ANSWER TO QUESTION NO. 4

This question raises the following issues:

(1) Does the agreement between UP and DAW meet the requirements for an enforceable contract?

(2) If so, are DAW's contractual obligations to UP subject to a condition precedent (or subsequent) that Dean would find financial backing for making the film in Michigan?

(3) Can DAW argue there was no breach on the basis of frustration of purpose, impossibility of performance, or mutual mistake?

(4) Is Dean personally liable to UP on his oral guarantee?

1. The contract is enforceable. Under Michigan law the elements of an enforceable contract are (1) parties competent to contract, (2) proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) if the contract is bilateral, mutuality of obligation. *Hess v Cannon* Trap, 265 Mich App 582, 592 (2005). Elements (1), (2), and (4) are plainly satisfied. In addition, both parties have given adequate consideration. Consideration is a legal detriment that has been bargained for in exchange for a promise. *Higgins v Monroe Evening News*, 404 Mich 1 (1978). A promise may be valid consideration for another's promise, as can a performance. *General Motors Corp v Department of Treasury*, 466 Mich 231, 239 (2002). Here the parties exchanged promises: UP promised to provide services and DAW promised to pay for them including a guaranteed minimum payment for at least two calendar quarters. There is also mutuality of obligation because the agreement on its face requires both parties to do certain things. *Reed v Citizens Ins Co*, 198 Mich App 443, 448 (1993).

2. Dean appears to believe that Phil should have understood that the written document was not binding until DAW was certain it had financial backing for making the film in Michigan. When an agreement provides that a party's contractual obligations do not arise unless a certain event occurs, that event is called a "condition precedent." A related concept is that of a "condition subsequent" -- a later event that operates to release a party from the obligations initially imposed by a contract. Here the written document between UP and DAW contains no reference to any

conditions, financing or otherwise; the obligations of both parties are stated without qualification. On the other hand, the writing does not include an "integration" or "merger" clause stating that the writing is the complete and exclusive statement of the parties' agreement. It is therefore permissible for DAW to argue'that the parties agreed on other, unwritten terms but did not include them in the writing. *Cf. UAW-GM Human Resource Center v KSL Recreation Corp,* 228 Mich App 486 (1998).

A court asked to interpret the agreement would attempt to give effect to the parties' intentions at the time they entered into the contract, including ascertaining whether there were additional unwritten terms consistent with the written terms. In the process, it could consider evidence of the parties' conduct and statements contemporaneous with making the agreement (this is called parol evidence or extrinsic evidence) to determine what each party should have understood the contract meant. *Goodwin, Inc v Coe,* 392 Mich 195 (1974).

DAW's argument that the contract contained an unwritten condition related to the availability of financing for filming in Michigan is likely to fail. Both parties believed the services described by the contract would be necessary at the time they signed it. The contract specifically called for UP to begin work even though the financing had not been finalized, and DAW made an oral request as well. Furthermore, DAW, which in the stated facts is the offeror, was in the best position to know when it proposed the contract how much uncertainty existed about lining up the necessary financial backers, and thus whether the contract should make allowances for those contingencies. But Dean did not write any such contingencies into the contract, and even his statements to Phil that he had not finalized the financing did not communicate that the Michigan pre-production services covered by the contract should not go ahead in the meantime. (An examinee may also invoke against DAW the doctrine of *contra proferentem,* i.e., that a document should be construed against its drafter. That is an acceptable observation, but more credit should be given to an examinee who recognizes that under Michigan law this interpretive rule is resorted to only as a "tie breaker" when all other interpretive devices fail. *Klapp v United Ins Group Agency Inc,* 468 Mich 459, 472 [2003]).

3. DAW could also attempt to argue that its obligations to UP -- or at least the $30,000 minimum -- were no longer enforceable on the basis of mutual mistake, frustration of purpose, or impracticability of performance.

Mutual mistake would not be a viable defense. A mistake must

relate to a part or present, not a future, fact. Restatement 2d, Contracts, §151, comment *a*. A mutual mistake regarding the existence of a fact that is critical to the purpose of a contract at the time a contract is made can be a basis for obtaining equitable relief from a contract. But here both parties knew when they signed the document in late September that it was not yet settled whether money would be available to make the film in Michigan. That, and whether Ms. Lovely is available to star, are future facts, not present facts.

A stronger argument for DAW, which stands some chance of succeeding, is that DAW's obligation to pay UP the guaranteed minimum of $30,000 should be excused under the doctrine of frustration of purpose. The purpose of the contract was unquestionably to ensure that DAW had a provider of pre-production services for a movie that would be filmed in Michigan. Once it was necessary that the movie be filmed elsewhere, UP's contracted-for services had no further purpose. Under Michigan law, the frustration of purpose doctrine applies if (1) the contract has not yet been fully performed on both sides; (2) the purpose of the contract was known to both parties at the time of formation; and (3) the purpose was frustrated by an event not reasonably foreseeable at the time of formation, so long as that event was not the fault of the party invoking the doctrine. *Molner v Molner,* 110 Mich App 622 (1981). Points (1) and (2) are satisfied. The stated facts would allow an examinee to argue either way on whether element (3), foreseeability, is satisfied. Apparently DAW had good reason to believe that Ms. Lovely would bring in investors, and her sudden unavailability was not DAW's fault. On the other hand, while Dean was justifiably confident that he could make financing fall into place after he signed her, one could argue it was reasonably foreseeable in September that Ms. Lovely's personal problems would interfere with her being able to appear, which would cause DAW's plan to quickly fall apart. Even with that possibility, DAW made an unconditional promise to pay UP at least $30,000. Of course, if frustration of purpose now excuses DAW from further performance, DAW is still obligated to pay UP for services already rendered at the agreed hourly rate of $150 plus expenses.

The doctrine of impracticability, on the other hand, does not fit these facts. It would not be impracticable or impossible for UP to continue scouting locations in Michigan; it would simply be pointless. (This situation resembles the classic illustration of the difference between frustration of purpose and impracticability: a contract to build a boat dock which was entered into just before boats were unexpectedly banned from the lake. Building the dock would not be impossible or impracticable, but the purpose of doing so would be frustrated.)

4. Irrespective of the other issues, Dean has no personal liability. The Michigan Statute of Frauds, MCL 566.132(1) (b), requires a "special promise to answer for the debt, default, or misdoings of another person" to be in writing. Dean's oral guarantee of whatever DAW might owe UP is void under that statute. In addition, no additional consideration was given for this separate oral promise made by Dean after the agreement between the companies was signed.