

**SAMPLE ANSWER**  
**ELS REMEDIES 2012 MIDTERM EXAM QUESTION NO. ONE**  
(Derived from the July 2012 California Bar Exam, Question No. 4)

1. Pete's Remedies Against Della Concerning his Employment:

Pete would argue that he had an enforceable employment contract with Della as her dental hygienist for 6 years, at a salary of (i) \$40,000 per year, plus (ii) as additional compensation, receiving ownership from Della of Greenacre, a parcel of undeveloped land that she owned appraised at \$50,000, if he worked for her for an initial 3 consecutive years. Pete would assert that Della intentionally breached their agreement by terminating his employment, without cause, after he had worked for only 2 years and 9 months, in order to avoid having to convey the \$50,000 Greenacre parcel to him, and so that she could sell Greenacre instead to Ted, for \$60,000.

Pete will further claim that in order to conceal her real intent in firing him, Della has intentionally defamed him and also interfered with his prospective economic advantage (new employment), by misrepresenting his work abilities to a prospective employer (a local dentist); and, that she has also threatened to repeat her false and defamatory statements to any other dentist inquiring about Pete's work abilities as a dental hygienist.

[a. As a first line of defense Della might argue that her alleged agreement with Pete is unenforceable because it consists of her oral offer of an (initial) work period, and Pete's oral counter-offer of a longer term of employment, in violation of (a typical) statute of frauds: being an agreement not only for employment longer than a year (*cf.* Calif. Civ. Code §1624(a)(1)), but also for the "sale" of real property (Pete's 3 years of work at a lesser salary, totalling \$30,000 over 3 years, could comprise the equivalent of "purchase price" in payment for the property), see, e.g., Calif. Civ. Code §1624(a)(3). Such are types of agreements typically requiring, under the statute, that the material terms thereof be contained in a written memorandum that is "signed by the party to be charged" ( Della), in order to be enforceable. There is no such writing identified by the facts.

(1). In response, Pete would argue that Della is equitably estopped to assert the statute of frauds as a defense, since he undertook the employment covered by the oral agreement, in reasonable reliance on her promises of lesser compensation, when he could have been employed elsewhere at a greater compensation (*vide* the offer of employment from another local dentist at a higher salary, which Pete turned down, in reliance on Della's promise to compensate him by transferring title to Greenacre to him at the end of the initial 3 years of employment with her), with a significant reward (ownership of Greenacre) when he completed the first 3 years of continued employment with Della. While Della

could oppose Pete's estoppel argument by claiming she was unaware of the competing employment offer and thus of his alleged "reliance" on her promise, it is not necessary, in order for an estoppel to apply, that the promisor be (also) aware of the detriment incurred "in reliance on the promise", by the promisee.

(2). In addition, in practical and objective proof of the existence of the employment agreement and at least some of its material terms (the yearly salary of \$40,000 per year, already paid by Della to Pete for 33 successive months), Pete can also argue that the statute of frauds is inapplicable, by virtue of the doctrine of "part performance": when the promisee actually performs material elements of the oral contract with the promisor's knowledge and consent, it is said that evidence of such performance "removes" the (thereby-proven) oral agreement from the (application of) the statute of frauds.

(3). Consequently, on balance, Pete could overcome Della's statute of frauds defense, based on equitable estoppel and part performance doctrines.]

[Competent treatment of the arguable "statute of frauds" issue – a standard component of Contracts substantive law – accorded extra credit grade points]

b. Pete would claim monetary damages from Della proximately incurred by him, as remedies for her breach of the employment contract. He would prove the breached agreement as one for a specific term (here, 6 years), and not the more typical (for employee contracts) "at will" agreement.

(1). Pete would seek "compensatory" damages, being monetary relief designed to place the injured party (Pete) in a position as if full performance of the contract had been rendered by Della: \$130,000 more in total salary, for the 39 months remaining in his term of employment, plus \$60,000, for the remainder of his promised total compensation, as the value of the Greenacre parcel (based upon Ted's presumably arm's length offer to buy it), at or about the time of breach, or when Pete would have completed the initial continuous 3 years of employment just 3 months after the breach. The second element assumes no recovery/award of the title to Greenacre, to Pete.

(2). Such damages would also be categorized as "general" damages, i.e., those as may fairly and reasonably be considered arising naturally from the breach, if not damages reasonably supposed to have been in the contemplation of both parties when they made the contract, as the probable result of its breach.

(3). Della would argue that if the agreement is enforceable and in breach, but with 3 years and 3 months of its term remaining, then Pete's general damage claim is subject to the doctrine of avoidable consequences: that is, in mitigation of his damages, he must seek a replacement job as a dental hygienist (or other gainful employment), or alternatively, Della can present proof of what Pete could have allegedly earned during the balance of the contract term in

another employment, as a set-off to his general damages claim. [Here, however, it is arguable that Della's duty of mitigation defense argument may be impeached by her claims that Pete was an incompetent dental hygienist.]

(4). Pete may face an election of remedies choice respecting his claim to ownership of Greenacre, as a component of his general damages recoverable from Della's breach of the employment agreement. If he does not seek to and does not obtain ownership of the \$50,000 parcel, then Pete would seek to prove as expectancy damages what he lost monetarily by being denied its ownership: such as what he could sell the parcel for in the future; and/or possibly what he could profit from its future development. However these damages are subject to strict judicial scrutiny, given their speculative nature.

c. The facts state that Della had always been satisfied with the nature of Pete's work. However when he was fired, arguably to prevent his satisfaction of the condition precedent to being entitled to own Greenacre (just 3 more months of employment), she falsely claimed that he was incompetent, as a contrived excuse for his firing.

(1). While Della has arguably committed the tort of slander *per se* about Pete's performance in his profession, entitling Pete to recover defamation tort damages (including punitive damages) from her, she is threatening to continue the defamation, if not stopped, arguably causing more injury to Pete in his chosen profession than could be covered by damages; and, also requiring him to institute successive damage actions in the future against her to effect a full recovery.

(2). Consequently, while traditionally given the historical separation between "chancery" and "law" courts in past times, a plaintiff seeking equitable relief (an injunction) could not join that claim with one for damages in the same proceeding, that distinction is not presently uniformly enforced. Therefore in his suit against Della for contract breach damages, arguably Pete could join a damage claim for **present** defamation damage, **and** a claim for a permanent prohibitory injunction against Della, restraining her from publishing the threatened continued slanders. Defamatory statements do not enjoy "free speech" immunity; however, courts do not favor equitable decrees requiring substantial ongoing supervision particularly involving only private interests.

Pete could arguably satisfy the basic requirements for obtaining permanent injunctive relief: his "legal remedy" of tort damages would not protect/restore his professional reputation; Della would suffer no "hardship" in being prevented from publishing continual defamation; the harm to Pete's professional reputation from the slanders would be irreparable; and there is a public interest in protecting work reputations and thus employment opportunities, from self-serving slander.

## 2. Pete's Equitable Remedies Against Della and Ted Regarding Ownership of Greenacre:

Land is recognizably unique in the law; loss of its ownership often cannot be fully compensated by monetary damages. Here, Pete could argue that he should receive title to Greenacre, having qualified to do so under terms of his employment agreement with Della: her intentional breach of that agreement 3 months short of his completion of the 3 years of continued employment with her (the condition precedent to Della's contractual requirement to convey title in Greenacre to Pete), having excused his failure to satisfy that particular condition precedent to receiving title to the parcel. He would further argue, supporting the contention that land ownership is "unique", that the same was illustrated by the increase of \$10,000 in Greenacre's apparent market value in less than three years (from an appraised value of \$50,000 at the start of that period, to \$60,000 at the time of and represented by Ted's offer to purchase the parcel). Thus the value of the parcel could reasonably be expected to increase further, to the financial benefit of its owner.

a. With respect to Pete's claim of holding equitable title in Greenacre based on his employment agreement with Della, Ned could arguably qualify as an innocent *bona fide* purchaser of value ("BFP") of the parcel, in connection with the transfer of title from Della to Ned from the escrow already established for its sale, on the ground that he was unaware of Pete's prior claims to ownership, and of a potential transfer of title by Della to Pete, to effect same. Therefore, it would be important for Pete to prevent that escrow from closing and thereby vesting title to Greenacre in Ned, as an "immunized" BFP. Consequently, in a proceeding not only to recover compensatory damages in the alternative for Della's breach of the employment agreement, for Della's past and present slander, and to enjoin Della's threatened continued defamation (see above), Pete could also seek to separately enjoin Della and Ned from proceeding with the sale of Greenacre to Ned, out of the escrow they have established for that purpose. Modernly, damages can also be recovered by a plaintiff in an equitable action which also seeks injunctive relief.

(1). In support of a temporary injunction enjoining the consummation of the proposed Della-Ned sale, Pete would point out that the loss of ownership of land as an unique item of property, would constitute irreparable injury to him; that monetary damages would not be an adequate substitute for the ownership of Greenacre as an unique asset; that he is likely to prevail in his action against Della for damages for breach of the employment agreement; that he would suffer greater hardship than Ned in Pete's prospective loss of ownership in Greenacre if its sale to Ned is not enjoined, since he had already "paid" to Della part of a purchase price for the parcel (the lesser salary paid him by Della, over a period of 2 years and 9 months, in consideration of his prospective ownership of the parcel at the completion of 3 years of employment), while Ned as yet has paid nothing; and, that if the sale was not enjoined, Ned could then presently take title

as an (alleged) BFP, possibly immune from any subsequent court decree vesting title to Greenacre in Pete. He could also argue that such injunctive relief served a public policy interest in protecting the integrity of employment contracts and of insuring that an employee received the full promised fruits of his or her labor.

On balance, Pete should obtain such a preliminary injunction, pending trial of Pete's claim to ownership of Greenacre based upon his employment agreement with Della, even if the court required Pete to post an injunction bond.

b. Pete would also seek a mandatory permanent injunction requiring Della to transfer fee title to Greenacre to him, in completion of an agreed part of his compensation for his work as Della's dental hygienist, under the agreement. In support of that equitable relief, Pete would cite the same elements that support his request for the temporary injunction. This would be relief not only alternative to part of his claim for damages (the part compensating him for denial of the ownership of Greenacre), but also to an equitable action for specific performance of the employment agreement – that part involving transfer of title to Greenacre to Pete as part of his employment compensation. As Pete claims that the employment agreement was breached by Della, it would arguably be inconsistent for him to seek a decree of specific performance of the breached agreement. The injunctive relief would instead provide the remedy otherwise to be effected by specific performance.

[c. "Mandating" by a "permanent" injunction with a limited life and purpose, that Della convey title to Greenacre to Pete, is in practicality a decree of specific performance of that element of the Della-Pete employment agreement providing for such a conveyance, conditional on the promisee/grantee (Pete) having worked for the promisor/grantor (Della) for 3 successive years. As that condition however was not in fact satisfied, due to the promisor's breach of the agreement by "firing" the promisee right before the end of the 3 year period of employment, "specific performance" of the particular contract may be denied. And, because Della as employer could not "require" Pete as an employee to provide personal services for her (she could obtain damages instead, if he failed to perform an agreement to provide services), arguably the element of "mutuality of remedies" required in some courts for awarding specific performance, would be absent here, leaving the injunctive mandating of the Greenacre title transfer as the means of doing equity.]

## ELS REMEDIES MIDTERM EXAM QUESTION NO. TWO

(Derived from Joe Tinney's Spring 2005 final exam Question No. 3)

### I. Rights of Liz:

1. Liz vs. Carr: Liz will assert that Carr's negligence in performing the written contract between them for the remodeling of the family room in Liz's residence, breached that contract twice: by (a) installing "Next" 2-1/2 inch bolts instead of the "Best" 3 inch bolts as called for by the remodeling plans of Arch, the project architect, thereby (per Arch), decreasing the structural integrity of the remodeled family room because of the "lesser quality" of the "Next" bolts; and, (b) providing faulty rewiring in the family room (allegedly due to Carr's distraction caused by serious injuries to a close family member), causing unexpected loud noises to suddenly emanate from electronic equipment installed there, including in the middle of the night, thus causing Liz to incur medical care expenses from visiting her family physician and obtaining medications to treat her upset from the unpleasant noise; and, some additional expense derived from living part-time in a neighboring motel in order to have some "peace and quiet" away from the ongoing family room noise.

a. While the medical and part-time motel living expenses are possibly not presently liquidated, and in any event are not currently provided, another remodeling contractor, Bud, has estimated that the family room renovation to correct the (alleged) defect of using the weaker bolts will cost Liz \$28,000, while the cost of re-wiring the family room to cure the unexpected loud noises from the electronic equipment installed therein, will cost an additional \$3,000, for a total of \$31,000 being required to repair the allegedly defective original remodeling construction work by Carr.

b. Regarding damages recoverable by Liz due to Carr's installation of the improper bolts, the predominant rule is that if the cost of remedying the construction defect in the house is grossly disproportionate to the actual injury, then the injured party will not be able to obtain the costs of remedying the defect, if that cost is relatively too high. Rather, the injured party receives the difference in value between the house as if the contract had been fully and properly performed, and the (lesser) value, as actually built with defects. Arguably the cost of \$28,000 to reconstruct the family room in order to install the correct bolts, is grossly disproportionate to the actual loss, so Liz will probably only be able to recover the difference in value: being something not provided in the facts, but which can likely be established by expert testimony.

c. A party in breach of a construction contract is also liable for incidental and consequential damages, if reasonably contemplated by the parties at the time that the contract was made. When residential repair construction is done improperly, the contractor should be aware that such can cause the owner to have increased costs for substitute housing during the periods when the defects

make the residence unlivable in practicality, and while repairs are being done. Such would be in the reasonable contemplation of the parties here. Carr would accordingly also be liable for Liz's motel living costs for a reasonable period of time, likely also including costs of restaurant meals, according to proof.

d. Under the doctrine of avoidable consequences, Liz as the injured party must take reasonable steps to mitigate her damages, and not just allow them to increase. Liz has not done so here. She still "holds" \$5,000 that she owes the Carr on the construction contract cost; arguably she could utilize that money to have the faulty wiring repaired, then move back into her home. Liz will likely only be permitted to obtain damages representing her motel living costs, plus meals, for a reasonable period within which another contractor could repair the defective family room wiring.

e. The facts recite that Liz was badly frightened, subjectively, by the disturbing noises caused by Carr's defective construction work. Carr would "have to take his plaintiff as she is" if Liz is somehow unusually sensitive to strange noises in her home. Liz may be able to recover damages for her mental distress (separate from special damages for costs of medical treatment, and temporary off-site living), even though she may not display any physical symptoms of that mental distress, although the same is related to a breach of contract.

(1). Liz can argue that her mental distress is based on a tort by Carr, i.e., negligent infliction of mental distress; something he knew or should have known would flow from a negligent installation of the media wiring in the family room. As her special damages from Carr's tortious conduct, Liz may recover her doctor's bills to date (she has already been to her doctor twice for treatment of the mental distress), and future related medical expenses, including drugs used in her treatment for her mental distress, according to proof.

f. Given the experience with Carr's preceding renovation construction work, Liz is not required to permit Carr to do the required repairs to the family room renovation work, as his alleged means of "mitigating the damages" he has previously caused to Liz.

g. Carr's on-the-job negligence in the faulty family room renovation wiring is not excused because of his mid-job distraction due to the serious injuries then suffered by his only son in an automobile accident. Carr had the duty under the contract to have the renovation work done in a competent manner. If he was seriously distracted by a family crisis, then he should have told Liz that the construction was going to be temporarily delayed (nothing described of the "family room renovation" project suggests any need for haste, or any time deadline for completion); or, had someone else finish the work.

[2. Liz v. Arch: Liz, and not Carr, hired Arch as the architect for the family room renovation project. From the facts, Arch does not appear to have

committed any wrongful acts, or failed to exercise due care in the discharge of his duties, proximately causing any damage to Liz. Sometimes an architect on a project assumes a duty (such as under the construction contract), to periodically inspect the work done, for the contractor's compliance with the construction specifications, but there are no facts of Arch assuming such duties here. Nor do the facts indicate any reason why Arch would be deemed culpable for specifying the use of 3-inch bolts, instead of alternatives (such as the 2-1/2 inch bolt.)]

### 3. Rights of Carr:

Liz has installed a publicly-viewable large sign next to a busy freeway falsely claiming that Carr is a crook. Liz is also having leaflets passed out in public places which detail his mistakes on her job, but there is no showing that the leaflets contain any false statements. These displays hurt Carr's business.

a. If Liz's "speech" by her large freeway sign and the leaflets is false and it is intended to injure Carr by coercion or intimidation, then her conduct can possibly be enjoined. However, in general false statements in a business context are not subject to prohibition by injunctive relief, due to First Amendment rights. .

(1). Carr could sue Liz for tort damages for defamation, measured by whatever business was lost proximately attributable to the false statement, plus damages to Carr's business reputation. Commercial speech is entitled to First Amendment protection, but not to the same degree as ordinary (non-commercial) speech. While commercial speech can be enjoined if it is false, here Liz's sign statements are probably not "commercial speech": Liz isn't a business competitor of Carr, even though she is targeting his business. And, the contents of the leaflets by contrast are not false, so their distribution cannot be enjoined. If Liz was judgment proof with respect to potential defamation damages, some courts would issue a prohibitory injunction regarding the false statement sign. But there is now showing that Liz is insolvent.

(2). While by no means a foregone conclusion, if Carr was otherwise qualified to obtain a permanent injunction against Liz's continued display of the sign adjacent to the freeway (above), Carr could possibly satisfy the various basic requirements for obtaining that form of relief: tort damages for defamation might not provide the full cure to ongoing injury to his business, as would an equitable decree removing Liz's sign completely from further public view; Liz will suffer no real "hardship" from having to give up the display of the sign (only her desire for "revenge" would be thwarted) while Carr is suffering real injury to his business from its existence; Carr could suffer irreparable injury to his business, he would be unable to reach every potential customer who might see Liz's sign, and provide them with a rebuttal to the sign's slander; and, there is arguably some "public interest" in seeing that public rights of way are not cluttered with defamatory signage.