

ANSWER TO QUESTION 15

This question raises issues of (1) consideration, (2) statute of frauds, and (3) standing to sue as a third party beneficiary.

With respect to consideration, the applicant should point out that every valid contract requires some form of consideration. *Detroit Trust Co v Struggles*, 289 Mich 595, 599 (1939). Courts do not inquire into the sufficiency of consideration, *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 239 (2002). Consideration requires a bargained for exchange, i.e. a benefit on one side, or a detriment suffered, or service done on the other. *Id.* As to Al's implied charge that there was no consideration for the contract ("I didn't give You anything you did not already have"), two issues arise. The first issue to be addressed is the impact Michigan's smoking law has on Al's promise to allow Joe to smoke in the dugout and on the field. The performance of a pre-existing legal duty is not sufficient consideration for a new promise, *46th Circuit Trial Court v Crawford County*, 476 Mich 131, 158 (2006), because "doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v AAA*, 461 Mich 732, 741 (2000). Here, Al had a pre-existing legal duty to allow Joe to smoke in all open air spaces, which would include the dugout and field. Hence, the duty Al undertook in the managerial contract with Joe was the same as he was required to do under state law, so performance of the pre-existing duty did not provide legal consideration for the contract between Joe and Al. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 525 (1995).

Second, it can still be argued that there is consideration supporting the managerial contract, as consideration for a contract can be in the form of a benefit extended to third parties, *Plastrap Corp v Cole*, 324 Mich 433, 440 (1949). Thus, Joe's brother receiving a free hot dog franchise is consideration to support the contract, as it was a benefit conferred on a third party by Al at Joe's request. Additionally, if one of the forms of consideration fails, but another survives, that surviving consideration will normally support the contract. *Nichols v Seaks*, 296 Mich 154, 160 (1941). Consequently, there is consideration supporting the managerial contract.

The next issue is Al's assertion that the contract is invalid because it was written on a napkin and Joe did not sign it. The statute of frauds requires that any contract that is not to be performed within a year of making the agreement must be in writing

and signed by the person against whom performance is sought. MCL 566.132(1) (a). Joe's two-year employment contract cannot be performed within a year, so it must comply with the statute. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441 (1993). To do so, the written document must contain the essential terms of the agreement. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 369 (1982). Here, the essential terms of the contract--the job, its length, and the consideration--were all contained on the napkin. Additionally, Joe would be seeking to enforce the agreement against Al, who signed the napkin. Hence, the statute of frauds is satisfied.

The final issue is Joe's brother's ability to sue Al to enforce the promise of a free hot dog franchise. In order to sue Al as a third party beneficiary, Joe must have been an intended third party beneficiary of the managerial contract. MCL 600.1405. "A person is a third-party beneficiary of a contract only when that contract establishes that a promissor has undertaken a promise *directly* to or for that person." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428 (2003). This third party is not a signatory to the contract, but is the beneficiary of the contract between the promissor and promisee. *Jt Admin Comm v Washington Group Int'l, Inc*, 568 F3d 626, 631 (CA 6, 2009), citing Williston on Contracts, §37:23 (4th Ed, 1990). In deciding whether the parties intended to make someone a third party beneficiary, a court must determine from the form and meaning of the contract itself whether they objectively intended that person as a third party beneficiary. *Kammer v Asphalt Paving Co v East China Twp Schools*, 443 Mich 176, 189-190 (1993).

Joe's brother is a third party beneficiary of the managerial contract. The contract specifically identified him as the recipient of a free franchise, establishing the objective intent of the parties. Al knew that he was undertaking an obligation specifically to Joe's brother, undertook that obligation for at least a year, and the contract is otherwise enforceable.