FEBRUARY 2021

ESSAY QUESTION 1 OF 5

Answer All 5 Questions

California Bar Examination

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

On January 15, Paul fell down the stairwell of Dell's Department Store ("Dell"). Paul sued Dell for personal injuries, alleging he fell because one of the steps was broken. The following occurred at a jury trial in the California Superior Court while Dell's manager, Mark, was being examined by Dell's attorney:

QUESTION: Where were you when Paul fell down the stairs?

ANSWER: I was standing nearby with my back to the stairs talking to Carol, a store customer, when I heard the noise of the fall.

(1) QUESTION: Has Paul sued Dell before?

ANSWER: Yes, five times that I personally know about.

(2) QUESTION: No one saw the accident. Right?

ANSWER: That's right. A thorough investigation was unable to find anyone who saw Paul fall on the stairs.

Mark was then cross-examined by Paul's attorney as follows:

(3) QUESTION: Isn't it true that you used to be employed by Paul as a cashier in his grocery store and that he fired you for stealing money from the cash register?

ANSWER: That is what he claimed.

(4) QUESTION: The stairs were repaired the day after Paul fell. Weren't they?

ANSWER: Yes.

(5) QUESTION: Didn't Carol, the store customer, exclaim at the time of the accident: "Oh no! A man just fell on that broken step"?

ANSWER: So, what?

QUESTION: Is this the report that Dell's insurance company prepared following an investigation of the accident?

ANSWER: Yes. That is the report the insurance company gave me. They always prepare a report in case we get sued.

Paul's attorney then moved to enter into evidence the insurance company's report. The report states: "Steps on the stairs at the store are in very poor condition."

A. What objections could Paul's attorney and Dell's attorney reasonably make to the questions or answers to Mark's testimony numbered **(1)** to **(5)** above, and how should the court rule on each objection? Discuss.

B. What objections could Dell's attorney reasonably make to the motion to enter the insurance company's report into evidence and how should the court rule? Discuss.

Answer according to California law.

FEBRUARY 2021

ESSAY QUESTION 2 OF 5

Answer All 5 Questions

California Bar Examination

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Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 2

Bright Earth Solutions ("Bright"), an agricultural services business that employed 10 people and had over 100 clients, purchased a new commercial tractor mower (not suitable for personal, family or household purposes) from Stercutus Mowers ("SM") for $15,000. In concluding the sale, SM presented a one-page contract that contained the following language:

> SM undertakes, affirms and agrees that this mower is free of defects in material and workmanship at the time of its delivery to the buyer. If the mower or one of its component parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, SM shall repair or replace at its sole option any such mower or component part at its own cost or expense. Other remedies are excluded.

The contract also stated in bold, 12-point font:

> **THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED AND PARTICULARLY, THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY SM IN CONNECTION WITH THE SALE OF THIS MOWER.**

Authorized representatives of Bright and SM signed the contract and Bright took delivery of the mower.

Over the next six months, Bright experienced numerous problems with the mower. The bolt holding the mower blade in place broke five times under normal usage. The steering system was faulty, causing unsightly and uneven lines in mowing jobs. The gas tank installation was defective, causing intermittent gas leaks. Several times the mower would not start due to various electrical faults and Bright had to cancel planned jobs. As a result, Bright lost clients and $5,000 in profits.

Bright took the mower to SM each time it malfunctioned. SM effected repairs and the mower would work for a while and then malfunction again. Sometimes the replacement part would fail, other times a different part would fail. The mower was returned to SM for repairs 12 times in the first six months after purchase.

At the beginning of the seventh month after purchase, the mower's steering wheel came off during a job. At that point, Bright communicated to SM that it wished to return the mower and be refunded the purchase price. SM refused, pointing to the clauses above in the original contract. Bright then sued SM for breach of contract and warranty.

1. Is Bright likely to prevail in its suit against SM? Discuss.

2. If Bright prevails, what remedies, if any, would likely be available? Discuss.

FEBRUARY 2021

ESSAY QUESTION 3 OF 5

Answer All 5 Questions

California Bar Examination

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Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 3

Prior to her 1990 marriage to Hal in California, Wendy helped operate an antiques and rare book business owned by her father.

During the marriage, Wendy continued to work with her father in operating the business. Over the years, Wendy and her father jointly operated the business and in 1995, they signed an agreement whereby Wendy became the owner of a ½ interest in the business. Wendy had developed an exceptional talent for buying antiques and took over that part of the business in 1995. The business doubled in value from 1995 to 2000. In late 1999, Wendy's father died and by his will left his interest in the business to Wendy, including all of the business's real property and inventory.

Wendy and Hal separated early in 2014. They have lived separate and apart since then and are now involved in divorce proceedings.

How should the court allocate the value of the business between Hal and Wendy? Discuss.

Answer according to California law.

FEBRUARY 2021

ESSAY QUESTION 4 OF 5

Answer All 5 Questions

California Bar Examination

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

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If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

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Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 4

Linda Lawyer is just starting out in practice. She arranges with Chiro, a chiropractor, to give Linda's name to his patients who have been in car accidents or falls. When Linda recovers money in contingent-fee lawsuits for Chiro's patients, she gives Chiro a gift, which they have agreed will be 5% of Linda's fee. If Linda recovers nothing, Chiro receives no gift. They also form a partnership, in which Chiro's services are described as "marketing."

Pete is one of Chiro's chiropractic partners. Chiro sends Pete to Linda because Pete is seeking a divorce from his wife Alice.

Pete tells Linda he can never forgive Alice because she was unfaithful. Pete tells Linda that he's having money problems and asks that she take the case on a contingency basis. Linda tells him she'll consider it if he'll have drinks with her. Pete feels he has little choice, and goes out with her. Linda initiates a sexual relationship with Pete, and agrees to take the case. Linda is increasingly distracted from Pete's case by her desire to spend time with him, sometimes filing papers hurriedly and narrowly avoiding deadlines.

Tom, Alice's divorce lawyer, calls Linda one day and says, "I know you're having sex with Pete. Either you settle this case cheaply, or I'll report you to the Bar." Linda decides to beat Tom at his own game and, without telling him, calls the Bar herself and reports his threat.

1. What ethical violations, if any, has Linda committed with respect to her:

    a. Financial arrangement with Chiro? Discuss.

    b. Partnership with Chiro? Discuss.

    c. Relationship with Pete? Discuss.

    d. Accepting Pete's case on a contingency basis? Discuss.

2. What ethical violations, if any, has Tom committed? Discuss.

Answer according to California and ABA authorities.

FEBRUARY 2021

ESSAY QUESTION 5 OF 5

Answer All 5 Questions

California Bar Examination

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

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QUESTION 5

Ed owned a parcel of land on the north side of a rural highway. A lane connected the highway to the small country inn Ed operated on the land. Ten years ago, Ed entered into a signed written agreement conveying a right-of-way easement over the lane to Fran, his neighbor north of his parcel. Fran operated a commercial farm with a small bunkhouse for farm workers on her land. She often used Ed's lane to access the farm and bunkhouse from the highway.

Recently, Fran announced that she was converting her farm into a 50-lot residential subdivision and the bunkhouse to a computer server center. She informed Ed that she wanted to run new electric lines and a fiber optic cable along the lane.

Fifteen years ago, Ed and Gloria, his then-neighbor on the south side of the highway, had entered into a signed written agreement in which Gloria covenanted that she and her successors in interest would use her property only as a commercial organic garden and, in exchange, Ed would purchase produce from Gloria for use in his country inn. Soon thereafter, Gloria sold her land to Henry. Ed continued to buy produce from Henry.

Recently, Henry informed Ed that the more intense development Fran had planned for her parcel and the increased traffic along the highway justified the conversion of Henry's garden into a combination truck stop and diner.

Ed objected to Fran's and Henry's intended changes and decided to sue both of them to enforce his rights.

1. What rights and interests do Ed and Fran each have in the lane, and may Fran, over Ed's objection, carry out her plans for the lane? Discuss.

2. What rights and interests do Ed and Henry each have in the garden property, and may Henry, over Ed's objection, carry out his plans for that property? Discuss.

February 2021

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

MATTER OF I.B.I.

PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Hodgeson and Hawkins, LLC
53 Severance Ridge Road
Columbia City, Columbia

MEMORANDUM

To: Applicant
From: Sarah Hodgeson
Date: February 23, 2021
Re: Matter of I.B.I.

Our firm represents Innovative Business Incubators (I.B.I.), a non-profit business that provides advice and support to new entrepreneurs in Columbia City. I.B.I. offers a range of services to new startups, including advice, expert consulting, networking, and referrals to other professional services. I recently met with Frank Duquesne, the Executive Director of I.B.I.

One of I.B.I.'s main services is the arranging of mentoring relationship between new entrepreneurs and experienced mentors. As the attached interview notes and article explain, these mentors can provide value that I.B.I. cannot, including expertise tailored to the needs of particular kinds of business.

Recently, after a complaint about a mentor, Duquesne has decided that he needs to formalize the relationship between I.B.I. and its mentors. He provided me with an article that highlights the benefits and the risks of the mentoring relationship in an incubator context. He has also provided me with a draft contract that he has revised to include the basic parameters that he wants to set on the relationship.

I want you to write a memo assessing several legal issues arising out of the relationship between mentor and mentee. For each of the following questions, I want you

to assess the impact of the law on the draft contract and, without drafting new language, describe any changes you might recommend to address our client's concerns:

1. Whether the relationship between an I.B.I. mentor and mentee gives rise to fiduciary obligations owed by the mentor to the mentee;

2. Whether the draft contract between I.B.I. and a mentor creates contractual rights that an I.B.I. mentee can assert against the mentor.

Hodgeson and Hawkins, LLC
53 Severance Ridge Road
Columbia City, Columbia

MEMORANDUM

To: File

From: Sarah Hodgeson

Date: February 21, 2021

Re: Matter of I.B.I.: Initial Interview with Frank Duquesne

I met with Frank Duquesne today. He's the Executive Director of Innovative Business Incubators (I.B.I.), a private non-profit that helps startup businesses with services and advice. Frank is an old acquaintance who, after several years working in business, started I.B.I. as a way of providing help to new entrepreneurs.

Frank told me that, for several years after starting I.B.I., he and his paid staff provided almost all of the support services to mentees: help with business basics; networking activities; internet access; advice on finding loans, managing accounts, and developing businesses.

Eventually, Frank told me, he realized that his mentees would benefit from working directly with established business people in areas where I.B.I. lacked expertise. He created several informal mentoring relationships between these "mentors" and his mentees. These relationships worked well, so he decided to make mentoring a regular and important part of I.B.I.'s service.

He recruited a team of over 30 mentors, all located in the capital city, representing a diversity of business structures and business types. I.B.I. now routinely offers to connect its mentees with mentors and Frank is aggressively seeking out new mentors for business models and services with which he is not familiar.

Recently, however, Frank received a complaint from one of his startup mentees. The mentee reported that one of I.B.I.'s mentors had pressured the mentee to use the mentor's business as a principal supplier, on terms less favorable than the mentee could obtain elsewhere. Moreover, this same mentor had also pressured the mentee to allow him to invest in the business, in exchange for a significant ownership share. The mentee resisted both advances and ended the relationship.

Frank stressed that this kind of problem had only occurred once. He believes that, in most circumstances, both mentor and mentee will act in good faith, that the mentees will seek independent advice before transacting with a mentor, and that strong reasons can exist for such transactions, involving benefits for both parties.

However, Frank wants to clarify the relationships between I.B.I., its mentors, and its mentees. He did some research and found some model mentoring agreements that he revised and proposes to ask his mentors to sign. He proposes to use such an agreement with all of his mentors. Before he does so, he wants us to review the agreements and advise him about the legal consequences for I.B.I.'s mentors.

Before our meeting ended, I spent time exploring what goals he wanted these agreements to serve. As I expected, Frank identified several conflicting concerns:

- Protecting I.B.I.'s Startup Mentees: Given the feedback from this one mentee, Frank wants to make sure that both he and his mentees have a way to protect the mentee legally if a mentor does succeed in taking advantage of the mentee.

- Avoiding the Discouragement of Mentors: At the same time, Frank does not want to expose his mentors to unnecessary liability. In most cases, mentors volunteer their time. He doesn't want the threat of lawsuits to chill that willingness to help.

- Informality: Frank is more than willing to ask mentors to contract with I.B.I., but he wants to preserve the informality and open-endedness of the relationships between mentors and mentee/mentees. He strongly

believes that these relationships work best if mentors and mentees work in good faith, without asking them to sign binding contracts defining the relationship.

I told Frank that we would research his questions and get back to him soon.

Business Incubators and Business Mentors: Helpful or Harmful?

Columbia Business Incubator Newsletter

A business incubator helps startup companies to grow by providing services such as management training or office space. Business incubators differ from industrial parks in their dedication to startup and early-stage companies. Incubators also differ from the Small Business Development Centers (and similar government sponsored business support programs) in that they serve only selected clients.

The formal concept of business incubation began in the USA in 1959 when Joseph Mancuso opened the Batavia Industrial Center in a Batavia, New York, warehouse. Since then, incubators have spread across the globe; by some estimates, as many as 7,000 business incubators exist world-wide.

Technology has increased this growth. New experiments like Virtual Business Incubators bring the resources of entrepreneurship hubs like Silicon Valley to remote locations all over the world. Virtual incubators allow startups to get the benefit of an incubator without actually being located at the incubator site.

Many incubators rely on business mentors to help as advisors and consultants for startup businesses. These mentors typically come from the same industry as the startup and include established individuals with substantial business experience.

A good mentor can be a huge plus. Mentors bring knowledge and perspective that allow startups to avoid hidden risks and to seize unseen opportunities. A mentor can provide entry into specialized business networks and can help new business people form relationships with suppliers, customers, and regulators.

At the same time, the mentoring relationship can have its downsides. Mentors sometimes take too little time to learn the new business. Mentors may fail to understand new or disruptive business models. Finally, some mentors have used their position of

influence to take an ownership position in the startup or to sign contracts that benefit the mentor’s own business.

Before using the services of an incubator or a business mentor, take time to understand how the incubator and the mentor work. Ask for copies of the mentoring agreement. If you do work with a mentor, make sure to seek a second opinion before entering into an investment or contractual relationship with your mentor.

AGREEMENT WITH BUSINESS MENTORS

This Agreement is between Innovative Business Incubator (I.B.I.), a non-profit in the State of Columbia, and _____, an individual (Mentor), desiring to provide business and professional guidance to individuals and businesses using the services of I.B.I. (Mentee(s)).

With this Agreement, I.B.I. and the Mentor seek to accomplish the following goals:

— to protect the respective interests of I.B.I., the Mentor, and the Mentees;

— to clarify the relationships between I.B.I., the Mentor, and the Mentees; and

— to ensure the confidentiality of information disclosed in the context of counseling or technical assistance.

Accordingly, I.B.I. and the Mentor agree as follows:

1. The Mentor agrees:

    a) Not to charge a fee or accept a gift (or secure same or another) for counseling or other services provided to the Mentee;

    b) Not to service competing Mentees at the same time prior to notifying all competing Mentees that the Mentor is providing services to competing Mentees;

    c) Not to discuss Mentee information or the counseling relationship with anyone other than I.B.I. personnel; and

    d) Not to withdraw from a counseling assignment without first notifying I.B.I.

2. Duration: The Mentor agrees that this Agreement shall remain in force and in effect, from the date hereof, during the term of its relationship with any Mentee.

3. Remedies: In the event of any breach of this Agreement, I.B.I. is entitled to enforce the terms of this Agreement through actions that may include actions for damages or injunctive relief or other remedies.

IN WITNESS WHEREOF, the undersigned parties have duly executed this Agreement.

I.B.I.	MENTOR:
_____	_____
(name) (title)	(name) (title)
Date:	Date:

February 2021

California Bar Examination

Performance Test

LIBRARY

MATTER OF I.B.I.

LIBRARY

Togs for Tots, Inc. v. CCM

Columbia Supreme Court (2011)

Jeremy Painter owns Togs for Tots, Inc., a Columbia corporation that markets children's clothing to retailers. Children's Clothing Manufacturer, or "CCM," manufactures children's clothing in Columbia.

In 2001, Painter approached Ronald Denito, owner of CCM, with a business proposition: Denito should create a company to manufacture children's clothing that Painter would then sell. As a result, Denito started up CCM. Painter and Denito agreed that CCM would manufacture products, that Painter would market those products to the retail trade, and that Painter would act as CCM's sole marketer.

Through his company, Togs for Tots, Painter then began to create a market for the products CCM manufactured and sold under its name. Togs for Tots paid all costs of the sales effort, including travel expenses and the maintenance of a showroom office in Columbia. Painter held himself out to the retail trade as a partner in CCM and carried a business card designating him as Vice President of CCM. From 2002 to 2008, Togs for Tots solely engaged in marketing products for CCM.

During this time, Painter and Denito made all business decisions together. CCM handled the manufacturing aspect, while Togs for Tots handled the marketing. At trial, Painter alleges that he and Denito shared "a confidential relationship." Painter and Denito shared the profits of CCM, with Painter receiving marketing profits in the form of commissions and Denito receiving manufacturing profit.

As a result of Painter's marketing efforts, by 2009, CCM grossed $15 million in annual sales. This included $12 million from Walmart, CCM's biggest customer. To obtain Walmart as a client, Painter helped design a unique line of clothes that CCM manufactured exclusively for sale under Walmart's private label.

In October 2009, CCM terminated their relationship with Togs for Tots. At that time, Denito informed Painter that defendants could no longer afford to share their revenues with plaintiffs.

Painter and Togs for Tots then filed suit, claiming that both Denito and CCM had breached a contract and, separately, that Denito and CCM had breached a duty arising out of a confidential relationship. Defendants moved to dismiss all claims. The trial court dismissed the claim as to breach of contract, but did not dismiss the confidential relationship claim. The defendants appealed this decision; the Columbia Court of Appeals affirmed.

In this appeal, CCM contends that Painter and Togs for Tots have failed to establish the existence of a confidential relationship between them, and that this cause of action must also be dismissed.

To succeed on a claim for breach of fiduciary duty in Columbia, a plaintiff must prove three elements: (1) a fiduciary duty between the parties; (2) defendant's breach of that duty; and (3) damages that were proximately caused by the breach. If proven, such a claim can result in liability independent of any contract between the parties.

The first element requires proof of the existence of a fiduciary duty. In some cases, such a duty arises out of a relationship well recognized as such: agent and principal; trustee and beneficiary; or guardian and ward. In other cases, the duties may arise out of relationships outside the standard fiduciary models. In such cases, the plaintiff must prove the existence of a “confidential relationship” as a matter of fact.

The existence of a confidential relationship cannot be determined by recourse to rigid formulas. A confidential relationship may exist where one person relies on another because of a history of trust, older age, family connection, and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship. Reliance and dominance are the key

factors in such a relationship. In the relationship between a business advisor and client, the advisor may bring more knowledge, expertise, or financial resources than the advisee. The resulting inequality could impose duties on the advisor to refrain from self-dealing or from exacting inequitable terms.

For example, in *Shaw v. Benedetti Enterprises* (2007), defendant Benedetti hired Shaw as an advisor to help Benedetti create a business that would manufacture and market durable medical equipment. Shaw sued for unpaid commissions, and Benedetti counterclaimed for breach of a confidential relationship. On the facts of that case, we found no such relationship. The parties had entered into a bargained-for exchange, pursuant to which each party received some benefit. We refused to extend duties of a confidential relationship to everyday commercial activity. To do so would expose participants to unexpected liability and could erode the exacting standards applied to those in a true fiduciary relationship with each other.

In this case, the pleadings do not indicate that either Painter or Denito had substantially greater knowledge, expertise, or financial resources than the other. In fact, Painter initiated the relationship and provided his share of the capital required to start up the marketing relationship. Moreover, the pleadings indicate a history of bargained-for collaboration resulting in substantial profits for both parties.

The trial court erred in failing to dismiss the plaintiffs' claim based on an alleged confidential relationship.

Accordingly, we reverse.

Norton v. Kramer

Columbia Supreme Court (2007)

This case arises from a lawsuit filed by Josephine Norton and several others against Samuel Kramer. Norton and her co-plaintiffs claim to be third-party beneficiaries of a contract between Kramer, acting under the name of Joseph Morgan, and the Columbia Basin Retreat (Retreat). The plaintiffs alleged that Kramer breached this contract by concealing his identity and by fraudulently inducing the plaintiffs to reside at the Retreat for over ten years.

Samuel Kramer formed the Retreat in 1992 as a non-profit corporation. He appointed himself as the spiritual leader of the Retreat, using the name of Joseph Morgan. In so doing, Kramer concealed his background as a former art student at the Columbia College of Art and as a failed retail merchant.

The Retreat included approximately twenty resident members (Residents) and operated a small public center for teaching yoga. In 1995, the Retreat moved to a 150-acre site in Lenox County, Columbia, which contained several large facilities. Between 1995 and 2006, over 8,000 paying guests per year visited the Retreat “to relax, take yoga classes, meditate, have massages, and otherwise take a break from the routine of their daily lives.” The Residents operated the facility, working for room and board and a small monthly stipend in exchange for the opportunity to live at the Retreat as Morgan’s “disciples.”

The Residents allege that they, the paying guests, and donors were attracted to the facility precisely because of Morgan's presence. Morgan's picture hung throughout the facilities, his videos ran continuously in the public areas, and his books, tapes, and other items were offered for sale by the Retreat. Publicly, Morgan claimed to be an authentic teacher and object of veneration, one who attained his status through several forms of abstinence. Morgan outwardly professed “honesty, selfless devotion to the well-being of his followers,” and

“absolute personal trust” between teacher and disciples, as well as celibacy and a physically and financially simple lifestyle.

The Residents characterize Morgan as cultivating an intense emotional dependence on him. They were told to identify themselves and their well-being with Morgan and to regard him as the most important person in their lives. He frequently offered guidance on the most intimate aspects of the Residents’ personal lives. They state that, over many years, each of them developed a “close and deeply personal relationship” with Morgan. They state that they endeavored to be chaste, honest, selfless, and devoted to the well-being of others. At Morgan’s urging, many donated all of their possessions to the Retreat, in some cases as much as $100,000.

The Residents claim that, in fact, Morgan/Kramer was a fraud. Their complaint alleges that, from 1992 through 2005, the Retreat entered into a series of lucrative contractual relationships with Kramer, to induce him to remain physically present at the Retreat. Kramer received an annual fee, free housing, free transportation (both domestic and international), a percentage of the proceeds from literature, video, and audiotape sales, and free sponsorship of seminars throughout the world. He retained the revenue from these operations in an amount of many hundreds of thousands of dollars.

Kramer left the Retreat after the discovery of his background by an author hired to write his authorized biography. The Residents brought this lawsuit, claiming intentional infliction of emotional distress; breach of fiduciary duty; breach of contract on a third party beneficiary theory of recovery; fraud and misrepresentation; and unfair and deceptive trade practices.

Kramer moved to dismiss all claims. The trial court dismissed all but the fiduciary duty, fraud, and trade practices complaints. The Residents appealed the dismissal of their breach of contract claims to the Court of Appeals, which affirmed the dismissal. We also affirm.

The Residents' complaint alleges that the Retreat contracted with Kramer for his services and that they, as resident members of the Retreat, were the intended beneficiaries of such contracts. According to them, Kramer breached these contracts when he misrepresented his status as a "true and authentic teacher" for the purpose of amassing significant personal wealth.

To recover as third-party beneficiaries, the Residents must show that they were intended beneficiaries of a contract between the defendant and the Retreat. Only intended beneficiaries, not incidental beneficiaries, can enforce a contract. A party is an intended beneficiary if performance under the contract effectuates the intention of the parties, and if circumstances indicate that the beneficiary would receive the benefit of the promised performance. See Restatement (Second) of Contracts § 302(1)(b).

The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. For example, if A and B enter into a contract whereby A agrees to pay B to construct a house for C, it is clear that C is an intended beneficiary. Similarly, if X and Y enter into a contract whereby Y will provide a service to C, C has the right to enforce the terms of that contract against Y.

The Residents allege that Kramer, for valuable consideration, contracted with the Retreat to provide services to the customers and Residents of the Retreat. Construed in a light favorable to the Residents, the terms of those contracts required Kramer to remain physically present at the Retreat, teach yoga courses, meet with guests and visitors, and serve as advisor, mentor and exemplar to the Residents, in addition to providing counseling services to his followers.

These allegations, if proven, would be sufficient to conclude that the Residents were intended beneficiaries of his agreement with the Retreat. They may maintain an action for breach of contract as third-party beneficiaries. However, this conclusion does not end the discussion; the facts as alleged by the

plaintiffs simply fail to state a claim for breach of the contract between Kramer and the Retreat.

The gist of the Residents' complaint is that, by secretly reaping substantial monetary compensation, Kramer was not providing the services of an "authentic" teacher. The required services included the development of a close mentoring relationship with the plaintiffs, as an exemplar of a particular lifestyle. But plaintiffs' own complaint indicates that Kramer satisfied those requirements: "Over many years, each of the plaintiffs developed a close and deeply personal relationship with Kramer."

To achieve the result sought by the Residents, the contract would have had to limit the financial benefits to Kramer or to require him either to act or refrain from acting in ways that complied with particular standards of behavior. But nothing in the complaint indicates that the contract specifically required Kramer to adhere to a particular code of conduct or abjure any specific behavior to maintain his status. Considering the liberal financial benefits obtained by Kramer, it is difficult to conclude that the contract intended such terms. Even taking all the Residents' allegations as true, Kramer's conduct does not constitute a breach of any specific terms of the contract between him and the Retreat.

In sum, although the Residents are third-party beneficiaries of the contract between the Retreat and Kramer, nothing in their complaint states a claim for breach of contract. Accordingly, we affirm the dismissal of this count of their complaint. We note that their claims for breach of fiduciary duty, for fraud, and for unfair and deceptive trade practices were not dismissed and are not affected by our decision. Plaintiffs may pursue those claims at trial.

Affirmed.