*, 408 So. 2d 926 (La. App. 1981).

Cerdes will be given a "reasonable time" to complete the house. Where a contract is silent as to time for performance, a "reasonable time" is implied. Such time is to be determined by the circumstances of the case. In this case, the trial court concluded that six months was a reasonable period of time for completion of the project. The court then awarded Wright liquidated damages as stipulated in the contract. The Appellate Court affirmed the holding.

Case 2.2. *James v. Turilli*, 473 S.W.2d 757 (Mo. Ct. App. 1971).

Stella James wins, and Turilli must pay her the $10,000 reward money. An offer of a reward is a unilateral contract. To be entitled to collect the reward, the offeree must (1) have knowledge of the reward offer prior to completing the requested act and (2) perform the requested act. Only substantial performance is required; literal performance need not be shown.

Stella James pleaded that after hearing defendant's offer she submitted affidavits of persons in and acquainted with the Jesse James family, each stating facts constituting evidence that Jesse James was in fact killed as alleged in song and legend. The court held that the petition sufficiently pleaded that a reward had been offered and that the plaintiff had complied with its terms. The court also held that an affidavit stating appellant's sister was the widow of Jesse James and that James had been killed and that he had attended the funeral, viewed the body, and knew it was that of Jesse James, was properly admitted. Accordingly, the Court of Appeals affirmed the lower court's holding of a directed verdict for the plaintiff.

IX. Terms

- acceptance—Occurs when a buyer or lessee takes any of the following actions after a reasonable opportunity to inspect the goods: (1) signifies to the seller or lessor in words or by conduct that the goods are conforming or that the buyer or lessee will take or retain the goods in spite of their nonconformity; or (2) fails to effectively reject the goods within a reasonable time after their delivery or tender by the seller or lessor. Acceptance also occurs if a buyer acts inconsistently with the seller's ownership rights in the goods.
- agreement—The manifestation by two or more persons of the substance of a contract.
- auction with reserve—Unless expressly stated otherwise, an auction is an auction with reserve, that is, the seller retains the right to refuse the highest bid and withdraw the goods from sale.
- auction without reserve—An auction in which the seller expressly gives up his or her right to withdraw the goods from sale and must accept the highest bid.

- counteroffer—A response by an offeree which contains terms and conditions different from or in addition to those of the offer. A counteroffer terminates an offer.
- express authorization—A stipulation in the offer that says the acceptance must be by a specified means of acceptance
- implied authorization—Mode of acceptance that is implied from what is customary in similar transactions, usage of trade, or prior dealings between the parties
- implied term—A term in a contract which can reasonably be supplied by the courts.
- lapse of time—An offer terminates when a stated time period expires if no time is states, an offer terminates after a reasonable time.
- mailbox rule—A rule that states that an acceptance is effective when it is dispatched, even if it is lost in transmission.
- mirror image rule—States that in order for there to be an acceptance, the offeree must accept the terms as stated in the offer.
- objective theory of contracts—A theory that says the intent to contract is judged by the reasonable person standard and not by the subjective intent of the parties.
- offeree—The party to whom an offer to enter into a contract is made.
- offeror—The party who makes an offer to enter into a contract.
- offer—The manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.
- proper dispatch—An acceptance must be properly addressed, packaged, and posted to fall within the mailbox rule.
- rejection—Express words or conduct by the offeree that rejects an offer. Rejection terminates the offer.
- revocation—Withdrawal of an offer by the offeror terminates the offer.
- reward—To collect a reward, the offeree must (1) have knowledge of the reward offer prior to completing the requested act and (2) perform the requested act.
- supervening illegality—The enactment of a statute or regulation or court decision that makes the object of an offer illegal. This terminates the offer.