

## TEACHING PERSPECTIVE

### Contracts 101: Basics and Applications

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Contracts represent an area of operation common to educators, students, and practitioners in the sport and recreation industry. Virtually all individuals encounter multiple situations involving contractual issues regardless of the individual's specific discipline, area, or practice. The legal interpretation of a contract is governed by the Uniform Commercial Code (UCC), the *Restatement of the Law, Contracts*, and common law. The UCC governs the sale of all goods defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . ." (Burton and Eisenberg, 1999, UCC § 2-105, p. 64).

The purpose of this paper is to serve as an educational tool for individuals teaching contractual concepts to students of sport and recreation. The following provides a brief overview of eight factors used to assess the validity of a contract, sport and recreation-related scenarios specific to each factor, and key educational concepts associated with each scenario.

#### I. FACTORS IN ASSESSING A VALID CONTRACT

There are eight factors that are useful in assessing the validity of a contract (Carpenter, 2000; Cotten, 1996). These factors include the offer, acceptance, consideration, legal subject, meeting of the minds, legal capacity of parties, clear and unequivocal terms, and public policy considerations, which are discussed in the following paragraphs.

##### A. The Offer

The offer represents a fairly obvious component associated with any contract. Basic terms within an offer typically include the following; parties to the agreement, the price, quantity (if appropriate), the date, the place, and other terms as desired. Although the offer may be an obvious

element, there are situations where the offer becomes the focus of a dispute.

*Illustration #1:* In May, a sporting goods store offers to sell you 40 uniforms at \$45.00 each. For a variety of possible reasons (i.e., your athletic director is out-of-town, you are unsure of the upcoming fiscal year budget, you are not sure if your program is going to be cut due to Title IX concerns), you do not communicate back to the sporting goods representative until early October. In early October, you communicate your desire to accept the \$45.00 offer. Is the May offer still a valid offer?

*Key Concept:* Unless otherwise specified, an offer remains open for a “reasonable” time period. As defined by the UCC § 1-204, what qualifies as a reasonable time “depends on the nature, purpose and circumstances of such action” (Burton and Eisenberg, 1999, p. 48). Similarly, the *Restatement* § 41(2) states that what defines a reasonable time “is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made” (ALI, 1981, p. 109; Burton and Eisenberg, 1999, p. 237). In the above illustration, one could argue that the May offer is not a valid offer based on an unreasonable passage of time. For example, it is logical that the sporting goods store may have incurred an increase in its own expense structure over the five month time period as a result of increases in interest rates, minimum wages, product costs, and expansion-related expenses.

*Illustration #2:* A new sales representative prepares an advertisement which erroneously states that Cybex equipment can be purchased, delivered, and installed for a price representing an incredible below-market value savings. You communicate your desire to purchase the equipment in accordance with the terms as stated in the advertisement. The company later refuses to sell you the equipment at the advertised price. Has the company breached their contract?

*Key Concept:* What might appear as an offer may be interpreted as an “invitation for an offer” or a “preliminary negotiation.” Typically, communication to a large audience is more likely to be held as an invitation to an offer versus an actual, binding offer. “Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell . . . [T]o make an offer by an advertisement . . . there must ordinarily be some language of commitment or some invitation to take action without further communication” (ALI, § 26(comment b), p. 76, quoted in, Knapp, Crystal, and Prince, 1999, p. 62).

*Illustration #3:* Your public recreation department agrees to lease a facility to you for an upcoming athletic event during discussions on No-

vember 1. On November 6, prior to your acceptance, the facility director calls you and revokes the offer although you were all prepared to make a phone call to indicate your acceptance of the offer. Can the recreation department facility director walk away from that contractual offer after it is already communicated?

*Key Concept:* The power of acceptance is terminated when the offeror revokes the offer (ALI, 1981, § 36(c), p. 102). An offer can be revoked at any time prior to acceptance unless otherwise specified by the terms of the initial agreement. In the above illustration, it is the facility director's prerogative to revoke the offer at any time prior to acceptance.

*Illustration #4:* Now assume you have been in negotiations with the National Collegiate Athletic Association (NCAA) to host a tournament in your city. The NCAA agrees that they will *not* award the tournament to any other city before December 1 in exchange for a \$1,000.00 payment from you. You agree to pay the \$1,000.00 so long as they leave the contract "open" for your acceptance until December 1. On November 24, the NCAA revokes the contract. Can they do this? Can you back out of the contract without any consequences?

*Key Concept:* Contracts which contain an agreement to remain open for a specified time in exchange for some type of consideration are referred to as option contracts (ALI, § 87, p. 229). During this designated time period, the offeror cannot revoke the contract (ALI, § 24(comment a & b), p. 72). On the other hand, the offeree typically retains the ability to terminate acceptance at any time subject to the loss of any monetary exchange provided (Carpenter, 2000). In the above situation, there are legal implications if the NCAA would choose to revoke the contract.

## B. Acceptance

A contract is "accepted" when the terms presented are agreed upon. However, it is noteworthy that based on the UCC governing the sale of goods in the United States, additional or different terms can become part of the original contract unless the terms "materially alter" the original agreement and result in "surprise" or "hardship" (Burton and Eisenberg, 1999, UCC § 2-207, p. 179). If no rebuttal or written objection is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume the terms are agreeable and part of the original contract. It is in the offeror's best interest to state in the contract that any additional terms indicated by the offeree are not binding unless otherwise agreed upon.

*Illustration #1:* You complete a contractual agreement to purchase 100 football helmets from ABC Manufacturing Company. You later receive a letter from the manufacturer disclaiming all warranties of merchantability and fitness for a particular purpose. Are you bound by the contract clause disclaiming warranties presented to you by ABC Manufacturing Company?

*Key Concept:* Warranties of merchantability and fitness for a particular purpose represent warranties significantly impacting consumer recourse upon injury. An argument could easily be made that disclaiming these warranties represents a material contractual breach in violation of UCC § 2-207. On the other hand, a clause altering the credit terms to those more compatible with industry standard would represent an immaterial breach.

*Illustration #2:* You agree to sell your boat to an acquaintance that lives in Oklahoma. You send your Oklahoma acquaintance the terms of the sale. The person signs the contract in agreement with its terms. The signed agreement is sent via post office mail back to you, postmarked November 2. On November 3, your acquaintance that had agreed to purchase the boat calls, informs you that they have changed their mind, and indicates their refusal to accept the terms of the contract. Has a legal acceptance already been provided?

*Key Concept:* The "mailbox rule" is a concept in contract law stating that acceptance is given once the signed contract is placed in the mailbox. Attempts to withdraw a contract will not be recognized once deposited in the mailbox (ALI, § 63(comment a), p. 152). Acceptance by telephone or fax is interpreted as if the "parties are in the presence of each other" (§ 64, p. 157; Burton and Eisenberg, 1999, p. 63). In the above situation, the party agreeing to buy the boat cannot withdraw his deposited acceptance.

### C. Consideration

Consideration represents a bargained-for-exchange between the offeror and the offeree. Typically, the consideration reflects some sort of monetary amount provided in a return for services (i.e., coaching, use of facilities) or a product (i.e., sporting goods equipment). For example, I agree to coach in your school district in exchange for a monetary stipend. The coaching obligation/responsibility in exchange for the monetary stipend reflects a bargained-for-exchange. However, monetary exchanges are not the only form of legal consideration. For example, consideration could represent tennis lessons I agree to give you if you stop smoking.

*Illustration #1:* You agree to purchase a \$2,500.00 trampoline from a friend for a real bargain price of \$100.00. Is the element of consideration met when the bargained-for-exchange excessively favors one party over the other?

*Key Concept:* Courts do not scrutinize the “fairness” of an exchange (ALI, 1981, § 79, p. 200). Consideration does not infer that equivalent values are being exchanged. Rather, contract law respects the ability of two individuals to enter into a contract as desired regardless of the benefit or detriment received by either party. However, the courts will intervene if there has been a gross inadequacy that is unconscionable, fraud, mistake, duress and/or undue influence (Knapp, Crystal, and Prince, 1999).

#### D. Legal Subject

A contract represents an agreement between two parties for which a legal remedy is provided if the agreement is breached. The contract represents American democracy, as a person of legal capacity is able to become part of a legally binding agreement even if it is not in their best interests. However, American contract law does not allow a party to engage in an agreement where the terms of the agreement violate existing laws.

*Illustration #1:* You know of a situation where a local medical doctor has contractually agreed to sell \$10,000.00 in steroids to a state university Division I football coach. In turn, the coach distributes the steroids to his players. The contract contains what appears to be a typical offer, acceptance, and consideration. Is this a legally binding contract?

*Key Concept:* It is a legal premise that all contracts will be for a legal purpose. All contracts to engage in illegal activities are void and unenforceable. In most states, steroids are classified as an illegal drug. Hence, the above scenario would be illegal.

*Illustration #2:* Assume a scalping statute states that tickets cannot be resold above the stated ticket price. Regardless, you contract with a local individual to engage in scalping practices. You agree to split all monies above and beyond the original ticket value stated on the face of the ticket. Is this a legally binding agreement?

*Key Concept:* As stated above, contracts outside the realm of legally accepted practices are not enforceable as valid contracts.

### E. Meeting Of The Minds

Contractual agreements must contain a "meeting of the minds," i.e., an understanding of the terms being agreed upon. Mistakes regarding contractual terms that are misunderstood by *both* parties can present cause for the contract to be voided by the desiring party. Fraud and misrepresentation provide a breaching party with other claims that may be appropriate to illustrate a lack of meeting of the minds.

*Illustration #1:* Your administrative assistant enters a contract where she believes she is purchasing basketballs. The other party believes the contract is dealing with the sale and purchase of volleyballs (see Carpenter, 2000). Must the contract be accepted if you receive the volleyballs instead of the intended basketballs?

*Key Concept:* If there is a mutual mistake as to the terms of the agreement, the contract can be voidable by either disadvantaged party (ALI, 1981, § 152). And, if only one party makes a mistake as to a material term(s) of the agreement, the contract may still be voidable (§ 153, p. 394). Further, a mistake by one party who had lack of information or clarity also can make a contract voidable if the other person had reason to know of the inadequate bargaining positions and thoroughness of information. In the above situation, the administrative assistant should be excused from the contractual agreement as a result of a mistake in understanding.

*Illustration #2:* You enter into a coaching agreement that stipulates you will receive a base salary plus perks. Your liquidated damage clause stipulates that upon breach of the contract by the school, you will receive one year's base salary plus perks. The school decides to terminate your contract early. How much are those "perks" worth?

*Key Concept:* The above scenario reflects the widely discussed case, *Rodgers v. Georgia Tech Athletic Association* (1983). This case involved the monetary values associated with various "perks" such as the season tickets to home basketball games, meals available at the Georgia Tech training table, initiation fees at the country clubs, and so on which were left undefined in the original contract. As the case illustrates, it is very important to be specific regarding contractual clauses and related specifics.

### F. Legal Capacity

Legal capacity refers to the age and/or mental capacity of the contracting parties. Minors and those with mental incapacities have the option of voiding a contract. Hence, agreements with these individuals can

fail to have any legally binding effect. It is up to the minor or mentally incapacitated person as to whether they choose to make a contract enforceable.

*Illustration #1:* As athletic director, you order letter jackets for each athlete on one of your high school varsity athletic teams (Carpenter, 2000). Each jacket has the name of the student-athlete and the respective year of participation. All the student-athletes agree in writing to pay for their own individual jacket upon arrival. After receiving the letter jackets one student-athlete refuses to pay. Do you have any contractual claim against this student-athlete?

*Key Concept:* Contractual agreements with minors are voidable (ALI, 1981, § 12(2), p. 38). Minors represent people under the age of 18 years unless a state statute indicates otherwise. If a contract is entered into by a minor, it is important to recognize that the minor can void the contract, waiving his or her responsibility for the agreement terms. On the other hand, the other non-minor contracting party can remain subject to the contractual terms should the minor choose to enforce the contract. As summarized by Carpenter (2000, p. 113), “minors can make enforceable contracts, but minors cannot be the subject of contractual enforcement.”

*Illustration #2:* As the manager of your recreation program, you have all students participating in the annual ski trip sign a waiver. The students are below the age of majority. You have contractual agreements with each student stating that they waive their rights to sue for any acts of ordinary negligence. A student is later injured when he leaves his room after you have already made “bed checks” for the evening. Do you have any legal defense as a result of the waiver signed by the student?

*Key Concept:* Waivers and releases are known as exculpatory clauses that are contractual in nature. Although often given little legal merit, waivers and releases have been recognized as a legal contract in all states except Louisiana, Montana, and Virginia (Cotten, 1996). Since a waiver excuses a sport or recreation provider from their own acts of ordinary negligence, the use of exculpatory clauses (i.e., waivers and releases) is common among sport and recreation providers. Although an exculpatory clause cannot be enforced against the signing minor, the exculpatory clause signed by a minor still has utility. Properly worded exculpatory clauses, for example, can be used as part of an attempt to prove a plaintiff assumed the risk of injury or is responsible under contributory or comparative negligence doctrines.

### G. Clear And Unequivocal Language

Contractual language should be precise and exact. One cannot expect that a term will infer a particular meaning. Rather, the contract should be written with the intended meaning clearly and unequivocally stated. Although a court may include terms based on common trade practices when essential terms are omitted, it is best if the contract language is direct and concise from the outset.

*Illustration #1:* Assume you work for a National Football League (NFL) franchise. One of your season ticket holders has routinely purchased 55 season tickets. Unfortunately, this person resells/scalps all but two of the season tickets for a price far in excess of the stated face value on the ticket itself. At the end of the season, you refuse to renew the individual's season ticket order. The fan sues you for breach of contract. Does the fan have a viable cause of action?

*Key Concept:* The season ticket holder has no property interest or other contractual interest that would enable them to rebut the team's/organization's withdrawal of the tickets. Typically, a season ticket will contain language either on the ticket itself or in the ticket agreement directly stating that the ticket is a revocable license. This specific language on the back of the ticket or in the ticket agreement (i.e., I can remove from you/take away from you at any time) would clearly communicate (or more clearly communicate) that this is the right of the team/organization. Clearly communicated language plays an important role in supporting the franchise-related practices (*In re: Warren S. Liebman*, 1997; *In re: William V. Harrel v. Phoenix Suns*, 1995; *Skalbania v. Simmons*, 1982; *Soderholdm v. Chicago National League Ball Club*, 1992).

*Illustration #2:* As a manager of a health club, you have members sign a contract stating their the waiver of the right to sue for all accidents that occur "in a program or activity even if based on the negligence of the health club, its managers, employees, or sponsors." One of your members is later injured as a result of slipping on pooled water in the locker room. Does your waiver signed by members offer you sufficient legal protection?

*Key Concept:* The above scenario illustrates the need for specificity and thoroughness in choosing contractual language. The above language excusing liability for ordinary negligence in "all accidents that occur in a program or activity" may not offer protection, for example, when a plaintiff-club member is injured in the locker room. Rather, the chosen language should be encompassing, excusing the named parties for acts of



ordinary negligence “occurring on or in facility premises, activities, and/or programs.”

*Illustration #3:* An Executive Director at a metro YMCA promises a Program Director at one of the city’s branches that if he relocates to another branch, he will be made an Executive Director within a year time period. Also assume this is a large city. The employee relies on the assertions made by the metro Executive Director and relocates across town, relocates his kids from one school to another, and makes other major life adjustments. The individual is later passed over for the Executive Director position. Does this person have any recourse based on these oral promises?

*Key Concept:* Although the assertions or promises made in the above situation may be less than clear and unequivocal, it is important to recognize that oral promises can create legal liability. For example, promissory estoppel represents a cause of action based on the premise that to *not* allow recovery or to *not* recognize the plaintiff’s assertions and resultant damage would be unjust. Promissory estoppel allows for recovery when a promise is made, the promise is made knowing the plaintiff would rely on that promise, the plaintiff does rely on the promise and acts accordingly, the plaintiff is subject to later damage (ALI, 1981, § 90, p. 242).

#### H. Must Be In Accordance With Public Policy.

Contracts not in accordance with public policy can be unenforceable. Public policy is defined in *Black’s Law Dictionary* (Black, 1990, p. 1231) as the “community common sense and common conscience, extended and applied throughout the state . . .” Common law decisions play a large role in ascertaining what situations the courts may find against public policy.

*Illustration #1:* You hire a football coach at your junior college school that has a highly successful athletic program. Your contract with this coach includes a restrictive covenant prohibiting her from coaching at another competing junior college team in the same district for a duration of one year. This coach is later offered a very attractive agreement with a competing junior college football team in the same district. Is this restrictive covenant enforceable?

*Key Concept:* As mentioned above, courts will not recognize contracts viewed as being against public policy or in violation of acceptable societal norms and behaviors. The above illustration represents a restrictive covenant or what is often referred to in the employment context as a non-compete clause. Restrictive covenants can be interpreted as

being against public policy and hence, unenforceable. In addition, unreasonable restrictive covenants may violate the Restatement (Second) § 188 prohibiting promises to refrain from competition. These clauses are legal so long as they remain reasonable, represent only that restraint which is necessary to protect, in this situation, the school's legitimate interests, and fall within the realm of acceptable societal guidelines. The above illustration is not restrictive enough to be against public policy. On the other hand, an unreasonable restrictive covenant raising public policy concerns would be one precluding an individual from working in any coaching capacity for a duration of 10 years.

## II. SUMMARY

Professionals in sport and physical activity deal with contractual issues daily. A basic understanding of contractual principles is a prerequisite for proactive management. Understanding the factors used to assess the validity of a contract and obtaining knowledge of their application enhances decision making and problem solving abilities while avoiding potential litigation and misunderstandings.

## ABOUT THE AUTHORS

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