Starting Off Right in Contracts

SECOND EDITION

Carolyn J. Nygren
Howard E. Katz

Carolina Academic Press
Durham, North Carolina

Copyright © 2014
Carolyn J. Nygren and Howard E. Katz
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Nygren, Carolyn, 1942- author.
Starting off right in contracts / Carolyn J. Nygren, Howard E. Katz.
-- Second edition.
pages cm
ISBN 978-1-59460-827-8 (alk. paper)
1. Contracts--United States--Outlines, syllabi, etc. 2.
Contracts--Study and teaching--United States--Outlines, syllabi, etc.
3. Law--Study and teaching--United States. I. Katz, Howard E.,
author. II. Title.

KF801.Z9N94 2013
346.7302'2--dc23

2013036603

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Foreword ix
Introduction xv
Chapter 1 · Information Necessary for Law School Survival 3
Case Reading—A Time-Consuming Task 3
1. Cases were not written as teaching materials 3
2. Cases are full of words you don't know 4
Casebooks—A Mystery 5
1. The cases in your casebook are from many jurisdictions 5
2. Casebook editors often try to "hide the ball" 6
The Ultimate Goal 6
Taking Notes on Cases—Briefs? 7
Cases and Classes 10
Note Taking—Keeping the Goal in Mind 11
More About What Happens in Class 12
Outlining 13
Law School Testing—A Shock 16
Grading—More Mystery 19
Answering Exam Questions 21
Practicing the Method 24
What about IRAC? 24
Chapter 2 · Contract Formation 27
Case Reading and Note Taking 28
Outlining 32
Is there an offer? 33
Can the offer be revoked? 34
Was the power of acceptance terminated? 35

Was the offer accepted? 35
UCC Differences 37
Test Taking and Grading 38
Sample Questions 48
Unilateral Contract 48
Option Contract 54
Bilateral Contract with Counteroffer 58
Unilateral Contract 67
Consideration and Promissory Estoppel 69
Analysis Hints 69
Consideration 70
Promissory Estoppel 73
Sample Questions 73

Chapter 3 · Defenses 85
Defenses that Arise at the Time of Formation 87
Analysis Hints 87
1. Defenses easy to spot, easy to analyze 87
2. Defenses usually easy to spot, harder to analyze 88
3. Defenses hard to spot, usually easy to analyze 88
4. Defenses easy to spot, policy analysis required 88
Effect of Establishing a Valid Defense 89
Defining What Is and Isn't a Defense 89
Capacity—Infancy 89
Capacity—Mental Incapacity 90
Capacity—Intoxication 90
UCC 90
Misunderstanding 91
Mutual Mistake 91
Unilateral Mistake 91
UCC 92
Misrepresentation 92
Intentional Misrepresentation—Fraud 93
Duress 93
Unconscionability 93
Statute of Frauds 94
UCC 95
Sample Questions 96
Defenses that Arise after Formation 106
Analysis Hints 106

Impossibility 106
Impracticability 107
Frustration of Purpose 107
UCC 108
Sample Question 109
Other Categories of Arguments to Avoid Enforcement (not true affirmative defenses) 112
Conditions 113
Parol Evidence Rule 116
Summary of the Rule 116
Step-by-Step Analysis 117
UCC 118
Rights and Obligations of Third Parties 118
Third Party Beneficiary 119
Assignment of Rights 120
Delegation of Duties 120
UCC 121
Sample Questions 121

Chapter 4 · Formation and Defense Questions 131

Chapter 5 · Breach and Remedies 139
Analysis Hints 139
Breach 140
UCC 141
Remedies 141
Common Law Compensatory Damages 141
Liquidated Damages 142
Alternative Measure—Reliance 143
Alternative Measure—Restitution 143
Equitable Remedy—Specific Performance 144
UCC 144
Sample Questions 145

Chapter 6 · Confronting Your Final Exam 159
Contracts—The Big Picture 160
Formation 160
Defenses (arising at the time of formation) 161
Defenses (arising after formation) 161
Other Categories of Arguments to Avoid Enforcement (not true defenses) 161
Breach 162

Alternative Theories of Recovery 162
Remedies 162
Using Old Exams to Prepare 162
Final Thoughts 163

Foreword

How to Use This Book

This book is designed to provoke thought and discussion. It will suggest organization, analysis, and writing techniques helpful to you from the very first day of class. As you become more sophisticated in your knowledge of the law, your analysis and writing skills will also become more sophisticated. This book can only give you a foundation, but our hope is that by providing you with such a foundation, everything you do in your first weeks and months of law school will be done with greater purpose, direction, understanding, and efficiency. Nevertheless, we encourage you to modify our rule statements, definitions, and listings of elements, to create your own methods of organizing the material, to challenge our analysis of the facts, to add philosophical and policy considerations, and even to come to different conclusions. In order to help you, the methods we suggest have to be seen as a starting point, which can be adapted to your needs and to the expectations of your professors.

The book begins with a short introduction entitled "The Study of Contracts is Unique." It discusses how studying contracts is different from studying any other course. These few pages will give you the "Goodyear Blimp overview" of the study of contract law. It is important that you have a framework into which you can fit the rules you will learn and the cases you will read. You may want to return to these pages throughout the course, to see how the topic you are studying at any given time fits into the bigger picture.

Chapter One provides you with information necessary for law school survival. Chapter Two covers offer (including revocation and termination), acceptance, consideration, and promissory estoppel. You may want to read the entire chapter at the outset to see how all of the sub-topics are related (and to help put your course reading in context), or you may want to wait until you have covered each of the topics more fully in class before reading each part of the chapter.

Chapter Three covers defenses and related arguments. We have divided this topic into defenses based on circumstances that were true at the time of the formation of the contract, defenses based on events that took place after formation, and other arguments that can be raised to avoid enforcement of a contract that are not true affirmative defenses. Chapter Four introduces you to multi-issue exam questions. Chapter Five covers breach and remedies, and also includes more multi-issue questions.

Chapter Six is meant to be read now and shortly before your final exam. This book cannot prepare you for every question asked by every professor. Rather, its purpose is to provide you with an organized, deliberate approach, and the building blocks necessary for you to construct your own answers. Chapter Six contains suggestions for exam preparation (including a checklist of contract law issues), and some hints for strategizing during your actual exam.

The organization of topics in this book may be different from the organization in your casebook. For example, although your casebook may include revocation as a subsection of termination, it is given a separate heading in this book, because complete and efficient analysis of contract formation problems requires special attention to revocation. The organization of the chapter on defenses is also non-traditional. It provides you with a simple and efficient approach to use when you are analyzing a complicated fact pattern. The chapter then goes on to discuss other arguments that can be raised by one party to try to avoid enforcement of a contract that are not typically considered to be true affirmative defenses. The order of topics in your casebook reflects the author's idea of the best way to introduce and teach the substance of contract law, but that order may not be the most effective way to analyze a contracts problem. Our goal is to provide you with a format that will help you to organize the course material and to make use of it on an exam. As you cover particular topics in your class, you should add what you learn to the framework we have provided. Some courses begin with contract formation, others with theories of recovery or with remedies. Regardless of where the course begins, the successful law student recognizes that sometimes the course material has to be reorganized to best facilitate applying it to an exam question. Use our framework as a starting point, and modify it in light of your particular course and professor.

The primary purpose of this book is not to teach you the law. Although many students find they need more than their casebooks and class notes to learn the rules of law, your bookstore already has various commercial outlines and hornbooks to help you in that regard. We have found that most students

learn more than enough law, in terms of knowing the rules. But what many students find more challenging is figuring out what to do with all those rules, how to organize them in a usable way, and how to apply them the way the professor wants that to be done. That is the focus of this book. Assuming you have learned the law, this book will enable you to effectively demonstrate your knowledge on an exam.

Each chapter begins with an explanation of useful techniques used to approach problems in a given topic. This will be followed by a draft outline of the topic. The draft outline consists of rule statements, exceptions, and some common applications. You can add the information you've learned in class, and from the cases you've read showing how the rules have been interpreted. With the exception of the Uniform Commercial Code (UCC), the rules in contract law have been centuries in the making, and no two professors (and no two commercial outlines) state them in exactly the same way. Don't let this throw you. The basic components of the rules are pretty much the same from professor to professor and hornbook to hornbook. Because there is no one universally accepted phrasing of the rules, it's okay to compose a rule that makes sense to you, so long as it contains the accepted elements and captures any particular approach your professor takes. If your professor gives you a specific rule statement, you would be wise to use it. Each chapter will also include sample exam questions, sample notes for an answer, and some answers.

This book is designed to give you organizational strategies for answers, not a complete explanation of every rule and every doctrine. It can be particularly useful in a study group, and in Chapter Six we suggest how members of a study group can work together on exam preparation. The material in each of the chapters can be used throughout the semester as your study group meets, or near the end of the semester as you begin your final review.

The approach we suggest and demonstrate throughout the book is designed to ensure that a student addresses all the issues in an exam question. We explain here, and again later in the book, how to answer a question by first doing a "top-down" analysis, going step-by-step through each rule, element, or subelement that applies to a particular topic. Then we suggest that you proceed "bottom-up," looking more closely at each fact in the question to make sure that you have not missed any possible significance.

At some point before you begin actually writing your exam answer (either after you have done your top-down analysis, or after you have done both the top-down and bottom-up analysis), we suggest you underline or cross out the words in the fact pattern that you have already applied to various rules. You should then look at the unmarked words to see if you have missed something

important. Sometimes words you have not marked are there merely to advance the story of the fact pattern, but often they may prompt you to notice an issue you might have missed. So why not cross out those words the first time you use them? Because sometimes the same fact can fit into your answer in more than one place. This basic approach—first, going step-by-step (top-down), and second, focusing more closely on the facts (bottom-up)—is an important exam technique for many students. However, this approach cannot be successfully employed for the first time during an actual exam. It requires practice. So we provide the opportunity to practice this approach in each chapter.

Here is one suggested way to use this book: After each sample answer, there is another copy of the question. We provide a second copy of the question because many law students seem to feel compelled to underline words in a question the first time they read it. With another copy of the question provided, you will have a clean copy available for you to practice giving your answer. We suggest that you read the Notes for Answer, and then the sample answer, as many times as necessary in order to understand our approach. Then read the copy of the question. First, apply the top-down method of reading the facts given to determine what aspect or aspects of contract law are likely to be involved. Then, for each topic you have identified, try to recall everything you know about it. That means each basic rule or definition, of course. But it also means everything else you learned about the rule: limitations, common applications, and the like. Once you have recalled everything you know about that topic, write down a quick outline. This outline is, in effect, an inventory of all the things the legal system considers relevant for that topic, and thus the things that must be demonstrated to determine whether or not the rule applies.

Once you have identified what must be demonstrated, you look at the new facts you have been presented with in the exam question and apply those facts to the existing rules, elements, policy arguments, etc. That's what we mean by a top-down analysis: you take what you know about a topic (the law), go through it in a step-by-step manner, and apply the new facts to what you already know. Then, after having done this top-down analysis, you should do a bottom-up analysis. This means taking another close look at each fact, to consider what legal rule or rules that fact suggests to you (even if you have already applied that fact to one or more rules doing your top-down analysis). At some point, as mentioned earlier, you might want to underline the words from the question that you have already used in your top-down draft of an answer. Underlining is better than crossing the words out, since a given fact might apply to more than one rule or element.

The outlines and suggested answers we have provided are intended as a starting point. Using the notes you have from your casebook reading and from class, see if there are any issues or sub-issues we did not include in our Notes for Answer and Sample Answer, and add those to your analysis. The cases you have read or the notes you have taken may modify what we have said, or might present a rule in a different manner. If so, you should obviously take that into account in how you will learn the material for your course. After you have added to the Notes for Answer, you may want to put the book answer out of sight. Put the question with the underlinings you have made and your modified notes in front of you. Write out your own answer to the question, taking as much time as you need to be satisfied with your work. You may want to write the answer again, but using less time. We have left some questions without answers so that you can practice on your own or with a study group. Most professors do not provide a format for a model exam answer. We are suggesting a generic format that can be adapted to fit most classes. If your professor gives you an answer format that differs, that is the one you should use.

Most students find it useful to devote from one-third to one-half of the time allocated for each question on an exam to thinking, planning, and writing down preliminary notes on scratch paper. Once you have done so, you must be able to write your actual answer quickly. Writing answers to exams is a skill, and as with any other skill, the best results are achieved by practice. Although practicing writing and rewriting simple answers may seem mundane, the time is well spent. The more complicated questions on a law school exam are usually no more than a combination of simpler questions. Though more complicated questions will require even better organization, you will find that if you follow the systematic approach presented in this book, much of that organization will come naturally (with practice).

You can expect this book to help you in four ways:

1. We give you draft outlines, so that you don't have to agonize over starting your own.
2. We provide techniques for reading fact patterns successfully.
3. We make suggestions for how to organize your answers coherently on exams, using a step-by-step approach.
4. We supply sample questions and suggested answers for each topic so you can practice your writing.

Introduction

The Study of Contracts Is Unique

Contracts is the only course in the first year of law school in which almost every case and every fact pattern presents the same central issue: was there an enforceable contract between the parties? Notice that the word "enforceable" usually does not mean that one party will be forced to actually perform what was promised. Rather, contract law contemplates that if there is an enforceable contract that has been breached, the breaching party will be forced to compensate the other party for the failure to perform. Since the course is filled with many rules with many details and many exceptions, it is easy to forget that it is essentially a one-issue course. Of course if there is an enforceable contract, then two other issues present themselves: first, did one (or both) parties breach the contract, and, second, if so, what remedies are available to the non-breaching party?

The cases in your casebook represent abnormal situations. The business world is full of contractual disputes that never result in litigation, and many more contracts that never give rise to dispute at all. The cases you will study are examples of those rare situations where relationships and other means of amicable dispute resolution have failed.

Unlike tort remedies, generally contract remedies are not affected by the notion of fault. Some of the cases you will read will be examples of good faith attempts at performance that failed, while others represent intentional refusals to perform. The following is an example of the latter:

Tamara's Tomato Patch (Tamara's) is a small farm that grows only tomatoes. It sells some of the tomatoes at its roadside stand, but most of the tomatoes are sold to The Green Grocer (Grocer), a large produce market. Tamara's

and Grocer entered into an agreement in January, which specified the variety of tomato Grocer will buy, the minimum size and degree of ripeness, the quantity, and the price ($.50 per pound). This agreement means that each party takes a certain amount of risk, but also gets a certain amount of security. The growing season may be wonderful, there may be a glut of tomatoes, and Grocer could buy the tomatoes from other farmers for $.30 per pound. On the other hand, the growing season may be terrible, there may be a shortage of tomatoes, and Tamara's could sell all its tomatoes at its roadside stand for $.95 per pound. The agreement commits both parties to a predetermined price.

In a glut year, Grocer has a distinct financial incentive to avoid the agreement with Tamara's. If Grocer has a valued, long-term relationship with Tamara's, it might pay the agreed-to price, or it might try to negotiate a better price. If Tamara's valued its long-term relationship with Grocer, it may well agree to some reduced price, though perhaps not the low price of $.30. There is a cost and a benefit to both sides to preserving good will and a productive ongoing relationship.

For a variety of reasons, it might be that in the glut year Grocer could not negotiate a better price with Tamara's. Looking at the market price, and not caring about a good long-term relationship with Tamara's, Grocer might consider other suppliers. Grocer (or rather Grocer's lawyer) would know that the rule for contract damages is generally to put the non-breaching party in the position it would have been in if the contract had not been breached. Therefore, if Grocer went ahead and bought tomatoes from another farmer for $.30 per pound, it would still have to pay Tamara's something. If Tamara's had been able to sell its tomatoes to others, Grocer would have to pay the difference between the contract price and Tamara's selling price. If Tamara's had not been able to sell the tomatoes, Grocer might be liable for the full $.50 per pound for the quantity of tomatoes it had agreed to buy. Of course, this may be a bad business decision in the long term, as Grocer would have burned its bridges with Tamara's. But putting those relationship issues aside, Grocer will still be no better off by buying from someone other than Tamara's, *if* Tamara's is able to collect damages, because whatever Grocer saves by getting a lower price elsewhere it would have to pay to Tamara's as damages. And if Tamara's cannot find a substitute buyer, then the damages owed by Grocer to Tamara's plus what Grocer paid to another supplier for the tomatoes would be *more* than if Grocer had just gone ahead and paid Tamara's the contract price. (We are ignoring the cost to Tamara's to sue, to keep the example simple.)

But suppose Grocer can find a reason why a contract with Tamara's was never properly formed, or a reason why, even if a contract was formed, it

should not be enforced. Then it may make good business sense to replace Tamara's as its supplier. Grocer might be able to avoid the contract with Tamara's altogether. Or maybe Grocer will have to pay Tamara's something, but if Tamara's recovery is not based on the contract, that amount might be less since, as we will see later, non-contractual remedies are usually not as good (for the non-breaching party) as contract remedies.

There are several different types of legal arguments that Grocer's lawyer would consider:

1. The agreement the two parties made did not satisfy the legal requirements of a contract. If so, there is no enforceable contract. This is the argument the non-performing party in contract formation cases, and, in the problems in Chapter Two, will usually make first. If this argument is successful, contract remedies don't apply because there was no contract to begin with.
2. If the formation of the contract cannot be disputed, the lawyer for the non-performing party might argue that there is something about the situation at the time of contract formation that makes the agreement unenforceable. For example, the contract may have been the result of misrepresentation or mutual mistake. If so, there is a defense to the enforcement of the otherwise properly formed contract, and the remedies for breach of a contract will not come into play. This is the subject of the first section of Chapter Three.
3. If there is no defense based on a situation that existed at the time of the making of the contract, maybe something happened after the formation of the contract that would make the contract unenforceable. If so, there is a defense to the enforcement of the contract, and, again, contract remedies would not apply. This is the subject of the second section of Chapter Three.
4. There may be other rules or requirements that were not complied with, which are not normally called defenses. For example, some contracts must be in writing, and the contract in question may not have been. Or one party may have improperly delegated to another company its duty to deliver tomatoes. If one of these additional rules applies, there may be an unenforceable contract, or the rights of the parties may be altered. If so, contract remedies may not apply. These additional rules (that can be invoked to avoid enforcement of the contract, but that are not true affirmative defenses) are the subject of the last part of Chapter Three.
5. Even if a contract has been formed, and even if there are no defenses that can be raised and all other applicable rules have been complied with,

there may not be a breach of contract. In the Tamara's-Grocer situation, the breach is clear, but it will not always be so. If there is no breach, remedies do not come into play.

6. Only if all of these other steps have been addressed does the issue become one of how to determine the proper remedy. There are several types of contract remedies available, some of which would be less costly or less onerous for the non-performing party than others. Remedies for breach of contract are covered in Chapter Five. Even if the agreement is found to be an unenforceable contract, there may be other remedies for the party that expected performance. These are also addressed in Chapter Five.

It may be useful to keep this simple model of the types of arguments that can be made in mind as you read cases and examine fact patterns.