SEPERAC UBE FINAL REVIEW OUTLINE

(BASED ON THE UBE MASTER HIGH PRIORITY CATEGORIES ONLY)

JULY 2019 UBE EXAM

RELEASE DATE: JULY 8, 2019

While there are 366 testable MBE/MEE categories according to the 2019 NCBE Subject Matter outline, this outline contains only 120 of them. This FINAL REVIEW outline basically consists of the most important parts of the UBE MASTER outline. It is intended for examinees who don’t have the time to study the entire UBE MASTER outline or who are looking to do a final review of the most important topics for the July 2019 MBE/MEE. I expect the content in this outline to account for 50%-60% of your total July 2019 UBE score. Following is my advice on how best to utilize this final review outline:

(1) If you are studying full time (8-9 hours per day for 6-7 days per week), then you should follow the study-time recommendations for each category (e.g. study 3x a week, 2x a week, 1x a week, 1x every two weeks, or 1x every month) for optimally efficient study. If you are studying part-time, you should adjust the study-time proportionally. The majority of your remaining study time should be spent on answering and reviewing MBE practice questions.

(2) When you are reviewing the black letter law sections, pay special attention to the yellow highlighted text. The 200+ yellow highlighted sections identify the topics/areas I believe will be tested on the upcoming July 2019 UBE. I strongly suggest that you devote extra time to studying the highlighted areas versus the non-highlighted areas. For example, an examinee who passed with an MBE of 174.1 and a UBE score of 318 told me: "*Your yellow highlighting was very close to the mark. Incredible.*"

(3) Make sure to read and understand every single HYPO. These hypotheticals are detailed examples that are separately identified and appear in yellow boxes with the prefix **HYPO**. The HYPOs serve as excellent examples of how the legal principles may be tested on the upcoming July 2019 exam and it will serve you well to be intimately familiar with them.

(4) Learn the built-in MBE rules. This outline contains MBE rules for the NCBE OPE and MBE Study Aid questions released between 2006-2019. For each released NCBE MBE question from 2006 to present that was tested on that category, there is an MBE rule I wrote that synopsizes the legal issue being tested in that question. In regards to the universe of released NCBE MBE questions, these rules are the most important MBE rules to know. You should expect to see some of these concepts directly re-tested on the upcoming MBE.

(5) Review the built-in MEE issue statements. This outline contains MEE issue statements for the NCBE MEE questions released between 2008-2015. I regard this as the most important range of MEE rules to know for the upcoming exam. Keep in mind that topics tested on the MEE that pertain to MBE subjects are also tested on the MBE (especially with Civil Procedure) so knowing these MEE issues will help you not only on the MEE, but also on the MBE. The issues are color coded, so you know the result after you read the issue question. This color coding is designed to enable you to study more efficiently by seeing the answer in color. If the answer to the issue is in the Affirmative, the answer appears in **GREEN.** If the answer to the issue is in the Negative, the answer appears in **RED.** If the answer to the issue is neutral or cannot be answered definitively, the answer appears in **BLUE.** For example:

**THE ANSWER TO THE ISSUE** **I****S****A****F****F****I****R****M****A****T****I****V****E****:**

**[2015-FEB-Q5-P2](SEPERAC-J19 EXAM-MEE MASTER-RELEASED ANSWER COMPILATION.doc" \l "SEPERAC_2015_FEB_Q5_P2): (35%) Are two corporations diverse for purposes of federal jurisdiction when they are incorporated and headquartered in different states but their main facilities are located in the same state, which is also the state of incorporation of one of the businesses? The District Court has diversity jurisdiction over MedForms’s breach of contract claim because the amount in controversy exceeds $75,000 and MedForms and the company are citizens of different states.**

**THE ANSWER TO THE ISSUE IS NEGATIVE:**

[**2015-FEB-Q5-P2**](SEPERAC-J19%20EXAM-MEE%20MASTER-RELEASED%20ANSWER%20COMPILATION.doc#SEPERAC_2015_FEB_Q5_P2)**: (35%) Are two corporations diverse for purposes of federal jurisdiction when they are incorporated and headquartered in different states but their main facilities are located in the same state, which is also the state of incorporation of one of the businesses? The District Court has diversity jurisdiction over MedForms’s breach of contract claim because the amount in controversy exceeds $75,000 and MedForms and the company are citizens of dif****f****e****r****e****n****t****s****t****a****t****e****s****.**

**N****O****A****N****S****W****E****R****,****N****E****U****T****R****A****L****A****N****S****W****E****R****:**

**[2015-FEB-Q1-P1](SEPERAC-J19 EXAM-MEE MASTER-RELEASED ANSWER COMPILATION.doc" \l "SEPERAC_2015_FEB_Q1_P1): (30%) Is the driver an independent contractor or an employee of the store? Although the store characterized the driver as an independent contractor, the store had the right to control his conduct and thus the driver was an employee of the store.**

If you have difficulty understanding an MEE issue, you should click on the issue link to read the full answer explanation. The hyperlinks to the MEE answers are available to give you insight into the analysis involved with each question (what facts are used and discussed). To go to the full MEE answer, simply press the CTRL key and click on the hyperlinked issue prefix (e.g. [2015-FEB-Q1-P1](SEPERAC-J19%20EXAM-MEE%20MASTER-RELEASED%20ANSWER%20COMPILATION.doc#SEPERAC_2015_FEB_Q1_P1)). Make sure that the SEPERAC MEE MASTER RELEASED ANSWER COMPILATION document is in the same folder as the UBE MASTER outline. There are hyper-links for MEE issues.

(6) Use the MEE Topic Summaries links if you don’t fully understand a category topic. For the MBE/MEE categories that have been tested on the MEE, there is an MEE Topic Summaries section. For example, a header for a section appears as follows:

[**MEE Topic\_Summaries: Jurisdiction – Federal SMJ**](file:///L:\LAW\BAR%20EXAM\SEPERAC-F18%20EXAM-MEE%20MASTER-TOPIC%20SUMMARIES.doc#I_A_Federal_SMJ)

These headings are hyperlinked. This means if you press CTRL and click on the link, you will be taken to the appropriate topic summary in the SEPERAC MEE MASTER TOPIC SUMMARIES document (make sure to have this document in the same folder as the UBE MASTER outline).

(7) Make sure to read the MBE, MEE, and MPT Strategy pages on the subscription site and download the Exam Strategies Sheet after it is released.

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### Contracts: Cat I: Formation of Ks (A. Mutual assent) – MBE: 1-2 Qs – MEE: 20/23 exams (87%) Avg Pts: 35 – JULY 2019 MBE-MEE PRIORITY: HIGH – REVIEW: THREE TIMES A WEEK

1. **MBE:** 25% of K questions test UCC Article 2; 75% of K questions test the common law

2. **Vocabulary**

a. *Contract* – legally enforceable promise or set of promises (agreement alone isn’t enough, then look to see if it is legally enforceable and if there are any defenses)

(i) *Express K* – communicated by *language* (oral or written)

– E.g.: X promises to paint Y’s car, in return for Y’s promise to pay X $100

(ii) *Implied K* – contract implied based at least in part on *conduct*

– E.g.: X fills his car at Y’s gas station – there is K for purchase & sale of gas

b. Types of Contracts- **All contracts are bilateral** unless the offer says it can be accepted **only by performance** (if there is any ambiguity as to which it is, it is presumed to be a bilateral contract).

(i) *Bilateral K* – "promise for a promise" – requires an exchange of promises. Offer that can accepted in any reasonable way.

(ii) ***Unilateral K*** – "promise for an act" – requires an exchange of an act for a promise; 2 types (all other K’s are bilateral):

(a) Offer *expressly requires performance* for acceptance (e.g. ***offer …* accepted *only by …***)

(b) *Offer to the public* (e.g., reward, prize, contest)

c. *Void, voidable & unenforceable K’s*:

(i) *Void* K – one without any legal effect from the beginning (e.g. an agreement to commit a crime)

(ii) *Voidable* K – one that a party may *elect to avoid or ratify* (e.g. a K by a minor or mentally ill)

(iii) *Unenforceable* K – one otherwise valid but for which some *defense* exists extraneous to formation (e.g. Statute of Frauds)

d. ***Creation* of an enforceable K requires**:

(i) ***Mutual assent*** – (i) *offer* (promise) & (ii) *acceptance* before termination

(ii) ***Consideration*** – (i) *bargained-for-exchange* of something of legal value, or (ii) substitute for consideration (promissory estoppel, detrimental reliance, or good faith modification under UCC), &

(iii) ***No defenses*** to formation –including (i) mistake, (ii) lack of capacity (voidable K), (iii) illegality (void K), or (iv) specific performance

– NOTE: On MBE, best defense in a K action is that no K was formed; otherwise look to defenses of incapacity, duress, mistake, fraud, illegality, SOF, etc.

3. **Applicable Law**

a. ***Common law*** – use this for *service*, *real estate, employment*, etc. (*NOT* sales or lease of goods)

b. ***UCC Article 2*** – applies to K’s that are for the current or future ***sale of goods*** (most rules are same as common law rules)

(i) ***Goods*** – tangible, movable personal property (NOT real property or intangibles)

(a) Goods include unborn young animals, growing crops, timber, gas

(b) Goods do NOT include money in which the price of the K is to be paid; investment securities, or things in action

(c) ***Mixed deal of goods & services*** – it’s *all or nothing*, *depending on which is more important (primary)*

(1) Predominant factor test: UCC applies to Ks that include both the sale of goods and services if the goods are the more important part of the deal (if service is more important part of the deal, then common law applies).

**HYPO:** A famous artist orally agrees to paint a portrait of P for $5,000. The artist refuses to perform and P sues for breach. Here the service aspect predominates so the oral K is governed by the state's general statute of frauds rather than by the UCC statute of frauds. However, if the artist was merely selling a reproduction, it would be regarded as a sale of goods.

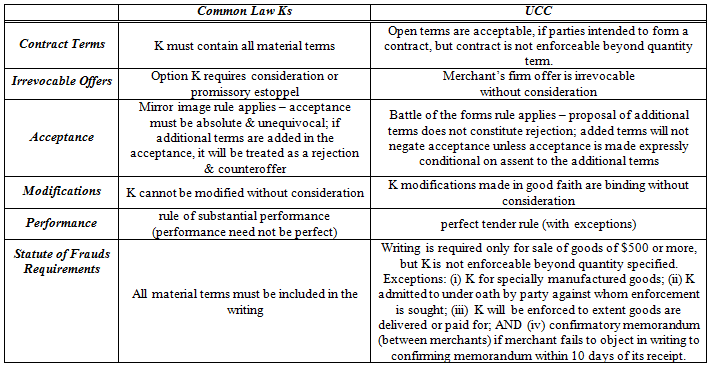
[i]. If pmt is tied to time of delivery of the goods and not to the completion of related services, UCC generally applies UNLESS service aspect is most of the K price.

**HYPO:** If a company sells copy machines and K includes agreement to service them on the buyer's premises for one year (which is 40% of the K price), the K is governed by the UCC because the service aspect is merely incidental.

(2) Decapage exception (Parts test): if the K price is expressly divided into *2 parts* with one amount allocated for the goods & the other price allocated for the services, then & only then can you use Art 2 for sale part of the deal & common law for the services part (K is severed)

(ii) ***Merchant*** – one who regularly deals in goods of the kind sold or who otherwise by his profession holds himself out as having special knowledge or skills as to the practices or goods involved. *Under Art. 2, almost anyone in business can be deemed a merchant in regards to general business practices such as confirmatory memos and modifications* (BUT implied warranty of merchantability requires merchant to regularly deal in goods of the kind sold).

c. Differences b/w common law & UCC:



4. **Offers** – a *manifestation of commitment;* Requirements:

a. An expression of ***promise, undertaking or commitment*** to enter into a K – consider:

(i) Language used; (ii) surrounding circumstances; (iii) prior relationship of the parties;

(ii) Method of communication (broader the communicating media, less likely it is an offer);

(iii) Custom in the industry; (vi) degree of definiteness & certainty of terms

– NOTE: *price quotations* are NOT offers UNLESS it is a response to a specific inquiry

b. ***Definite & certain*** in its terms – depends on:

(i) *Identification of offeree* – must be sufficiently specific to justify the inference that the offeror intended to create a power of acceptance in the offeree.

(ii) *Definiteness of subject matter* – (i) *real estate,* land identified & ***price specified***; (ii) *sale of goods,* quantity must be certain or capable of being certain, (iii) *employment k*, duration

(a) *Vague* terms – NO offer because may defeat formation; unless acceptance or part performance makes the vague term clear

(1) Disqualifying terms – “appropriate”, “fair”, “reasonable”

(2) *Highly indicative terms* – *“all”, “only”, “solely”*

(b) *Missing price* terms

(1) **UCC (Sale of Goods)** – offer still valid even though K says *nothing* about price, it’s still valid K (reasonable terms *supplied by court* if those terms are consistent with parties’ susceptible intent)

(2) Common Law K – NO offer

(c) ***Requirements/output K’s (UCC)*** – *Requirements Ks* (promises to buy "all that I will require") and *output Ks* (promises to sell "all that I manufacture") are valid & enforceable, even though there’s *no quantity term* (the buyer can increase requirements so long as the increase is *in line with prior requirements*; RULE OF THUMB: a moderate increase is about 10%)

c. ***Communicated*** to the offeree – offer must be communicated to the offeree, OR ELSE offeree cannot accept even though knowledge of the offer has been indirectly acquired.

5. **Statements that are not offers –** following are ***invitations to deal*** and NOT offers:

a. *Offers* followed by additional terms – must consider additional terms

b. *Advertisements* are NOT offers; unless (i) they are specific as to quantity & (ii) indicate who can accept (“1 black hat, worth $140 – 1st come, 1st serve” is NOT an offer)

c. *Price quotations* – naked price quotes are not offers unless the quote is extremely specific, BUT may be considered offers if given in response to an inquiry

d. *Statements of Intention* – does not count as an offer (e.g. A says to B that he intends to sell the car for $500)

e. *Inquiries* – “*Would you consider selling the car for $500”* is NOT an offer

f. *Opinions* – “*I believe your car is worth $500*” does not count as an offer

6. **Termination of Offers**

a. *Termination by* ***Operation of Law***:

(i) *Death of a party prior to acceptance* – death or incapacity of either party terminates the offer

(a) Offeree's power to accept is terminated when the offeree or the offeror dies or is deprived of legal capacity to enter into the K

(b) EXCEPTIONS: (i) *options* K, (ii) part performance of offer to enter into unilateral K; & (iii) irrevocable offers (BUT offeree's death/ incompetence will terminate an irrevocable offer).

(ii) *Destruction* of the proposed K’s subject matter; or

(iii) *Supervening illegality*

b. *Termination by* ***Lapse of Time*** – time stated OR reasonable time (RULE OF THUMB: 1 month)

c. ***Revocation*** – *termination by Offeror (by words or conduct)*

(i) *Method of revocation*

(a) *Statement* by offeror to retract offer; OR

(b) ***Conduct* by offeror *unambiguously*** indicating change of mind, AND ***offeree’s awareness*** (here, need to look at both the offeror & offeree)

(ii) *When revocation is effective*

(a) ***Time of receipt***(contrast to the mailbox rule for acceptances) BUT *publication of revocation* is effective when published

(b) *Before Acceptance* – once buyer accepts, it’s too late for the seller to revoke

(iii) ***Limitations* – *4 exceptions that limit offeror’s power to revoke:***

(a) ***Option K*** – offeror promised to keep offer open AND ***offeree paid*** for that promise (consideration):

**HYPO:** S offers to sell B his car, & B pays S $10 for his promise to keep the offer open for a week – S can’t revoke for a week as offer only lapses when option expires, BUT if NO *consideration*, S can revoke offer at any time

(1) Rejection (or counteroffer) of option *before* end of option period – does NOT terminate the power to accept the offer, UNLESS the offeror detrimentally relies on upon the rejection

(2) Oral promises not to revoke (*illusory* promise) – offeror still retains the right to revoke offer

(b) ***“Firm offer rule” under UCC* (Sales of Goods)** – offer can NOT be revoked (***up to 3 months*** & *NO need for consideration*) if:

(1) Offeror is a ***merchant*** (one who regularly deals in goods of kind or who has specialized knowledge of the business practices involved), AND

(2) ***Written & signed*** offer that promises to *keep the offer open for some period of time (can be faxed or emailed with an electronic signature)*

**HYPO:** S, a used car dealer, offers to sell B a car for $400 – S promises by signed writing to keep the offer open for 6 months (Court cuts off to 3 months; even okay if time period not stated)

(c) ***Detrimental reliance*** – offer cannot be revoked if there has been detrimental reliance by the offeree that is *reasonably foreseeable*

(d) ***Unilateral K Part Performance Rule*** – offer NOT revocable for a reasonable time in which offeree can complete performance:

(1) *Mere preparation* is NOT part performance – BUT can argue *detrimental reliance*

(2) BUT, part performance is NOT *acceptance*, complete performance required for acceptance

[i]. NOTE: in bilateral K, part performance is acceptance of offer

**HYPO:** B tells C he will pay C $5,000 if he designs a toy, and C starts working on it, if C then dies, B’s estate CANNOT revoke the offer since C has started working on it.

d. ***Rejection*** – *termination by Offeree* (*by words or conduct*) – direct/ express rejection OR *indirect rejection (3 types)*:

(i) Express rejection

(ii) ***Counteroffer*** – *(i) terminates the offer & (ii) becomes a new offer*

(a) If a counteroffer made, then NO express K, UNLESS that counteroffer itself has been accepted

(b) Distinguished from bargaining (which does not terminate the offer)

(1) *Bargaining* involves *interrogatories* – “will you take 9K?”

(2) *Counteroffers* are *declaratory* – “I will only pay 9K”

(iii) ***Conditional Acceptance*** (same as counteroffers) – (i) terminates the offer & (ii) becomes a new offer

(a) Using words as: *“if”, “provided that”, “so long as”, “on condition that”*

(b) Applies under both Common Law & UCC (Sale of Goods)

e. ***“Mirror Image Rule”***

(i) **Under Common Law** – acceptance that *adds additional terms* is treated like a counteroffer rather than an acceptance and no K is formed (BUT, if the other party has acted to indicate acceptance, there’s an *implied K)*

(ii) NOTE: ***“Battle of the Forms” under UCC (Sale of Goods)*** – **does NOT** follow the *mirror image rule*; acceptance or written confirmation that shows an intention to contract forms K

(a) *Conditional Acceptance* – additional terms are NOT part of the K

(b) ***K involving Non-Merchant*** – K formed but the additional term NOT included (merely a proposal that is to be separately accepted or rejected), UNLESS the offeror agrees

(c) ***K between Merchants*** – the additional terms is a part of the K, UNLESS

(1) Additional term *materially changes* the offer, such as:

[i]. disclaimer of a warranty in which either warranty normally attaches;

[ii]. clause requiring guaranty of 90-100% deliveries where usage of trade allows leeway;

[iii]. clause reserving power to cancel by S upon B's failure to meet any invoice when due;

[iv]. requiring complaints be made in a time materially shorter than customary/reasonable;

[v]. arbitration clause, UNLESS the clause is the industry norm – burden of showing that arbitration is material term is on the party opposing it

(2) Offer *expressly limits* acceptance to the offer’s terms; OR

(3) *Offeror objects* to the change

(d) *“Knockout rule”* – some courts knock out conflicting terms in the offer & acceptance, using terms provided by the UCC instead

7. **Acceptance of an Offer**

a. *Who may accept* – offer can only be accepted by (i) a person who *knows* about the offer (ii) who is the person to whom it was made (offers CANNOT be assigned BUT options *can* be assigned)

**HYPO:** X posts a reward for whomever find his lost dog, & Y find it & returns it, not knowing of the reward, Y has no contractual right to the reward

b. *Promises to perform* – most offers can be accepted by a promise to perform (e.g. offer to buy goods for current or prompt shipment may be *accepted* by either a ***promise*** to ship or by a *shipment* of conforming or nonconforming goods).

c. ***Start (part) of performance as acceptance*** – bilateral K (acceptance); unilateral K (NOT acceptance)

(i) *Bilateral K* – start of performance is acceptance and is treated as an *implied K*

(a) *UCC: Conduct by both parties that recognizes existence of a contract is sufficient to establish contract*

(ii) *Unilateral K* – start of performance is NOT acceptance; *completion* of performance is required

d. ***Improper performance as acceptance***

(i) *Services K* – acceptance & breach

(ii) ***Seller of Goods*** (sends ‘wrong’ goods) – acceptance & breach

– EXCEPTION – ***Accommodation exception*** (counteroffer & no breach)

(a) E.g.: B orders 200 blue widgets, but received 200 red widgets, *along with a note* from S saying that S’s supply of blue widgets is exhausted & cannot be restocked before the delivery date

(b) B may EITHER accept the shipment & pay list price, OR reject it with no other remedy

e. *Offeree’s silence* – silence is never acceptance (e.g. you must do something, even if it’s just nodding your head or giving a thumb’s up), UNLESS offeree by words/conduct agrees silence is acceptance (e.g. offer provides that acceptance need not be communicated).

(i) If *commercially reasonable* to think silence is acceptable (e.g. for many years, the parties treated silence as acceptance), then the offeree is under a duty to notify the offeror if it does not intend to accept

**HYPO:** If a man buys 2 books from a door-to-door salesman every year for the past 4 years, if the salesman arrives at the man's door and the man simply nods his head and raises 2 fingers, the man has accepted the salesman's offer.

8. ***Mailbox Rule*** – acceptance sent by mail is effective *when posted* (i.e. the moment of dispatch)

a. NOTE: rejection & revocation are effective only when *received* (i.e. it comes into the possession of the person addressed, or of someone authorized by him to receive it, or when it is deposited in some place authorized as the place for this or similar communications to be deposited).

b. LIMITATIONS:

(i) *Offer otherwise provides* (e.g., “**acceptance not be effective until received**”) – NO mailbox rule

(ii) *Option contracts* – NO mailbox rule (acceptance is effective upon receipt)

(iii) ***Rejection & then acceptance*** – **NO mailbox rule (whichever arrives first controls)**

(a) *Offer – Rejection – Acceptance – receives Acceptance – receives Rejection (Contract)*

(b) *Offer – Rejection – Acceptance – receives Rejection – receives Acceptance (NO K)*

(iv) ***Acceptance & then rejection*** – **mailbox rule & K (*unless rejection arrives 1st & relied by offeror)***

(a) *Offer – Acceptance – Rejection – receives Acceptance – receives Rejection (Contract)*

(b) ***Offer – Acceptance – Rejection – receives Rejection – receives Acceptance (Contract)***

(c) *Offer – Acceptance – Rejection – receives Rejection* ***& relies*** *– receives Accept. (NO K)*

(v) ***Revocation & Acceptance***

(a) *Offer – Revocation – Acceptance – receives Revocation = Contract (mailbox rule applies)*

(b) *Offer – Revocation – receives Revocation – Acceptance = NO K (terminate power of acceptance)*

**HYPO:** On Monday, S mails B a letter with offer to sell widgets *–* B receives the letter on Wednesday and mails acceptance to S on Thursday *–* after the acceptance is mailed by B, but before it is received by S, S sends a fax to B revoking the offer *–* under mailbox rule, it is valid K.

9. **Implied-in-fact contract**

a. ***Implied-in-fact K*** – K in which each party’s promise is inferred from their act or conduct, or from words that are not explicitly words of agreement (non-verbal).

(i) *Elements* – (i) mutual assent (intention to engage); and (ii) mutual agreement (intention to be bound)

(ii) If a person accepts services from someone in the business of providing those services, there is an implied-in-fact contract (tacit promise) to pay for the reasonable value of those services. Examples:

(a) *Ambulance/taxi ride* – calling an ambulance or taxi is a tacit promise that you will pay them for that transportation.

(b) *Patron at a restaurant* – when you order food, you implicitly agree to pay their charges.

(c) *Patient visit to doctor* – when you go to a doctor and they give you a bill at the end, you agreed to pay the standard charges.

(iii) Implied in fact K can be enforced even where a defendant has received nothing of value.

b. ***Quasi-K* (**Implied-in-law K for restitutionary recovery at law) – where there was *unjust enrichment* for one party or one party benefited; where there was no meeting of the minds & no assent.

(i) *Elements* – P has conferred a benefit & reasonably expected to be paid, AND D realized unjust enrichment if P not be compensated

(a) Not governed by K law – governed by equitable concepts (e.g. doctor renders aid to an unconscious patient)

(b) Any time the proper application of *K rules produces an unfair result*, we move to Quasi-K

**HYPO:** X contracts with Y to build a house for Y – X becomes ill & can’t continue after completing 1/3 of work – X can’t sue in K, but may recover for benefit conferred on Y

(ii) *Measure of recovery* – K price is *not* the measure of recovery. You get the reasonable value of the benefit conferred, not the contract price.

(iii) NOTE: this is only available as a remedy for *total* breach, NOT for *partial* breach

**Seperac Rules for NCBE MBE Issues Tested on Formation of Ks – Mutual assent**

• Rule 449: The UCC governs any contract for the sale of goods involving one or more ***merchants*** – when a transaction is between merchants, additional terms in an acceptance or confirmation do not become part of the contract if they materially alter it ((e.g. if B telephones S and places an order and S mails B an acknowledgment form with an arbitration clause added to it, a valid contract is formed when S mails its acknowledgment, BUT the court must decide whether the arbitration term should be excluded as a material alteration of the contract – to determine whether an arbitration clause is material, a key fact is whether or not arbitration is a common or universal practice in the industry)). (SA19-73)

• Rule 450: An ***implied-in-fact contract*** is a contract that has not been expressly agreed to, but the parties' conduct infers a mutual intent to contract – it arises when one party intends to engage in the conduct and knows that the other party expects to be compensated ((e.g. if a client gives his attorney a note asking him to research a legal issue, the attorney's performance creates an implied-in-fact contract)). (SA19-66)

• Rule 451: In a ***unilateral contract*** (where one party makes a promise to do something if the other party performs a certain act), once the offeree begins the invited performance, the offer becomes a binding option contract, which makes the offer temporarily irrevocable. If the offeror dies before the offer is accepted, it is revoked, BUT if the offer is accepted, then death does not terminate the obligations of the contract ((e.g. if a toy collector tells a toy designer he will pay him $5,000 if he designs a batman toy, and the designer starts working on it, if the toy collector then dies, the collector's estate CANNOT revoke the offer since the designer has started working on it)). (SA19-69)

• Rule 452: A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance, but a ***counteroffer*** – on the other hand, an inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer, is ordinarily not a counteroffer ((e.g. if a seller offers to sell his farm to a buyer, and buyer then asks in an email whether seller’s offer includes the horses, and the seller replies in the negative, if the buyer then emails the seller that he accepts the seller’s offer, there is a binding contract because the buyer’s first email about horses was an inquiry and not a counteroffer with a different term, so the buyer still had the power to accept the offer until it was revoked or a reasonable time lapsed)). (OP4-13)

• Rule 453: Before a ***contract*** is created, the parties must have a clear understanding of the terms of the agreement and an intention to be bound – whether the parties intended to be bound is based on an evaluation of the agreement and the surrounding circumstances ((e.g. in a telephone call, if a lender offers to accept 80% of the promised amount as payment in full for a loan, provided the borrower promises to pay that amount a month before the original due date, if the borrower then replies ‘I will try my best,’ the borrower has not made a clear intention to be bound and the lender is free to revoke his offer before acceptance)). (OP3-92)

• Rule 454: Parties may be bound contractually when they have reached agreement in principle, even though they contemplate either further negotiations (agreement to agree) or the execution of a formal written contract (formal contract contemplated) – when the parties' manifestations of assent are in themselves sufficient to conclude a contract was formed, contract formation will not be prevented simply because the parties also manifested an intention to prepare and adopt a written memorial of the contract ((e.g. if two parties have reached agreement in principle but one party states that he would now ask his attorney to draft a written contract so that there would be a record of the terms, there is still a binding contract and no memorialization by an attorney is required)). (OP3-22)

• Rule 455: ***Additional terms between merchants*** become part of the contract unless: (1) the offer expressly limits acceptance to the terms of the offer; (2) they materially alter it ((e.g. an arbitration clause is not a material term unless the other side is not expressly aware of it and there is evidence that its inclusion would result in surprise or hardship to them)); or (3) notification of objection to them has been given or is given within reasonable time after notice of them ((e.g. if a seller ships an order of goods and emails an acknowledgement form with an arbitration clause to the buyer and the buyer accepts the goods without any protest but later sues on the contract, the seller’s best argument to enforce arbitration is that the additional term did not materially alter the contract and the buyer failed to object within a reasonable time)). (OP3-43)

• Rule 456: If an offer invites acceptance by performance, the offeree’s beginning of performance creates an ***option contract*** which precludes the offeror from revoking its offer ((e.g. an offer by a bank to give a customer $25 for waiting in line for more than 5 minutes cannot be withdrawn by the bank if a customer has begun performance by waiting in line)). (OP2-36)

• Rule 457: In a ***sales contract***, the UCC provides that an order (offer) can be accepted either by shipping goods (either conforming or non-conforming) or by promising to do so, BUT if a seller accepts by promise ((e.g. by mailing a letter to the buyer accepting the order)), a subsequent *notice of accommodation* sent along with non-conforming goods is not appropriate, and the *imperfect tender* results in a breach by the seller. (OP2-39)

• Rule 458: A statement from a seller that he is thinking of selling an item is not an offer but a ***solicitation for an offer***, and if an offer is subsequently made by mail, an acceptance of the offer by mail is effective upon the mailing of the acceptance. (OP1-89)

#### [MEE Topic Summaries: Formation of Ks – Mutual assent](SEPERAC-J19%20EXAM-MEE%20MASTER-TOPIC%20SUMMARIES.doc#I_A_Mutual_assent)

[**2013-JUL-Q7-P1**](SEPERAC-J19%20EXAM-MEE%20MASTER-RELEASED%20ANSWER%20COMPILATION.doc#SEPERAC_2013_JUL_Q7_P1)**: (20%) Is there a contract between the manufacturer and the chef for the purchase and sale of 10 knives? Yes. The manufacturer and the chef entered into a contract at the trade show when they agreed that the chef would buy 10 knives from the manufacturer for $100 each.**

[**2011-FEB-Q6-P1**](SEPERAC-J19%20EXAM-MEE%20MASTER-RELEASED%20ANSWER%20COMPILATION.doc#SEPERAC_2011_FEB_Q6_P1)**: (40%) Was a contract formed when Designer offered Retailer a discounted payoff in exchange for early cash payment; Retailer responded, “Thanks. That’s a good deal. I don’t have the cash to pay you now. I’ll do it if I can get a loan”; and Designer replied, “That will be great”? Yes. Designer made an offer to Retailer to modify their existing contract. Retailer did not accept the offer. Instead, Retailer made a counteroffer, which Designer then accepted, forming a modified contract.**

**AFTER YOU HAVE TESTED THESE LINKS AND CONFIRMED THEY WORK, IF YOU LATER DECIDE YOU WANT TO MOVE FORWARD WITH THE TUTORING, YOU MUST STATE IN THE EMAIL TO ME THAT YOU TESTED THE UBE MASTER OUTLINE LINKS AND YOU ARE LETTING ME KNOW THAT THEY WORK. IT IS IMPORTANT FOR YOU TELL ME THIS BECAUSE IT HELPS ME CONFIRM THAT YOU ARE INDEED A SELF-STARTER WHO CAN FOLLOW INSTRUCTIONS EVEN WHEN EMBEDDED IN A DENSE AMOUNT OF TEXT (WHICH MY STYLE OF TUTORING LEANS TOWARDS).**