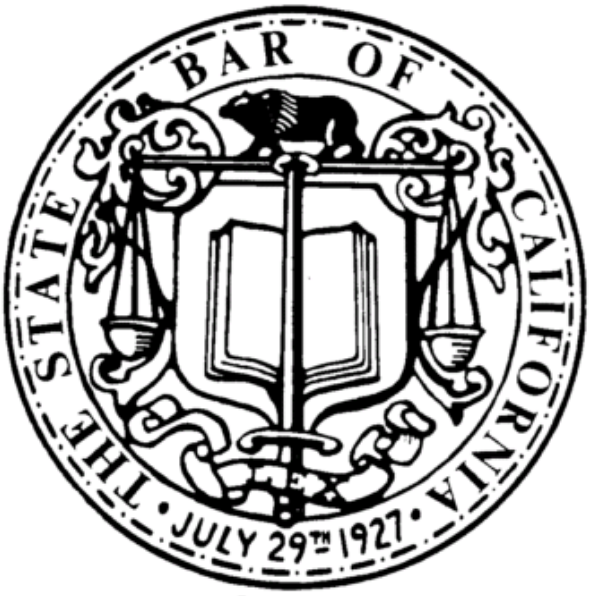

California
Bar
Examination

Performance Tests
and
Selected Answers

February 2006

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains two performance tests from the February 2006 California Bar Examination and two selected answers to each test.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

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FEBRUARY 21, 2006

California
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Examination

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INSTRUCTIONS AND FILE

HENSEN v. BUILD A BURGER

FILE

HENSEN v. BUILD A BURGER

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

To: Applicant
From: Beverly Cohen
Date: February 21, 2006
Re: Hensen v. Build a Burger

Our firm represents Gail Hensen in an action against Build a Burger (Burger), the regional fast food restaurant chain. During a deposition yesterday, an issue arose whether there had been improper contact by this firm with two witnesses. After a conversation with the judge, both parties were ordered to submit simultaneous briefs addressing Burger's allegation that our firm engaged in improper *ex parte* communication with two Burger employees.

We need to prepare our brief anticipating defendant's argument that the actions of the firm violated the Columbia Rules of Professional Conduct. Please draft a persuasive memorandum of points and authorities that argues that the firm has done nothing improper. Disputes like this are won or lost on how well we use the facts, so it is very important that you pick the key facts that support our position, set them forth cogently in your statement of facts, and weave the facts into your legal arguments. Follow the guidelines in the attached office memo regarding persuasive briefs.

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

To: Attorneys
From: Gregory Mandel
Date: March 27, 2003
Re: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to all attorneys, all persuasive briefs or memoranda such as memoranda of points and authorities to be filed in state court shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position.

Following the Statement of Facts, the Argument should begin. This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, Improper: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. Proper: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA, HAS

SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs. Associates should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Cohen & Mandel
Attorneys at Law
12 Manning Blvd.
Balston Springs, Columbia

To: File
From: Beverly Cohen
Date: June 1, 2004
Re: Hensen v. Build a Burger – Interview Notes

Gail Hensen is a former general manager of a restaurant owned by Build a Burger. She worked for the company for fifteen years, starting as a server and working her way up to general manager. She was general manager of a Henniker, Columbia Build a Burger for approximately three years.

Ms. Hensen quit over a salary dispute. For her first twelve years at Build a Burger, she worked approximately 50 hours per week. As a result she received regular overtime pay. After being promoted to general manager, she worked for approximately 60 hours per week. From the beginning of her job as general manager, she submitted requests for overtime but was routinely denied. She claims that her Area Training Director, James Gathii, told her that now that she was management, she was an exempt employee and no longer eligible for overtime.

Ms. Hensen states that just before her promotion to general manager she was making $9.00 per hour. She was making on average about $23,000 per year including overtime. When she left Build a Burger her income as general manager was approximately $25,000. She figures that on an hourly basis she was making less money than before the promotion.

I told her I would look into the matter and we set up another appointment.

ADDENDUM/JULY 16, 2004:

I met with Ms. Hensen today to discuss the potential lawsuit against Build a Burger.

I explained that research indicates we can bring a claim against Build a Burger for unpaid wages, fraud, deceit, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. The basis of the complaint is that Build a Burger misclassified her as exempt from the overtime pay provisions of Columbia law.

I explained, therefore, that the principal focus of a lawsuit would be on what duties Ms. Hensen actually performed and what percentage of those duties were properly classified as exempt work. In Columbia, employees are exempt from overtime requirements if they are employed in an "administrative, executive or professional" capacity. A person is considered to be employed in an administrative, executive or professional capacity if, among other things, the employee is "engaged in work that is primarily intellectual, managerial, or creative, and that requires the exercise of discretion and independent judgment."

Ms. Hensen wishes to pursue the matter.

ADDENDUM/NOVEMBER 6, 2004:

Suit filed today.

Excerpts of Deposition of Harold Dubroff

February 20, 2006

FOR PLAINTIFF: Beverly Cohen (Cohen)

FOR DEFENDANT: Neil Levine (Levine)

* * *

BY BEVERLY COHEN

Q: Please state your name.

BY HAROLD DUBROFF

A: My name is Harold Dubroff.

Q: Where do you work?

A: I'm currently an Area Training Director with Build a Burger.

Q: Since when?

A: I began in November, 1997.

Q: Since you've been an Area Training Director for so long, you are obviously familiar with the position's responsibilities.

A: Sure.

Q: Are these responsibilities the same at Build a Burger for all Area Training Directors?

A: Oh yes. We all do the same thing.

Q: What are your responsibilities?

A: Area Training Directors are each responsible for the management of multiple restaurants owned by Build a Burger.

Q: What does that entail?

A: Area Training Directors directly supervise the general managers. The Area Training Directors report directly to Build a Burger's Regional Vice President.

Q: Who does the Regional Vice President report to?

A: She reports directly to the President of Build a Burger.

Q: How much contact is there between the general managers and the Area Training Directors?

A: They talk at least once a day.

Q: How familiar are the Area Training Directors with the operation of individual outlets?

A: As the direct supervisors of the general managers, the Area Training Directors are familiar with what the general managers do on a day-to-day basis.

Q: I think we may be able to move this along a bit more quickly if we refer to your signed declaration, Plaintiff's Exhibit A. In that declaration you said . . . .

Levine: Okay, let's stop right here. Ms. Cohen, am I to understand that you have previously spoken to Mr. Dubroff?

Cohen: Certainly.

Levine: When was this?

Cohen: You can see on the declaration Mr. Dubroff signed. It was several months before the complaint was filed.

Levine: I don't believe this. You previously deposed Mr. Gathii during the course of this lawsuit, and I appeared at the deposition representing Build a Burger and Mr. Gathii. Don't tell me you also talked to Gathii before his deposition.

Cohen: Of course I did, as part of the preparation.

Levine: Are you telling me you have a signed declaration by Gathii too?

Cohen: Sure. Would you like to see it?

Levine: This is outrageous. You were well aware that Build a Burger's attorneys of record were representing the company's Area Training Directors. You have clearly violated professional ethics by communicating *ex parte* with both Mr. Dubroff and Mr. Gathii without the consent of Build a Burger's counsel. You've compounded this misconduct by obtaining declarations from these individuals with an intent to use them against Build a Burger. Such conduct is intolerable.

Cohen: Oh, come on. These people are not high-level management employees. There was nothing improper.

Levine: I think we will end this deposition.

Cohen: I think we should call the judge right now.

RECESS

JUDGE SPAIN ON SPEAKER PHONE: Are we on the record?

Levine: Yes, your honor.

Judge Spain: So, talk to me.

Levine: Your honor, it is outrageous that Ms. Cohen talked *ex parte* to two of the managers of my client. As lawyer for the company, I represent all of its employees. I don't ever let them talk to lawyers suing the company unless I'm present. I even met with one of the employees, Mr. Gathii, to prepare our defense and assumed our conversation was in confidence. Ms. Cohen and her firm should be disqualified from representing Ms. Hensen.

Cohen: Mr. Levine is not happy that I talked to some employees that he wants to label as high-level management. In fact, either one of these gentlemen could have been potential plaintiffs. The logical conclusion of what Mr. Levine is saying is that an employee can never hire an attorney to sue his or her employer. My behavior was above reproach.

Judge Spain: Okay, counselors, I can't resolve this today. Be in my court tomorrow at 2:00 p.m. Submit briefs by the end of today. Goodbye.

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

MEMORANDUM

To: File

From: Beverly Cohen

Date: January 6, 2006

Re: Hensen v. Build a Burger – Gathii Interview

Mr. James Gathii called to set up an appointment with me today. He is employed by Build a Burger as an Area Training Director. He is Gail Hensen's direct supervisor. He is not particularly happy with the company and felt that he had some information that would help in our preparation of our lawsuit against Build a Burger.

I asked him if he was represented by anyone and he indicated no. I asked if he had talked to counsel for Build a Burger concerning Gail Hensen and he indicated that he had been called to a meeting at corporate headquarters a couple of weeks ago and that Build a Burger's General Counsel, Neil Levine, asked him some questions about both the general role of Area Training Directors and Ms. Hensen.

I explained to Mr. Gathii that I was going to stay away from asking him what he told Mr. Levine, but that it was okay for him to answer my questions, even if he had been asked the same thing by Mr. Levine.

Mr. Gathii described to me the general duties of the Area Training Directors, as well as the duties of general managers of restaurants. Regarding the general managers, he said that they handle the day-to-day operation of the specific restaurants. They supervise

employees, establish weekly schedules, and work the counter during rush periods and when someone calls in sick. They monitor running the cash registers. They do anything that needs to be done by any level of employee. I asked Mr. Gathii if he would sign an affidavit that summarizes the role of the general manager. He indicated he would.

Regarding Area Training Directors, I asked if he had responsibility for Ms. Hensen's job classification as an exempt employee. He indicated that job classifications are handled at company headquarters and that, as far as he knew, all general managers are classified exempt; at least all those that work in his restaurants are so classified. Gathii told me he has no involvement in the development of this or any other policy for the company.

I asked him what his duties were. He said Area Training Directors assist general managers and deal with problems that arise on a day-to-day basis in the restaurants in their area. They are in charge of hiring and firing and handle matters related to benefits. Area Training Directors also ensure that general managers know about and carry out all procedures regarding services to customers, scheduling of employees, sanitation and daily receipts.

I asked him about his contacts with his supervisors and other management above him. He meets with his Vice President once a month to report on the five stores he supervises. He does not attend Vice President meetings or Board of Directors meetings and sees the President and Board only at the annual staff holiday party and on other ceremonial occasions.

As he was leaving, Mr. Gathii asked for more details about the nature of the lawsuit. After I explained the basic theory, he asked whether he should think about hiring a lawyer since he used to be a general manager and maybe he could receive back wages. I told him I would need to look at the statute of limitations and we could talk about it when he came back to sign the declaration.

ADDENDUM JANUARY 23, 2006:

Mr. Gathii returned today to sign the declaration. He indicated that, on reflection, he thought suing Build a Burger was not worth the aggravation, since it would clearly harm his career opportunities with the company.

Affidavit of Harold Dubroff

September 27, 2004

My name is Harold Dubroff. I am not a party to any potential lawsuit between Gail Hensen and Build a Burger. On or about September 17, 2004, I was contacted by Beverly Cohen, who suggested I might be of some help in her litigation against Build a Burger. I have no personal knowledge of Gail Hensen, but as a member of the Build a Burger management team, I have knowledge of the operation of the company.

Since November 1997, I have held the position of an Area Training Director. I reported to the Regional Vice President who, in turn, reported directly to the President of Build a Burger. As one of the Area Training Directors in Columbia, I am responsible for the management of five Build a Burger restaurants in Southern Columbia. I am the direct supervisor of the restaurant general managers. Throughout my tenure as the Area Training Director, I saw what they did on a day to-day-basis.

The general managers perform menial tasks; they do not exercise independent judgment and discretion in the operation of the restaurant; they have no managerial authority. The general managers do no hiring, firing, or promoting; they have minimal time to supervise the other employees employed in the restaurant. Up to 80% of the general managers' time is spent on manual, non-managerial type of activities and the remaining time they spend performing administrative clerical chores.

_Harold Dubroff_____

Harold Dubroff

Acknowledged before me this __27th_____ day of __September_____, 2004

_Lisa Empe_____

Lisa Empe
Notary Public

Affidavit of James Gathii

January 23, 2006

My name is James Gathii. I am not a party to this action. I have been employed by the Defendant Build a Burger from May 1991 to present. I currently hold the position of an Area Training Director. As a member of the Build a Burger management team, I have knowledge of the operation of the company.

As the Area Training Director, I am responsible for the management of five Build a Burger restaurants in Henniker, Columbia. I am the direct supervisor of the restaurant general managers. Throughout my tenure as the Area Training Director, I see what they do on a daily basis.

The general managers perform menial tasks; they do not exercise independent judgment and discretion in the operation of the restaurant; they have no managerial authority. General managers do no hiring, firing, or promoting; they have minimal time to supervise the other employees employed in the restaurant. Up to 80% of the general managers' time is spent on manual, non-managerial type of activities and the remaining time they spend performing administrative clerical chores.

James Gathii

James Gathii

Acknowledged before me this 23rd day of January, 2006

Lisa Empe

Lisa Empe
Notary Public

TUESDAY AFTERNOON
FEBRUARY 21, 2006

California
Bar
Examination

Performance Test A
LIBRARY

HENSEN v. BUILD A BURGER

LIBRARY

Snider v. Quantum Productions, Inc.

Columbia Court of Appeals (2003)

In this appeal we are presented with the question whether the trial court properly disqualified attorney Dale Larabee from representing David Snider because of his contacts with two employees, one a sales manager and the other a director of production, of respondent Quantum Productions, Inc. The trial court found that Larabee violated Columbia's State Bar Rules of Professional Conduct, Rule 2-100 that provides in part:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a *party* the member *knows to be represented by another lawyer in the matter,* unless the member has the consent of the other lawyer.
>
> (B) For purposes of this rule, a '*party* ' includes:
>
> > (1) *An officer, director, or managing agent of a corporation* or association, and a partner or managing agent of a partnership; or
> >
> > (2) An association member or *an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.* (Italics added.)

We conclude that there was no violation of Rule 2-100 as the contacted employees were not "represented parties" within the scope of that rule as (1) they were not "officer[s], director[s] or managing agent[s]" of the organization; (2) the subject matter of the communications was not an act or omission of the employees that could be binding or imputed to the organization; and (3) they were not employees whose statements might

constitute admissions on behalf of the organization. We further conclude that if the employees were subject to Rule 2-100, the court still erred in ordering the disqualification of Larabee, as the evidence did not show that he had actual knowledge the employees were represented parties.

We emphasize, however, that counsel desiring to contact an employee of a represented organization should endeavor to ensure, prior to the contact, that the employee, either because of his or her status within the organization or the subject matter of the proposed communication, does not come within the scope of Rule 2-100. Further, once contact is made, counsel should at the outset pose questions designed to elicit information that would determine whether the employee comes within the scope of Rule 2-100 and should not ask questions that could violate the attorney-client privilege. By the same token, if organizations do not want employees within the scope of Rule 2-100 to have contact with opposing counsel, it is incumbent upon them to take proactive measures to ensure that the employees and opposing counsel understand the organization's position. Ethical violations and unnecessary litigation over such *ex parte* contacts would largely be obviated by prudent actions taken by counsel and organizations in applying Rule 2-100.

Snider was employed by Quantum, an event design company, as a sales manager. In 2002 Snider resigned and formed his own business. Quantum alleged that Snider misappropriated confidential and secret business information and used that information to compete with Quantum. In July 2002, Quantum filed a complaint against Snider, alleging misappropriation of trade secrets, breach of contract and intentional interference with contractual relations.

In the joint pretrial statement, Quantum listed as a percipient witness its employee Toni Lewis. Snider listed as a percipient witness Laura Janikas, also a Quantum employee.

Thereafter, before trial, Larabee contacted Lewis and Janikas to talk about the pending case. When counsel for Quantum discovered the contacts, he brought a motion to

disqualify Larabee.

In support of the motion, Quantum submitted the declaration of its president, Pam Navarre, as well as declarations from Janikas and Lewis. In Navarre's declaration she stated that Quantum employs 40 people. She stated that she and Quantum's vice-president, Bill Hardt, were the only executive-level personnel. Below the executives were two sales managers, a director of operations, and a director of production. Janikas was a sales manager, and her duties included selling Quantum's goods and services and directly supervising two subordinate employees. She was also responsible for enforcing Quantum's rules, policies and procedures. According to Navarre, the position of sales manager was a position of great confidence, and she relied on the counsel of Janikas in making corporate policies and decisions. Navarre did not describe Lewis's position at Quantum.

In her declaration, Janikas described her work for Quantum as including "management responsibilities." She stated that she had been aware of the litigation for months but had not discussed it at length with her superiors. She stated that in January 2003 Larabee called her at home on two occasions and left messages for her. She returned one of his calls and left a message for Larabee. Larabee was able to reach her on her work cellular phone. According to Janikas, she talked to Larabee for about 10 minutes.

Janikas stated that Larabee "asked [her] many questions about this lawsuit, and made [her] feel like [she] was on the witness stand." He asked her if she knew the "real reason" why Quantum had sued Snider. She replied that she understood that he had been sued because he breached his contract with Quantum. Larabee asked if she had seen Snider's contract with Quantum. She replied that she had not. Larabee asked her if she had signed a contract. She replied that she had, as had all other employees. Larabee asked her what she thought the contract meant, and Janikas attempted to explain it to him. Larabee also asked her about a meeting of key employees in October 2001. Larabee also asked her if she took a pay cut after September 11, 2001, and whether that made her want to leave Quantum. At the end of the conversation Larabee asked her if Quantum's counsel had ever

called and talked to her. She responded that he had not.

In her declaration, Lewis stated that she was the director of productions for Quantum, and described her work there, which included supervising the production department and its 19 employees. Larabee first called her before Christmas 2002. He left multiple messages but she never spoke to him.

Larabee filed a declaration in opposition to Quantum's motion. In that declaration he stated that he had no intention of calling Janikas or Lewis as witnesses in the case. He also confirmed that he never spoke with Lewis concerning the case. He stated that he had asked Janikas if counsel for Quantum had talked to her about trial testimony and she stated that she had not. Before contacting them, he asked Snider what duties and responsibilities they had. Snider told Larabee that they were salespeople with no corporate responsibility. Based upon this he concluded that they were not within the "control group" of Quantum's management and he did not believe that they could bind or make an admission on behalf of the organization. Larabee only wanted to ask them about matters of which they had percipient knowledge, particularly about a meeting in the Fall of 2001 when Navarre told the employees that business was bad and that if they wanted to look for another job they could do so. Larabee admitted asking Janikas if she had any idea why Snider had been sued. According to Larabee, she stated that she did not.

Larabee also stated that he told Janikas and Lewis that he was Snider's counsel and they did not have to talk to him if they did not want to. He stated that Lewis had called him back as many times as he called her and that she wanted to talk to Larabee. According to Larabee, Lewis also contacted Snider on her own and told Snider that she had to rewrite her declaration multiple times because Quantum's attorneys did not like it and that they "told her what to say."

I. Were Janikas and Lewis Employees Subject to Rule 2-100?

A. Covered Employees

Contact with represented parties is proscribed to preserve the attorney-client relationship from an opposing attorney's intrusion and interference. Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright-line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. Further, Rule 2-100 must be interpreted narrowly because a rule whose violation could result in disqualification and possible disciplinary action should be narrowly construed when it impinges upon a lawyer's duty of zealous representation.

To determine whether Larabee violated Rule 2-100 by contacting Janikas and Lewis, we must first determine whether they were "covered employees," i.e., those with whom contact was proscribed under Rule 2-100. Rule 2-100 permits opposing counsel to initiate *ex parte* contacts with present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability.

The drafters of Rule 2-100 characterize rule 2-100 as prohibiting contact only with members of an organization's "control group," citing the United States Supreme Court in *Upjohn Co. v. United States* (U.S. 1981). The actual text of paragraph (B)(2), however, suggests that the rule reaches beyond the control group. It is true that paragraph (B)(1) states the control group test: officers, directors and managing agents of the organization may not be contacted for any purpose. However, paragraph (B)(2) focuses on the subject matter of the communication. It applies first to employees outside of an organization's control group if the subject matter of the conversation is the employee's act or failure to act in connection with the matter at issue, *and* that act or failure to act could bind the organization, or be imputed

to it, *or*, second, if the employee's statement could constitute an admission against the organization.

With regard to statements that could constitute admissions on the part of the organization, Evidence Code section 1222 provides in part:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> > (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement.

In Columbia this applies only to high-ranking organizational agents who have actual authority to speak on behalf of the organization.

B. *Janikas's and Lewis's Status at Quantum*

1. *Paragraph (B)(1)*

To determine whether Lewis and Janikas were within the ambit of Rule 2-100, we must first determine whether they were officers, directors or managing agents. The parties agree that neither were officers nor directors. Quantum, however, argues that a broad interpretation must be given to the term managing agent, one that would include Lewis and Janikas even if they were mid- or lower-level employees, in order to protect the attorney-client privilege.

We must look to the meaning of the term managing agent and the intent of the drafters to determine whether it applied to Janikas and Lewis. Snider contends that the definition of "managing agent" in Rule 2-100 is the same as that in Civil Code section 3294, subdivision (b), which requires wrongdoing by an "officer, director, or managing agent" before punitive damages will be awarded against an organization for an employee's act. In *White v. Ultramar* (1999), a wrongful termination action, the Columbia Supreme Court defined managing agent for the purposes of organizational liability for punitive damages as

including only an employee that exercises substantial discretionary authority over significant aspects of a corporation's business. In reaching this conclusion, the high court stated that the Legislature placed the term managing agent next to the terms officer and director, intending that a managing agent be more than a mere supervisory employee. The court also rejected a broader definition of managing agent, stating that, "if we equate mere supervisory status with managing agent status, we will create a rule where corporate employers are liable for punitive damages in most employment cases."

We conclude that the definition of managing agent in *White* applies equally well to Rule 2-100(B)(1). Like Civil Code section 3294, the term managing agent immediately follows the terms officer and director, indicating an intention to limit the term to high-level management, not mere supervisory employees.

There is no evidence that Janikas and Lewis fit the definition of managing agents. Quantum's president Navarre describes Janikas as a supervisory employee that could enforce Quantum's policies, and that she relied upon Janikas in setting corporate policy. However, Navarre does *not* state that Janikas had the discretion and authority to set corporate policy as to any issues, much less the matter involved in this litigation. Navarre stated nothing concerning Lewis's status. Therefore, Janikas and Lewis did not fall within the terms of paragraph (B)(1) of Rule 2-100.

2. *Paragraph (B)(2)*

Quantum argues that Janikas and Lewis fall within the terms of paragraph (B)(2), as each was an employee whose "act or omission ... in connection with the matter ... may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

This argument fails because there is no evidence that the subject matter of the contacts with the employees was concerning "any act or omission of such person in connection with

the matter." The interview with Janikas did not concern her own actions or omissions concerning the dispute, but her percipient knowledge of events surrounding the dispute.

Quantum focuses on the second category in paragraph (B)(2), those employees whose statements "may constitute an admission on the part of the organization." However, as discussed, this category only applies to high-ranking executives and spokespersons with the authority to speak on behalf of the organization. This interpretation is again consistent with the drafters of Rule 2-100's rejection of the broader interpretation of the no-contact rule under former Rule 7-103.

Rule 2-100(B)(2) applies to persons outside the "control group" if the management-level employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation. Under this "managing-speaking agent" test, those employees having managing authority sufficient to give them the right to speak for, and bind, the corporation are covered by the rule. This interpretation best reconciles the language of the statute and the drafters' intent to narrowly circumscribe the type of employees who would be covered by the rule.

Even under this test there is no evidence presented that Janikas or Lewis had authority from Quantum to speak concerning this dispute or any other matter, or that their actions could bind or be imputed to Quantum concerning the subject matter of this litigation.

C. *Attorney Larabee's Knowledge*

Even if Quantum could demonstrate that Janikas or Lewis were subject to the terms of Rule 2-100, we still would not conclude there was a violation of Rule 2-100 as Quantum did not demonstrate that Larabee had actual knowledge that Janikas and Lewis were deemed "represented parties" under that rule.

Quantum argues that it is enough that Larabee should have known that Janikas and Lewis

were employees subject to Rule 2-100, that there was a duty to inquire of opposing counsel, and if an agreement could not be reached as to the contact, Larabee was required to submit the matter to a court.

Actual knowledge is required before an attorney can be held to have violated Rule 2-100. Nor does Rule 2-100 require advance permission of opposing counsel or an order from the court prior to contacting employees that are not within the scope of Rule 2-100. A bright-line rule is necessary because attorneys should not be at risk of disciplinary action for violating Rule 2-100 because they should have known that an opposing party was represented or would be represented at some time in the future. Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge.

Nevertheless, to avoid potential violations of Rule 2-100, an attorney contacting an employee of a represented organization should question the employee at the beginning of the conversation, before discussing substantive matters, about the employee's status at that organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization's counsel concerning the matter at issue. If a question arises concerning whether the employee would be covered by Rule 2-100, the communication should be terminated. Once a dispute arises that could lead to litigation, it is also incumbent upon an organization and its counsel to take proactive measures to protect against disclosure of privileged information by informing employees and/or opposing counsel their position concerning communications between employees and opposing counsel. The exercise of caution and prudence on both sides will avoid much of the potential for violations of Rule 2-100.

There is no evidence that in this case Larabee had actual knowledge that Janikas and Lewis were "represented parties" under Rule 2-100. Without such actual knowledge, there can be no violation of Rule 2-100.

We, therefore, reverse.

Jorgensen v.Taco Bell Corp.

Columbia Court of Appeals (1996)

Defendant Taco Bell Corp. (Taco Bell) contends the trial court abused its discretion by denying its motion to disqualify counsel for plaintiff Noelle Jorgensen (Jorgensen). Jorgensen's counsel had retained an investigator to interview witnesses concerning facts relevant to Jorgensen's claims of sexual harassment before her lawsuit against Taco Bell and one of its employees was filed.

Taco Bell contends these interviews with its employees violated Rule 2-100 of the Columbia Rules of Professional Conduct, because counsel for Taco Bell was not informed of the interviews, and they constituted attempts to interview parties without the consent of their counsel. Jorgensen argues that no lawsuit had been filed at the time of the interviews, and neither the employees of Taco Bell nor Taco Bell itself were parties represented by counsel at the time of the interviews. We conclude that the trial court did not abuse its discretion.

Jorgensen, a former employee of Taco Bell, filed this action in June 1995, alleging that she was sexually harassed and sexually assaulted by another Taco Bell employee, Javier Hernandez (Hernandez), her supervisor, in July of 1994.

By November of 1994, Jorgensen had retained counsel. Jorgensen's counsel retained a private investigator, Linda Hoen, who interviewed the alleged harasser, Hernandez, and two other Taco Bell employees. No counsel for Hernandez, Taco Bell, or the other employees gave their consent for the interviews. Seven months after the interviews, Jorgensen filed this action against Hernandez and Taco Bell.

Taco Bell moved to disqualify Jorgensen's counsel. The basis for Taco Bell's motion was that the interviews violated Rule 2-100, which provides as follows, in pertinent part:

> (A) While representing a client, a member shall not communicate directly or

> indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

Jorgensen argued that Rule 2-100 was not violated because there was no lawsuit pending, and her counsel did not know that either Taco Bell or any of its employees were a "party the member knows to be represented by another lawyer in the matter."

On these bases, the trial court denied the motion to disqualify.

The employees and Taco Bell were not represented by counsel in "the matter," since no such matter had yet been asserted against Taco Bell by Jorgensen.

Taco Bell advocates a broad interpretation of Rule 2-100, contending that it should apply not simply where a lawyer "knows" the other person is represented, but also where the lawyer "should have known" that the other person *would* be represented.

The interviews in issue occurred not on the eve of the filing of the lawsuit, but seven months prior. The record does not support Taco Bell's speculation that these interviews were conducted prior to the filing of the lawsuit as a subterfuge to allow violation of Rule 2-100. These interviews were routine prelitigation investigation activities, which many counsel engage in before deciding whether to send a demand letter or file a lawsuit.

Taco Bell's proposal has wide and troubling implications. Under it, counsel for a plaintiff who is a tort victim would risk disciplinary action by interviewing adverse parties or their employees, if that counsel "should have known" such interviewees would be represented by some unidentified counsel *after* a complaint is filed. Reasonable investigations by counsel in advance of suit being filed to determine the bona fides of a client's claim would be precluded.

Taco Bell's proposed expansion of Rule 2-100 would mean that attorneys would be subjected to disciplinary action for violating Rule 2-100 if they directed interviews of claimants or alleged tortfeasors, although no determination to file suit had been made and no lawyer to file or defend it had been retained.

Taco Bell contends that it had "house counsel," as Jorgensen's attorney "should have known," available to communicate with Jorgensen's attorney before her investigator conducted interviews. Numerous corporations in America have full or part-time house counsel. That knowledge or presumptive knowledge does not trigger the application of Rule 2-100, unless the claimant's lawyer knows *in fact* that such house counsel represents the person being interviewed when that interview is conducted.

It became apparent at oral argument that Taco Bell's contention had a curious and defense oriented hook in it. Before suit was filed, defense counsel would be unimpeded by Rule 2-100 in investigating employees and taking their statements for purposes, inter alia, of evaluating their claims. Counsel attempting the same evaluation for their plaintiff clients will be precluded from the same action as to prospective defendants, because they "should have known" any lawsuit filed, post such investigation, will be defended by a lawyer. We cannot approve such an uneven playing field.

Frivolous litigation is frequently avoided by a careful lawyer's investigation of a client's claims. Rule 2-100 should not be applied to prevent investigation of such claims before suit is filed because the party or employee investigated *may* obtain counsel at a future time.

We will not interpret Rule 2-100 to make the routine investigation of claims prior to filing of a lawsuit more difficult, when the persons being interviewed are *not* in fact known to be represented by counsel in the matter at the time of that interview.

Affirmed.

Answer 1 to PT - A

1)

Memorandum of Points and Authorities

I. Statement of Facts

Beverly Cohen ("Cohen") represents Gail Hensen ("Hensen") in a suit against Build a Burger ("Burger") for unpaid wages, fraud, deceit, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. The basis of this complaint is that Burger misclassifed Hensen as an employee who is exempt from the overtime pay provisions of Columbia law.

Hensen is a former general manager of a restaurant owned by Burger. She worked for the company for 15 years, working her way up from server to general manager. She quit her job shortly before June 1, 2004, due to a salary dispute. After being promoted to general manager, she worked approximately 60 hours per week, but did not receive overtime pay. Hensen filed a complaint against Burger on November 6, 2004.

Burger has alleged that Cohen, Hensen's attorney, engaged in improper ex parte communications with two Burger employees, in violation of Columbia Rule of Professional Conduct s2-100 ("Rule 2-100").

A little less than a month prior to filing the complaint, Cohen, Hensen's attorney, met with Harold Dubroff ("Dubroff"), an employee of Burger. Cohen contacted Dubroff on or about September 17, 2004. Dubroff holds the position of Area Training Director ("ATD") with Burger. Dubroff executed an affidavit at Cohen's behest on September 27, 2004, detailing his personal knowledge of the operation of Burger and the respective responsibilities of ATDs and general managers.

On January 6, 2006, James Gathii ("Gathii"), also an employee of Burger, contacted Cohen to talk to her about the Hensen litigation. Gathii is also employed by Burger as an ATD. Prior to initiating a substantive discussion with Gathii, Cohen asked him whether he was represented by anyone. Gathii told Cohen that he was not represented. Cohen then asked Gathii whether he had spoken to counsel at Burger concerning Hensen, and Gathii indicated that Neil Levine ("Levine"), counsel for Burger, had called him to a meeting a few weeks prior and spoken to him about the general role of ATDs and about Hensen.

Cohen then explained to Gathii that she was going to stay away from asking Gathii what he had told Levine, but indicated that Gathii would answer her questions, even if he had been asked the same questions by Levine.

In the interview with Gathii on January 6, 2006, Cohen asked about and Gathii

described the general roles and duties of ATDs and general managers. Gathii also questioned Cohen about whether he should also consider taking legal action for unpaid wages.

On January 23, 2006, Gathii returned to Cohen's offices to sign a declaration regarding the general responsibilities of ATDs and general managers. At this time he also indicated that he did not wish to pursue a lawsuit.

On February 20, 2006, Cohen took Dubroff's deposition, which was cut short when Levine learned of Cohen's prior contact with Dubroff and Gathii.

Gathii and Dubroff are both ATDs for Burger. The responsibilities of ATDs include: assisting general managers with problems that arise on a day-to-day basis in the restaurants they cover, hiring and firing employees at restaurants, and handling matters relating to benefits. ATDs also ensure that general managers know about and carry out company procedures regarding customer service, employee scheduling, sanitation, and daily receipts.

ATDs meet their supervising vice president once a month to report on the five stores they each supervise. ATDs do not attend vice president meetings, nor Board of Director meetings. Gathii indicated that he only saw the President and Board at the annual staff holiday party and at other ceremonial occasions.

ATDs are not responsible for classifying employees as exempt or not exempt. Job classifications are handled at company headquarters, and it appears that all general managers are classified as exempt. Gathii has no involvement in the development of any policy for Burger, nor is there any indication that Dubroff is involved in setting policy.

II. Argument

A. Harold Dubroff and James Gathii are not "parties" for purposes of Rule 2-100 because neither is an "officer, director, or managing agent" of Burger, the subject of the communications did not involve their acts or omissions in connection with Hensen's dispute, and their statements are not admissions against Burger because they do not have authority to speak for Burger.

Rule 2-100(A) provides that an attorney shall not communicate regarding the subject of representation with a party the attorney knows to be represented by another lawyer in the matter, without the consent of the other lawyer.

Rule 2-100(B) further defines a "party" to include:
(1) an "officer, director, or managing agent of a corporation";
(2) an employee of a corporation "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the [corporation] for purposes of civil...liability"; or

(3) an employee "whose statement may constitute an admission on the part of the [corporation]."

Whether Rule 2-100 is violated when an attorney communicates with an employee of a corporation thus depends on whether the employee constitutes a "party" as defined by the Rule. Additionally, in order for an attorney to be disciplined under the Rule, the attorney must have actual knowledge that the employees were represented parties. Snider, p. 2.

As discussed below, Dubroff and Gathii are not parties within the meaning of the rule because they are not with the "control group" of Burger, because the communications did not discuss any acts or omissions by them in connection with Hensen's dispute, and because they had no authority to speak for Burger. Therefore, they were not "represented parties" under the Rule, and Cohen did nothing improper in speaking with them.

Moreover, even if Dubroff and Gathii are found to be "parties," Cohen did not have actual knowledge that they were represented parties. Additionally, she followed all of the suggestions by the court in Snider to ensure that she complied with her ethical obligations.

1. Neither Dubroff [n]or Gathii are "officer[s], director[s], or managing agent[s]" because they do not exercise substantial discretionary authority over significant aspects of Burger.

Dubroff and Gathii are clearly not officers or directors. Like the sales manager and Director of Production in Snider, they are merely managers. Thus, the question is whether they are "managing agent[s]."

The court in Snider defined "managing agent" by reference to Civil Code s3294. According to the court, a managing agent is only someone who "exercises substantial discretionary authority over significant aspects of a corporations's business." Snider at 7. Additionally, a managing agent is more than "a mere supervisory employee." Id. In Snider, one of the employees was a supervisory employee that enforced the company's policies, and the court held that this was not a managing agent.

Similarly, the ATDs at Burger each have a supervisory role over the general managers and employees at five restaurants under their supervision. Although the ATDs enforce Burger policies, they do not set corporate policy. The court in Snider was careful to note that the employees at issue there did not have the authority to set corporate policy with regard to any issues, including the matter involved in the litigation. ATDs are not responsible for determining which employees are exempt; this policy is set at corporate headquarters. Since Gathii and Dubroff only enforced Burger policies and did not set them, they similarly should not be considered managing agents, but rather "mere supervisory employees."

Therefore, an argument that Gathii and Dubroff are managing agents because they are responsible for enforcing corporate policy should fail under Snider.

2. The subject of the communication did not concern any "act[s] or omisison[s]" of Dubroff or Gathii, but rather only the percipient knowledge of each of the events surrounding the dispute.

Cohen's communications with Dubroff and Gathii concerned the general roles of general managers and ATDs at Burger. The court in Snider held that where an attorney speaks to a percipient witness about his knowledge of the events surrounding the dispute rather than the witness' own actions or omissions concerning the dispute, the communication is not in connection with the witness' acts in connection with the matter.

Here, Cohen did not ask Gathii about any actions he took with regard to Hensen and her dispute with Burger. Rather, she asked Gathii about Hensen's role as general manager and about his own role at Burger. Gathii has personal knowledge of these events that surround the dispute. Therefore he is merely a percipient witness, as in Snider.

Dubroff has no personal knowledge of Hensen and did not discuss any acts or omissions of his own. Therefore he is also a percipient witness.

Burger may claim that Gathii can testify as to Hensen's complaints regarding her pay and whether Burger had notice, yet failed to take action. However, Cohen's communications with Gathii did not concern Hensen's complaints to Gathii or any of Gathii's discussions with Hensen. Therefore, the subject of the communications did not concern any acts or omissions by Gathii.

3. Dubroff's and Gathii's statements could not constitute admission against Burger because they do not have actual authority to speak on behalf of Burger.

The court in Snider looked to Evidence Code s. 1222 to determine whether an employee's communications could constitute an admission against a corporation, and therefore make the employee a "party" for purposes of Rule 2-100. Under the Evidence Code, a statement is an admission if "[t]he statement was made by a person authorized by the party to make a statement... concerning the subject matter of the statement." The court noted that, in Columbia, the rule only applies to "high-ranking organizational agents who have actual authority to speak on behalf of the organization." Snider at 6. For the reasons discussed above, Gathii and Dubroff are not "high-ranking" agents of Burger. They have no authority or discretion to set corporate policy, they only meet with vice presidents about once a month, and they do not attend meetings of vice presidents or Board of Directors meetings. Additionally, they only see the President and Board of Burger at ceremonial occasions. Therefore, they are not "high-ranking" agents of Burger.

Admissions can apply to persons outside of the so-called "control group" if the "management-level employee was given actual authority to speak on behalf of the

organization or could bind it with regard to the subject matter of the litigation." Snider at 8. As in Snider, there is no evidence that Gathii or Dubroff had actual authority to speak on behalf of Burger, nor is there evidence that they can bind Burger with regard to the subject matter of the litigation. Gathii and Dubroff merely communicated their personal knowledge of the roles of general managers and ATDs at Burger; Burger is free to counter with its own witnesses as to the role of a general manager or ATD at Burger.

B. Cohen did not have actual knowledge that Dubroff and Gathii might be "represented parties" under Rule 2-100 because Cohen determined prior to communicating with Dubroff and Gathii that they were not "parties."

1. Cohen's communications with Dubroff were not made "knowing" that he was represented by another lawyer in the matter because there was no such "matter when she communicated with him.["]

In Jorgensen, an attorney retained an investigator to communicate with two employees of a corporation prior to filing a complaint. The court held that the employees and the corporation were not represented by counsel "in the matter" because no matter had yet been asserted against the corporation. The court held that for routine prelitigation investigation activities, an attorney was entitled to interview relevant witnesses in order to decide how to proceed in a suit.

In this case, Cohen interviewed Dubroff a little less than a month prior to filing a complaint. Additionally, it occurred only two months after Hensen decided that she was interested in pursuing a lawsuit. The court in Jorgensen emphasized the public policy in encouraging thorough investigations by counsel to avoid frivolous lawsuits. Additionally, the court pointed out the "curious and defense oriented hook" in the position that defense counsel could interview employees to investigate their claims, but plaintiff counsel could not. In the instant case, Levine admits that he interviewed Gathii[.]

Burger will likely argue that Cohen's conduct was different than the conduct in Jorgensen because Cohen obtained an affidavit from Dubroff, which is closer to litigation preparation than investigation. However, the evidence of the timing of Cohen's interview with Dubroff shows that it was prior to the filing of a lawsuit, and therefore should be protected by the public policy rationale of Jorgensen.

Additionally, Burger will argue that since Levine is in[-]house counsel for Burger, Cohen should have known that Dubroff was represented. However, as the court discussed in Jorgensen, numerous corporations have in[-]house counsel. The knowledge that a corporation has in[-]house counsel "does not trigger the application of Rule 2-100 unless the lawyer knows in fact that such counsel represents the person being interviewed when that interview is conducted." Jorgensen at 12. Here, there is no evidence that Cohen knew that Levine represented Dubroff.

2. Cohen's communications with Gathii were not made knowingly because she had no actual knowledge that Gathii was represented and she followed the court's suggestions in

Snider[.]

Prior to speaking with Gathii, Cohen asked whether he was represented. Gathii said he was not. Further, Cohen asked whether Gathii had spoken to Burger's counsel, and indicated that she did not wish to ask him about his communications with Burger's counsel. Additionally, Cohen was already aware that the duties and responsibilities of ATDs did not meet the high level required to constitute a managing agent or someone with authority to speak for the corporation because of her earlier communications with Dubroff. Finally, Cohen took care to avoid asking Gathii about any acts or omissions of his own with respect to Hensen's dispute.

Thus, Cohen took all the steps advised by the court in Snider to avoid an ethical problem up front: she asked whether Gathii was represented, she avoided discussing anything that might be protected by the attorney-client privilege, and she determined whether Gathii's role rose to the level such [as] speaking to Gathii would be the equivalent of speaking to a represented party.

Therefore, Cohen did not have actual knowledge that Gathii was a party, even if the Court determines that he is one.

Answer 2 to PT - A

1)

MEMORANDUM

To: Beverly Cohen

From: Applicant

Date: February 21, 2006

Re: Hensen Points and Authorities on Improper ex parte Communication

STATEMENT OF FACTS

Gail Henson is suing Build a Burger for their misclassification of her as an "exempt employee" and not entitled to overtime pay (Hensen interview (HI)). Exempt employees, under Columbia law, are not required to receive overtime pay for any work completed over 40 hours in a week. (HI). Hensen disputes her classification and is suing to receive back wages for the overtime she has worked since being promoted to general manager. (HI).

After filing suit against Burger on her behalf, Hensen's direct supervisor, James Gathii, contacted our firm and desired to set up an appointment to discuss the lawsuit. (Gathii Interview (GI)). Gathii is an Area Training Director for Burger whose primary responsibility is to keep track of general managers and their stores. (GI). He does not have any involvement in officer or director meetings, talks to the vice president only once a month and rarely sees the president of the company. (GI).

Our firm specifically asked Gathii if he was represented by counsel prior to discussing any matter with him and he claimed that he was not represented. (GI). Our firm further inquired as to whether Gathii, as an employee of Burger, discussed any matter pertaining to a lawsuit with attorneys representing Burger. (GI). He indicated that he had spoken with Levine, Burger's general counsel, at a corporate meeting and that Levine had asked him some questions about Hensen and her role as general manager. (GI). Our firm further impressed upon Gathii that it would not inquire into matters he had discussed with Levine. (GI).

Gathii revealed only the general duties of directors and managers within Burger. (GI). He then agreed to sign an affidavit summarizing the roles of the general managers. (GI). Gathii further revealed his duty as a regional area training director and his personal responsibilities within the working structure of the Burger company. (GI). Aside from revealing the general roles of all employees within Burger, Gathii was not asked any specific question pertaining to the pending lawsuit nor asked to reveal any information that

may be confidential only to employees within Burger. Gathii voluntarily came to our law firm to discuss his work at Burger and his concerns about his potential claim for back pay that he did not receive while general manager.

Our firm contacted Harold Dubroff approximately two months prior to filing the lawsuit in an effort to determine if a valid cause of action existed. (Dubroff Affidavit (DA)). Because the suit against Burger had not been filed, Dubroff was contacted to discuss the roles of the parties in determining if a lawsuit was necessary. Dubroff did not know Hensen nor did he supervise Hensen's activities in any way. (DA). His affidavit reveals only that he has a working knowledge of Burger and the responsibilities of each of the level [sic] of employees. (DA). Like Gathii, he is not executive level personnel and does not participate in executive level decisions. He holds the same position as Gathii and interacts with the executive officers and directors rarely.

ARGUMENT

I. Gathii and Dubroff, as area training directors, are not "officer[s], director[s] or managing agent[s]" under CRPC 2-100 with whom contact is proscribed because they enjoyed a mere supervisory status over the general managers and had no authority over significant aspects of Burger, but instead oversight of day to day activies.

Gathii and Dubroff were both "area training directors" in charge of supervision over the general managers. (GI, DA). CRPC 2-100 applies to all ex parte communication with officers, directors or managing agents. Gathii and Dubroff are clearly not officers. If a broad interpretation is given to "director or managing agent", they might both be included in either of these terms. However, the Columbia Supreme Court had defined managing agent as including only employees that exercise substantial discretionary authority over significant aspects of a corporation's business. (Quantum citing Ultramar). If Gathii and Dubroff fail to qualify even as managing agents, the lesser of the three categories, they cannot be held liable under CRPC 2-100 (the three terms are limited to high level management; see Quantum). Gathii and Dubroff are nothing more than supervisory employees. They assist the general managers in day to day activities. (GI). They hire, fire, and handle employee benefits. While they enforce policies of Burger and are third on the chain of command at Burger, they have no discretion or authority to set or change corporate policy. (GI). Important decisions such [as] job classifications and overtime pay exemptions are handled at company headquarters and Gathii and Dubroff have no involvement in the development of this or any other policy for Burger. (GI). In fact, the area training managers have more contact and similar duties with the general managers of the restaurants they supervise than they do with the officers and directors of Burger. (GI, Dubroff Depo).

Because there is no evidence that Gathii or Dubroff are anything other than supervisory employees with no discretion to set policy or control significant aspects of Burger's business, they do not qualify as officer[s], directors or managing agents within the meaning of CRPC 2-100 (see Quantum).

II. The ex parte communication with Gathii and Dubroff, as area training directors, does not fall within the proscribed communication of CRPC 2-100 because neither interview concerned their own actions or omission in the lawsuit, but instead involved percipient knowledge of events surrounding the suit.

Gathii and Dubroff do not fall within CRPC 2-100 (B)(2), as employees whose "act of omission....in connection with the matter....may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." (CRPC 2-100). There is no evidence that the subject matter of the interviews with Gathii or Dubroff was concerning any act or omission of themselves in connection with the suit. Neither the interview with Gathii nor Dubroff concerned their own actions in regards to Hensen's overtime pay. (GI, DA). Gathii was Henson's direct supervisor, however, his communication was limited to his job duties, the duties of the general managers and the corporate officers['] duties. (GI). The dispute in the lawsuit was whether Hensen was entitled to back pay for overtime worked. (HI). Neither Gathii nor Dubroff had any control over whether Hensen received back pay, was classified as exempt, nor was entitled to a change in classification. (DA, GI). Both the interviews with Gathii and Dubroff did not concern their actions or omissions in the dispute, but instead involved their percipient knowledge of events surrounding the dispute. Their percipient knowledge included the duties of all employees within Burger, their own duties, and the ability of officer[s] and directors to control corporate policy. (DA, GI).

Such percipient knowledge is admissible ex parte communications. (Quantum). Therefore, neither Gathii nor Dubroff's interviews by our firm fell within the proscribed communications of CRPC 2-100.

III. Gathii and Dubroff, as area training directors, are not employees whose statements might constitute admissions on behalf of Burger because they were not given the authority to speak on behalf of Burger nor bind them with regards to this lawsuit.

As stated previously in Section I., neither Gathii nor Dubroff can be classified as high ranking officials. Whether their statements may be regarded under CRPC 2-100 as "an admission on the part of the organization" depends upon their being high ranking officials. (Quantum). To constitute their interviews as admission on the part of Burger, Gathii and Dubroff would have to be executives or spokespersons with the authority to speak on behalf of the organization. (Quantum). Both Gathii and Dubroff admitted that they had minimal contact with the vice president and president of Burger (DA, GI). With such minimal contact, it would be difficult to find that Burger trusted these low level employees to speak on their behalf or to bind the organization. Their supervisory roles limit them to decisions affecting only day to day activities and the necessary services provided to employees below them and their customers. (GI).

The (B)(2) admissions section of CRPC 2-100 applies only to employees outside the

director level "control group" only if that employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation. (Quantum). Under this test, those employees who are given authority to speak for and bind Burger are covered by CRPC 2-100. (Quantum). There is no evidence that Gathii or Dubroff had the authority for Burger to speak concerning this dispute or any other matter. There is also no evidence that their actions could bind Burger or be imputed to Burger concerning the specific subject matter of this litigation. In fact, Gathii spoke to Burger's in[-]house counsel and was not told nor given authority then or at any other time to speak on Burger's behalf nor bind the corporation with regards to this dispute. (GI). Therefore neither Gathii nor Dubroff are subject to CRPC- 2-100 (B)(2) and no violation has occurred.

IV. <u>There was no actual knowledge that Dubroff and Gathii were represented by counsel at the time of the interview because (1) Gathii explicitly denied being represented by counsel, and (2) Dubroff was interviewed prior to filing of the lawsuit and involved only careful investigation of a litigant's claims, thereby neither communication triggers CRPC 2-100</u>.

Dubroff was interviewed approximately two months prior to the filing of a lawsuit against Burger. (DA, HI). An employee cannot be 'represented by counsel in the matter' under CRPC 2-100 if no such matter has been asserted (Taco Bell). Routine pre-litigation activities such as interviews prior to filing a lawsuit is [sic] not a violation of 2-100 (Taco Bell) because such interviews are necessary to determine whether to file suit. The interview with Dubroff was intended to determine whether Hensen's activities as general manager were exempt or qualified for overtime wages. In order to determine the scope of Hensen's responsibilities in comparison with other employees, it was necessary for our firm to interview an employee of Burger who held more responsibilities than Hensen. Our firm went one step further and interviewed an employee who did not know Hensen nor had any knowledge of her claim against Burger. (DA). This employee was chosen in order to protect the integrity of the parties to the lawsuit should one be filed and in order to insure that no improper inside information was revealed regarding the suit by Dubroff. Because no lawsuit was filed, and because Dubroff was carefully chosen as a third party with no interest in the suit, CRPC 2-100 has not been violated.

Gathii was not chosen by our firm for interview after suit had been filed, but instead came to us of his own accord requesting to speak about his position at Burger. (GI). Because Gathii was interviewed after the suit had been filed, the issue is whether our firm had knowledge that he was a represented party (2-100). The standard is not "knew or should have known" that the party was represented by counsel, but whether the attorney "in fact" had actual knowledge at the time the interview is [sic] conducted (Taco Bell). Gathii was specifically asked if he was represented by counsel prior to the interview taking place. (GI). He denied being represented and was actively seeking out our firm to discuss his work with Hensen and Burger. (GI). Simply because Burger had in[-]house counsel and Gathii had spoken with that counsel does not mean that our firm "should have known" that Gathii was represented. (Taco Bell). Numerous corporations have in[-]house counsel and that knowledge does not trigger CRPC 2-100 unless our firm knew in fact that Burger's

house counsel represented Gathii when he was interviewed. (Taco Bell). Gathii denied being represented. (GI). Even though he revealed that he had spoken to Burger[']s in[-]house counsel, he did not indicate that he was represented by their counsel. (GI). He simply indicated that Burger's in[-]house counsel asked him some questions. (GI). He also never indicated that Burger's in[-]house counsel informed him that he was a represented party nor that counsel advised him not to communicate with anyone about the pending litigation. Despite our lack of actual knowledge about Gathii's representation, we attempted to limit our discussion with him to matters that we wanted to discuss and not intrude upon the conversation between Burger's counsel and Gathii. (GI). Because there was no actual knowledge of representation, CRPC 2-100 has not been violated.

Public policy further supports the actual knowledge requirement to afford plaintiffs against corporations with in[-]house counsel the opportunity to seek out legal advice and not be precluded from investigating potential lawsuits (Taco Bell). Such an "uneven playing field" in factor of the numerous corporations with in[-]house counsel would place a chill on all litigation by employees upon their employers (Taco Bell). If Burger were able to assert that they represented all employees anytime an employee was aggrieved, actually injured employees would have a difficult time getting redress for their grievances. Hensen is no exception. Without our firm's discussion with Dubroff and Gathii, Hensen might lose her claim against Burger and Burger may go on violating their employees['] rights. Public policy would not support such a position.

CONCLUSION

We ask this court to conclude that there was no violation of CRPC 2-100 as Gathii and Dubroff were not "represented parties" within the scope of that rule as (1) they were not officers, directors, or managing agents to the organization; (2) the subject matter of the communications was not an act or omission of Gathii or Dubroff that could be binding or imputed to the organization; (3) they were not employees whose statements might constitute admission on behalf of the organization; (4) even if the interviews with Gathii and Dubroff were subject to CRPC 2-100, our firm did not have actual knowledge that [they] were represented parties and one communication with an employee was prior to the filing of a lawsuit; and (5) public policy supports the ability to talk to employees of organizations with in[-]house counsel in certain circumstances to even out an already "uneven playing field" for employees with real claims against their employers. Our firm has done nothing improper in violation of CRPC 2-100 and we ask that our attorneys for Hensen not be disqualified.

THURSDAY AFTERNOON
FEBRUARY 23, 2006

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

ESTATE OF SMALL

FILE

ESTATE OF SMALL

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

WASHINGTON & SHEEHAN, LLP
1000 Greenpoint Avenue
Valley Stream, Columbia 09546

MEMORANDUM

To: **Applicant**
From: **Jonathan Washington**
Date: **February 23, 2006**
Subject: **Estate of Small**

We represent Patricia Sanchez Small. Ms. Small was the wife of Robert Small, a prominent Valley Stream businessman who died more than a year ago. She is involved in litigation over Mr. Small's sizable estate with Mr. Small's heirs, who are his three adult children from two prior marriages. She filed a petition for determination of her entitlement to share in the estate as an omitted spouse. The superior court denied the petition, and she has appealed.

Last week, with Ms. Small's consent, I approached Lillian MacKenzie, who is counsel to Mr. Small's heirs, with a suggestion to try to settle the litigation by resort to appellate mediation. After obtaining her clients' consent, Ms. MacKenzie agreed.

Please draft *only* (1) the statement of facts and (2) the argument of an appellate mediation brief, following the accompanying guidelines. In the argument, take the position that the superior court erred in denying Ms. Small's petition because: (1) contrary to the court's conclusion, she is indeed an omitted spouse and, as such, is entitled to share in Mr. Small's estate (see Colum. Prob. Code, § 610); and (2) the conditions that might defeat her entitlement (see *id.*, § 611)—which, in light of its conclusion, the court did not address—are not satisfied under the law and the evidence.

WASHINGTON & SHEEHAN, LLP

1000 Greenpoint Avenue

Valley Stream, Columbia 09546

MEMORANDUM

To: **All Attorneys**
From: **Executive Committee**
Date: **April 5, 2005**
Subject: **The Drafting of Appellate Mediation Briefs**

The Columbia Court of Appeal has recently instituted an appellate mediation program.

Mediation is an informal process in which a neutral person—the mediator—assists each of the parties to an appeal in understanding its own interests, the interests of the other party, and the practical and legal realities they each face. The mediator does not resolve the dispute, but simply helps the parties do so.

In approaching appellate mediation, the single most important step we take is the drafting of an "Appellate Mediation Brief." An appellate mediation brief is similar to an appellate brief, but shorter and more focused, since (1) its intended audience is primarily the opposing party, who is already acquainted with the law and the facts, and (2) its intended purpose is primarily to persuade the opposing party of the strength of the position it will encounter.

All appellate mediation briefs must include the following sections and conform to the following guidelines.

The *introduction* must briefly summarize the argument.

The *statement of the case* must concisely indicate the major procedural events from commencement of the proceeding to the judgment or order appealed from.

The *statement of facts* must contain the facts that support our client's position, and must also take account of the facts that may be used to support that of the opposing party. It must deal with all such facts in a persuasive manner, reasonably and fairly attempting to show the greater importance of the ones that weigh in our client's favor and the lesser importance of the ones that weigh in the favor of the opposing party.

The *argument* must analyze the applicable law and bring it to bear on the facts, urging that the law and facts support our client's position. It must respond to, or anticipate, the attacks that the opposing party has made, or may reasonably be expected to make, against our client's position. It must display a subject heading summarizing each claim and the outcome that it requires, such as, "Because the Contract Was Not Entered Into Freely, the Trial Court Erred in Holding It Enforceable." The subject heading should *not* state a bare conclusion, such as, "The Contract Was Unenforceable."

The *conclusion* must state, in simple fashion, that the appellate court would likely grant the relief sought by our client for the reasons set forth in the argument.

As with an appellate brief, an appellate mediation brief will have its cover, table of contents, and table of authorities prepared after approval of its substance.

WILL OF ROBERT SMALL

I, Robert Small, declare that this is my will.

First: I revoke any and all wills that I have previously made.

Second: I am not married. I was formerly married to Betty Harold Small and to Helen Barrett Small, from each of whom I have obtained a final judgment of dissolution. I have two children of my marriage to my former wife Betty Harold Small, whose names are John Small and Joseph Small. I have one child of my marriage to my former wife Helen Barrett Small, whose name is Rebecca Small. The term "my children" in this will refers to John Small, Joseph Small, and Rebecca Small.

Third: I give my estate as follows:

A. I give my estate in equal shares to my children who survive me.

B. If none of my children survives me, I give my estate to the University of Columbia.

Fourth: I nominate my sister, Frances Small Wiggins, as executor of this will, to serve without bond.

I subscribe my name to this will this 29th day of June 1976, at Valley Stream, Columbia.

Robert Small

Robert Small

On the date above written, Robert Small having declared to us that this was his will, and having asked us to act as witnesses, in his presence and in the presence of each other, we hereby subscribe our names as witnesses.

Barbara Collier residing at

1021 Nebraska Street

Barbara Collier Valley Stream, Columbia

Judy Myers residing at 14 Herman Avenue

Judy Myers Valley Stream, Columbia

PREMARITAL CONTRACT

OF

ROBERT SMALL AND PATRICIA SANCHEZ

Robert Small (Robert) and Patricia Sanchez (Patricia), having each separately consulted with independent counsel, enter into this agreement in contemplation of marriage in order to define their respective property rights.

1. At the time this agreement is entered into, Robert warrants that he owns the property listed in Exhibit A hereto, and Patricia warrants that she owns the property listed in Exhibit B hereto, both of which are hereby incorporated by reference.

2.. Robert and Patricia each acknowledge that he or she has read Exhibits A and B, and that he or she is entering into this agreement voluntarily and with knowledge of the facts stated herein.

3. Robert and Patricia each agree that all property belonging to the other at the commencement of their marriage shall be, and remain, the separate property of the other.

4. Robert and Patricia each agree to relinquish, disclaim, release, and forever give up any and all right, claim, or interest that he or she may acquire in the separate property of the other by reason of their marriage.

5. Robert and Patricia each acknowledge that he or she understands that, under the law of the State of Columbia, and in the absence of any agreement to the contrary, the earnings and income resulting from the personal services, skills, effort, and work of the other during their marriage would be community property in which he or she would have a one-half interest. Robert and Patricia each agree that such earnings and income that

would otherwise be community property shall be separate property, unless, as to any item of property, they each execute an express written agreement to treat such item as community property.

6. Robert agrees that if Patricia survives him as his lawful widow, there shall be paid to her from his estate the sum of $10,000.

7. If for any reason Robert and Patricia do not marry, this agreement will have no force or effect.

In witness whereof, Robert and Patricia have executed this agreement on the 5th day of July, 1981.

Robert Small

Robert Small

Patricia Sanchez

Patricia Sanchez

EXHIBIT A

Property of Robert Small

1. Home at 110 Haven Street, Valley Stream, Columbia, with furniture, appliances, and personal effects.

2. One 1981 Mercedes-Benz 300 sedan; one 1979 Corvette convertible; and one 1972 Datsun 240Z coupe.

3. Restaurant known as Sloane's and land at 1833 Summer Road, Valley Stream, Columbia.

4. Apartment building and land at 1083 Maple Avenue, Valley Stream, Columbia.

5. Commercial complex and land at 582-588 Parker Way, Fenton, Columbia.

6. Raw land of approximately 26,412 acres in Township 325, Range 38E, Kittridge County, Columbia.

7. Cash, stocks, bonds, and miscellaneous financial instruments in the approximate amount of $6.3 million.

EXHIBIT B

Property of Patricia Sanchez

1. Condominium at 13B Heald Avenue, Valley Stream, Columbia, with furniture, appliances, and personal effects.
2. One 1980 Mercury Cougar sedan.
3. Cash in the approximate amount of $1,500.

CODICIL TO WILL OF ROBERT SMALL

This is a change of executor of my will.

I, Robert Small, being of sound mind, appoint on this date my wife Patricia Small as executor of my will. I sign this freely and without any reservation as to what is being done. She is to comply with the laws of the State of Columbia as to the distribution of my estate according to my wishes dictated in my will.

Dated: September 3, 2004

Robert Small

Robert Small

Witnessed on this date by:

Lana Schmitz

Lana Schmitz

Ralph Schmitz

Ralph Schmitz

EXCERPTS OF DEPOSITION TESTIMONY OF PATRICIA SANCHEZ SMALL

* * *

Q [By Ms. Lillian MacKenzie (MacKenzie)]: Mrs. Small, you were the wife of Robert Small?

A [By Ms. Patricia Sanchez Small (Small)]: Yes, I was.

Q: When did you and Mr. Small marry?

A: On July 8, 1981.

Q: How long had you known each other prior to the date of your marriage?

A: Oh, almost three years.

Q: You met at his restaurant, Sloane's?

A: Yes, I worked there as a pastry chef.

Q: Mr. Small was not married at the time you met him?

A: No, he had been divorced from his second wife for a number of years.

Q: Before your marriage, did you sign a premarital contract with Mr. Small?

A: Yes, I did.

Q: You consulted with your own lawyer before signing it?

A: Yes.

Q: You understood it?

A: Yes.

Q: You signed it freely?

A: Yes.

Q: Mr. Small didn't force you to sign it, did he?

A: No, he didn't.

* * *

Q [By MacKenzie]: You were with Mr. Small when he drafted the codicil to his will?

A [By Small]: Do you mean that short document he wrote a month before he died?

Q: Yes.

A: Yes, I was.

Q: He drafted it himself, did he not?

A: Well, he copied it from a form he found on the Internet.

Q: But it was he who found it and copied it, is that correct?

A: Yes.

Q: And he had his wits about him?

A: Yes, he did.

* * *

Q [By Mr. Jonathan Washington]: About the codicil, did Mr. Small say why he drafted it?

A [By Small]: Yes.

Q: And what he did say?

A: He didn't want his sister Frances as executor.

Q: Did he say why?

A: He said he couldn't stand her any longer. After years of difficult relations, they had had a big fight. "That's it," he said.

Q: Did he describe the language he copied from the Internet?

A: Yes: "Boilerplate."

* * *

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF NEWALL

Estate of Robert Small,	)	No. 26-20519
	)	
Decedent.	)	**Order re Entitlement to Share**
_____	)	**in Estate as Omitted Spouse**
Patricia Sanchez Small,	)	
Petitioner,	)	
v.	)	
John Small, Joseph Small, and Rebecca Small,	)	
Respondents.	)	
_____	)	

The cause is before the court on petition by petitioner Patricia Sanchez Small (Patricia), who was the wife of decedent Robert Small (Robert), to determine her entitlement to share in Robert's estate as an omitted spouse. Respondents John Small, Joseph Small, and Rebecca Small, who are Robert's children and his heirs, oppose the petition.

On October 3, 2004, Robert died. Robert was survived by Patricia. Prior to their marriage, which was solemnized on July 8, 1981, Robert and Patricia entered into a premarital contract, which was executed on July 5, 1981. According to the terms of the premarital contract, Robert and Patricia agreed that all property each owned at the commencement of their marriage would remain separate property. They also agreed that all property each acquired during their marriage would be separate property, unless, as to any item of property, they each executed an express written agreement to treat such item as

community property. It turns out that during their marriage, Robert and Patricia did indeed expressly agree in writing to treat many of the items they each acquired as community property, including the family home and a surrounding vineyard, with a total value of about $13.6 million. In addition, Robert and Patricia each acquired separate property, valued at about $5.1 million for Robert and about $110,000 for Patricia.

On March 6, 2005, Patricia initiated this proceeding by submitting a petition asking for admission to probate of Robert's will, executed on June 29, 1976, and a codicil to that will, executed on September 3, 2004, and for appointment as executor.

On April 14, 2005, the court granted Patricia's petition and admitted Robert's will and codicil to probate and appointed Patricia as executor.

On November 23, 2005, Patricia submitted the present petition.

There is no dispute that Patricia is entitled to her separate property and to her share of the common property. What *is* disputed is whether she is entitled to share in Robert's estate, including its community property and/or separate property components, as an omitted spouse.

Columbia Probate Code section 610 states that "if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate," as specified therein. Columbia Probate Code section 601(a) defines "testamentary instrument" to include a will.

Patricia contends that she falls within Columbia Probate Code section 610 as an omitted spouse because Robert's will, which makes no provision for her, was executed prior to their marriage.

After consideration, the court rejects the claim. After the marriage, Robert executed a codicil to his will, which appointed Patricia as executor and directed her to distribute his estate "according to my wishes dictated in my will." Although it is true that a codicil is not defined as a "testamentary instrument" for purposes of Columbia Probate Code section 601(a), a codicil can republish a will (*Estate of Riddell* (Colum. Ct.App. 1981); but see *Estate of Challman* (Colum. Ct.App. 1984) (dictum)), which *is* defined as a "testamentary instrument" by Columbia Probate Code section 601(a). Thus, the will as republished by the codicil must be deemed executed *during the marriage*, and Patricia falls *outside* Columbia Probate Code section 610.

Patricia argues that in applying the doctrine of republication, the court must consider Robert's intent. The court has done so. The court finds that Robert's intent was to exclude Patricia from taking under his will. Robert executed the codicil to his will a month before he died, stating in pertinent part: "I . . . appoint on this date my wife Patricia Small as executor of my will. . . . She is to comply with the laws of the State of Columbia as to the distribution of my estate *according to my wishes dictated in my will*." (Italics added.) In her deposition testimony, Patricia stated that Robert found the language of the codicil in a form on the Internet, called it "boilerplate," and said his purpose was simply to remove as executor his sister Frances Small Wiggins, from whom he had become estranged. Patricia contends that this evidence calls into question Robert's intent to have his estate distributed "according to my wishes dictated in my will" and thereby to exclude her from taking under it. The court, however, finds no ambiguity in the plain language of the codicil. Whether the language is "boilerplate" or not, it is clear—and controlling.

In summary, the court finds that the codicil executed by Robert operated to republish his will, and that his will as republished must be deemed executed after Robert and Patricia were married, thereby putting Patricia outside Columbia Probate Code section 610 and precluding her characterization as an omitted spouse. Because of this result, the court need not, and does not, address whether any of the conditions, stated in Columbia Probate

Code section 611, that might have defeated Patricia's "entitlement" to share in Robert's estate as an omitted spouse was satisfied.

For the reasons stated above, Patricia's petition to determine her entitlement to share in Robert's estate as an omitted spouse must be, and hereby is,
DENIED.

Dated: January 19, 2006

Rachel Garaventa

Rachel Garaventa
Judge of the Superior Court

THURSDAY AFTERNOON
FEBRUARY 23, 2006

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Examination

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ESTATE OF SMALL

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SELECTED PROVISIONS OF THE COLUMBIA PROBATE CODE

* * *

§ 88. Will

"Will" means an instrument by which a person directs the disposition of his or her property, to become effective only on his or her death.

§ 89. Codicil

"Codicil" means a later instrument that affects the terms or validity of an earlier will.

* * *

§ 600. Family Protection: Omitted Spouses and Children

Section 600 through Section 630 provides family protection to the benefit of omitted spouses and children.

§ 601. Definitions

(a) For purposes of Section 600 through Section 630, "decedent's testamentary instruments" means the decedent's will under Section 88 and any revocable trust.

* * *

§ 610. Omitted spouse; share of omitted spouse

Except as provided in Section 611, if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate, consisting of (1) the one-half of the community property that belongs to the decedent, and (2) one-half of the decedent's separate property.

§ 611. Omitted spouse not to receive share; circumstances

An omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if any of the following is established:

(a) The decedent's failure to provide for the omitted spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

(b) The decedent provided for the omitted spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

(c) The omitted spouse waived the right to share in both the community property portion and the separate property portion of the decedent's estate.

* * *

Columbia Court of Appeal (1981)

This is an appeal from an order of the superior court denying a petition by George Riddell, the surviving husband, to determine his entitlement to share, as an omitted spouse, in the estate of his wife, Ethel Riddell, pursuant to section 610 of the Columbia Probate Code.

Ethel made a will prior to her marriage to George leaving "all my estate to my daughter, Florence," her sole child by a former marriage, but did not mention George. She then married him. In a codicil she later signed, again leaving all her estate to her daughter, she made no provision for him.

George contends that the superior court's order denying his petition was erroneous. He argues that because Ethel made no provision for him in her will, which preceded their marriage, he is entitled to share in her estate as an omitted spouse.

After review, we cannot find any error. Under the doctrine of republication, a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during the marriage. By its terms, section 610 of the Columbia Probate Code comes into play only if the decedent marries "*after* the execution of all of the decedent's testamentary instruments," including a will. Here, by virtue of republication, Ethel must be deemed to have married *before* making her will. We recognize that republication may not be applied to defeat the purpose of the testator as indicated in the codicil. But in her codicil, Ethel's purpose was express—to leave all her estate to her daughter. By such language, George is wholly barred from sharing in Ethel's estate.

The order is affirmed.

ESTATE OF CHALLMAN

Columbia Court of Appeal (1984)

This cause comes up on appeal by James Challman, the son and beneficiary under the will of Eugene Challman, from a judgment of the superior court as follows:

"That Helen Challman, as surviving spouse, was not provided for in the will of Eugene Challman, nor was she mentioned therein in such way as to show an intention not to provide for her.

"That pursuant to Columbia Probate Code Section 610, Helen Challman, as an omitted spouse, is entitled to receive as her share of the estate one-half of the community property belonging to Eugene Challman and one-half of his separate property.

"That James Challman is entitled to the balance of the estate."

Eugene's will was dated, signed, and witnessed on June 2, 1978. In his will, Eugene made a specific bequest of $2,500 to Helen Dollinger, one of his oldest friends, with the residuary to his son James. On December 10, 1979, Eugene married Helen Dollinger, who then became Helen Challman. On November 1, 1980, Eugene deleted the specific bequest to "Helen Dollinger" in his will in his own handwriting and appended his signature; he inserted "Helen Challman, Wife," after his son James' name in the residuary clause by typewriting without any signature. Also on November 1, 1980, Eugene handwrote and signed the following on a separate piece of paper as a codicil: "Helen Challman should be repaid the $1,620 she paid to repair my car."

On July 6, 1981, following Eugene's death, the superior court made an order on Helen's petition admitting Eugene's will and codicil to probate and appointing Helen as executor. The order reads in part as follows: "The document, dated June 2, 1978, excluding the typewritten and unsigned additions . . . is hereby admitted to probate as the will of Eugene Challman; and the holographic document dated November 1, 1980, is hereby admitted to probate as a codicil to the will."

In the proceeding now engaging our attention, it must be kept in mind that Eugene's will, as admitted to probate, contained neither the specific bequest to his wife Helen under her maiden name, which he effectively deleted, nor Helen's married name in the residuary clause, which he ineffectively attempted to insert. Consequently, the only mention of Helen in the instruments as admitted to probate is in the codicil, which was merely an acknowledgment of a debt to her.

The superior court concluded that, notwithstanding Eugene's codicil, dated November 1, 1980, Helen was an omitted spouse because Eugene's will, dated June 2, 1978, preceded his marriage to her on December 10, 1979.

Relying on the doctrine of republication, James contends that the superior court erred.

We recognize that *Estate of Riddell* (Colum. Ct.App. 1981) held that, for purposes of the protection afforded omitted spouses under Columbia Probate Code section 600 et seq., a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during marriage. *Riddell* seems questionable. Columbia Probate Code section 610(a) defines the requisite "testamentary instruments" to include "will[s]" and "revocable trust[s]"—but *not* "codicils." In effect, *Riddell* added "codicils" to Columbia Probate Code section 601(a) through the doctrine of republication—contrary to what may be assumed to have been the Legislature's intent.

In any case, we need not pass on *Riddell*'s soundness. For even if the doctrine of republication is applicable, it does not aid James. As *Riddell* itself states, "[R]epublication may not be applied to defeat the purpose of the testator as indicated in the codicil." From the provisions of Eugene's codicil and its circumstances, the superior court found that Eugene intended that Helen be repaid out of his estate to cover his debt and that she share what remained of his estate with James. There is simply no basis to disturb that finding.

It follows that we may not apply the doctrine of republication to treat Eugene's will as though it had been executed during marriage. To do so would deprive Helen of her entitlement to share in Eugene's estate as an omitted spouse and thereby leave her unprovided for—a result that would be contrary to Eugene's intent in his codicil.[1]

The judgment is affirmed.

[1] We note that James makes a perfunctory claim that the superior court erred by refusing to treat a certain letter Helen had written to Eugene as a waiver of any right to share in either the community property portion or the separate property portion of Eugene's estate, or both—a circumstance that would have defeated her entitlement to share in either portion of his estate (see Colum. Prob. Code, § 611(c)). A waiver of a right requires the knowing and intentional relinquishment of the right. The letter in question does not even purport to waive any right whatsoever.

Answer 1 to PT - B

1)

To: Jonathan Washington

From: Applicant

Date: February 23, 2006

Re: Estate of Robert Small – Draft Appellate Mediation Brief

I write in response to you[r] request to draft an appellate mediation brief on behalf of our client, Patricia Sanchez Small ("Pat") in support of her claim to entitlement to share in the estate of her deceased husband Robert Small ("Rob") as an omitted spouse. Per your instruction, I have drafted only (1) the statement of facts and (2) the argument of an appellate mediation brief, following the guidelines you provided.

I. Statement of Facts

Rob passed away on October 3, 2004, after being happily married to his devoted wife Pat since July 8, 1981. About two years before Rob met Pat in 1978, who worked as a fine pastry chef at his Sloane's Restaurant, he executed a will on June 29, 1976, leaving his estate to the surviving children of the two children he shared with his ex-wife Betty, John and Joseph, and a daughter, Rebecca, who he had with his ex-wife Helen.

Three days prior to their marriage, Rob and Pat entered into a premarital contract, which provided that all property each owned at the commencement of their marriage would remain separate property, and outlines [sic] all of Rob's property in the incorporated Exhibit A. They also agreed that all property each acquired during their marriage would be separate property, unless, as to any item of property, they each executed an express written agreement to treat such item as community property. Based on their enduring and committed relationship of 23 years in marriage and three years before, Rob and Pat did, in fact, expressly agree in writing to treat many of the items they each acquired as community property, including their warm family home and a surrounding vineyard, symbols of their commitment to each other, and other separate property.

Exactly one month before Rob's passing, he executed a codicil, the first line of which boldly expressed its purpose and his intent, reading, "This is a change of executor of my will." In fact, the codicil names Pat, his loving wife, as the new executor of his will to replace his sister Frances. He made this change in the executor of his will after [he] had a tumultuous relationship and serious falling out with Frances for several years, culminating in a big fight that led to his desire to not wanting anything to do with her. In deciding to change the executor, he looked on the Internet to aid him in drafting the codicil. He ultimately copied language from a codicil found thereon, describing it in his own words as standard

"boilerplate" language. This language included standard provisions involving the basic understanding of the executor as willing to "comply with the laws of the State of Columbia as to the distribution of my estate according to my wishes dictated in my will." This "boilerplate" language followed other "boilerplate language" such as, "I sign this freely and without any reservation as to what is being done."

II. Argument

A. CONTRARY TO THE SUPERIOR COURT'S CONCLUSION, PAT IS INDEED AN OMITTED SPOUSE AND, AS SUCH, IS ENTITLED TO SHARE IN ROB'S ESTATE BECAUSE THE COURT ERRONEOUSLY FOCUSED ON ROB'S "BOILERPLATE" LANGUAGE INSTE[A]D OF HIS TRUE INTENT, WHICH WAS TO CHANGE THE EXECUTOR OF THE WILL[.]

Columbia Probate Code section 610 states that "if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate," as specified therein.

The Columbia Court of Appeal in Estate of Challman recognized that Estate of Riddell, the case on which Superior Court Judge Rachel Garaventa relied in this case, held that, for purposes of the protection afforded omitted spouses under the Prob Code section 600 et seq., a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during marriage. Challman, written three full years after Riddell, clearly refers to Riddell as "questionable" because it added "codicils" to the Prob. Code section 601(a) through the doctrine of republication – contrary to what was the Legislature's intent. The Legislature expressly defined "decedent's testamentary instruments" as the decedent's will under Section 88 and any revocable trust, and deliberately made no reference to "codicils," which are defined in section 89.

Even if the doctrine of republication is applicable, it does not help John, Joseph, and/or Rebecca. As Riddell itself state[s], "[R]epublication may not be applied to defeat the purpose of the testator as indicated in the codicil." From the provisions of Rob's codicil and its circumstances, it is unequivocal that Rob unambiguously intended to execute the codicil merely for the purpose of changing the executor from his sister Frances, who he could no longer stand after several years of tumultuous relations and big fight[s], to his loving and devoted wife, Pat. This primary purpose is clearly evidenced by the first line of the codicil, which prominently stands alone and reads, "This is a change of executor of my will." Moreover, the provision relating to the "distribution of [his] estate according to [his] wishes dictated in [his] will" simply serve[s] as a formality that was included in the "boilerplate" – to use Rob's own words – form codicil that Rob copied off of the Internet when he intended to simply change his executor to Pat. This "boilerplate" language followed other "boilerplate language" such as, "I sign this freely and without any reservation as to what is being done."

The Superior Court clearly and erroneously ignored the circumstances pertaining to Rob's clear intent to execute the codicil in favor of a strict formalistic interpretation of the "boilerplate" secondary language that he obtained off of the internet.

For this season, too, Riddell is further and critically distinguished from the present case. In Riddell, the testator specifically reiterated in her codicil that she was leaving all her estate to her daughter, while not at all mentioning her spouse, who later claimed entitlement to his deceased wife's estate. To elaborate, in executing the codicil, the testator in Riddell specifically intended to leave her estate to her daughter and not to the husband to which she was already married. On the other hand, in the case at bar, Rob's mere intent was to change executors. Similarly, in [sic]

Similarly, Challman is soundly analogized to the present case. In Challman, the testator's will, as admitted to probate, did not contain the name of his wife, and the only mention of the wife in the instruments as admitted to probate was in the codicil, which was merely an acknowledgment of a debt to her. Likewise, in the case at issue, Rob's will did not contain Pat's name, and the only mention of Pat was in the codicil, which was merely appointing her as executor of his estate in lieu of his sister Frances.

Therefore, for these reasons, contrary to the Superior Court's conclusion, Pat is indeed an omitted spouse and, as such, in [sic] entitled to share in Rob's estate, including its community property and separate property components, under section 610.

B. THE THREE CONDITIONS THAT MIGHT DEFEAT PAT'S ENTITLEMENT, WHICH THE COURT DID NOT ADDRESS, ARE NOT SATISFIED UNDER THE LAW AND EVIDENCE BECAUSE ROB'S FAILURE TO PROVIDE FOR PAT WAS NOT INTENTIONAL, ROB DID NOT PROVIDE FOR PAT BY TRANSFER OUTSIDE OF THE ESTATE PASSING BY HIS WILL AND PAT DID NOT WAIVE HER RIGHT TO SHARE IN HIS ESTATE[.]

Having established that Pat is clearly an omitted spouse under section 610, it is obvious that the Superior Court erred in not addressing that any conditions that might have precluded Pat's entitlement to share in Rob's estate[sic]. Columbia Probate Code section 611 states that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if any of the three conditions elaborated below is established. Pat will clearly demonstrate that those conditions are not satisfied under the law and evidence because: (1) Rob's failure to provide for Pat was not intentional; (2) Rob did not provide for Pat by transfer outside of the estate passing by his will; and (3) Pat did not waive her right to share in Rob's estate.

1. Rob's failure to provide for Pat, his omitted spouse, in his testamentary instrument(s)

was not intentional and such intention does not appear from the codicil because the codicil was merely a change in executor and not an express and intentional disinheritance.

Section 611(a) provides that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if the decedent's failure to provide for the omitted spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

In executing his June 29, 1976, will, Rob gave his estate in equal shares to his children who survive him, and if none of them survive him, to the Univ of Columbia. He clearly declared that he was not married at the time – not to Betty, Helen or Pat. As a matter of fact, he did not know Pat at the time, with whom he had a relationship beginning in 1978 and who he married on July 8, 1981, and therefore, omitted her. Therefore, because he did not know Pat at the time, any omission as to Pat in the original will could not have been "intentional" for the purposes of the section 611(a) analysis.

Moreover, the premarital contract of July 5, 1981, between Rob and Pat, was not Rob's "testamentary instrument" within the meaning of Prob Code section 600 et seq. because the Legislature did not include premarital agreements as such in section 601. Therefore, that agreement also does fall under the purview of section 611(a).

As stated above, the Challman court stated that considering a codicil as a "testamentary instrument" is "questionable" because it appears to go against the Legislature's intent. However, even if it is considered as such, Rob's codicil does not show Rob's intentional failure to provide for Pat. In executing his September 3, 2004, codicil, it is agreed that Rob was of sound mind. However, as stated above, and as evidenced by the clear first and prominent line of the codicil, Rob clearly only executed the codicil to "change [the] executor of [his] will." The failure to provide for Pat in the codicil is irrelevant because the purpose of [the] codicil did not indicate how or to whom to distribute or redistribute Rob's estate. In other words, the intent of the codicil had nothing to do with determining the distribution of the estate to anyone, including Pat, John, Joseph or Rebecca. Rather, the purpose, or intent, clearly and merely involved a change of executor. The fact that the codicil states that Pat is to comply with the laws of the State of Columbia as to the distribution of his estate according to Rob's wishes dictated in his will, is secondary; it merely reflects the "boilerplate" language, as Rob described it, that he copied from the codicil he found on the Internet. Moreover, because the will was written about 18 ½ years before the codicil and his death, and that he met Pat only two years after the will was executed, it is highly likely that Rob forgot that the will was written at a time when he did not know Pat, and therefore, did not provide for her.

Therefore, Rob's failure to provide of [sic] Pat in his will was not intentional and such intention does not appear from any of the instruments involving the distribution of Rob's estate.

2. Rob did not provide for his omitted spouse, Pat, by transfer of property under the premarital agreement or subsequent written agreements in lieu of provisions in his will or codicil because no additional property owned by Rob existed that could have been given to Pat outside of the testamentary instruments, and alternatively, those designated in the written agreements cannot be deemed a satisfaction of Pat's interest in Rob's estate.

Section 611(b) provides that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if the decedent provided for the omitted spouse by transfer outside of the passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

Rob's 1976 will relates to his entire estate. Likewise, all the property Rob owned before he married Pat was more specifically referenced in their premarital contract from Exhibit A. In addition, the subsequent written instruments recharacterized the agreed-to characterized separate property in the premarital agreement as community property. Moreover, Rob's 2004 codicil did not mention any property, but even if it involved his property, it involved his entire estate. Therefore, all of the same property that Rob mentioned in his will was all of the property involved in the premarital agreement, the subsequent express written instruments and codicil. Therefore, there was no other additional property that Rob owned that Rob even possibly could have provided to Pat in lieu of a provision in the his testamentary instruments.

Alternatively, John, Joseph and Rebecca may argue that the property which Rob expressly agreed to treat as his and Pat's community property pursuant to the written agreements should be considered in satisfaction of Pat's interest in Rob's estate. However, such an argument would clearly be erroneous because no evidence exists showing that the expressly designated community property were [sic] expressly agreed to as a satisfaction.

Thus, logically, Rob did not provide for Pat by transfer of property in any way that would show that he intentionally transferred property to Pat in lieu of a provision in his will or codicil.

3. As an omitted spouse, Pat did not waive the right to share in Rob's estate because she did not knowingly and intentionally relinquish the right, and evidence of the express written agreements in which they entered recharacterizing much of Rob's property as community property shows that fact.

Section 611(c) provides that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if the omitted spouse waived the right to share in both the community property portion and separate property portion of the decedent's estate. In a footnote, the Columbia Court of Appeal in Challman clearly elaborates that "[a] waiver of a right requires the knowing and intentional relinquishment of the right."

In the premarital contract of July 5, 1981, between Rob and Pat, each agreed that all property each owned at the commencement of their marriage would remain separate property. They also agreed in Paragraph 5 that all property each acquired during their marriage would be separate property, unless, as to any item of property, they each executed an express written agreement to treat such item as community property. The evidence clearly shows, and Judge Garaventa clearly points out, that during their loving marriage, Rob and Pat did indeed expressly agree in writing to treat many of their items they each acquired as community property, including the family home and a surrounding vineyard, with a total value of about $13.6 million. Such subsequent express written agreements prove that Pat did not knowingly and intentionally relinquish her right to share in his portion of community property.

Paragraph 4 of the premarital agreement between Rob and Pat provides that they each agree to relinquish any interest that he or she may acquire in the separate property of the other by reason of their marriage. However, this provision is inextricably linked to the provision in Paragraph 5 mentioned above, that is[,] that property acquired during their marriage would be characterized as each of their separate property unless they agree to treat such items as community property. First, the provisions are adjacent to one another. While Paragraph 4 states the basic rule that they disclaim all interest in the other's separate property, Paragraph 5 elaborates on the Columbia legal presumption and that the Paragraph 4 provision overrides the presumption, but that the exception to that Paragraph 4 presumption exists where there is an express agreement. Rob and Pat each acquired separate property during the course of their strong marriage, of which Rob's portion is valued at about $5.1 million. The evidence shows that they expressly agreed in writing to include this separate property as an exception to the Paragraph 4 provision and characterize it as community property.

Thus, the existence of subsequent written agreements recharacterizing Rob's separate property as community property evidence the fact that the underlying premarital agreement does not waive any of Pat's right to share in Rob's estate whatsoever.

Answer 2 to PT - B

Appellate Mediation Brief

I. Statement of Facts

As you know, Robert Small executed a will which was dated, signed and witnessed on June 29, 2006. In his will, Mr. Small expressly stated that he was not married, and that his estate was to be devised into equal shares to his children who survive him. In the event that none of the children survived him, his estate was to go to the University of Columbia. The will also expressly nominated Mr. Small's sister as executor of the will.

On July 8, 1981, Mr. Small married Patricia Sanchez Small, whom he had met at his restaurant while she was working there as a pastry chief. Prior to the marriage, on July 5th, 1981, Patricia and Mr. Small voluntarily entered into a premarital contract. In the contract, it was agreed that all property they had acquired prior to marriage would be separate property, and that all property acquired during the marriage would also be separate property. However, they expressly agreed that any property acquired during marriage would become community property if they entered a written agreement to treat it as such. Indeed, they later did enter into numerous express written agreements to treat much of [sic] the assets they acquired during the marriage as community property, thus taking those items outside the scope of the premarital agreement. The agreement also covered a waiver of each's rights to any separate property, but did not refer to any of their rights to the community property. Finally, the premarital agreement provided that if Patricia survived Mr. Small, she would be paid a mere $10,000 from his estate.

On September 3, 2004, about one month before his death, some 28 years after he originally executed his will and some 23 years after marrying Patricia, Mr. Small copied a standard codicil form from the internet and had it validly executed. The codicil merely appointed Patricia as his executor, replacing his sister, whom Mr. Small no longer got along with. The codicil mentioned that as executor, Patricia's duty was to comply with the laws of the State of Columbia as to the distribution of his estate in accordance with his will.

On March 6, 2005, Patricia initiated a proceeding in superior court in the County of Newall by submitting a petition asking for admission to probate of the will and the codicil, and for appointment as executor. On November 23, 2005, Patricia petitioned the court to determine her entitlement to share in Mr. Small's estate as an omitted spouse under Columbia Probate Code §610. The court denied her petition, and Patricia appealed.

II. Argument

A. Because Patricia was not provided for in Mr. Small's will and because the subsequent codicil did not republish the will, the superior court erred in denying her petition for entitlement under §610 of the Columbia Probate Code[.]

Columbia Probate Code §610 provides that if a decedent fails to provide in a testamentary instrument for decedent's surviving spouse who married the decedent after execution of all of decedent's testamentary instruments, the surviving spouse is entitled to a share of the estate as an omitted spouse. Probate Code §610. Thus, if it is found that Mr. Small did not provide for Patricia in any testamentary instrument and that she married him after execution of all testamentary instruments, then the court erred in finding she was not an omitted spouse.

(i) Because Patricia was not provided for in any testamentary instrument executed by Mr. Small prior to their marriage, she is an omitted spouse[.]

Mr. Small executed his will on June 29, 1976. This was almost five years prior to his marriage to Patricia. The will makes no mention of her, but rather devises all of the estate to his surviving children, or if none of them survived him, to the University of Columbia.

Under §601(a) of the Columbia Probate code, only a "will" and a revocable trust are "testamentary instruments" within the meaning of §610. There is no evidence showing that Mr. Small executed any other testamentary instrument after they were married on July 8, 1981. Thus, because Patricia was not provided for in the will, executed prior to the marriage, she is an omitted spouse under §610.

(ii) Because the intent of the codicil was merely to appoint Patricia as the executor and not to republish the will, the court erred in finding that the doctrine of republication applies[.]

Even where a surviving spouse was not provided for in a will executed prior to a marriage, she may not qualify as an omitted spouse where the doctrine of republication applies. Riddell. Under this doctrine, a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during the marriage. Riddell. However, this doctrine does not apply to defeat the purpose of the testator as indicated in the codicil and its circumstances. Challman. Here, the superior court erred in failing to consider the circumstances surrounding the codicil and in relying solely on the ambiguous language of the codicil in determining Mr. Small's intent.

First, Challman clearly states that the republication doctrine shall not apply where it would defeat the purposes of the testator, which is to be determined by the codicil language and the circumstances surrounding it. In Challman, the Columbia Court of Appeal held that the doctrine did not apply to a codicil despite the fact that the codicil was executed after the marriage and specifically referred to the surviving spouse. The court so

held in part because of the fact that the decedent spouse had, prior to that codicil, attempted to revise his will to provide for his spouse. Although that revision was not valid because it was not executed properly, the court was clearly influenced by it in determining that the decedent spouse intended to provide for his spouse, and therefore evoking the republication doctrine would defeat his intent. The court also noted that the purpose of the codicil was to make sure his surviving spouse was repaid out of his estate to cover his debt, and nothing more. Thus, the codicil was not meant as a republication of the old will, and should not be treated as such.

Here, similar to Challman, Mr. Small's intent in making the codicil was merely to make Patricia the executor of his estate, and nothing more. As Patricia attested, Mr. Small copied the language of the codicil from the internet, drafted the document by himself, and referred to the language as "boilerplate".

As she explained, he had a falling out with his sister, and he didn't want to have her be the executor anymore. This codicil was drafted a month before his death, some 28 years after he executed his will and some 23 years after his marriage to Patricia, and contained only one, sparse provision regarding Patricia's appointment as executor. These surrounding circumstances, which the superior court failed to give weight to despite controlling precedent, shows that Mr. Small did not intend for this codicil to leave Patricia unprovided for, and therefore prevents application of the republication doctrine.

Furthermore, the superior court erred in finding that the language in the codicil was "clear" in referring to his "wishes dictated in my will". While the court's citation was correct, it is not clear when taken in context that the language evinces an intent to republish the old will and exclude Patricia from his estate. As discussed above, the codicil was merely meant to make Patricia his executor to the estate. The final sentence begins with "she is to comply with the laws of the State of Columbia...", which thus suggests that he was merely describing the duties she would have as executor. The fact that he referred to this as "boilerplate" language supports this interpretation, rather than the superior court's interpretation that this sentence somehow manifested an intent to exclude Patricia. At the very least, the intent of the language is ambiguous. Combined with the surrounding circumstances, there is strong evidence to suggest that applying the republication doctrine would defeat Mr. Small's purpose of the codicil, and thus it should not be applied.

Finally, Riddell is distinguishable from this case. In Riddell, the codicil that was executed after the marriage expressly referred to the specific gift made in the will, and made no mention of the surviving spouse. Here, the opposite is true. No mention is made to the specific gifts of the will, but rather there is only a general reference to it using "boilerplate" language. Thus, to apply the republication doctrine here would deprive Patricia of her entitlement to share in Mr. Small's estate as an omitted spouse and thereby leave her unprovided for - "a result that would be contrary to [Robert's] intent in his codicil". Challman.

In summary, the superior court erred in holding that Patricia was not an omitted

spouse, because she was not provided for in his will and because the doctrine of republication does not apply to the codicil he drafted shortly before his death. As such, she will likely be found to be an omitted spouse entitled to a share of the estate.

B. Because none of the exceptions in §611 of the probate code apply to Patricia, her entitlement to a share of Mr. Small's estate will not be defeated[.]

Because the superior court wrongfully concluded that Patricia was not an omitted spouse, it did not analyze the exceptions under §611. On appeal, assuming the court will find that Patricia is indeed an omitted spouse for the reasons discussed above, the court will also likely find that the exceptions will not defeat her entitlement.

(i) Because Mr. Small's failure to provide for Patricia was not intenti[on]al and no intention appeared from the will, exception §611(a) will not apply[.]

Under §611(a), §610 will not apply where the decedent intentionally failed to provide for the omitted spouse and that intention appears from the "testamentary instruments". Because only a "will" and a revocable trust is [sic] a testamentary instrument (§601(a)), the appellate court would only look at the will in making this determination. In the will, Mr. Small specifically states that he is not married. There is no reference to the possibility of a future wife. His gift to the University in the event that no child survives him does not clearly show an intent to leave a future wife out of his estate, primarily because there is no language on the face of the will referring to such a possibility. Because the intention must "appear" from the will, a court is likely to find that no such intention can be established from his will.

(ii) Because the amount of the transfer mentioned in the premarital agreement was for a mere $10,000, only a tiny fraction of Mr. Small's estate, it is not evidence of a transfer in lieu of a provision in the will under §611(b)[.]

§611 (b) says that where the decedent spouse provides for a transfer outside of the estate and intended for the transfer to be in lieu of a provision in the will, then that serves as a bar to entitlement under §610. Here, Patricia concedes that the premarital agreement provided $10,000 for her if she survived Robert. However, as §611(b) expressly provides, the intent that the transfer be in lieu is evinced by "the amount of the transfer or other evidence". The transfer was only for $10,000, which is a tiny fraction of the estate, which is worth millions. Clearly, given the minuscule amount, a court will not find this a sufficient transfer.

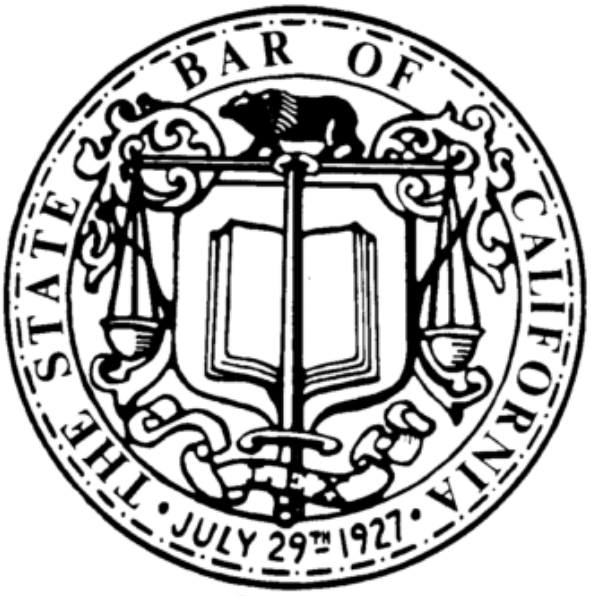
(iii) Because the waiver in the premarital agreement was not knowing and

> intentional, or at the very least was only knowing and intentional with respect to Mr. Small's separate property, it does not preclude Patricia from entitlement under §611(c)[.]

§611(c) states that there is an exception where the omitted spouse waived the rights to share in "both" the community property portion and the separate property portion of decedent[']s estate. The court in Challman clearly states that such a waiver requires the "knowing and intentional" relinquishment of the right. Challman.

While the premarital agreement expressly states that Patricia agreed to relinquish her right to all separate property of Robert's acquired by reason of marriage, it is not clear from that language whether she "knowingly" or "intentionally" was waiving her rights as an omitted spouse upon his death. This was a premarital agreement, and for the most part referred to property related to their impending marriage. It is possible that she only thought this was in reference to her rights on divorce.

Even if not true, at the very least it only applies to the separate property. §611 (c) uses the word "both", so she would have had to have separately waived her rights to the community property, which she didn't. They expressly made agreements to treat the family home, surrounding vineyard, and other assets [as] community property, so under the terms of the agreement, and under §610, she would still at least be entitled to Robert's one half community property interest in those assets.



California
Bar
Examination

Performance Tests
and
Selected Answers

July 2006

TUESDAY AFTERNOON
JULY 25, 2006

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

FILE

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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 States of Columbia and Franklin, two 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

BLANE, MORA & NIEBAUM, LLP
Attorneys at Law

M EM O R A N D U M

To: Applicant
From: Craig Mora
Date: July 25, 2006
Re: **SavAll Drugstores, Inc. v. Phister Pharmaceuticals Corp.**

Our client, SavAll Drugstores ("SavAll"), a multi-national chain of discount retail drugstores, sued Phister Pharmaceuticals ("Phister") for Phister's longstanding anti-competitive practice of refusing to sell its popular cholesterol control drug Serapatrin to SavAll.

Phister has been stonewalling us on discovery. Most recently, we propounded a narrowly drawn request for production of documents requesting Phister to produce all e-mail messages sent and received in the last five years bearing on the subject of sales and pricing of Serapatrin. About six weeks ago we had a hearing before Discovery Commissioner Felicia Moreno on our motion to compel production of the e-mails and Phister's cross-motion for a protective order seeking either to deny production or shifting the entire cost of production to us.

As ordered in the Commissioner's *Findings of Fact and Order*, we have taken steps to develop the facts surrounding the discovery issues by deposing Phister's Chief Technology Officer, Chester Yu, and Phister has deposed SavAll's computer expert, LaVon Washington.

I want you to prepare our supplemental brief. Our position is that Phister should not be relieved of the obligation to produce the documents and that Phister should pay the costs

of production. I have attached a recent ruling in Columbia, *Zwerin v. United Merchant Bank*, that sets forth the currently applicable rules on production and cost-shifting concerning electronically stored data. I have also attached a later case, *Baldocchi v. Orion Films, Inc.,* which applies the *Zwerin* factors and gives you some guidance on how to *apply* the rules.

Based on Commissioner Moreno's order, Phister has stipulated that it will produce at its own expense all readily available e-mails, i.e., e-mails that Mr. Yu said in his deposition remain on the individual users' hard drives and haven't yet been transferred to storage. Therefore, this first-level category (i.e., "category one") of e-mails is no longer in dispute.

In accordance with the guidelines set forth in Commissioner Moreno's *Order*, please draft a persuasive brief in which you do the following:

1. Summarize in a *short* introductory statement of facts the steps we have taken since the last hearing before the Commissioner and categorize the levels of data storage identified in the depositions; and

2. Argue that (a) Phister's motion for protective order relieving it completely of the obligation to produce the electronically stored data should be denied and (b) that Phister should be required to produce, at its own expense, all the e-mails in the *remaining* categories.

BLANE, MORA & NIEBAUM, LLP
Attorneys at Law

MEMORANDUM

To: All Associate Attorneys

From: Executive Committee

Re: **Persuasive Briefs**

To clarify the expectations of the firm and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs of these documents shall include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our client's position.

Following the Statement of Facts, the argument begins. The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER**: COLUMBIA HAS PERSONAL JURISDICTION. **PROPER**: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The associate should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

IN THE SUPERIOR COURT IN AND FOR THE STATE OF COLUMBIA

SAVALL DRUGSTORES, INC.,	)	
	)	
Plaintiff,	)	Case # 413406 FM
	)	
v.	)	
	)	**FINDINGS OF FACT AND ORDER**
	)	
PHISTER PHARMACEUTICALS CORP.,	)	
	)	
Defendant.	)	
_____	)	

This matter came on for hearing on June 6, 2006 on a discovery motion of plaintiff SavAll Drugstores, Inc. ("SavAll") to compel production of documents and a cross-motion of defendant Phister Pharmaceutical Corp. ("Phister") for a protective order relieving it of the obligation of producing the documents or, in the alternative, requiring SavAll to pay all costs of production.

The underlying action is a suit brought by SavAll for injunctive relief and damages arising from the alleged violation by Phister of the Columbia Unfair and Deceptive Trade Practices Act (the "Act"). The conduct complained of is the alleged refusal of Phister to sell its popular cholesterol control drug, Serapatrin, to SavAll during the period of the five years preceding the filing of this action. SavAll alleges that Phister unlawfully attempts to control and fix retail prices in violation of the Act.

SavAll propounded the following Request for Production of Documents:

> Request No. 34: Please produce, either in hard copy or in readable electronic form, all e-mail messages sent and received by Phister's Sales and Marketing Department staff to and from other members of said staff regarding Serapatrin retail prices set or recommended by Phister during the period January 1, 2001 to the present.

Phister's objection is that it would be unduly burdensome for it to comply with SavAll's request for the e-mails. Its assertion of burdensomeness is based on the following facts. In the past 20 years, Phister, like most modern business entities making the transition from recording their business transactions in paper media to computerized methods, has increasingly converted its record-keeping, management reporting, and interoffice and customer communications systems to electronic media. Throughout that period, Phister has had a records retention practice of periodically purging the hard drives on the computers utilized by its employees, including the members of its Sales and Marketing staff, and preserving all data therefrom which are stored randomly in various "backup" media such as digital tapes, floppy disks, compact disks ("CDs"), and the like, in archives. The data are not segregated by type. For example, a particular backup tape or CD might contain indiscriminately stored e-mails, marketing reports, accounting records, interoffice memos, and the like. Phister claims that for it to segregate and retrieve e-mails from five years of such randomly stored data would be extremely costly and consume time and resources that Phister cannot divert from its business objectives. Additionally, over the years Phister has gone through an extensive series of modernizations of its computers and systems. As a consequence, the means of retrieving and reproducing the e-mails from storage media more than about a year old are no longer available internally. Thus, Phister asserts that either it should be relieved of the obligation to produce any e-mails except those that happen to be readily available in hard copy, i.e., in paper form, or SavAll should be required to pay all costs of retrieving and reproducing the e-mails, including the time and expense incurred by Phister personnel to review the e-mails for the purpose of redacting privileged and business-sensitive/confidential information.

SavAll responds by saying that Phister's election to store its documents in electronic media rather than paper does not alter the usual rule that the burden and cost of production must be borne by the producing party, i.e., it is no different than if Phister had used paper memos rather than e-mail. Moreover, there must necessarily be a number of e-mails on hard drives that have not yet been purged and transferred to archival storage media. Those can certainly be merely printed out and produced to SavAll. Also, the most recent archival backups must necessarily be easily retrievable by Phister's existing computer equipment and personnel.

SavAll is correct in stating that the usual presumption is that the producing party, in this case Phister, is required to bear the cost of producing the requested documents. However, Rule 26 of the Columbia Rules of Civil Procedure gives the court broad discretion to depart from that presumption in part or in whole depending on the circumstances. The widespread use of computers in the conduct of business, the indiscriminate storage in bulk form of vast amounts of information, and the repeated advances and obsolescence of the means of data storage and retrieval have presented unprecedented discovery issues and require the courts to adopt novel approaches to discovery requests that require production of stored, archived electronic data.

On the record before me, the parties have simply not presented enough information to rule on all aspects of the cross-motions. However, based on the moving papers and the arguments presented at the hearing, I can and do make the following findings of fact:

This litigation presents important public policy issues having to do with price-fixing and consumer protection.

SavAll's claim appears to have some merit – it has come into possession of about 50 pages of e-mails that tend to show efforts by Phister to manipulate prices of Serapatrin.

The disputed request for production (Request No. 34, *supra*) is sufficiently narrow and specific to overcome any objection that it is vague or overbroad.

The amount of money at stake is significant. SavAll is suing for its lost profits, which it estimates to be in excess of $120 million over the past five

years, to be trebled if SavAll can prove the statutory violation.

The effect of the court's ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay for this important drug.

Both parties, SavAll and Phister, are large multi-national corporations with substantial resources.

SavAll already has in its possession a number of printed-out e-mails that tend to bear on its allegations of wrongdoing by Phister. Although it cannot be ascertained at this stage whether the sources SavAll seeks to discover contain a "gold mine" of information that might support SavAll's case, the materials that SavAll has already discovered suggest that there might be other similar data embedded in Phister's stored data.

Because Phister is a drug and pharmaceuticals manufacturer, it is required by the Federal Food and Drug Administration to retain all communications relating to its sales, marketing, and manufacturing functions for a period of seven years.

The five-year period covered by SavAll's request is reasonable, given that the complaint alleges that to be the period of Phister's alleged misconduct toward SavAll.

Phister has designated Chester Yu, Vice President and Chief Technology Officer of Phister, as the "person most knowledgeable" about Phister's computer systems, record retention policies, and record retrieval methodologies.

LaVon Washington, an independent consultant retained by SavAll, is the person designated by SavAll as its "person most knowledgeable" on discovery of electronically stored data.

There is no reason to depart from the presumption that Phister must bear the cost of producing all requested e-mails retrievable from as-yet unpurged hard drives that are in

active use. Phister has stipulated that it will do so. I will withhold all rulings on the remaining issues until the parties have developed further information as prescribed below.

In *Zwerin v. United Merchant Bank* (Columbia Court of Appeal, 2002), the court approved an approach that appears suited as the mechanism for resolving the issues presented in this case.

Accordingly, I make the following ORDER:

1. Phister shall produce at its own expense all requested e-mails retrievable from as-yet unpurged hard drives that are in active use.

2. The parties shall develop a factual record based on *Zwerin's* analysis to the extent applicable and file supplemental briefs arguing in support of their positions. The most expedient means of developing such a record would be for the parties to take the depositions of each other's "person most knowledgeable," but I leave it to the parties to make that determination.

Date: June 16, 2006

Felicia Moreno
Superior Court Discovery Commissioner

EXCERPT OF TRANSCRIPT OF DEPOSITION OF CHESTER YU

* * *

MR. CRAIG MORA [Attorney for Plaintiff, Savall Drugstores, Inc.]: Mr. Yu, are you the person at Phister Pharmaceuticals Corp. ("Phister") who is principally responsible for computerized office systems?

CHESTER YU: Yes, that's right. That's been my responsibility for about the past 15 years.

Q: Over that period of time, to what degree has Phister utilized computers to conduct communications internally and with customers?

A: Well, when I first joined the company, we had, by comparison to today, a fairly primitive computer system, and the programs weren't very sophisticated. We've been through several upgrades in the equipment and programs we use. At first, the computers were only used by specially trained people. Nowadays, almost everybody uses them, and most of our business is carried out by means of various computer media.

Q: Well, my questions will focus principally on the extent of the use of computers as the means of communications in Phister's executive, sales and marketing departments, and with customers. Did there come a time when Phister adopted an official "paperless workplace" policy?

A: If by that you mean did we reach a point where we decided to forego to the extent possible the use of hard copy – that is, paper – and begin using mainly electronic media to generate, communicate, and store business information, the answer is yes. We began implementing such a plan about 10 years ago and, I'd say, it's been fully in place for the past 7 years.

Q: Has e-mail always been a component of your computer system?

A: Yes, although in the early days it was pretty basic. Over the years, we've used probably 6 or 7 different e-mail programs, changing them as improvements came on the market. For the last year or so, we've been using the SoftPlan program because we've found it to be the most compatible with most business uses.

Q: Has e-mail been the principal means of conducting written communications among your executive, sales, and marketing staff and with your customers over the past five years?

A: Well, I can't say it's the *principal* method, but it is very widespread. It just depends on the nature of what's being communicated and the nature of the transaction.

Q: Isn't it correct that Phister prescribes to its wholesale and retail customers the prices at which its products, particularly Serapatrin, should be sold?

A: I don't know that "prescribes" is the right word. I know we "suggest" prices.

Q: Okay, I'll use your word. Does the company use e-mail as a medium of communicating internally and among its customers its pricing policies and "suggestions" as to prices?

A: Yes, I'm sure we do.

Q: In any given day or week or month in the past 5 years, how many e-mails relating to pricing of Serapatrin are sent and received by company employees and its customers?

A: You know, I really have no way of knowing. There are thousands of sales, marketing, and executive employees and customers all over the world, and the number has increased over the years as we've grown. I think I can safely say that in the past 5 years there are thousands of such e-mails every month. I can't even guess at how many of them relate to Serapatrin, but it must be in the hundreds every month. Probably very few of those would have anything to do with the *pricing* of Serapatrin.

Q: Does Phister have a policy or practice of printing out these e-mails?

A: No. We discourage it. However, I'm sure some people print out ones they particularly want to keep, but we have no way of tracking that. The whole object is to minimize the use of paper and the expense of maintaining paper files. We can store electronic documents at virtually no cost, whereas it costs huge amounts of money to process, file, and store paper documents.

Q: Aside from retrieving these e-mails electronically, how else can we get them?

A: I don't really know. I guess we could canvass our sales and marketing employees to ask for any printed-out ones or canvass our customers for the same thing. But that would produce questionable results.

Q: I agree. That would be a waste of time and money. Well, let me ask you this. In the past 5 years, has Phister had an official record retention policy regarding electronic documents?

A: Yes. It's been generally the same for about 10 years, and it works this way. We "back up" all of our computer transactions and communications at the end of every business day just in case of an emergency. Then, every 30 days, we do a "sweep" of all the hard drives in our company-wide computer system and transfer all the data to permanent storage for our archives.

Q: So for 30 days, all e-mails that a particular individual staff member sends and receives stay on the individual user's hard drive, and all you'd need to do is print them out, is that right?

A: That's right, unless the individual deletes them for some reason.

Q: OK. Why do you do "sweep" or "purge" the hard drives every 30 days?

A: Two reasons. First, to guard against the possibility of a catastrophic systems failure such as might result from power failures, computer viruses, fires, casualty losses, and so forth. If need be, we'd be able to reconstruct all the data. Second, to clear old data off the system and maintain the useable computer capacity we need just to conduct our business.

Q: Has it ever happened that you've had to reconstruct data from your archives?

A: Fortunately, not on any significant scale.

Q: Isn't it true that one of the reasons you have to back up your systems is that the federal Food and Drug Administration requires you to retain all communications relating to sales, marketing, and manufacturing functions for 7 years?

A: Yeah, that's right. But we don't segregate that stuff from all the other backed up data. We've never been called on by the FDA to retrieve such communications, so I don't know what we'd do if we needed to.

Q: What mediums do you use to preserve and store the archived materials, and how far back do you save them?

A: We actually still have all the archives for the past 15 years that I know of – they're all stored in an offsite fireproof vault. It costs virtually nothing to store the disks and tapes, so we just keep them rather than try to sort through them. As far as the actual storage mediums are concerned, those have changed over the years along with advancements in computer science. Of course, for 30 days, before we do our monthly "sweep" the data

remain on the individual users' computer hard drives, so that's one storage medium. In the early days, we used ordinary recording tapes. Then we switched to compact disks, then to offsite hard drives. It just depended on the degree of sophistication of our system and capabilities and what business programs we were licensed to use at any given time.

Q: What about in the past 5 years?

A: I'm sure we've used some of each storage medium. For the past year, we've been using the latest SoftPlan Office operating systems and storing our backups on offsite hard drives. Before that – let me see. I'd say that during 2004 and 2005 we used mainly compact disks – CDs - and during 2002 and 2003 we used tapes.

Q: Let's take them one at a time. Is there a single offsite hard drive that contains all the backup data for 2006 and, if not, how many are there?

A: Oh, no. There are hundreds of them. When one fills up, we remove it and replace it with another and store the filled up ones.

Q: How about the CDs Phister used in 2004 and 2005? How many of those are there?

A: I'd have to say thousands – they don't hold as much data as the hard drives we're now using.

Q: And how many tapes that you used in 2002 and 2003 are there?

A: Again, I'd have to say thousands.

Q: Now, you've said that you've never segregated the stored data. What do you mean by that?

A: I mean that any given storage device in the archives will contain an unsegregated mass of data – e-mails, letters, accounting reports, marketing and sales reports, business plans, and any other kind of business documents you can think of randomly recorded on the storage medium.

Q: Would I be correct in assuming that there are computer programs that will allow you to search each of the storage mediums by document type and content and retrieve only the e-mails that deal with matters relating to the pricing of Serapatrin?

A: It would be a lot of work but *possible* to do that with the stored hard drives we've been using in the past year, but I have serious doubts that we could do it with any of the earlier storage mediums – at least, not in-house.

Q: Please explain that.

A: Well, for the past year, all the data we've stored was initially produced on programs that are compatible with our current e-mail system and the SoftPlan system. So, it would be *possible* to run and sort the data and pull out the e-mails.

Q: Why do you put the emphasis on the word *possible*?

A: Because it would be a tremendous amount of work and extremely expensive. We don't have the spare personnel it would require, and if we assigned existing staff to do it we wouldn't be able to get our normal work done. We'd have to hire extra people. Also, it would tie up computer capacity that we need for everyday business matters.

Q: Have you tried to figure out what it would cost to do this?

A: Yes. It's hard to estimate it with any certainty, but just to retrieve the e-mail data you want from the hundreds of hard drives we have, assuming everything went smoothly, would take about 1500 employee-hours. At an average of $25 an hour, which is about what qualified people would have to be paid, that would be $37,500. Then, we'd have to print them out or transfer them to CDs, have someone read them all to make sure they're responsive to your request and sort out any confidential or privileged data – maybe another $15,000, for a total of just over $50,000. I suppose we could get a better idea of time and cost if we ran a sample with a few hard drives and extrapolated from there.

Q: OK. Couldn't you do the same thing with the CDs and tapes from the earlier years?

A: Probably not. The farther back in time we go, the less likely it is that we have the capability of even being able to read the data. What I mean by that is that we've changed the computer equipment and the software programs that were in use when the data were initially recorded. We'd have to reacquire the equipment and programs – if that's even possible anymore – to be able to read and retrieve the data.

Q: Have you made any estimate of what that would cost?

A: That's *really* hard to do. As to the CDs we used in 2004 and 2005, the equipment and software programs are probably still available on the market. I suppose we could lease the equipment and renew our licenses to the software programs. The rough cost of that would be about $25,000 a month, and it would probably take about 6 months -- $150,000, plus about $50,000 in additional personnel costs to do the work. So, for those CDs, a total of about $200,000. I suppose we could outsource it and have an outside specialist do the work, but, even at that, we'd have to supervise and review the production of the materials, probably at a total cost of $150,000 to $175,000. It's cheaper than doing it in-house, but we have to worry about losing control of the process and the danger of disclosing confidential business information. That's a major concern of ours, so I don't think we'd be willing to just turn the materials over without subjecting them to a careful review before we produce them to SavAll.

Q: What about the tapes from the earlier years?

A: That would be just about impossible for us to do because I don't think we could replicate the equipment and programs necessary to read and retrieve the data. We'd have to outsource that to outside contractors who specialize in such work. I've gotten a very rough estimate from an outside contractor – he gave me the figure of $250,000 to read, sort, and reproduce the relevant information.

So, adding it all up, it would cost somewhere in the neighborhood of $500,000 to do what you're asking us to do. And, what makes that hard to swallow is that there probably isn't much to be found. I mean, Phister hasn't tried to fix prices like SavAll has accused us of doing, so you're not going to find much.

Q: Well, to defend this lawsuit, you're going to have to do exactly what we're asking you to do – go through all the data and prove that you haven't fixed prices. Isn't that right?

A: I don't think so. It's not our job to prove the negative. It's *your* job to prove it, so, as far as we're concerned, we don't need to go through any of the data for Phister's benefit. Although I guess it would *marginally* help Phister in defending the case if we were to search the data and find that there were no responsive e-mails. But we have absolutely no current *business* need for the data.

MR. MORA: No further questions.

END OF DEPOSITION

EXCERPT OF TRANSCRIPT OF DEPOSITION OF LAVON WASHINGTON

* * *

MS. LAUREN LATHROP [Attorney for Defendant Phister Pharmaceuticals Corp.]: Mr. Washington, can you please explain the capacity in which you've been retained by SavAll Drugstores, Inc. ("SavAll") in this lawsuit?

LAVON WASHINGTON: Yes. I am the principal owner of a consulting firm called Innovative Computer Solutions. We specialize in retrieval and reproduction of electronically stored data. SavAll has retained my firm to assist it in pretrial discovery in its suit against Phister.

Q: Are there companies other than yours that do that kind of work?

A: Oh, yes. We have lots of competition.

Q: You were present during the deposition of Chester Yu, Phister's Chief Technology Officer, weren't you, and you have read the transcript of his deposition, haven't you?

A: Yes.

Q: Do you understand Mr. Yu's testimony to the effect that Phister has experienced successive changes in the computer equipment, software programs, and data storage mediums it has utilized over the years?

A: Yes. What he said is fairly typical of the transitions the business community has gone through in recent years. Computer science has changed at an accelerated pace, and it's likely to continue.

Q: You agree, don't you, that the task of identifying and reproducing for the past 5 years the e-mails that SavAll has requested is virtually impossible?

A: No, not at all. It won't be easy, but it is certainly technologically possible. That's what my company does. We do it all the time. I agree that it gets more difficult the farther back in time you go. But, as to Phister's most recent data, it's relatively easy.

Q: What do you mean, "Phister's most recent data?"

A: There are two categories of recent data. First, there are the e-mails that haven't yet been transferred to permanent storage and are still on the active hard drives of Phister's system. That is, the accumulated e-mails for the last 30 days since the last general

archival back up. Those can just be downloaded and printed from existing active files – just like you'd look at your e-mails on your home personal computer. Let's call that "category one."

The second category – let's call it "category two" - of recent data are the data Phister has transferred to the offsite hard drives in the past year. Phister has all the equipment and software necessary to read, sort, and pull out the relevant e-mails. So it's just a matter of assigning employees to do the job – just like you'd have them go through paper files.

Q: You agree, don't you, that even that would be time-consuming and costly and that Mr. Yu's estimate of about $50,000 is about right, maybe even conservative?

A: Well, using Mr. Yu's assumptions about the volume of materials and the employee hours required, I believe $37,500 for the retrieval work is a bit high, but not by much. The only part of it that I can't evaluate is the $15,000 he says it would cost to review the materials for privileged and confidential information.

Q: What about the materials for the earlier years?

A: Well, they belong in a third category – "category three."

Q: Do you agree with Mr. Yu's estimates regarding category three?

A: He's correct about it being harder to do. Based on what I know so far, I think I could do the CDs for about $75,000 and the earlier tapes for about $100,000. I have the people who are trained to do it and access to the obsolete equipment and software programs.

Q: So, overall, you think the job could be done for, say, $200,000 to $225,000?

A: That's right. In fact, I think it would be cheaper for me to do it than if Phister went out and hired its own contractor.

Q: Why is that?

A: Because I've been working with SavAll on the problem, and I've already got a head start. Any other contractor would have to go back to square one and incur startup costs that I've already put behind me.

Q: All right. How would you handle the problem of privileged and confidential information? I mean, if you're working for SavAll, you'd be in a conflict situation, wouldn't you?

A: I guess so, but if I were ordered by the court or there were an agreement of the parties not to turn over the materials to SavAll until they'd been reviewed and redacted by Phister, I'd abide by that.

Q: How long would it take you to complete the work?

A: Hard to say. Assuming that Phister took care of the recent data in-house and turned over all the other archives to me, I could turn it around in about 3 months. That also assumes that Phister did its review for privileged and confidential data promptly. It might help to predict this more accurately if whoever did the job could do some trial runs on limited samples of each of the different kinds of storage mediums.

Q: What would that accomplish?

A: Two things, really. First, it would give you a chance to test the equipment and software to make sure it works. Second, it would allow Phister to extrapolate from the sample and get an idea of the ultimate volume of e-mails that would come out of it.

Q: How much would that cost?

A: It depends on how large a sample we were instructed to run. If we took a month's worth of the archives for each of the types of storage mediums, I'd guess we could do the sampling for $25,000 to $30,000.

MS. LATHROP: No further questions.

END OF DEPOSITION

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TUESDAY AFTERNOON
JULY 25, 2006

California
Bar
Examination

Performance Test A
LIBRARY

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

LIBRARY

Zwerin v. United Merchant Bank

Columbia Court of Appeal (2002)

We accept this interlocutory appeal from a discovery Order issued by Commissioner Marrit Schein, and we endorse what we believe is a good model for resolving the increasingly common pretrial discovery disputes involving the burdens of retrieving and producing electronically stored data.

Laura Zwerin is suing United Merchant Bank ("UMB") for gender discrimination, harassment over a protracted period of time, and retaliation under the Columbia Civil Rights Act. Her case has *prima facie* merit, and, if she prevails, her damages may be substantial. She has come into possession of a number of e-mails that tend to show she was terminated from her position as Senior Vice President/Asian Equities Sales Department because she filed a complaint of gender discrimination. She contends that additional key evidence is located in various e-mails exchanged among UMB employees and that those e-mails now exist only in backup tapes and other archived media. Zwerin moved to compel UMB to produce all such e-mails at its own expense. UMB objected, asserting that compliance with Zwerin's motion would cost approximately $175,000, exclusive of attorney time, and moved for a protective order.

In June 2002, Zwerin served upon UMB a document request demanding that UMB produce "all documents, including without limitation electronic or computerized compilations, concerning any communications by or between UMB employees relating to Plaintiff." UMB produced about 100 pages of printed e-mails and refused to search for or produce any others on the ground that it would be unduly burdensome for it to have to resort to electronically stored archival data. Zwerin deposed Alan Benny, who, as UMB's expert, testified as to UMB's e-mail backup protocols and the cost of restoring and retrieving the relevant data.

In the first instance, the parties agreed that e-mail was an important means of communication at UMB during the relevant time period of 1999 through 2001. Each salesperson in the Asian Equities group sent and received approximately 200 e-mails a day. Given this volume, and, because the Securities and Exchange Commission regulations required UMB to preserve such communications for three years, UMB implemented an elaborate e-mail backup and preservation system. In particular, UMB backed up its e-mails in two distinct ways: on backup tapes and on compact disks.

The Tapes: Using an automated backup program, UMB routinely backed up its *internal* e-mail traffic on tapes at various intervals, the monthly backup tapes being the ones that were preserved for three years. According to Benny's testimony, there are 94 extant backup tapes.

To restore e-mails stored on the tapes requires a lengthy and elaborate process, each tape requiring about five days to restore. It could be done faster by an outside vendor specializing in data retrieval, but the cost would be commensurately greater.

The Compact Disks: Certain e-mails to and from outside "registered traders" in Asian securities are automatically stored and archived onto a series of compact disks ("CDs"). UMB has retained all the CDs since the system was put into place in mid-1998.

These CDs are easily searchable, and a person with the proper credentials can simply log into the system, search for e-mails using key words (e.g., "Laura" or "Zwerin") and isolate and reproduce responsive e-mails.

Paralleling the federal standards, the discovery processes articulated in the Columbia Rules of Civil Procedure, particularly as applicable here, in Rule 26, are intended to allow the parties to obtain *the fullest possible knowledge of the issues and facts* before trial.

Consistent with this approach, Rule 26(b)(1) provides that the parties may obtain by discovery "*any matter*, not privileged, that is *relevant to the claim or defense* of any party" in the form of "books, documents, or other tangible things," including things preserved in electronic rather than paper form.

There is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims, which they clearly are. As noted, e-mail constituted a significant means of communication among UMB employees. UMB had admittedly not searched the 94 backup tapes it possesses. Zwerin herself came into possession, other than by discovery from UMB, of over 100 pages of e-mails, several of which bear directly on her claims. These two facts strongly suggest that there are relevant e-mails that reside on UMB's backup media.

There are, of course, limitations. Rule 26(b)(2) imposes a general limitation on the frequency or extent of discovery. This so-called "proportionality test" confers upon the court broad discretion to restrict discovery that it deems unduly burdensome, cumulative, duplicative, or outweighed by the burden or expense in light of the nature of the litigation.

The usual presumption is that the responding party must bear the expense of complying with the discovery requests. However, Rule 26(c) allows a court to grant protective orders to protect the responding party from undue burden or expense, including orders conditioning discovery on the requesting party's payment of the costs of discovery.

Any principled approach to the question whether discovery costs should be shifted to the requesting party when it comes to producing electronic evidence must respect the usual presumption that the costs must be borne by the responding party. Electronic evidence is no less discoverable than paper evidence. As large companies increasingly move to

entirely paper-free environments, any approach to discovery that *routinely* departs from the usual presumption will often cripple the ability of plaintiffs to obtain the evidence. Thus, cost shifting should be considered only when electronic discovery imposes a truly undue burden or expense on the responding party.

The case at bar is a perfect illustration of the range of accessibility of electronic data. As explained, UMB maintains e-mail files in three forms: (1) active user e-mail; (2) archived e-mails on compact disks; and (3) backup data stored on tapes. UMB's active user e-mails and those stored on CDs are easily accessible. The 94 available tapes fall into the backup tape category and would require a costly and time-consuming process to search and isolate the documents for production pursuant to Zwerin's request.

Whether production of electronic documents is unduly burdensome or expensive turns primarily on whether they are maintained in an *accessible or inaccessible* format, a distinction that corresponds directly to the expense of production. In turn, the question of accessibility or inaccessibility turns largely on the media on which the data are stored.

Deciding disputes regarding the scope and cost of discovery of electronic data requires a two-step approach:

First, it is necessary to understand thoroughly the responding party's computer system, both with respect to the active and stored data. For data that are kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of production. A court should consider shifting *only* when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media.

Second, because the cost shifting analysis is so fact-intensive, it is necessary to determine what data may be found on inaccessible media. As we discuss below, we endorse any measure that will assist the court in evaluating the marginal utility, i.e., how likely it is that the expensive search will produce something worthwhile. Often, proceeding in small increments such as requiring the responding party to bear the expense of running small samples from different chronological parts of the archive will be enlightening on whether the responsive data are present and in what quantity.

The application of these steps is particularly complicated where electronic data are sought because otherwise discoverable evidence is often available only from storage media from which the data are expensive to retrieve.

To make the decision, we rely on a 7-factor test, weighing the factors as we discuss below.

The 7-Factor Test:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

The Seven Factors Should Not Be Weighted Equally: Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a checklist, resolving the issue in favor of which column has the most check marks. But when the ultimate question on the issue of cost shifting is whether the request for production imposes an *undue burden* on the responding party, the test cannot be applied mechanically at the risk of losing sight of its purpose.

The order in which the seven factors are listed above suggests their order of importance, i.e., they should normally be weighted in descending order. The first two, and most important factors – (1) the extent to which the request is specifically tailored to discover relevant information, and (2) the availability of such information from other sources – comprise what can be called the "marginal utility analysis." As the court observed in *McPeek v. Aschcroft*, (USDC, D. Franklin, 2001),

> The more likely it is that the backup tape contains the information that is relevant to the claim or defense, the fairer it is that the responding party search at its own expense. The less likely it is, the more unjust it would be to make the responding party search at its own expense. The difference is "at the margin."

A problem with applying the "marginal utility analysis" is that, at the inception, there is usually an insufficient factual basis for knowing to what extent the information being sought exists in the electronic storage media. Some courts have made an assumption that, unless the requesting party can show that there is a "gold mine" of information to be retrieved, the marginal utility is modest, at best, and they tend for that reason to lean heavily in favor of shifting the cost to the requesting party. However, requiring the requesting party to prove a "'gold mine" is contrary to the plain language of Rule 26, which permits broad discovery of *any matter* that is *relevant*. Thus, we agree with the precept of marginal utility, but we reject the "gold mine" approach.

The second group of factors, next in importance, addresses the cost issues, i.e., how expensive will the production be and who can handle the expense? These factors include: (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; and (5) the relative ability of each party to control costs and its incentive to do so.

The third "group" – (6) the importance of the issues at stake in the litigation – stands alone, and may not often come into play. However, where it does come into play, this factor becomes weightier.

Finally, the last factor – (7) the relative benefits to the parties of obtaining the information – is the least important because it is usually a fair assumption that the response to a discovery request is for the benefit of the requesting party. But in the unusual case, where production will also provide a tangible benefit to the responding party, that fact may weigh *against* shifting the costs.

The case is remanded to the trial court, the Superior Court, for determination of the pending production request in accordance with this opinion.

Baldocchi v. Orion Films, Inc.

Superior Court of Columbia (2004)

Plaintiff, Rina Baldocchi, sued defendant, Orion Films, Inc. ("Orion") for gender discrimination under the Columbia Civil Rights Act. She prays for special and compensatory damages in the amount of $100,000 and punitive damages in the amount of $3,000,000.

In the course of discovery, she filed a sweeping request for production of documents covering a four-year period, including e-mail messages that exist only in electronic form on Orion's computer system and in its electronically stored archives. Orion produced a substantial volume of paper documents, which it asserts is all it has in readily producible form. Orion then moved for a protective order to relieve itself of the obligation of producing the requested electronically stored documents. The basis for Orion's motion is that the burden and expense of production far outweighs any possible benefit that Baldocchi will gain from the additional discovery. Orion further contends that, if the additional discovery is ordered, the entire cost should be shifted to plaintiff.

Orion's computerized records system consists of three levels of accessibility: first, records stored in active files on hard drives that are in daily use and have not yet been transferred to another storage medium; second, records that have recently been transferred to storage on compact disks pursuant to Orion's records retention policy under which active files are purged every 90 days and transferred to compact disks; and, third, records more than two years old that were transferred to a series of about 100 magnetic recording tapes at a time when Orion was using now obsolete computer and software systems. The second and third categories are archived solely for "disaster recovery" purposes, i.e., in the event of a catastrophic systems failure. Baldocchi successfully demonstrated that the discovery she seeks, although very broad, is generally relevant.

It is not uncommon to shift the expense of production of discovery to the requesting party, especially when the discovery involves electronically stored evidence that may be extremely expensive to retrieve and produce. Rule 26 of the Columbia Rules of Civil Procedure clearly gives the court broad discretion in this regard.

Discovery of data stored electronically poses new and different issues from those applicable to the discovery of traditional paper documents. The Columbia Court of Appeal, in *Zwerin v. United Merchant Bank* (2002), recently dealt with those problems and articulated a 7-factor test for doing so. We apply those factors to the present case in the order and relative weights prescribed by the court in *Zwerin*:

1. The Extent to Which the Request is Specifically Tailored to Discover Relevant Information: The less specific the requesting party's demands, the more appropriate it is to shift the cost of production to that party. Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the cost. Here, plaintiff's requests are broad and nebulous, and, if that were the sole determining factor, it would favor shifting the costs to her. However, as the *Zwerin* Court makes clear, the seven factors are to be taken as a whole and assigned relative weights in descending order.

2. The Availability of Such Information From Other Sources: Some cases that have denied discovery of electronic evidence or have shifted costs to the requesting party have done so because equivalent information either has already been made available or is accessible in a different format at less expense.

Factors 1 and 2 go hand in hand. They can be best applied using the concept of "marginal utility" articulated in *McPeek v. Ashcroft*, (USDC, D. Franklin, 2001), under which the inquiry is how likely it is that a computerized search of the files will produce relevant information. Here, plaintiff argues that there is a high enough probability that a

broad search of the defendant's e-mails will produce relevant information that the search should not be precluded altogether.

If the plaintiff can show that it is likely that the electronic medium contains certain targeted information and can demonstrate with reasonable certainty that the information is not otherwise readily available, then she has crossed over the margin into the realm where it is just to require the responding party to bear the expense of producing it. On the other hand, if plaintiff's showing is too broad or uncertain or the responding party can show that the information is readily available elsewhere, then plaintiff's request falls below the margin and it would be unjust to require the responding party to bear the expense.

In the instant case, there has been no showing that the electronic records plaintiff seeks from defendant are available other than by a search of defendant's hard drives and backup media. Defendant's representations that it has produced all there is to be found is speculative because defendant has not conducted a search of the electronic files. However, neither has plaintiff shown any reasonable likelihood that the information she seeks can be found on the electronic media to any extent that would make an expensive search of those media worthwhile. Part of the problem is that plaintiff's discovery requests are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what she seeks.

In light of these conclusions, it seems just to shift to plaintiff the cost of at least the initial, preliminary searches of the storage CDs and tapes. Of course, the current, unexpurgated data that remain on Orion's active files must be produced at Orion's cost.

The next three factors address the cost issues and are to be considered together.

3. The Total Cost of Production, Compared to the Amount in Controversy: This factor deals with the relativity between the dollar value of what plaintiff is attempting to recover and what it will cost to produce the information. There is no bright-line. If the cost

is not extraordinary or out of line with what a responding litigant can expect in the ordinary course of litigation, there is no justification for departing from the presumption that the responding party must bear the cost irrespective of the relationship between the cost and the amount in controversy. However, if the amount of plaintiff's alleged damages is small and the cost of extracting and producing the information is relatively large, then it makes little economic sense to require a defendant to incur a huge expense when the ultimate economic benefit is relatively small. In the present case, we know that the plaintiff's prayer exceeds $3,000,000, which is a substantial sum. Plaintiff projects that the total cost of production would exceed $1,000,000, a substantial sum by any standard. Defendant's estimate is $150,000. The magnitude of this expense in relation to the most special and compensatory damages being sought by plaintiff militates in favor of shifting the cost of production to defendant.

4. The Total Cost of Production, Compared to the Resources Available to Each Party: Plaintiff proceeds as an individual against an established major film studio. Although the record does not reflect the extent of each party's financial resources, we can assume that this is not a situation where two functioning, successful business entities are sparring with one another such that this factor would be a wash, or, conversely, where a wealthy plaintiff is pursuing an impoverished defendant. Here, it is safe to assume that defendant can afford whatever the cost might be better than plaintiff. Standing alone, this factor favors shifting the cost to defendant.

5. The Relative Ability of Each Party to Control Costs and Its Incentive to Do So: The plaintiff probably has a greater ability, i.e., being sensitive to the cost, plaintiff will be able to calibrate her discovery based on information obtained in the initial sampling (*see infra*). If she is required to pay, she will be in the best position to decide whether further searches will be justified to limit the costs of discovery of the e-mails to a much greater extent than defendant. Of course, this factor alone does not prevent later shifting of the

cost back to defendant if the results of the initial search warrant it. But, as to the initial sampling, this consideration militates slightly in favor of cost shifting.

6. The Importance of the Issues At Stake in the Litigation: This factor does not always come into play. In this case, the issue is a straightforward one of whether there has been gender discrimination as to plaintiff, an individual. Although, in a broader context, gender discrimination is an important public policy issue, this case proceeds in the context of well-settled law and will affect only Ms. Baldocchi's interests. It is not an action that will result, for example, in vindication of a broader public interest that would be stifled if plaintiff were prevented by cost considerations from conducting discovery that would expose a widespread wrong. Thus, in this case, this factor is not particularly weighty and tends in favor of shifting the cost to plaintiff, but in the appropriate case it could be extremely important to prevent cost shifting.

7. The Relative Benefits to the Parties of Obtaining the Information: If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. Under such circumstances, the guiding principle is that information that is stored, used, or transmitted in new forms (e.g., electronically) should be available through discovery with the same openness as traditional forms (e.g., paper). A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery.

Conversely, a party that happens to retain vestigial data for no current business purpose but only for retrieval in case of an emergency or simply because it has neglected to discard the data should not be put to the expense of producing it. Defendant's backup tapes clearly fall into this category. There is no evidence that defendant itself ever searches these tapes for information or even has the means of doing so. Cost shifting is therefore warranted with respect to the backup tapes. Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to

pay the cost of retrieving deleted e-mails.

Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requested party. For example, a collateral benefit could result for the responding party's business such as the creation of a computer search program that would also be useful in its regular business activities. Second, the responding party might benefit in the litigation from the review of its own records. Third, the search could create a universe of data that *either* side could use to support its case.

On balance, the relevant factors tip slightly in favor of shifting the cost to plaintiff of conducting at least a preliminary search for the e-mails in this case. The protocols to be followed will be addressed below.

Privileged and Confidential Documents: Beyond the cost of isolating and producing the required e-mails, defendant argues that the time and expense of reviewing these documents for privilege and confidentiality would be enormous. Defendant estimates that it would take over six months of work by attorneys and paralegals and the cost would be about $75,000.

However, the sanctity of defendant's documents can be adequately preserved at little cost by enforcement of a protective order requiring that all documents produced during this litigation be used solely for purposes of the litigation and that, at the end of the case, the documents all be returned to Orion. Moreover, as suggested in the protocol discussed below, defendant's interests can be protected by making provision that the e-mails be for "attorneys' eyes only" during discovery and that disclosure of attorney-client documents, whether intentional or inadvertent, shall not be deemed a waiver of the privilege.

Even with such protections, however, disclosure of privileged documents cannot be compelled if defendant objects. Thus, notwithstanding the recommended precautions, if defendant still chooses to conduct a complete review of the e-mails prior to production, defendant shall do so at its own expense.

The Protocol to Be Followed: The parties shall comply with the following protocol. It is a guideline only and may be modified by agreement of the parties as they proceed through discovery.

Initially, plaintiff shall designate one or more experts who shall be responsible for isolating the defendant's e-mails and preparing them for review. The experts shall be bound by the terms of this order as well as any confidentiality order entered in the case. With the assistance and cooperation of the defendant's technical personnel, the plaintiff's experts shall then obtain a log of all hard drive and backup tapes containing e-mails. The plaintiff may choose to review a sample of hard drives and tapes in lieu of all such devices.

Plaintiff's counsel shall formulate a search procedure for identifying responsive e-mails and shall notify defendant's counsel of the procedure chosen, including any specific word searches.

A very sensible protocol that was suggested by plaintiff but rejected by defendant was that the parties mutually select a limited representative sample of the hard drives and backup tapes and that defendant, at its own expense, develop the search programs, isolate the responsive e-mails, and produce them to plaintiff. The object would have been to gauge the nature, incidence, and frequency of responsive e-mails and perhaps, by extrapolation, limit the scope of the search. Defendant refused to go along because, under the proposal, it would have had to pay the cost of the sampling. Plaintiff shall develop such sampling protocol in her suggested protocol if she believes it will be helpful. It shall be conducted at plaintiff's expense.

Once an appropriate search method has been established, it shall be implemented by plaintiff's expert. Plaintiff's counsel may then review the documents elicited by the search on an "attorney's eyes only" basis. Once plaintiff's counsel have identified the e-mails they consider material to the litigation, they shall print out and provide those documents to defendant's counsel in hard copy, numbered and logged for later verification. At this point,

plaintiff shall return all hard drives and tapes to defendant. Plaintiff shall bear all costs associated with the production described thus far.

Defendant's counsel shall then have the opportunity to review, at defendant's expense, the documents for claims of privilege and confidentiality. Documents identified as being privileged or confidential shall be retained for attorneys' eyes only until any dispute has been resolved. No waiver of privilege or confidentiality shall result from this procedure. If defendant wishes to delete from the hard drives and tapes the documents that are ultimately determined to be confidential, defendant shall do so at its own expense and shall, also at its own expense, furnish plaintiff with copies of the hard drives and tapes so redacted.

Once the nature, incidence, and frequency of the responsive e-mails are reliably estimated, the parties shall return to this court for further direction on how to proceed and which party shall bear the cost from that point forward.

Conclusion: Defendant's motion for relief is denied, and the parties are ordered to proceed in accordance herewith.

Answer 1 to Question PT-A

1)

I. STATEMENT OF FACTS

The parties were before Commissioner Moreno on June 6, 2006, and subsequently received her findings of fact and order on June 16, 2006. Since that time, we have deposed defendant's Vice President Chester Yu, indicated to be the person most knowledgeable about Phister's computer systems. Similarly, defendant has deposed our independent consultant LaVon Washington. During these depositions, we have determined that Phister has over the course of the past five years switched its medium for storing and archiving data as the means to do so have modernized. As the various media available have matured and become obsolete, the cost to access and retrieve the information on those media has grown. In addition, Phister began implementing a "paperless office" policy, beginning about ten years ago. This process was fully completed seven years ago, two years prior to the beginning of the period for which documents are sought. As Phister's witness described this policy, it encouraged the use of electronic media to communicate within the firm. Further, the executive, sales, and marketing staff extensively uses e-mail as a method of communicating information on prices and sales of the drug in issue here, Serapatrin.

Since the accessibility of the various e-mails which are sought on discovery varies, consultant Washington has categorized the various media used by Phister over the years, based on Yu's description, as follows:

Category One consists of e-mails that are present on each employee's computer hard disk. These e-mails are tightly integrated with Phister's enterprise-wide management software, and searching these e-mails is very inexpensive. Phister has already agreed to produce the e-mails in category one that conform to SavAll's document request.

Category Two consists of e-mails that are stored on offsite hard disk drives. Every month, Phister performs a "clean sweep" of the computers in their facilities for purposes of efficiency. The contents of each hard drive is archived permanently, and placed in offsite hard disk drives. These hard disk drives are not separated according to content, or individual, or any other metric. Phister simply places all the e-mails in the enterprise together as they come in. Yu has indicated that these hard drives can be searched using computer programs already in existence, since the hard drives from the past year are integrated into the company's office management software, SoftPlan. The estimated cost by Phister to perform searches of these e[-]mails is $37,500, plus an additional $15,000 for a privilege screen by the firm's attorneys. Category two includes all e-mails from the past year.

Category Three consists of e-mails that were archived according to the same "clean sweep" policy during the period of 2002 through 2005. From 2002 to 2003 the firm used tapes to permanently archive these files, but in 2004 the firm began using compact discs

instead. All of these media were also moved offsite after they were filled. They cannot be searched using the company's existing data search software, and so if such a program were to be used to search the volumes of data, it would have to be created specifically for this task.

The estimated cost to search these archives by Phister's witness Yu is $200,000 for the compact discs if done in-house, and $250,000 for the tapes, which must be outsourced [due] to the unavailability of the machinery and software to access these files. Comparatively, the consultant Washington has indicated that for his firm to accomplish a task like this would cost approximately $225,000, due to the fact that his firm has access to the hardware and software necessary to access the obsolete storage media.

SavAll asserts that all three categories of data are subject to discovery at Phister's expense. Phister counters that production in categories two and three must be borne by SavAll.

II. ARGUMENT

A. PHISTER'S MOTION FOR PROTECTIVE ORDER RELIEVING IT COMPLETELY OF THE OBLIGATION TO PRODUCE THE ELECTRONICALLY STORED DATA SHOULD BE DENIED SINCE PRODUCTION OF ELECTRONICALLY STORED DATA IS ALWAYS ALLOWED WHERE IT IS RELEVANT[.]

The first issue presented is whether Phister should be relieved of the obligation to produce electronically stored data based purely on the expense of doing so. This is in conflict with Columbia case law governing whether discovery should be granted with respect to electronically stored data.

The Columbia Court of Appeal addressed the issue of whether discovery should be granted over the producing party's objections that the cost was too great. In Zwerin v. United Merchant Bank, the Court determined that Columbia Rules of Civil Procedure Rule 26 demanded production. The Court stated that: "Rule 26 (b)(1) provides that the parties may obtain by discovery "any matter, not privileged, that is relevant to the claim or defense of any party ... including things preserved in electronic rather than paper form" (italics in original). Accordingly, the threshold inquiry for production depends not on the cost, but rather on the relevance of the production sought. The Court made this clear when it stated that "[t]here is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims ... there are, of course, limitations." The limitation described by the court refers to Columbia Rule 26(c), which permits shifting of cost in the discretion of the court. The same approach was applied in Baldocchi v. Orion Films, where the court determined that "Baldocchi successfully demonstrated that the discovery [she] seeks, although very broad, is generally relevant" before denying defendant's motion for a protective order to relieve it of the obligation to produce.

The facts in the present case are sufficient to reach the threshold articulated in Zwerin and Baldocchi. In her findings, Commissioner Moreno stated that "the materials [plaintiff] has

already discovered suggest that there might be other similar data embedded in [defendant's] stored data." In addition, she stated that the specificity and time period sought to be discovered are "reasonable." This supports the finding of relevance necessary to compel discovery. While defendant's employee Yu testified in his deposition that there were "thousands of e[-]mails a month", with "several hundred a month" relating to the drug at issue here, he also testified that he was certain that e-mail was used as a medium to communicate pricing policies, which is extremely relevant to establishing plaintiff's case of anti-competitive practices. This is similar to the court in Zwerin finding discovery appropriate where the defendant generated "200 e-mails a day" over the course of two years. All that is necessary is that plaintiff demonstrate that the discovery sought is relevant, which is met here.

The scope of the discovery quest is extremely similar to that in Zwerin and Baldocchi, being relevant to the plaintiff's case, and should accordingly be granted.

B. PHISTER SHOULD BE REQUIRED TO PRODUCE AT ITS OWN EXPENSE ALL OTHER E-MAILS SINCE THE UTILITY OF RECOVERY OUTWEIGHS THE BURDEN.

The next issue is whether the cost should be shifted to plaintiff due to the substantial burden of conducting discovery where there is uncertainty as to the amount of documents which will be produced.

1) PRODUCTION CONDUCTED ON CATEGORY TWO DATA MUST BE AT PHISTER'S EXPENSE SINCE OFF-SITE HARD DRIVES ARE NOT "INACCESSIBLE[.]"

The Court in Zwerin set forth the standard for cost-shifting in discovery cases where the defendant has alleged that discovery would incur great expense due to the obsolescence of the equipment necessary to conduct the search. The standard articulated is that: "A court should consider shifting only when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media." The relevant language is that regarding "obsolete or other very difficult-to-search media" which determines what electronic sources cannot be shifted to the requesting party.

The information stored in "category two", or offsite hard disk drives, does not meet the standard in Zwerin for "inaccessible" media, which the court indicated included "backup tapes or obsolete or other very difficult-to-search media." Indeed, Yu testified that the offsite hard drives are part of the "SoftPlan Office operating system", indicating that it is relatively straightforward to conduct searches on that data. The fact that such a program already exists to search the data contained therein further serves to separate category two from the types of data contemplated by the Court in Zwerin.

Phister may attempt to argue that the fact that the hard drives are offsite contributes significantly to the expense, and that therefore the hard drives should be considered "inaccessible" and fall under the 7-factor test. This does not properly interpret Zwerin's definition of inaccessible. There is no difficulty in searching the category two data, as witness Yu made clear in his deposition - it is possible to perform the search because the

systems and software already exist and are in Phister's possession. The only burden associated with the production is the sheer volume of it, and the time required in terms of man-hours to conduct the search. Had the Zwerin court intended the test for accessibility to turn on the volume of the data, it would have said so. Instead, recognizing the unique problems posed by rapid obsolescence and adoption of new technologies for storing records, the court articulated a standard based on whether the technology was obsolete, or out of date, or such that searching the media posed an undue burden.

Phister having chosen to store its data by throwing the contents of its staff's hard drives together indiscriminately, it cannot now be allowed to state that its own choice not to file data at the time of collection should excuse it of the duty to produce. If it were paper records at issue, and Phister reported that it simply put all of its papers, unlabelled and unsorted, into a large warehouse, it could not then argue that it was too difficult to search the data.

Accordingly, the proper metric for determining accessibility under Zwerin is the availability of the means to search the offsite records, and not the volume of records offsite.

2) PRODUCTION CONDUCTED ON CATEGORY THREE DATA MUST BE AT PHISTER'S EXPENSE SINCE THE 7-FACTOR ZWERIN ANALYSIS DOES NOT INDICATE IT WILL CONSTITUTE AN UNDUE BURDEN[.]

Where the data is relatively inaccessible, the court should apply the 7-factor test set out in Zwerin, considering: i) the extent to which the request is specifically tailored to discovery relevant information, ii) the availability of such information from other sources, iii) the total cost of production, compared to the amount in controversy, iv) the total cost of production compared to resources of the parties, v) the relative ability of each party to control costs and its incentive to do so, vi) the importance of the issues at stake in the litigation, and vii) the relative benefits to the parties of obtaining the information. These factors are each considered in turn, and then balanced to determine whether the burden should be shifted.

i) THE DISCOVERY REQUEST IS NARROWLY TAILORED TO THE DOCUMENTS SOUGHT[.]

The first factor weighs the breadth of the requesting party's description of documents sought. A highly specific request minimized both the number of documents which must be printed and verified, but also minimizes those that must be checked for privilege and demonstrates the producing party's good faith assertion of relevance. A requesting party that cannot adequately articulate what materials it seeks should be compelled to pay the expenses of compliance.

Here, SavAll's requests, as indicated by Commissioner Moreno, "is sufficiently narrow and specific to overcome any objection that is vague or overbroad." Indeed, since the incident is limited to Phister's cholesterol drug Serapatrin, and to those marketing and sales e[-]mails dictating the price, this request is very specific. In Baldocchi the court found that the requests were "expansive rather than targeted," which is simply not the case for

SavAll's request.

ii) THE DATA IS NOT AVAILABLE FROM ANY OTHER SOURCES[.]

The second factor looks to the necessity and utility of obtaining this information from difficult to access backup media as opposed to other means. Where the information sought is available in other formats, it is preferable for the requesting party to obtain discovery from those sources rather than demanding time consuming and expensive searches of out-of-date records. Where there is no other source available, however, the presence of relevant data in offsite archives becomes crucial.

The court in Baldocchi used the approach that if the plaintiff can demonstrate that the electronic media contains certain targeted information, and that the information is not otherwise readily available, then the responding party must bear the expense of production. Where it is uncertain, then the plaintiff should bear the cost.

The court in Baldocchi took the approach that a targeted sample of prior records could be used to demonstrate the existence of relevant information in older records. Further, the court found that where the discovery requests "are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what [plaintiff] seeks," then plaintiff should bear that cost.

Here, Phister's witness Yu stated that Phister discourages printing out e-mails, and that there is no reliable way to obtain the contents of those e-mails "aside from retrieving [them] electronically." This is part and parcel of Phister's own paperless office policy, which Yu admits has saved Phister a "huge amounts [sic] of money" over the years.

Therefore, there is no other source to obtain this data from. Similarly, the request is sufficiently specific to not require SavAll to pay for a targeted sample search, as was done in Baldocchi. Here, unlike in that case, the request is highly specific, and a few searches should suffice to determine whether any relevant documents in fact exist. Therefore, Commissioner Moreno's finding that "it cannot be ascertained at this stage whether the sources SavAll seeks to discover contain a 'gold mine' of information that might support SavAll's case will not shift the burden to SavAll. Rather, the fact that SavAll has already discovered substantial documents "suggests that there might be other similar data embedded in Phister's stored data."

Accordingly, this factor favors plaintiff, and there is no need to conduct a targeted search.

iii) THE TOTAL COST OF PRODUCTION IS MINOR COMPARED WITH THE AMOUNT IN CONTROVERSY[.]

The total cost of production looks to whether the document request, as a whole, is disproportionate to the expected recovery by the plaintiff. After all, if plaintiff only filed a claim for $50,000, and it would cost $200,000 to comply with discovery, the defendant would prefer to simply pay the plaintiff's claim than undergo a more expensive discovery

process. When the court in Baldocchi applied this test, it found the factor favored plaintiff where the plaintiff made a good faith claim for $3,000,000, including punitive damages, and the cost of production would be from $150,000 to $1,000,000.

Here, SavAll has made a good faith claim for $120,000,000 in purely compensatory damages. Under Columbia competition law, this figure may be trebled as a punitive measure due to the statutory violation. As the punitive damages were imposed in Baldocchi, the proper measure of SavAll's damages is $360 million for purposes of compliance with discovery.

The cost of discovery varies by category of data to be retrieved. The calculations by Yu, Phister's witness, stated that the cost to retrieve "category two," or offsite hard drive backups, would be $37,500, plus an additional $15,000 for screening by Phister's attorneys. Since category two cannot be shifted to SavAll based on 1, above, only category three should be included. "Category three," or compact discs and tapes, have a cost of approximately $450,000, which may or may not include the cost of screening by attorneys.

Comparatively, the consultant retained by SavAll testified that the cost for his firm, of which there are many others in competition, would be approximately $175,000, plus whatever costs are required in order to perform screening. The total cost, even using Phister's own estimates of the cost, are over 500 times smaller than the amount sought in relief. Compare to Baldocchi, where this factor weighed for plaintiff even where the damages figure was only three times higher then the production cost, or twenty times higher, if defendant's figures were believed.

Since the cost of production is minor compared to the amount in controversy, this factor favors SavAll.

iv) THE TOTAL COST OF PRODUCTION IS MINOR COMPARED WITH THE RESOURCES OF BOTH PARTIES[.]

This factor looks to the relative abilities of each side to afford the cost of production based on the financial resources available. Where an individual proceeds against a large corporation, there is a strong presumption that the corporation is better able to shoulder the burden of producing, and should be required to do so as is the norm under the discovery rules in Columbia.

Here, both Phister and SavAll are "large, multi-national corporations with substantial resources," as Commissioner Moreno found. Accordingly, this factor should favor neither side.

v) NEITHER SIDE HAS A GREATER ABILITY OR INCENTIVE TO CONTROL COSTS[.]

This factor looks to which party has a better ability to control costs. The court in Baldocchi

looked at this factor primarily with regards to the initial targeted sampling identified in factor 2, supra, and found that since plaintiff was in a better position to decide how much discovery to conduct based on information retrieved there, this factor should favor shifting the burden to the requesting party.

Here, there is no need for a targeted sampling as indicated above. The court in Baldocchi further indicated that if the initial search indicated that there were discoverable materials to be found, then the factor could be shifted back to the defendant. The factor should therefore favor neither party.

vi) THE ISSUE AT STAKE IN THE LITIGATION IS IMPORTANT[.]

Where the issues at stake in the litigation "vindicat[e] a broader public interest that would be stifled if plaintiff were prevented... from conducting discovery," then the factors militate against shifting and leaving the burden on the producing party.

Here, as Commissioner Moreno found, "the effect of this court's ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay for this important drug" (italics added).

Since there is an important public interest in paying fair prices for important medications, this factor should also favor SavAll.

vii) BOTH PARTIES WILL BENEFIT FROM OBTAINING THIS INFORMATION[.]

Where the producing party has stored documents only for purposes of emergency recovery, and not for ongoing business concerns, the court in Baldocchi stated that this factor leans towards shifting the costs to the requesting party. The court there indicated further that "where the responding party itself benefits from the production," the fact that the production is most useful to the requesting party is mitigated.

Here, Phister is under a duty to the Food and Drug Administration to store copies of all communications relating to sales, marketing, and manufacturing functions for 7 years. Phister's technology officer testified in his deposition that "we've never been called on by the FDA to retrieve such communications, so I don't know what we'd do if we needed to." This indicates that Phister would benefit from doing an in-house search of its documents to separate out those relevant to specific drugs. Further, as in Baldocchi, creating a tool to facilitate such searches would also be a benefit, both for compliance with Phister's regulatory obligations and for use in this and further litigation.

Accordingly, this factor should tilt in favor of SavAll.

viii) THE BALANCE OF THE 7 FACTORS IN THE ZWERIN TEST FAVOR SAVALL[.]

In considering the disposition of the factors, the Zwerin court indicated that the factors do

not all bear equivalent force. Instead, since the ultimate question is to minimize the undue burden on the responding party, the first two factors are the most important, followed by the next three. Where the sixth factor "does come into play, this factor becomes weightier." And lastly, the seventh factor is the least important.

Here, the first two factors clearly favor SavAll, due to the very narrow and specific document request and the fact that Phister has adopted a policy by which these materials, stored indiscriminately in offsite warehouses, does not have them available in any other form. Of the next three factors, the cost of discovery relative to the claim for relief favors SavAll, and the rest are neutral. This is true even considering the cost of all of the different "categories" of data storage and the associated costs. The sixth factor, the public interest in resolution of the matter, also favors SavAll, since its interests are aligned here with the public interest in fairly priced medication. The seventh factor, also, favors SavAll.

Accordingly, on the balance of the factors, Phister should be required to pay for all discovery conducted on category three data searches.

3) COSTS OF PERFORMING PRIVILEGE SCREENING ON PHISTER'S DOCUMENTS SHOULD BE BORNE BY PHISTER[.]

Notwithstanding the Zwerin analysis, which dictates that Phister must bear the cost of producing the documents, it bears noting that the Baldocchi court also determined that since defendant's privilege can be preserved with an adequate protective order, there was no urgent need for screening for attorney-client privilege purposes. Accordingly, if the producing party opted to have full screening performed, rather than using an "attorneys' eye only" protective order, that producing party should be required to bear the costs.

III. CONCLUSION

Accordingly, on the balance of the factors, Phister's motion for a protective order with respect to all categories of data must be denied.

Answer 2 to Question PT-A

1)

Supplemental Brief In Support of Motion to Compel Production of Documents

Statement of Facts

Plaintiff SavAll Drugstores, Inc. ("SavAll") sued defendant Phister Pharmaceutical Corp. ("Phister") for violations of Columbia Unfair and Deceptive Trade Practices Act ("the Act") for alleged price fixing of the cholesterol reducing drug "Serapatrin" and refusal to sell the drug to SavAll. After propounding a discovery request to produce all e[-]mail messages sent and received by Phister's Sales and Marketing Department during the previous five years, Phister refused production, and SavAll filed a motion to compel production of documents. In response, Phister filed a motion for a protective order. The court ordered that the factual record be developed to make a ruling on the two motions.

Since the Court's recent ruling, SavAll deposed Mr. Chester Yu, defendant's designated person known knowledgeable about the e[-]mails in question. At the deposition, Mr. Yu stated that defendant has been using electronic media to communicate for the past ten years. Currently, he estimates that the practice of sending e[-]mail is "very widespread," with around hundreds of e-mails related to Serapatrin sent every month. (Yu Depo. 11). Mr. Yu also noted that defendant's employees have "suggested" prices internally and to customers via e[-]mail. (Yu Depo 11). All e[-]mail messages are stored on the personal computer from which they are sent for up to 30 days, after which time, Mr. Yu states, they are backed up by transferring them to electronic archives. (Yu Depo 12). The cost of maintaining these archives is "at virtually no cost." (Yu Depo 11). Mr. Yu stated that the files are backed up for two reasons: one, in case of an emergency, the files can be restored; two, the Food and Drug Administration ("FDA") requires that defendant maintain "all communications relating to sales, marketing, and manufacturing for seven years." (Yu Depo 12).

The storage of the e[-]mails can be placed into three categories according to Mr. Lavon Washington, plaintiff's computer expert, who was also deposed since the initial order. First, there are the e[-]mails that have not yet been transferred to permanent storage and remain on the active hard drives of defendant's system. (Washington Depo 17). Defendant has stipulated to produce these e[-]mails, and their production is no longer in dispute. The second category includes that data which defendant has transferred to its offsite storage hard drives within the last year. Since defendant still has the equipment necessary to read, sort and pull out the relevant e[-]mails, production of these would be relatively simple. (Washington Depo 18). Finally, there is a third category of data, which includes stored data on compact disks ("CD") and tapes. (Washington Depo 18). From 2002 until 2003, defendant used tapes to archive information, and from 2004 until 2005 defendant used the CDs. (Yu Depo 13). Mr. Yu estimates that there are hundreds of offsite hard drives, and thousands of CDs and tapes. (Yu Depo 13). While Mr. Yu predicts

the cost of discovery to exceed $500,000, Mr. Washington testified that the cost of finding and producing responsive documents would be between $200,000 and $225,000. (Washington Depo 18).

DEFENDANT'S MOTION FOR PROTECTIVE ORDER FROM PRODUCING ELECTRONICALLY STORED DATA SHOULD BE DENIED BECAUSE THE INFORMATION IS RELEVANT TO PLAINTIFF'S CLAIM[.]

Rule 26 of the Columbia Rules of Civil Procedure is "intended to allow the parties to obtain the fullest possible knowledge of the issues and facts before trial." Zwerin. Rule 26(b)(1) provides that a party may obtain discovery of "any matter, not privileged, that is relevant to the claim or defense of any party in the form of books, documents, or other tangible things, including things preserved in electronic rather than paper form." Zwerin. Therefore, a party should be entitled to discover e[-]mails as long as they are relevant to a claim.

Here, SavAll contends that defendant has unlawfully attempted to fix the retail price of Serapatrin. Mr. Yu admitted that the practice of sending e[-]mails is very widespread. Moreover, Mr. Yu also admitted that employees of defendant have "suggested" prices to customers. This type of suggestion via e[-]mail is certainly relevant to establishing a claim for price fixing in violation of the Act. Additionally, the e[-]mails that are in the possession of plaintiff "tend to bear on its allegations of wrongdoing by Phister," and there is no reason to believe that the e[-]mails that have yet to be discovered will not contain more relevant information. Therefore, defendant's motion for a protective order should be denied because the information sought is relevant to the claim at issue.

DEFENDANT SHOULD BE REQUIRED TO PRODUCE ALL E[-]MAILS AND SHOULD BEAR THE COST OF PRODUCTION BECAUSE THE INFORMATION IS RELEVANT, NOT AVAILABLE ELSEWHERE, AND BECAUSE IT WOULD BENEFIT DEFENDANT TO PRODUCE IT[.]

Even when material is capable of being discovered, as the e[-]mails at issue here, the Rules of Civil Procedure impose a proportionality test on litigants: the court can restrict discovery that it deems "unduly burdensome" pursuant to Rule 26(b)(2). Moreover, Rule 26(c) allows a court to grant protective orders to protect the responding party from undue burden or expense, including making discovery conditional on the requesting party's payment of the costs of discovery. Zwerin. However, "[a]ny principled approach to the question whether discovery costs should be shifted to the requesting party when it comes to producing electronic evidence must respect the usual presumption that the costs must be borne by the responding party. Electronic evidence is no less discoverable than paper evidence." Zwerin. Therefore, "cost shifting should be considered only when electronic discovery imposes a truly undue burden or expense on the responding party." Zwerin.

DEFENDANT SHOULD BEAR THE BURDEN OF PRODUCING THE E[-]MAILS STORED ON OFFSITE HARD DRIVES BECAUSE IT IS AN ACCESSIBLE STORAGE FORMAT[.]

To determine whether the costs should be shouldered by the requesting party, the Zwerin court made a distinction between that media stored in accessible format, and that stored in inaccessible format. For data that is stored in accessible format, the usual rules of discovery apply: the producing party bears the cost. A court should consider cost shifting only when the format is relatively inaccessible. In Zwerin, the court found that CD's containing e[-]mails that were easily searchable were accessible. A person with proper credentials could log-in and search for e[-]mails using key words to easily isolate and reproduce responsive e[-]mails. Zwerin.

In the current situation, Mr. Yu responded that it would be possible to "run and sort the data and pull out the e-mails" from the off-site hard drives. (Yu Depo 14). He also admitted that there are programs that could be used to do this. Thus, the e[-]mails in the second category, those stored on offsite hard drives, are in accessible format under Zwerin. Therefore, pursuant to the usual presumption that the producing party bear the costs of production, defendant must pay the costs of producing these e[-]mails.

DEFENDANT SHOULD BEAR THE COSTS OF PRODUCING E[-]MAILS FROM THE CDS AND TAPES BECAUSE IT IS LIKELY THAT THEY CONTAIN RELEVANT EVIDENCE[.]

In Zwerin, the court defined inaccessible media as "backup tapes or obsolete or other very difficult-to-search media." Mr. Yu testified that defendant no longer uses the same computer software nor computer equipment as it did when the information was transferred to the CDs and tapes. (Yu Depo 14-15). In order to read the information contained on those storage devices, Mr. Yu testified that defendant would have to lease equipment and renew licenses to the software programs to read the information on the CDs. (Yu Depo 15). With respect to the tapes, Mr. Yu expected that the company would have to outsource the job to retrieve the data. Thus, the material contained on the CDs and tapes would be considered to be inaccessible media.

In evaluating whether to shift the costs of production of inaccessible media to the requesting party, the Zwerin court articulated a seven factor test: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining information. The factors are listed in order of descending importance.

Marginal Utility Analysis Favors Not Shifting the Cost of Production Because Plaintiff's Request is Specifically Tailored to Obtain Likely Relevant Information Not Available Elsewhere[.]

The Zwerin court noted that the first two factors are the most important and comprise the "marginal utility analysis." "The more likely it is that the backup tape contains the information that is relevant to the claim or defense, the fairer it is that the responding party

search at its own expense." Zwerin (citing McPeek v. Aschcroft). While some courts have required the requesting party to show that there is a "gold mine" of information to be retrieved, the Zwerin court found this to be "contrary to the plain language of Rule 26, which permits broad discovery of any matter that is relevant." Thus, "if the plaintiff can show that it is likely that the electronic medium contains certain targeted information and can demonstrate with reasonable certainty that the information is not otherwise readily available, then she has crossed over the margin into the realm where it is just to require the responding party to bear the expense of producing it." Baldocchi.

Here, the court already found that the request is sufficiently narrow to overcome any objection that it is vague or overbroad. The court also found that the request for e[-]mails within a five year period is reasonable. In contrast to Baldocchi, where the plaintiff's request was "a sweeping request" for documents relevant to gender discrimination over a four-year period, plaintiff's claims in the instant case are quite tailored and specific given the nature of the claim. Plaintiff has alleged that defendant has engaged in a continuous scheme to fix the price of Serapatrin over the course of many years and seeks only e[-]mails that relate to Serapatrin. Mr. Yu admitted that the use of e[-]mail was prevalent and the widespread method for communicating with customers over the last five years, and that defendant's employees had "suggested" prices to these customers. It appears very likely that discovery of e[-]mail from the CDs and backup tapes would yield relevant evidence for plaintiff's claim. Indeed, as discussed above, the court has also noted that plaintiff has a number of e[-]mails "that tend to bear on its allegations of wrongdoing by Phister." Therefore, the likelihood that the e[-]mails contained on the CDs and tapes will be relevant to plaintiff's claim is substantially high.

Moreover, the information is not obtainable elsewhere. Also in sharp contrast to Baldocchi where the plaintiff made no showing that the electronic records were not available elsewhere, Mr. Yu admitted that defendant actually discourages the retention of the e[-]mails in paper form; electronic storage is the only format where the information resides. The only other way to get the information contained in the e[-]mails on the CDs and tapes would be to canvass defendant's customers and ask for any e[-]mails that they may have. Mr. Yu even conceded that this would "produce questionable results." (Yu Depo 11). Therefore, the only opportunity that plaintiff has of obtaining the e[-]mails is to retrieve them from the defendant's electronic storage devices. Since this information is very likely to be relevant to plaintiff's claim and is not obtainable elsewhere, plaintiff has "crossed over the margin" and it is just to require defendant to bear the costs of production.

The Cost of Production Compared to the Amount in Controversy is Slight[.]

As described by the Baldocchi court, this factor "deals with the relativity between the dollar value of what plaintiff is attempting to recover and what it will cost to produce the information." If the cost "is not extraordinary or out of line with what a responding litigant can expect in the ordinary course of litigation, there is no justification for departing from the presumption that the responding party must bear the cost irrespective of the relationship between the cost and the amount in controversy."

In his deposition, Mr. Yu contended that the cost of doing the retrieval would be around $200,000 for the CDs and $250,000 for outsourcing the tapes. Mr. Washington predicted that he could retrieve the information from the CDs for around $75,000, and from the tapes for about $100,000. Mr. Yu expressed concern about "losing control of the process and the danger of disclosing confidential business information." (Yu Depo 15). However, as stated in Baldocchi, "defendant's documents can be adequately preserved at little cost by enforcement of a protective order requiring that all documents produced during this litigation be used solely for purposes of the litigation and that, at the end of the case, the documents be returned to [defendant]." Moreover, the court allowed that "disclosure of attorney-client documents[,] whether intentional or inadvertent, shall not be deemed a waiver of the privilege." Adopting a similar order in this case would greatly reduce the costs of producing the documents. Under such an approach, Mr. Washington's estimate of $175,000 should be used.

SavAll is suing for lost profits during the time when it alleges defendant refused to sell its drug to plaintiff and engage in the illegal price fixing. In total, these profits are estimated to be in excess of $120 million, and which would be trebled if plaintiff proves the statutory violation. A $175,000 cost compared to a $360 million recovery is a far cry from the $1 million cost compared to a $3 million recovery that the Baldocchi court found to weigh in favor of cost shifting. Given that the proportion of cost to recovery is infinitesimally small in the current case, the court should find this factor weighs against cost-shifting.

Defendant is More Than Able to Bear the Costs of Production[.]

The fifth factor evaluates the resources of each party. In Baldocchi, the court hypothesized about a situation where two functioning, successful business entities are sparring with one another such that this factor would be a wash. This describes the current case, and this factor does not favor shifting the costs to plaintiff. Defendant is more than capable of bearing the costs of producing the documents.

Neither Party Can Be Sensitive to Costs of Discovery[.]

This factor looks at whether either party would be sensitive to the costs of production, and would be able to calibrate the discovery based on information obtained in the initial sampling. However, because of defendant's refusal to produce any of these documents, it is not yet currently known how extensive discovery would be. Mr. Washington has estimated that he could run an initial sample of the e[-]mails to generate an idea of what the ultimate volume may be. (Washington Depo 19). The costs would be relatively low to do such a sampling. However, as noted, defendant has refused to comply with the discovery request and should not benefit from its own misconduct. Therefore, this factor does not weigh in favor of shifting costs.

The Importance of Plaintiff's Claim Is Great Because it Impacts the Public at Large[.]

This factor considers the importance of the action to the public. This is an action that will result in "vindication of a broader public interest that would be stifled if plaintiff were

prevented by cost considerations from conducting discovery that would expose a widespread wrong." Baldocchi. In its preliminary order, the Court has found that the "effect of the court's ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay for this important drug." Thus, putting the costs of discovery on plaintiff, and by straying from the normal presumption of cost burdens in discovery, plaintiff may be less likely to [sic] be able to vindicate an important public right. The public at large would benefit from the reduced price of Serapatrin should plaintiff prevail, and this factor thus favors not shifting the costs to plaintiff.

Defendant Would Benefit in Obtaining the Information Because of the FDA Regulations[.]

Finally, if "a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense." Baldocchi. "A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery." In Baldocchi, the court found that because the information was used solely as a backup for emergency restorations, it was not proper to require the party to bear the costs of production. The court noted that a "collateral benefit could result for the responding party's business such as the creation of a computer search program that would also be useful in its regular business activities."

Here, Mr. Yu testified that defendant keeps the information for backup purposes and that it does not use them in its ordinary course of business. Also, he doubted that any information resulting would be useful to defendant in this litigation. However, rather than merely keep the information for defendant's purpose of backing up, the FDA requires it to keep the information for a period of seven years. Accordingly, defendant will derive a benefit from organizing and devising a program that is capable of searching through the data in the event of an FDA request. This constitutes a business benefit. Moreover, there is the possibility that defendant could turn up information beneficial to itself in this litigation. This factor accordingly weighs in favor of maintaining the traditional presumption.

CONCLUSION

As stated above, defendant's motion for a protective order should be denied because the information sought is relevant and within the permissible range of discovery under the Rules of Civil Procedure. Moreover, defendant should bear the costs of producing the requested documents per the traditional rule regarding burdens of costs because the information sought is likely relevant, the request is narrowly tailored, the e[-]mails are not available elsewhere, the costs of production are slight compared to plaintiff's recovery, defendant is able to bear such a burden, the public interest favors defendant bearing the burden, and because production would ultimately benefit the defendant.

THURSDAY AFTERNOON
JULY 27, 2006

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

BREENE AND FROST

FILE

BREENE AND FROST

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LAW OFFICES OF LYNN R. DAWSON
5922 Jeanette Drive
Cordesville, Columbia

MEMORANDUM

To: Applicant

From: Lynn Dawson

Date: July 27, 2006

RE: **Breene and Frost**

Our client, Jim Breene, is a patent lawyer who works principally as a consultant to other lawyers in patent litigation. He was retained by the firm of Willing, Mayer & Frost to assist Julia Frost in presenting a patent infringement case on behalf of one of Frost's clients.

Breene and Frost entered into a fee-splitting arrangement pursuant to which, according to Breene, Breene would get 50% of whatever fee Willing, Mayer and Frost received from the litigation. The agreement is enforceable, raising no formation, Statute of Frauds, or subject matter issues.

Recently, Breene received and cashed a check for $128,000 purportedly tendered in "full satisfaction" of Breene's share of the fees. Breene claims this is far short of the full amount to which he is entitled and seeks our advice concerning what he should do.

Please draft for my signature an opinion letter, following the format and guidelines described in the firm's memorandum on opinion letters, explaining to Breene what options are available to him and which one we recommend to him.

LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive

Cordesville, Columbia

MEMORANDUM

To: All Attorneys

From: Executive Committee

Re: **Opinion Letter Guidelines**

Often the firm's attorneys must prepare an opinion letter to communicate its views to a client. An opinion letter should follow this format:

- State the facts that led to the client's need for advice.

- State your understanding of the client's goal or goals.

- Identify options the client has or the actions the client could take to achieve those goals.

- Objectively analyze each of the client's options or possible actions in light of the applicable law and the relevant facts. Be sure to identify the likely success in achieving the client's goals of pursuing each option or action.

- Although you must discuss the law, you should do so as clearly and straightforwardly as possible, in language that allows the client to follow your reasoning and the logic of your conclusions.

TRANSCRIPT OF INITIAL INTERVIEW WITH CLIENT JAMES BREENE ON JUNE 27, 2006

Lynn Dawson ("Dawson"): Hi Jim. I understand you are here because you need help obtaining payment in a situation where you have done the work and have yet to be paid?

James Breene ("Breene"): Yes. It is a little bit complicated.

Dawson: No surprise there. Why don't you tell me what happened and where things stand right now?

Breene: Sure. I used to be a chemist, but then I went to law school at MidCentral so I could practice patent law. I passed the patent bar about 6 years ago, and all I do and all I've ever done is patent law. I don't have much of a clue about other areas, which is why I need your help.

Dawson: I understand patent law is its own separate world.

Breene: Absolutely it is. Most of what I do is pretty technical, and I've been using my chemistry background for most of it. I'm not with any law firm or any other lawyer. I've been doing it on my own. Rather than go out and try to get clients, which I didn't know how to do, I've been getting work on basically a project basis from lawyers, primarily lawyers in firms that have clients that have patent issues. They hire me to help with the patent work. I've done most of my work for Willing, Mayer & Frost, especially Julia Frost ("Frost"). I'm here to see you because I wasn't paid properly for some of the work I did for Frost.

Dawson: Do you have written agreements with Willing, Mayer & Frost, or with Frost, concerning the terms for work?

Breene: No. It is all done orally and fairly informally. They aren't really an intellectual property firm, but some of their clients end up involved in patent matters once in a while. So one of the attorneys from the firm calls or drops by my office to see if I'm available for a particular project. I'm almost always interested in taking the job, as I can use all of the work I can get. We have an understanding that I will keep track of my hours and that they will pay me half of the amount that Willing, Mayer & Frost collects from the particular client for each hour of work I do. So, if they are charging the client $250 an hour for my work, I'll get $125. They pay me when the client pays. If the client doesn't pay and they aren't

successful at collecting, I don't get anything, and of course neither do they. The clients are always informed of the arrangement and must approve it. It actually has been a very good arrangement for me until this problem arose.

Dawson: What happened?

Breene: In the Spring of 2003, a longtime client of Frost's, an inventor by the name of Russell Hoover, told Frost that he wanted to pursue a patent infringement case against Hampton Company. At the time, Hoover didn't have any money. So Frost made a contingency deal with Hoover.

Dawson: I take it you ended up doing some work on Hoover's case?

Breene: Yes, and the deal was that I wouldn't get paid on an hourly basis but would get 50% of whatever Frost's firm got from Hoover.

Dawson: And none of this was put into writing?

Breene: Right. I ended up doing most of the work on that case, and Hoover knew all about me and the arrangement. But we didn't write anything down.

Dawson: Did you keep track of your hours and the tasks for the Hoover case?

Breene: Not systematically the way I did when I was being paid on an hourly basis. But I made some general notations, and I could easily piece a lot of it together with my calendar.

Dawson: What was the outcome of Hoover's case?

Breene: Well, it turned out pretty well. The case settled in the middle of the trial. Hampton Company paid Hoover $100,000 and agreed to pay future royalties to Hoover.

Dawson: What did Frost's firm get out of it?

Breene: Frost got $50,000 in cash and an agreement that Hoover would make quarterly payments to Frost equal to 25% of all the future royalties received by Hoover.

Dawson: Did Frost pay you anything?

Breene: Yes, I got $25,000, which is half of what Frost got from the cash settlement.

Dawson: What about the royalties?

Breene: I got a check for $10,000 as my share of the first quarterly royalty payment.

Dawson: Did the Frost firm explain how they arrived at the $10,000 figure?

Breene: Yeah. The check came with an accounting from Hoover showing the total

royalties Hoover had received from Hampton Company up to that point.

Dawson: Have there been any more payments?

Breene: No, that's why I'm here. About a month after the end of the next quarter — no check! I called Frost several times before she would actually talk to me.

Dawson: What did she say?

Breene: She told me that I'd already received an amount equivalent to the hourly rate agreement we had used in other cases. But I told her that was not our deal in this case.

Dawson: What was her response?

Breene: Well, it was sort of vague. She said, "I never agreed to pay you a windfall."

Dawson: Has she ever said that your payment from the Hoover case was to be limited to the old hourly rate arrangement?

Breene: No. She just said, "You've already received all you deserve."

Dawson: Did Frost or anyone at the firm ever indicate that you had failed to do the work adequately?

Breene: Never. They were complimentary and appreciative. So was their client, Hoover. And the result seemed quite positive. And no one suggested they weren't paying me because I didn't do the work properly.

Dawson: Why do you think they aren't paying you more?

Breene: Well, Frost has had a lot of money problems, and I've heard that the firm is likely to disintegrate. So the money may have already been spent, and that might be a reason I haven't been paid.

Dawson: OK, I'd like to do some research. I'll get back in touch with you.

END OF TRANSCRIPT

LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive

Cordesville, Columbia

MEMORANDUM

To: File

From: Ted Guth, Associate Attorney

Date: July 7, 2006

Re: **Breene v. Frost — Phone call interview with Russell Hoover**

On July 7, 2006 I interviewed Mr. Russell Hoover ("Hoover") by telephone. I introduced myself and told him I was representing James Breene ("Breene"), but did not explain exactly what the nature of the representation was. I asked if he would be willing to answer a few background questions, and he was happy to do so. He said he knew Breene and remembered him from the Hampton matter and that Breene "had been real helpful" and had done "a whole bunch of stuff and spent a lot of time on it." He said he had been fully informed by Frost that Breene had been hired to do work on the Hampton matter.

Without my leading him, he said that his recollection was that Breene was to get half of Frost's share of the royalties. He said, "That's my understanding of how it worked, anyway, and I sure didn't have any problem with it."

When asked how much Frost's percentage was, he said: "Maybe 25%? I think that is what I'm sending to Frost, but you could ask my accountant." (I took the accountant's name and number.) Hoover said the patent has been quite successful and has earned over two million dollars in royalties. I asked for Hoover's prediction of future royalties. He said, "You never know about these things, but $6 million or $7 million total is a conservative estimate." Hoover said he had a longtime personal and professional relationship with Frost. He said

that he thought quite highly of Breene's work on the Hampton matter, was "very satisfied with it" and would recommend Breene to others.

LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive

Cordesville, Columbia

MEMORANDUM

To: File

From: Ted Guth, Associate Attorney

Date: July 16, 2006

Re: **Breene vs. Frost — Evaluation of Breene's Claim**

I have completed the preliminary evaluation of James Breene's ("Breene") situation, and my research indicates there aren't any issues that would make filing a suit a waste of time. First, I talked with Russell Hoover ("Hoover") and then researched the enforceability of the fee agreement. There is absolutely nothing illegal, impermissible, or unethical about the payment arrangements among Breene, Julia Frost ("Frost") and Hoover.

There isn't anything else from a contracts perspective that makes Breene's deal with Frost unenforceable. There is obvious consideration for the deal. While the agreement isn't in writing, no Statute of Frauds provision requires it to be in writing. The fact that there is no specific dollar amount specified at the time the deal is struck is unremarkable and could not be used as a defense — many deals involve contingent payments of speculative royalties. And Hoover confirmed that the exact amount of the payments are precisely determined by regular accountings (see memo to file July 7, 2006). There isn't any argument that Breene somehow botched the work and thus was in material breach, because Hoover was satisfied and has been paying Frost. Hoover says he's earned $2 million in royalty payments so far. That means Frost has received $500,000 and Breene should have received $250,000 already. So far, Frost has only sent Breene $10,000 as Breene's share of royalty payments. Thus Breene is due $240,000.

I checked around, and Breene is correct: Frost's law firm is about to break up. There are some allegations that Frost had some bad real property investments, was spending way too much time concerning those, and wasn't devoting enough time to the firm. Nothing has gone to bankruptcy, but Frost's business assets might very well be tied up for quite a while.

TRANSCRIPT OF MEETING WITH CLIENT JAMES BREENE
ON JULY 26, 2006

James Breene ("Breene"): I thought I needed to tell you about an unexpected development, and although I think I'm okay about it, I wondered if I need some advice concerning what to do. My office received in the mail yesterday a check for $128,000 from Julia Frost ("Frost"). It was accompanied by a letter that said it was payment in full. Here's the letter. (Attached to this memo.) The same language about the payment was written on the front of the check, and on the back right above the place where the check is endorsed.

Lynn Dawson ("Dawson"): You said your office received it. Have you endorsed and deposited it yet?

Breene: It was endorsed and deposited yesterday. I didn't see it or sign it myself. My secretary endorses and deposits the checks made out to my business. He does it all the time. But I have asked him to always cross out any full payment or settlement language and write, in big print, "Endorsed without consent to settlement. James Breene protests the terms, and by this protest reserves all rights and remedies." He did so with this check, both on the front and on the back, and then deposited it. I didn't find out about this until I got to the office this morning and my secretary told me about the check.

Dawson: We'll need to do some quick research to decide what to do. Let me ask you a few questions. From what we've found out, it appears that you are entitled to around $240,000 as of now. So the $128,000 check is only a little more than half of what you've got coming. Frost doesn't have any obvious strong defenses to your claim, although nothing is certain, and sometimes good defenses show up later. Do you want to keep the $128,000 and give up on trying to collect the rest, including likely future royalty payments?

Breene: I thought about that on the way over here. The answer to your question is no. I understand nothing is certain and that to succeed I have to prove that Frost made me that promise about the royalties. But she made it, I did a lot of work, and I'm entitled to get my percentage.

Dawson: I understand. If it turns out the only way you can sue for the full amount is to

give the $128,000 back, how would you feel?

Breene: I don't see why I should have to do that. Frost owes me this money and quite a bit more. Besides, I'm going to use the money right now. Things have slowed down quite a bit in chemical patents, and I don't get that much work these days. Right now I'm getting some home renovation done because of a flood at my house, and I've got a kid in college. So I'm really short of cash, and I need to use that money now. It came at a good time. So my preference is to keep it, assuming it wouldn't add a lot of expense and complexity to the process of suing for the rest of it.

Dawson: Do you think Frost knew anything about your really needing money now?

Breene: You mean, did she send it over to try to get an easy, cheap settlement because I was strapped for money? No. I haven't mentioned my money situation to Frost or anyone she might hear it from. But I'm a little reluctant to just give it back for another reason. As I mentioned before, Frost has had a lot of money problems recently. I think I should keep this. It is part of what she owes me, and if their finances are all messed up it might be a long time, or never, before I collect fully on this thing. So I don't want to give up on this payment, and I shouldn't have to. She owes me this and a bunch more.

Dawson: I do have another question. You must have received quite a few checks from Frost over the time you worked for her, including the two payments for what you did for Russell Hoover. Did all of the checks say "payment in full" or something like that?

Breene: From what my secretary described, this one was different. It had the letter along with it, and the language was much more complete and directed toward this situation. And it was on the back as well as the front in big print. According to my secretary there was no way to miss it.

Dawson: Okay. For now I think that's all we need to know about this.

END OF TRANSCRIPT

WILLING, MAYER AND FROST, PC

3320 E. 14 St.

Cordesville, Columbia

July 24, 2006

James Breene
4446 Luesinger Place
Cordesville, Columbia

Re: Your Fee - Russell Hoover v. Hampton Company

Dear Mr. Breene:

I am getting tired of arguing with you about the amount of your fee in this matter. I know there is a dispute about it, and I just want to get that behind us.

Enclosed is a check for $128,000. This check is tendered to you as PAYMENT IN FULL of your fees. Your endorsing and cashing of this check constitutes a FULL AND COMPLETE RELEASE OF ALL CLAIMS you may have against me or this firm for your fees for work done in this matter.

Sincerely,
Willing, Mayer and Frost, PC

Julia Frost

Julia Frost

THURSDAY AFTERNOON
JULY 27, 2006

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BREENE AND FROST

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SELECTED PROVISIONS OF THE COLUMBIA COMMERCIAL CODE

ARTICLE 1. General Definitions and Principles of Interpretation

* * *

§ 1-207. Performance or Acceptance Under Reservation of Rights. (As Amended)

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

(2) Subsection (1) does not apply to an accord and satisfaction.

* * *

ARTICLE 3 NEGOTIABLE INSTRUMENTS

* * *

PART 3. Enforcement of Instruments

§ 3-311. Accord and Satisfaction by Use of Instrument. (New)

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (a) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom

the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (b) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted.

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

* * *

COLUMBIA COMMERCIAL CODE COMMENTS - §1-207 and §3-311

The amendment to §1-207 and a new section, §3-311, are part of revisions of the Columbia Commercial Code. The enactment of amended §1-207 clarifies that §1-207 of the Columbia Commercial Code does not apply to accord and satisfaction agreements reached by full payment or full satisfaction checks. New §3-311 establishes rules for accord and satisfaction by full payment or full satisfaction checks.

An accord and satisfaction agreement is a contractual method of discharging a debt. The "accord" is the agreement between the parties, while the "satisfaction" is the execution of the agreement. In some situations a person against whom a claim may be asserted attempts an accord and satisfaction of the disputed claim by tendering a check to the claimant for some amount less than the full amount claimed by the claimant, with the check identified as "payment in full." Occasionally in such situations the recipient of the check will cash the check, but strike out or protest the full-payment language, and seek further amounts, arguing that the protest preserved the recipient's ability to seek further amounts.

Columbia case law had concluded that the "reservation of rights" language of §1-207

enables a creditor to endorse and cash a full-satisfaction check, protest the terms, and sue for remaining amounts the creditor believes are due. The purpose of this legislation is to clarify that §1-207 does not permit a creditor to do so. Accordingly, the sole amendment to §1-207 is the addition of subsection (2) stating that §1-207 "does not apply to an accord and satisfaction." Thus words of protest are not evidence that an accord and satisfaction did not take place. Subsection (1) has not been altered, and continues to provide machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute.

A new section, §3-311, was enacted to govern full satisfaction checks. It reiterates that a creditor is generally not permitted to endorse and cash a full-satisfaction check yet sue for more by protesting the terms. Under the new rule of §3-311, combined with amended §1-207, if a claimant endorses and deposits a check that is conspicuously identified as payment in full and is offered in good faith to settle a disputed debt, the claimant may not seek further amounts even if the claimant protests the full-settlement language before depositing the check. The section codifies two common law requirements concerning settlement payment: (1) the settlement payment must be offered as a good faith offer to settle a debt; and (2) the debt to be settled by the payment is either unliquidated or genuinely disputed, so there is consideration for the settlement promise by the creditor. The section also contains limited exceptions concerning inadvertent accord and satisfaction.

* * *

Mathers v. Vincent

Columbia Court of Appeal (2002)

Jeff Mathers (Mathers) appeals from a trial court decision granting summary judgment to Sandra Vincent (Vincent) in a lawsuit concerning the amount due on a driveway repaving job. The trial court held that because the parties had settled their dispute with an enforceable accord and satisfaction agreement, Mathers's lawsuit must be dismissed on summary judgment. We affirm.

The relevant facts are simple and not in dispute. Mathers paved Vincent's driveway. No specific price was identified in advance. After the driveway was completed, Mathers sent Vincent a bill for $17,329.25. After a dispute arose concerning the amount due, Vincent sent Mathers a check for $5,733.20 with the notation "Payment in full — 1150 Powell Taylor Driveway" written both on the memo line on the front of the check and above the endorsement line on the back of the check. After receiving the check Mathers struck through both notations, wrote "Under Protest" below his endorsement, and cashed the check. Mathers subsequently initiated the suit below for the balance due.

Vincent filed a motion for summary judgment contending that the disputed debt between herself and Mathers had been settled by accord and satisfaction as a result of Mathers's acceptance and negotiation of the check, notwithstanding Mathers's obliteration of the "payment in full" notation and his "under protest" endorsement of the instrument. The trial court executed an order granting Vincent summary judgment and dismissed Mathers's suit for the balance due.

Mathers contends that the trial court erred in granting summary judgment on the basis that §1-207 of the Columbia Commercial Code (CCC) and *Ditch Witch Trenching Co.* (1995) authorized Mathers to reserve his rights to pursue the disputed debt by striking through the "paid in full" language and writing "under protest" on the check. We disagree. While *Ditch Witch*, factually on all fours with this case, held that endorsements with protests defeated

accord and satisfaction, subsequent to that decision, the Columbia Legislature overruled the controversial "have-your-cake-and-eat-it-too result" of *Ditch Witch* when it amended the Columbia version of the Uniform Commercial Code in 2000. Consequently, §3-311, and not §1-207, dictates whether Mathers settled his dispute with Vincent when he endorsed and negotiated the check.

Subparagraph (a) of §3-311 contains three requirements for the application of §3-311 to a full satisfaction check. The three requirements state aspects of longstanding common law rules of accord and satisfaction.

First, pursuant to §3-311(a)(i) the check must be a genuine offer in good faith to settle a dispute. Thus it must be viewed as an offer: an objective manifestation of intent to be held to a settlement, viewed from the perspective of the offeree. "Good faith" in subsection (a)(i) means honesty in fact and observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. For example, if a check issuer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by issuer. An example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. The requirement of good faith applies to the accord and satisfaction proposal only, however. A debtor can in good faith attempt to settle a dispute with a full payment check even though the debtor's bad faith behavior led to the claim that is disputed. In other words, even if the debtor is in bad faith regarding the underlying agreement, if the dispute in fact exists and the debtor tenders a settlement of the dispute in a genuine effort to settle it, then the tender will be deemed to be in good faith.

Second, §3-311 does not apply to cases in which the debt is a liquidated amount and is not

subject to a bona fide dispute. In this regard Subsection (a)(ii) incorporates into statute the common law rule that accord and satisfaction agreements require consideration. If the debtor gives up an opportunity to assert that there is a bona fide dispute concerning either the proper amount (i.e. the liquidation issue) or whether the amount is owed at all (i.e. the dispute as to whether it is owed issue), that forbearance is consideration for the creditor's promise to settle.

A claim is liquidated if, at the time it arose, it is a readily ascertainable sum certain, that is, the evidence furnishes data that, if believed, makes it possible to compute the amount with exactness without reliance upon opinion or discretion. A bona fide dispute means an honest belief by the debtor that there is a dispute concerning the proper amount of whether the amount is owed. It is not necessary that the debtor's position in the dispute be correct or well-founded. If the claim is liquidated and the debtor does not have an honest belief in the viability of his or her position, then there is no consideration for the creditor's promise not to sue.

Third, the claimant must have received payment from the check. See § 3-311 (a)(iii).

If any one of the three requirements of §3-311(a) is not met, the remainder of §3-311 does not apply, and the claim has not been discharged, as there has been no valid accord and satisfaction agreement resolving the dispute. The burden of proof is on the person seeking enforcement of the accord and satisfaction to prove that the subsection (a) requirements of good faith, unliquidated or bona fide disputed debt, and payment received are met. If that person also proves that, as required by subsection (b), there was a conspicuous statement that the check was offered as payment in full, the claim is discharged unless subsection (c) applies. Normally the statement required by subsection (b) is written on the check. Thus, the canceled check can be used to prove the statement as well as the fact that the claimant obtained payment of the check. Subsection (b) requires a "conspicuous" statement that the instrument was tendered in full satisfaction of the claim. The statement is conspicuous if it is so written that a reasonable person against whom it is to operate

ought to have noticed it. If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. In cases in which the claimant is an individual the claimant will receive the check and will normally endorse it. Since the statement concerning tender in full satisfaction normally will appear above the space provided for the claimant's endorsement of the check, the claimant "ought to have noticed" the statement.

Subsection (c) of §3-311contains two exceptions that allow a claimant to avoid an inadvertent accord and satisfaction. Payment of the check might be obtained without notice to the personnel of the claimant concerned with the disputed claim. Subsection (c)(1) allows an organization claimant with very large numbers of customers to protect itself by advising customers by a conspicuous statement that communications regarding disputed debts must be sent to a particular person, office, or place. If the claimant proves that the check was not received at the designated destination the claim is not discharged unless subsection (d) applies. In addition, any claimant, organization or otherwise, may prevent an inadvertent accord and satisfaction by complying with subsection (c)(2). If the claimant discovers that it has obtained payment of a full satisfaction check, it may prevent an accord and satisfaction if, within 90 days of the payment of the check, the claimant tenders repayment of the amount of the check to the person against whom the claim is asserted.

Subsection (d), however, indicates that the exceptions contained in Subsection (c) do not apply if the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation cashed the check with actual knowledge that it was offered in full satisfaction. Thus if the claimant or her agent is aware that the check was offered in full settlement, the claim is discharged even if the check was not sent to the person, office, or place required by a notice complying with subsection (c)(1) or the claimant tendered repayment of the amount of the check in compliance with subsection (c)(2). A claimant has actual knowledge that a check was tendered in full satisfaction of a claim only when that fact is brought to the attention of an individual having direct responsibility with respect to

the dispute. Subsection (d) does not apply to every agent or employee of the claimant, but only to agents having direct responsibility with respect to the disputed obligation.

Application of §3-311 to the check sent by Vincent to Mathers indicates that the claim against Vincent is discharged. There are no disputed facts concerning whether the three prongs of §3-311(a) are met. The check was offered in good faith to settle the dispute. There are no facts suggesting that Vincent was trying to take advantage of Mathers or routinely puts payment in full language on every check. There was a bona fide dispute concerning how much was owed for the job, and since there had been no specific amount identified in advance, the debt was unliquidated. Vincent received payment when he negotiated the check. The notation "Payment in full —1150 Powell Taylor Driveway" on the front and the back of the check was a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. Because Mathers crossed out the restrictive language, presumably believing he could thereby negate the language, there can be no argument that he was unaware the check was tendered in full satisfaction of the claim. And in any event, Mathers did not, after cashing the check, tender repayment within ninety days.

Since there are no genuine issues of material fact and Vincent is entitled to judgment as a matter of law, the trial court properly granted summary judgment.

Answer 1 to Question PT-B

1)

July 27, 2006

Dear Mr. Beene:

It was a pleasure meeting you, despite the circumstances. We look forward to helping you with this matter and to achieve the best possible result to suit your needs. This letter contains my opinion of your case after researching the facts and the applicable laws.

Statement of facts that led you to need our advice

I understand that you are a very accomplished patent attorney and that you [have] done a lot of work on a case-by-case basis for Willing, Mayer & Frost, especially Ms. Frost. All of your agreements with Willing, Mayer & Frost have been oral and rather informal. Usually, you work on an hourly basis and the firm pays you one half of the amount it receives from the client. In addition, the client is always informed of the arrangement and approve[s] it.

In Spring of 2003, Frost made a contingency deal with Russell Hoover to work on his behalf in a patent infringement case. Based on an oral agreement with Frost, you were entitled to 50% of whatever the firm received from Hoover. You did the majority of the work on the case but did not keep track of your hours.

After the case settled, Hoover received $100,000 payment right away and the firm forwarded to you your share. Because the firm agreed to a 50% contingency with Hoover and then 25% for all future royalties, you received a check for $25,000 from the initial payment. Later, you received one quarterly accounting and a payment of $10,000– the amount owed to you under the agreement.

After that initial payment and the one royalty payment, you received no other payments. When you inquired about future payments, Frost indicated that to pay you any more would give you a windfall. She insisted that the amount already paid was equivalent to your hourly rate.

Then on July 25 of this year, your office received a check for $128,000 from Frost accompanied by a letter. Written on the check's front and back[,] and on the accompanying letter, was stated that the check was payment in full. This despite the fact that Hoover had already received 2 million dollars – which would entitle you to another $240,000.

The check was endorsed and deposited by your secretary, who crossed out the payment in full language and wrote: "Enclosed without consent to settlement. James Breene protests the terms, and by this protest reserves all right and remedies."

According to Mr. Hoover, the amount of future royalties he might receive in the settlement could total over 6 million dollars. Assuming you would receive one half of 25% of that, you should be entitled to over one million dollars in future royalty payments.

The other complication in all this is that Willing, Mayer & Frost appears to be on the verge of breaking up[,] which may pose a problem in terms of collecting this and future monies.

My understanding of your goals

You stated to me that you do not want to just keep the $128,000 and give up trying to recover the other money owed unto you. You did a lot of hard work on the Hoover case and (deservedly) believe you are entitled to the full fruits of your labors. Assuming it does not lead to added expense or complexity to the case, you would like to keep the money.

Further, you are short of cash right now and therefore need the money.

Options you may take to achieve your goals

There are a few options at this stage that you should consider and whose respective benefits and problems I will explain below.

First, you can keep the $128,000 as payment in full and not pursue this matter any further.

Second, you may keep the $128,000 and pursue a legal course of action against Willing, Mayer & Frost for the rest of the money you believe that is owed unto you.

Third, you can return the $128,000 to Willing, Mayer & Frost and legally pursue the entire amount that you believe is rightfully owed to you.

Analysis of your options in light of applicable law and relevant facts (and the likelihood of success in achieving your goals through that option)

1. Keep the $128,000 as satisfaction of the total amount owed

a. Analysis

It is entirely possible for you to keep the $128,000. In some ways, this would be the easiest course of action. You have already deposited the check, and thus would have immediate access to the money for all of your immediate needs. Further, there would be no expenses from our firm and the final amount you would receive is already known. In addition, it would end your dispute with Willing, Mayer & Frost and you could move on to establishing a relationship with a new firm to take care of your future financial and work needs.

b. Likelihood of success in achieving your goals through this option

Also, given Willing, Mayer & Frost's precarious financial position, this option guarantees you coming out of this with a good amount of money.

However, this option appears to not satisfy your goals. You told me that you had thought about this option and had rejected it because you feel that you are entitled to your percentage.

2. Keep the $128,000 and pursue legal action against Willing, Mayer & Frost

a. Analysis

According to the Columbia Commercial Code 1-207, a party may reserve rights and not prejudice rights in a dispute by explicitly reserving those rights.

In your current case, it appears that this is what your secretary did when he cashed the check but struck out the language on it regarding full payment and satisfaction and wrote: "Endorsed without consent to settlement. James Breene protests the terms, and by this protest reserves all rights and remedies."

However, despite the clear language of 1-207, according to the Columbia Commercial Code Comments on 1-207 and 3-311, it does not apply to accord and satisfaction agreements reached by full payment or full satisfaction checks. 3-311 was enacted specifically to govern satisfaction checks. According to the Comments, previous case law had allowed someone in your position to reserve their rights and endorse and cash a full-satisfaction check, protest the terms, and sue for the remaining amount. However 3-311 was designed to clarify the law and prohibit a creditor (such as yourself) from doing so: "Words of protest are not evidence that an accord and satisfaction did not take place."

(There was a case similar to yours called Ditch Witch. Under its holding, any court would find in your favor because of the "protest language" on the check. However, according to the court in Mathers, Ditch Witch was overruled by 3-311.)

Therefore, even though your secretary cashed the check for $128,000 with clear terms of protest, the Commercial Code will not protect your ability to say that the check was not cashed in satisfaction.

While this appears to defeat your claim, there are three requirements for the application of 3-311(a) to apply to a full satisfaction check.

As the court in Mathers stated, first, "the check must be a genuine offer in good faith to settle a dispute." This lack of good faith is difficult to define. The court in Mathers explained that it could mean that a debtor who regularly writes "full satisfaction" on ALL the checks it sends does not act in good faith.

The court in Mathers stated that even where the debtor (such as Willing, Mayer & Frost) attempts in good faith to settle a dispute that arose out of bad faith acts of the debtor, the

payment is acceptable if it is a genuine effort to settle the matter.

I believe that this language hurts your case against Willing, Mayer & Frost because Frost's letter to you stated "I know there is a dispute." Thus, she acknowledged the genuine existence of a dispute between you two. Since she sent the check in order "to get th[is] behind us" it appears that she intended in good faith to settle the dispute.

The second requirement of a 3-311 satisfaction check according to the Mathers court is that "if the claim is liquidated and the debtor does not have an honest belief in the viability of his or her position, then there is no consideration for the creditor's promise not to sue." The court in Mathers stated that a claim is liquidated if it is a readily ascertainable sum.

In your dispute with Willing, Mayer & Frost, the sum is arguably very ascertainable. You are to get 50% of the amount they receive from Hoover in royalties. According to you and to Hoover (one of my associates spoke with him the other day and he was very complimentary of your work), he agreed to pay Willing, Mayer & Frost 25% of his royalties. And he was aware that you were to get 50% of the money sent to Frost. Thus, it should be quite easy to go through his records and Frost's records to determine the amount paid.

In addition, Hoover told one of my associates that he has already earned 2 million dollars in royalties. Thus, Frost has received $500,000, which means, you should have received $250,000 in royalties already instead of the mere $10,000.

On the other hand, Willing, Mayer & Frost may argue that arriving at a sum is difficult because of the nature of the payments. Because they are being paid quarterly, the figure owed to you is always changing. However, I do not think that a court would have great difficulty figuring out how much is owed you.

Furthermore, Frost did not have an honest belief in the viability of her position when she sent you $128,000. If appears to be an arbitrary number with no basis for it in reality. Thus, it should not be considered as valid consideration not to sue her.

Thus, I believe that this second requirement for a valid 3-311 satisfaction check will likely not be satisfied by Frost.

According to Mathers, the third and final requirement to satisfy a 3-311 satisfaction is that the claimant receive the check.

In your case, there is no dispute that you received the check – even though it was your secretary who actually received it and cashed it.

According to the Mathers court, if any of these three requirements is not met, then 3-311(a) is not met and 3-311 does not apply. As I stated above, I believe that requirements one and three have likely been met. However, requirement two does not appear to have been met, and that would allow you to prevail in an action against Willing, Mayer & Frost. (At least, it would mean that 3-311 does not bar your claim because the $128,000 was not a

valid satisfaction.)

Further, according to the Mathers court, the burden of proof is on the party seeking to enforce the accord and satisfaction. That means that Willing, Mayer & Frost would have to prove the three requirements discussed above, and that the check was offered in payment in full.

I do not think that they will have difficulty proving that it was offered as payment in full because of the language on the check's front-side and back-side, as well as the accompanying letter from Frost which stated in ALL CAPS that is was PAYMENT IN FULL.

In addition to the requirements discussed above, 3-311(c) has two exceptions that would allow you to avoid an inadvertent accord and satisfaction. According to Mathers, 3-311(c)(1) allows an organization with a large number of customers to protect itself by stating that disputed debts must be sent to a particular person or office.

Unfortunately, I do not think that 3-311(c)(1) will be of much use to you. You stated that you do most of your work for Willing, Mayer & Frost, and Frost sent the letter and payment directly to you.

The second exception of 3-311 regards returning the money, which I will discuss as your third option.

b. Likelihood of success in achieving your goals through this option

I believe that this option may work to achieve your goals. It would allow you to keep the $128,000 and pursue the other money owed to you. Thus, it would solve your current cash crunch and allow you to receive the full fruits of your work that you believe that you are entitled to. In addition, keeping the money while pursing other money would not add any expense or complexity to the case (two of your concerns).

Working against you in pursuing this course of action is the cost of litigation, which you know is not cheap. Second, the Columbia Code has been rewritten to make it harder for someone in your position to dispute a satisfaction check. Third, several of the requirements for a legal satisfaction check appear to have been satisfied by Frost's check to you and the accompanying letter. Fourth, according to one of my associates, Willing, Mayer & Frost is about to break up. Thus, it might be a waste of time to pursue a course of action against them when Frost's assets might be tied up for quite a while.

That said, there are several factors that cut in your favor with regards to this approach. First, despite the change in law, the burden of proof will be on Willing, Mayer & Frost to prove that the check was a valid satisfaction. As an attorney, you know that this means we do not have to prove anything. Second, as I stated above, I do believe that one of the requirements of a valid 3-311 satisfaction weighs in your favor. Finally, the amount of money you might recover through this course of action is huge. Based on Hoover's estimates of future royalties, you could collect over a million dollars.

3. Return the $128,000 and then purs[u]e legal action

a. Analysis

According to the Mathers court, according to 3-311(c)(2) and 3-311(d) if a claimant discovers that it has obtained payment of a full satisfaction check it may prevent accord and satisfaction if, within 90 days of payment of the check, the claimant tenders repayment of the check to the person against whom the claim is asserted.

Thus, 3-311(c)(2) appears to allow you to return the $128,000 to Frost and thereby prevent any accord and satisfaction.

However, this option is not available if the claimant or agent of claimant had direct knowledge of the disputed obligation and cashed the check anyway. 3-311 states that a claimant has actual knowledge that a check was tendered in full satisfaction only when that fact is brought to the attention of an individual having direct reproducibility with respect to the dispute.

In your case, it was your secretary who endorsed and deposited the check. And it was your secretary who crossed out the full settlement language and wrote the "under protest" language. Thus, the issue will be determining whether your secretary was an agent with "direct responsibility with respect to the disputed obligation" as the court in Mathers put it.

On the one hand, it would appear that your secretary is not an agent having direct responsibility with respect to the disputed obligation. In fact, in Mathers, it was Mathers himself who crossed out the disputed language – therefore, the court regarded his action of cashing the check a valid satisfaction. Given this example, it would appear that you are the only party actually in direct responsibility with regards to the disputed obligation.

On the other hand, considering how small your operation is, Frost could argue that your secretary had direct responsibility with disputed obligations because you instructed him to always cross out any satisfaction language and write protest language in its place. In addition, your secretary might have been aware of the disputed obligation. Whether this makes him directly responsible is unclear from the applicable law and relevant case.

Given the facts of Mathers, it appears as though you could credibly claim that your secretary did not have direct responsibility with respect to the disputed obligation. Therefore, you would be able to return the $128,000 to Frost and pursue the full amount.

b. Likelihood of success in achieving yours goals through this option

This option seems to be the worst one for achieving your desired aims because it would leave you with no money now and potentially no money in the future. And, considering the fact that Frost is having financial difficulties of her own, it might not be such a wise move to send her a large sum of money that you might never see again.

The legal advantage of this option is that it would demonstrate good faith on your part and it would demonstrate that any seeming accord and satisfaction was inadvertent on your secretary's part. It would then put you in a favorable position to sue William, Mayer & Frost and collect all of the money owed to you.

The disadvantage of this option is that it would leave you with no money now and potentially no money in the future. In addition, there is no guarantee that a court would accept that you complied with 3-311. Thus, you might return the money and a court could determine that Frost already satisfied her debt to you – which is the worst of all outcomes.

Conclusions

You have stated that you are interested in keeping the $128,000 you have already received and to pursue legal action against Willing, Mayer & Frost. Therefore, I believe that option two is in your best interests and is the one to legally have the best chance of success.

Option one, whereby you keep the money and not sue Frost, would leave you with just the $128,000 and would not incur any legal bills pursuing a claim against a company on the brink of bankruptcy.

Option three would leave you with nothing now but with the chance to recover a lot more later. The problem with option three is that it is legally questionable to argue that the acceptance of the check was inadvertent. Further, it would only marginally help your case while still pursuing a debtor that is on the verge of bankruptcy.

Option two allows you to keep the money already paid and to pursue more money. Further, should Willing, Mayer & Frost actually break up, it might be possible to attach a lis pendens to its assets or to Frost personally. Although, it may take a while to recover, it will probably be worth it given the large amount of money at stake.

Should you have any questions or concerns, please do not hesitate to call me. I look forward to resolving this matter to your satisfaction.

Sincerely,

Answer 2 to PT-B

Law Offices of Lynn R. Dawson
5922 Jeanette Drive
Cordesville, Columbia

Date
Mr. James Breene
4446 Luesinger Place
Cordesville, Columbia

Mr. Breene,

I wanted to get back to you as soon as possible regarding your fee dispute with Ms. Frost. I have researched the case law regarding your dispute. Your underlying case is extremely favorable. There are no issues regarding the viability of your fee agreement with Ms. Frost. The agreement is enforceable. There are no formation, Statute of Frauds, or subject matter issues. That being said, in regards to the check and letter sent by Ms. Frost on July 24th, you may be facing some potential issues regarding the purported accord and satisfaction that Ms. Frost attempted to render via her check and accompanying letter. As such, I will lay out the facts as I understand them, then I will list the goals that you have indicated you'd like to achieve with regard to the dispute, and then I will identify various options you have regarding this issue and present the accompanying legal consequences of each option. Please consider each option carefully and contact me to discuss which options you would like to pursue.

As I understand the situation, you were retained by Willing, Mayer & Frost to perform work on a patent law infringement case for Russell Hoover. Prior to your work on Mr. Hoover's case, you had previously worked with Willing, Mayer & Frost on a number of occasions. Each time you worked on one of the firm's cases, you generally kept track of your hours worked, and you received half the fee that Willing, Mayer & Frost collected from each client

for the hours you worked. The arrangement was informal and oral. In regards to Hoover's case, the specific fee arrangement set up between Willing, Mayer & Frost and Hoover was a contingency fee arrangement. As such, the arrangement between you and Willing, Mayer & Frost was altered due to the fact that the firm was not billing Mr. Hoover on an hourly basis. Under the terms of your agreement with Hoover, you were to receive 50% of all money Willing, Mayer & Frost collected from Mr. Hoover. Mr. Hoover's case subsequently settled, and under the settlement, Willing, Mayer & Frost received $50,000 and 25% of all future royalties received by Hoover. You were paid $25,000 from immediate award per your agreement with Frost. You were only sent one royal check for $10,000, however, and received no future payment until July 25th.

When you spoke to Ms. Frost, she did not deny that you were entitled to royalty payments under your agreement, but stated that you had already received "all you deserve." It seems that Ms. Frost's law firm is about to break up, allegedly due to some investments made by Ms. Frost. At this time, the firm has not declared bankruptcy. Upon contacting Mr. Hoover's accountant, we learned that Frost has received $500,000 in royalty payments at this time. You are owed $240,000 in total.

On July 25th, you received a check and letter from Ms. Frost. The check was in the amount of $128,000. The check included language written on the front of the check and above the place where the check is endorsed stating that the check was for the amount paid in full. The writing on the check was very conspicuous. The accompanying letter stated that Ms. Frost was tired of arguing with you about the amount of your fee, that the fee was disputed and that she was tendering a check to you as "PAYMENT IN FULL" of your fees. She also stated that the check constitutes a "FULL AND COMPLETE RELEASE OF ALL CLAIMS" you have against her. Your secretary endorsed and deposited the check, as per his business duties. You were not informed of the endorsement until it had actually been completed. In endorsing the check, your secretary crossed out the "payment in full" language on the check and wrote that you protest the accord terms and reserve the rights and remedies. Prior checks sent by Ms. Frost stated that they constituted payment in full,

but this particular check included more precise and more conspicuous language, as well as the accompanying letter.

As I understand your goals, while you understand that you may have difficulty in collecting the full payment of your fees from Ms. Frost, you prefer to keep the check and sue Ms. Frost on the remaining balance due to you, which is approximately $112,000. You intend to keep the check, as long as it does not add expense and complexity to the process of suing for the rest of the amount due. From talking to you about this issue, you haven't clearly indicated to me whether you would prefer to return the check outright in order to sue for the entire amount due, or keep the check and forfeit your claim. Though you have expressed a desire to use the money right away, you also seemed very adamant that you would fight to recover you[r] entire sum rather than accept only a small portion of that. I believe[,] then, that should your ability to sue on the entire debt depend on your tendering of the check back to Ms. Frost, you would prefer to do so, rather than keep the check and not sue. I will outline all these options, however, and[,] of course, it is ultimately your decision as to what path you'd like to pursue. I will now identify the options I can see, and analyze each option individually.

Optional 1: Retain Possession of the $128,000 And Sue on the Remaining Debt

As I understand it, this is your most desirable option. In order to successfully pursue this option, we will need to show that this check is either governed by Section 1-207 of the Columbia Commercial Code or that Section 3-311 of Article 3 of the Columbia Commercial Code does not apply to your particular case.

Under Article 1-207, a party who explicitly reserves his rights using words such as "under protest" or "without prejudice" in response to a manner demanded or offered by another party does not thereby prejudice the rights reserved. Therefore, were Article 1-207 to apply, by crossing out the "payment in full" language and specifying that [you] protest the accord terms and reserve your rights and remedies, your secretary preserved your rights to sue on the remaining debt under 1-207. However, it is almost certain that Article 1-207

does not apply to an accord and satisfaction of the check Ms. Frost sent to you. First, the Amendment to the Article, under 1-207(2) states that this provision does not apply to an accord and satisfaction. Furthermore, the Columbia Commercial Code Comments states that the amendment of 1-207 does not apply to "accord and satisfaction agreements reached by full payment or full satisfaction checks." It is clear that Ms. Frost's letter and check sent to you constituted a full satisfaction check. Therefore, it is unlikely that the reservation of rights language in 1-207 will be helpful. Mathers v. Vincent seems to be on point as well. In that case, the Columbia Appeals Court ruled that a check tendered by the plaintiff in full satisfaction of a driveway paving job was not covered by Section 1-207 due to the amendment, and that Section 3-311 was the generally appropriate statute under which to analyze the effect of the accord and satisfaction.

Since it is unlikely that you[r] reservation of rights in accordance with Section 1-207 will be effective, in order for you to retain your rights, we will have to first argue that Section 3-311 does not apply to the accord and satisfaction provision in your case. In order for Section 3-311 to apply, Ms. Frost must show that (i) she acted in good faith by tendering the check to you as full satisfaction of your claim. She must also show that (ii) the amount of the claim was unliquidated or subject to a bona fide dispute. Lastly, she must show that (iii) you obtained payment of the instrument.

(i) Good Faith Requirement

In order for Ms. Frost to prove good faith, she must show that the check as a genuine offer in good faith to settle a dispute. She must therefore show that she displayed honesty in fact and observance of reasonable commercial standards of fair dealing in attempting to satisfy your claim with the check. Columbia Courts have held that [by] taking unfair advantage of a claimant, good faith would be absent. In speaking to you, it appears that Ms. Frost's low-balling you with regards to your fees (by only offering about half of what was owed) was not the product of her attempting to take unfair advantage of your recent lack of business, but rather was likely a result of her own recent business misfortune. Unless we are able to show that she knew about your business slow-down, we will be unlikely to raise an inference of unfair advantage employed by Ms. Frost.

Columbia Courts have also held that good faith may be absent in situations where business debtors routinely print full satisfaction language on their check stocks so that a large part of the debts of the debtor are paid by checks bearing the full satisfaction language. The courts have held that such a practice constitutes bad faith if the claimant cannot be sure whether a tender in full satisfaction is or is not being made. As you indicated, most or all of the checks sent to you by Ms. Frost included routine "payment in full" language on the check stocks. This would normally lead to a presumption of lack of good faith, and is an argument we can make. Unfortunately, given the fact that Ms. Frost included different, more precise and more conspicuous language regarding the full satisfaction of the dispute, and especially since Ms. Frost included a letter specifically stating that the check was being tendered as "PAYMENT IN FULL," it is unlikely that we would be able to successfully argue that the letter and [sic] did not provide notice as to whether or not the check constituted a payment in full.

Lastly Columbia Courts have held that even if a debtor is in bad faith regarding the underlying agreement, if the debtor complies with the above requirements, good faith will be found. As such, I believe that Ms. Frost will be able to show "good faith" under the requirements of 3-311.

(i) Unliquidated or Subject to Bona Fide Dispute Requirement

Ms. Frost will also have to show that the debt is in an unliquidated amount or that it is not subject to a bona fide dispute. This requirement is based on the idea that a debtor must show that they have rendered consideration by tendering the check in the form of giving up their claim to contest that disputed amount. Here, Ms. Frost must show that she has an honest belief in the viability of her position in order to have rendered consideration under the accord and satisfaction agreement.

Columbia Courts have held that a liquidated claim is a claim that [,] at the time it arose, is a readily ascertainable sum. To be a readily ascertainable sum, we will have to furnish data such that the data makes it possible to compute the exact amount you are owed without reliance upon opinion or discretion. Although it seems that Ms. Frost bears the

burden of proof that the claim is unliquidated, if we can show that at the time your claim arose, there is data available to compute with exactness the amount you were owed by Ms. Frost without reliance upon opinion or discretion, we will be able to show that the debt was a liquidated claim, and thus 3-311 would not apply to Ms. Frost's attempted accord and satisfaction unless Ms. Frost could show that there was a bona fide dispute in regards to the claim. Here, it will likely be possible to convince a court of the exactness of the claim. We have assumed that we can prove [,] without contradiction, the specifics of your agreement with Ms. Frost. Therefore, because calculation of the amount owed can be established by the amount paid by Hoover to Ms. Frost's firm and because calculation of the debt was identified in advance (see Mathers), we can access the necessary data to calculate the exact amount owed depending upon the date the claim arose. Because the data is independent and not subject to opinion or discretion (because it is being produced by a relatively neutral third-party), we will be able to show the exactness of your claim based on data obtainable from Mr. Hoover's accountant's records.

In order to satisfy the second prong, Ms. Frost must show either that the amount was unliquidated or that it was subject to a bona fide dispute. If she proves either, Section 3-311 will apply. If she can prove neither, then there is no consideration for your promise not to sue. In order to show that a bona fide dispute exists, Ms. Frost must show that there is an honest belief by the debtor that there is a dispute concerning the proper amount of whether the amount is owed. Here, in your discussion with Ms. Frost, she claimed that she had compensated you fairly for your hourly work. However, under the terms of your agreement, you were to collect half of the money paid to Willing, Mayer and Frost from Mr. Hoover's royalties. Ms. Frost has not denied the validity of the agreement. In fact, you were sent the first quarter's royalty payment in accordance with the agreement. Assuming that the terms of the agreement itself can be proven, it seems unlikely that Ms. Frost can show that there is a bona fide dispute. She claims that she did not agree to pay you a "windfall," but the terms of the agreement do not address fair value compensation or windfall. They merely give you a right to half of the collection of royalties and fees from Mr. Hoover. Furthermore, [M]s. Frost has not denied the validity of your agreement or asserted that your recovery was to be limited to the old hourly rate arrangement. Ms. Frost claimed

in her letter that a dispute existed, but she has never identified which portion of your agreement was invalid or disputed. Thus, unless we are unable to prove the terms of the agreement, it seems clear that there is no bona fide dispute.

Therefore, I believe that we can show that the debt is both liquidated and not subject to a bona fide dispute. If we are able to show this, Section 3-311 will not apply and under Section 1-207, your reservation of rights will be effective and suit on the remaining balance will be effective.

(ii) Receipt of Payment Requirement

Lastly, in order for Section 3-311 to apply, Ms. Frost must show that you received payment from the check. Clearly, she will be able to show this requirement since your secretary has endorsed and deposited the check. Therefore, should the other two requirements be met, 3-311 will apply.

Additional Requirements

3-311 (b)

Assuming that Ms. Frost can show that the requirements for the application of 3-311 are met under the previously described tests, she must show that there was a conspicuous statement that the check was offered as payment in full. As discussed previously, she will be able to show this due to the writing on the check and the accompanying letter.

As a result of the foregoing analysis, I believe that we will be successful in defeating application of 3-311. Despite the fact that this provision clearly applies to checks tendered as full payment in satisfaction of a debt, Ms. Frost will be unlikely to show that the debt is a liquidated amount or that it is not subject to a bona fide dispute. While she can prove all the other provisions, this requirement bars application of 3-311, and relegates the dispute to judgment under 1-207, which would allow you to reserve the rights by indicating your desire to do so on the check at the time of endorsement. Given that this is your most desirable option and because I believe there is a strong likelihood of success in refuting the claim that 3-311 applies, I believe this would be the best course to follow. It is possible that

this option will fail. In that case, you will be limited to the recovery of the $128,000, and you will have taken the most complex route to litigation available among your options. This will incur more expense than the other options, but offers the highest reward.

Option 2: Tender Back the Check to Ms. Frost and Sue on the Entire Debt

As detailed above, this option would not be an attractive option if the check were to be litigated under Section 1-207, because it is clear that that [sic] provision allows you to reserve your rights to sue while still keeping the tendered amount. However, were a court to find that section 3-311 to [sic] apply, in order to sue on the entire debt, the check must be tendered back to Ms. Frost.

In the previous section, I outlined the requirements for section 3-311 to apply. Under requirement 3-311(a)(iii), Ms. Frost must show that you received payment. If Ms. Frost can show that (and she can) as well as the other requirements under 3-311(a) and (b), the claim will be discharged and you will be forced to take the $128,000 in full satisfaction.

The only way you will be able to undertake this option (of tendering back the check and suing on the entire debt), would be to show that subsection 3-311(c) applies. This section allows you to avoid a discharge by showing that an inadvertent accord and satisfaction has occurred. In order to show that 3-311(c) applies, you must prove one of the two exceptions is present. If we cannot prove this, then the claim will be discharged. If we can prove one of the exceptions, then we may tender the check back to Ms. Frost and sue on the entire debt.

3-311(c)(1) – Disputed Debt Communication

This section allows a claimant to avoid inadvertent accord and satisfaction if the claimant is an organization with a very large number of customers and that organization advises its customers by a conspicuous statement that disputed debts must be sent to a particular person, office or place.

I do not think this exception will apply. First, according to my knowledge of your operations, your business does not have a large amount of customers, as you are a solo practitioner. Additionally, as far as I am aware, you have not notified any of your customers that disputed claims must be sent to a particular person, office or place. It appears that your secretary handles all methods of payment, included disputed claims. As such, this exception will not apply.

3-311(c)(2) – 90-day grace Period

This section allows a claimant to avoid an inadvertent accord and satisfaction by tendering repayment to the person against whom the claim is asserted within 90 days. Therefore, under 3-311(c)(2), if you tender payment back to Ms. Frost w/in 90 days, you will be able to sue on the entire claim unless Section 3-311(d) applies.

3-311(d) – Notice Defeating Exceptions

Because I have established that Section 3-311(c)(1) will not apply as an exception, I will analyze this section according to its application to 3-311(c)(2). 3-311(d) acts to bar an assertion of inadvertent accord and satisfaction when the claimant or agent of the claimant having direct responsibility with respect to the disputed obligation cashes the check with actual knowledge that it was offered in full satisfaction. If this knowledge is established, the claim will be discharged even if the claimant can show an exception to discharge under 3-311(c).

In regards to the application of 3-311(d) to your present case, it appears that the endorsing and cashing of the check will not allow you to retender the payment to Ms. Frost in order to sue on the entire debt if it was done with knowledge by you or if your secretary is an individual having direct responsibility with respect to disputed claims.

Whether your secretary Constitutes an Individual with Direct Responsibility

While a judge could find that your secretary possesses such responsibility, I believe that he will not. Subsection (d) does not apply to every one of your agents. While your secretary is in charge of opening your mail and has received instructions allowing him to

endorse checks and contest disputed amounts, it is unlikely that he will be found to have direct responsibility. For instance, your secretary endorses and disputes amounts only at your direction. Furthermore, when doing so, he indicates that "James Breene protests the terms." This indicates that you are the individual in the firm who is directly responsible with respect to the dispute. On a practical level, this is also supported by the fact that you earn the fees, you are the individual that has the most knowledge with regards to the disputed agreement and the work and time spent on a particular project. Also, the dispute arose in regards to your wages, not the wages of one of your employees. I believe that these facts would show that 3-311(d) would not bar you from the option of retendering the check and suing on the entire amount. According to what you've told me, it appears that you would not be charged with knowledge of the accord and satisfaction, because your secretary endorsed and deposited the check before you were aware of its existence.

This option is a risky option. Although I am very confident that we would be able to prove that you are owed $240,000, it is likely that you will not receive the full amount of payment from Willing, Mayer & Frost due to their financial troubles. If that is the case, you may very well not receive the initial payment tendered by Ms. Frost, and you will incur legal expenses. However, assuming that you will be successful in collecting from Ms. Frost, this option is attractive if we are not able to keep the initial $128,000 and sue for the rest.

Option 3: Retain the Check and Do Not Sue on the Matter

As indicated above, it is possible that a court would find that the provisions of 3-311 would continue to apply to the disputed accord and satisfaction. Ms. Frost will likely be able to prove all of the elements entitling the dispute to resolution under the provisions of 3-311 except for the requirement under 3-311(a)(ii). If, however, she can show that the claim was unliquidated or subject to bona fide dispute, 3-311 will apply [,] thus [,] your reservation of rights would be ineffective.

Should 3-311 apply, you may be able to tender back the check under 3-311(c) within 90 days and sue for the entire debt. However, it is possible, though unlikely, that Ms. Frost will be able to show that the requirements for inadvertent accord and satisfaction were not

met and that your secretary was an individual having direct responsibility and would thus be charged with knowledge of the accord. In that case, your claim would be barred and you would be relegated to the option of retaining the check without the ability to sue for the rest of the amount due.

As you know, this is the safest option. Though you will not be able to collect the balance of your fees, you will not be incur[ring] much in the way of legal costs. Given that it is uncertain as to whether you can even collect the balance of your fees from Ms. Frost due to her impending insolvency, you may feel that you do not wish to risk frittering away what you've already collected from Ms. Frost for a chance to collect the entire balance. I believe that this option is far inferior to Option #1, which I believe provides a sound case, but depending on your level or [sic] risk tolerance and the state of Ms. Frost's finances, you may prefer this option over retendering and suing for the entire debt (Option #2).

Recommendation

I would recommend that we attempt to employ Option #1. I believe we have a strong case that Section 3-311 does not apply to your [sic] attempted accord and satisfaction in your case for the reasons stated above. Furthermore, we can file this suit without major costs, and re-evaluate if it is denied on summary judgment. If you do not feel as strongly as I do about this option, I would advise you to retain the check and not sue further, especially if Ms. Frost's finances further deteriorate. This, of course, depends on the state of her business. However, as I stated above, you would retain $128,000 without incurring legal expenses, which may be more than you can recover under Option #2.

I hope this opinion letter has clarified the likelihood of success of all of these options and that you are better able to assess which routes you would like to pursue. Please keep me informed as to what actions you would like me to take on this matter.

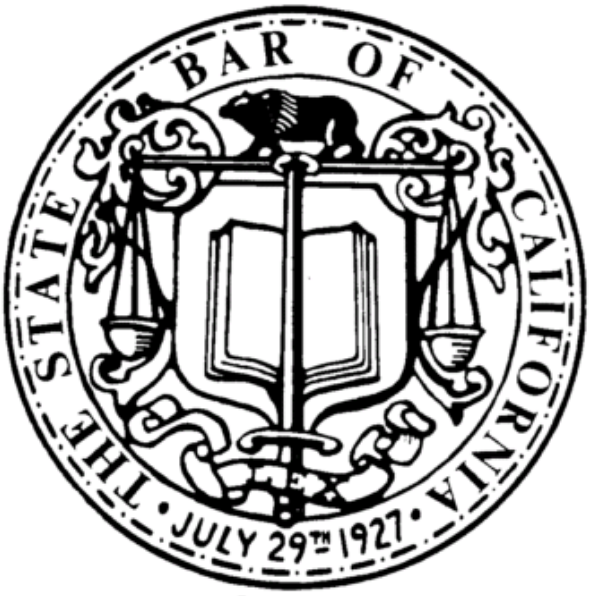
Sincerely,

_____

Lynn R. Dawson

Attorney at Law

End of Exam



California
Bar
Examination

Performance Tests
and
Selected Answers

February 2007

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2007 California Bar Examination and two selected answers to each test.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

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TUESDAY AFTERNOON
FEBRUARY 27, 2007

California
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Examination

Performance Test A
INSTRUCTIONS AND FILE

PHENOM NETWORKS v. JASMINE SEMICONDUCTOR

FILE

PHENOM NETWORKS v. JASMINE SEMICONDUCTOR

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Reed, Newcomb and Lev

Attorneys and Counselors at Law
Menlo Parque, Columbia
"First In Technology"

MEMORANDUM

To: Applicant

From: Susan Reed

Date: February 27, 2007

Re: **Phenom Networks v. Jasmine Semiconductor**

We have finished drafting our client Jasmine Semiconductor's ("Jasmine") complaint against Phenom Networks ("Phenom") for fraud and theft of trade secrets. I have just been called by Phenom's litigation counsel to inform me they have made a motion to prohibit disclosure to anyone, including the court, of a recorded voicemail conversation we have of Phenom's Executive Vice President and its attorney discussing their attempt to steal Jasmine's technology and personnel. The voicemail was left in a call to Valerie Wong, Jasmine's in-house legal counsel.

Please prepare our memorandum of points and authorities in opposition to the motion for a preliminary injunction, following our attached guidelines. Your memorandum should present our best arguments, and at the same time, address each of the arguments made in Phenom's brief to preclude our use of the voicemail as evidence. There are obvious issues of professional responsibility involved in this whole mess. Do not concern yourself with any such issues. Another associate is dealing with those issues. I will take care of preparing Ms. Wong's declaration authenticating the transcript of the voicemail. The transcript will be attached to her declaration, and you may use the contents of the voicemail in your memorandum.

Reed, Newcomb and Lev
Attorneys and Counselors at Law
Menlo Parque, Columbia
"First In Technology"

MEMORANDUM

To: Attorneys

From: Executive Committee

Re: **Persuasive Briefs and Memoranda**

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs including briefs in support of or in opposition to motions (also called memoranda of points and authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer shall conform to the following guidelines.

All of these documents shall include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated briefly, cogently, and accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position.

Following the Statement of Facts, the Argument should begin. The firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER:** COLUMBIA HAS PERSONAL JURISDICTION. **PROPER:** DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Associates should not prepare a table of contents, a table of cases, a summary of the case or the index. These will be prepared, where required, after the draft is approved.

TRANSCRIPT OF INTERVIEW OF VALERIE WONG

To: Jasmine and Phenom Pre-Litigation File

Date: February 20, 2007

Re: Interview of Valerie Wong, Jasmine Senior Director of Legal and Business Affairs

Susan Reed ("Reed"): Thanks for coming right over, Valerie. You covered a good bit of the background when you called, and I talked to my patent partner to learn about Jasmine, its dealings with Phenom, and the nondisclosure agreement that you had with Phenom.

Valerie Wong ("Wong"): Yes, after two years of development, we were ready to commercialize the technology we call TocTec into a product for market. Phenom, which had been working in the same technology, and guessed we were way ahead of them, wanted to buy it, and take over the key developers. So, we began a process of showing them just enough so that we could get full partnership, producing the product, not just a buyout. We wanted a full share in development and to keep control of our product. Phenom kept putting off negotiations on the eventual deal and instead wanted even more product info. We resisted, finally saying no to most of their requests. We never got very far with negotiations on the joint development contract that we wanted, but Phenom did accept and sign the nondisclosure agreement. So, on that basis we did go ahead with restricted, tightly controlled sharing of information. That disclosure is what's been going on the last few weeks. Then I got this call from them last night.

Reed: Let's get right to the voicemail.

Wong: I've never seen, I should say, never heard anything like it. I've got my answering machine. Do you want to hear it, or read the transcript?

Reed: Both. I'll read it while you set up. And of course I'll keep a copy of the written transcript.

Wong: And I've made a couple of annotations on it. Since I know both of them on the tape and know all of the others mentioned, I identified each speaker and added a note on who the others are.

Reed: OK, Valerie, I've read it. All set. I may need to hear it to believe it too.

* * * * *

[Listening to voicemail]

* * * * *

Reed: Valerie, it's still difficult to believe what they're saying, even after hearing it. What was your reaction?

Wong: I did not understand it. Imagine it. I listen to a message, just saying that Gross and Banerjee had called. Then about 5 seconds of silence -- and I was reaching to erase it then -- when all of a sudden, they're still talking. I thought that they were talking to me, at first that it was Gross again complaining that I'm going too slow, being too careful. Gross was always telling me that, and trying to get me to accept their boilerplate nondisclosure language or open up more technology before our restricted nondisclosure agreement was signed. We had refused, and, as I said, they signed our nondisclosure agreement before there had been any disclosure.

Reed: Yes. But . . . .

Wong: The first time I listened to the entire message in total confusion . . . thinking, what is this? Why are they telling this to me? It really had not sunk in. I had just come from a meeting with Barney, so I knew he was there, and I ran and dragged him to my office.

Reed: Barney is . . . ?

Wong: Barney Ng, our CEO. Halfway through the voicemail he burst out, "The sleazebags don't know they're still on your voicemail!" I actually think that's the moment

I finally accepted what it was. Until then, I guess I resisted, thinking this may be a joke, a dream. Everything just took off, exploded, it seemed.

Reed: How? I mean, how else?

Wong: Barney takes off the second we hear the dial tone, the end. Runs to Kathleen's office, oh, Kathleen Schaus, the one they talk about in the voicemail, she's manager of our TocTec project.

Reed: My patent partner told me about Kathleen. He had worked with her in the patent application for TocTec. What did Barney do?

Wong: Kathleen wasn't there, but Barney looked at her files, messages. It was even worse than we'd heard on the voicemail. Kathleen had sent Banerjee almost the entire patent disclosure file -- our most important intellectual property, and the very technology that we had refused to let them copy and many more details than we ever showed them. I'd spent weeks negotiating a nondisclosure agreement allowing the Phenom engineers a very limited look-see at what our technology could do. We denied them any access to the patent application. There had been many conditions to prevent them from stealing our technology or people.

Reed: Such as?

Wong: Whatever they viewed could not be copied or removed. We blacked out the names of our employees working on TocTec. We did let them see some confidential trade secrets under the nondisclosure agreement. Mostly they only saw the technology in operation, what it could do, and we tried to withhold as much as we could of how it worked. Keeping that technology and time-to-market advantage is what we were protecting in the nondisclosure agreement.

Reed: You mentioned the engineers?

Wong: Yes. The nondisclosure agreement prohibited them from contacting our key engineers, and all meetings with our personnel had to be in the presence of our human relations director. We denied them important personnel information, such as pay, stock

options, benefits, that could then be used to entice them away from us with their knowledge of our technology, if we did not conclude a joint development contract. Kathleen gave it to them, all of it.

Reed: Valerie, what do you think Gross and Banerjee are talking about where they say it would be ok if the deal closes?

Wong: I guess that if they paid for our technology, there would be no problem, even though it doesn't sound like that was what they were going to do. Instead they planned to steal our technology and recruit the right engineers, and then they could beat us in the marketplace . . . they have their economic might, since they are a much bigger company than we are, as just a start-up, plus they then have the new revenue stream of a fabulously successful product. No one else in the industry will touch our technology; it's tainted, too late, and at best a guaranteed fight with Phenom. We have a lawsuit, but no product to the market; they drag it out, and eventually we'd have to accept a bitter settlement, or just walk.

Reed: The big boys in Tech Valley play real hardball.

Wong: They were just trying to mislead us long enough to clean us out, and then dare us to fight.

Reed: With this, we may change the usual scenario. Let me see if I've got anything more. There's little doubt from what's said that Gross and Banerjee know that what they are doing is fraudulent. Gross is even counseling Banerjee, preparing for the cover-up.

Wong: And the mention of blackmail and leverage, is, I guess, their worry that if we catch them, then we'll . . . threaten to smear them, and use it to up our contractual demands. They assume that we'd act like them.

Reed: Meantime, Kathleen's gone, right?

Wong: Yes. Her office is locked up. Security has never allowed her back in. We are taking stock of her damage, tracing everything she sent over to Phenom. I'll have a

report for you and Barney by tomorrow. But I expect that Kathleen's already set up a new office over at the Phenom's campus.

Reed: We both have a lot to do. We will crank up and prepare to file a complaint and enjoin any use of everything they took illegally.

END OF INTERVIEW

TRANSCRIPT OF VOICEMAIL FROM KAI BANERJEE AND MATTHEW GROSS

Kai Banerjee ("Banerjee"): Valerie, hi. This is Kai Banerjee [Executive VP for Phenom]. It's a few minutes before six on Thursday, August 16th. I am here with Matthew Gross [Phenom's General Counsel]. We'd like to discuss where we go from here. Please give me a call as soon as possible.

[about 5 seconds of silence]

Matthew Gross ("Gross"): Too bad. Not there. . . . But as you said, Kai, we can use a little more time.

Banerjee: That's ok. . . Matt, you lawyers just keep this unsettled with whatever legal maneuvers you need, so we, you know, can get enough of their TocTec technology and we can get the right people in their engineering unit to quit and come with us.

Gross: Valerie's so cautious, so paranoid, that, that's not hard. If she or Ng were suspicious, she'll draft another nondisclosure agreement.

Banerjee: We took their technology on the pretense of just evaluating it, not putting it in our product . . . . But they gave it to us, you know. . . . But if it looks like we are going to get closure, and close the deal, right?

Gross: Sure, if we were to close the deal, everything's probably fine, but if they realize what we're doing, they could hold out for more. Use it as leverage, use it as blackmail.

Banerjee: That's right. So that's how I, as our project leader, can defend it, and that's how we can defend it. They gave it to us to use. If we end up having to pay Jasmine, it's no harm, no foul.

Gross: That's, that's what's going on right now. If it blows up, maybe Manuel Lopez [Phenom's Vice President for business development] gets a black eye.

Banerjee: How's that?

Gross: Sure, Manuel is our VP out there promising big option grants if their technology is transferred in advance to speed development time so time-to-market goal can be reached. That's what's going on.

Banerjee: Matt, something else. I'm getting scared, Kathleen Shaus, Jasmine's TocTec Project manager, is transferring too much. Not just the engineers' salaries and stock options, but all the product designers' personnel files, people we don't need to bring over. And this morning she sent over pretty much all of Jasmine's TocTec patent disclosures.

Gross: All at once?

Banerjee: Yeah. One super-stuffed e-mail attachment. Lopez says he'll need at least a week to get through it.

Gross: I know we asked for most of the stuff, but it's coming too fast and that can give her away.

Banerjee: That's right. What do you think, Matt, should I do something?

Gross: Yeah, call her. No, better, e-mail her, so we leave a paper trail. Make it sound polite, like, appreciate your generous courtesy, and her cooperation exceeds Jasmine's commitments, like it's all her idea. Thank her for assisting us to do our technical due diligence and that if we do it faster, it will benefit both companies — no say benefit both of us. She'll understand that. Do it now, so I can review it while I'm here.

Banerjee: OK, right now.

END OF VOICEMAIL RECORDING

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SUPERIOR COURT OF COLUMBIA
IN AND FOR THE COUNTY OF PALA

PHENOM NETWORKS,
Plaintiff,

Case No. 6586359

vs.

JASMINE SEMICONDUCTOR,
Defendant
_____/

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION TO PROHIBIT USE AND DISCLOSURE OF RECORDED ATTORNEY-CLIENT COMMUNICATION

I. Introduction

This application rests on a few, indisputable facts; it seeks emergency, preliminary relief based on inarguable, well-settled Columbia law.

Confidential communications between Plaintiff's senior corporate officer and its general counsel were surreptitiously captured and copied by the Defendant, a competitor of the Plaintiff in the aggressive high-tech industry.

The communications were plainly privileged. And counsel for Defendant could have determined in seconds that the conversation was confidential and that Plaintiff's officer and attorney were unaware that they were being electronically eavesdropped.

A brief listening to a recording of the attorney-client conversation or look at a transcript, and a simple phone call could have resolved the matter. Instead, we believe that Jasmine and its counsel have copied, transcribed, and analyzed the contents of the confidential communications.

This Court should not countenance, or indeed encourage, conduct that is so plainly in derogation of the strong policy in favor of confidentiality.

II. Statement of Facts

Plaintiff Phenom Networks (Phenom) is a publicly held company producing telecommunications equipment in Columbia. Defendant Jasmine Semiconductor (Jasmine) is a closely held private company which designs and manufactures telecommunications chips.

Phenom and Jasmine have been working separately on the development of TocTec. Jasmine offered to sell to Phenom Jasmine's relevant technology. To further induce Phenom to accept the offer, Jasmine allowed Phenom to review its technology and interview its engineering staff, without prior commitment or payment. Ultimately Phenom determined that its own technology was better and more advanced than Jasmine's, and that a superior product could be marketed sooner without Jasmine's participation.

It cannot be overemphasized that these kinds of offers, exchange of technology for review, and interchanges of technical staffs are common in the technology-based and fast developing telecommunications industry. And most end as did Phenom's

consideration of the Jasmine offer: Phenom declined Jasmine's offer to sell. We thought that the negotiations were done.

Then, two days ago, a former Jasmine engineer applied for an engineering position with Phenom and during her interview disclosed that Jasmine had surreptitiously recorded a voicemail conversation (the "Voicemail") between Phenom's Executive Vice-President Kai Banerjee[1] and its General Counsel Matthew Gross.[2]

The verbatim contents of the Voicemail are unknown to Phenom. We have neither heard the recorded Voicemail nor seen a transcript of the conversation. However, conversations between Messrs. Banerjee and Gross during the period of the negotiations with Jasmine concerned Phenom's rights and obligations in what could have been a very complicated, costly technology transfer agreement. Their conversations during this time almost certainly included Phenom's confidential assessment of Jasmine's technology, and Banerjee would have made confidential disclosures to his attorney Gross on the status of Phenom's own technical developments, its shortcomings and problems, and its timetable for getting a product to market.

During this period, Banerjee and Gross were constantly discussing whether to pursue the Jasmine offer. It would be expected that Banerjee would be disclosing confidential information comparing Jasmine's to Phenom's technology, and requesting and receiving confidential legal advice from Gross. There could not be a clearer case of confidential attorney-client communications.

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[1] Mr. Banerjee is a senior Phenom executive, second only to its Chairman and Chief Operating Officer Suhan Bizhar. Banerjee is Executive Vice-President, and Vice-Chairman of the Board of Directors.

[2] Mr. Gross is a member of the San Carlito law firm of Nemer-Fields.

III. Argument

A. This Court Should Not Permit the Inadvertent Capture of Communications That On Their Face Appear to be Subject to the Attorney-Client Privilege, And It Is Clear They Were Confidential.

The concept of confidentiality is a fundamental aspect of the right to the effective assistance of counsel. The confidentiality principle rests on the vital importance society places upon the "full, free and frank" exchange between lawyer and client, shielded from the intrusive eyes and ears of adverse parties, the government, the media and the public.

This was recently reiterated by the leading Columbia case of *State Fund v. WPS, Inc.*, 1999, where the Court of Appeal stated:

> The conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state. Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served. We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information.

The Court in *State Fund* acknowledged that its conclusion was grounded in the concern of "preserving confidentiality given the burgeoning of multi-party cases, the availability of xerography and the proliferation of facsimile machines and electronic mail *that make it technologically ever more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a facsimile machine.*" (Emphasis added.)

We are taught from first-year law school that waiver means the intentional relinquishment or abandonment of a known right. Inadvertent production is the antithesis of that concept. Phenom's lawyer might well have been negligent in failing to hit the disconnect button to terminate a conference call. But if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more

than a trivial mistake by counsel before the client can be deemed to have given up the privilege.

B. The Court May Not Require Disclosure of the Voicemail Claimed to be Privileged, And Its Contents Must Be Sealed For Purposes of this Motion.

Columbia Evidence Code Section 915 provides in part that "[t]he presiding officer may not require disclosure of information claimed to be privileged under section 954 (lawyer-client privilege) *in order to rule on the claim of privilege."* (Emphasis added.) This is the common situation on privilege determinations.

This Court can determine whether there is a prima facie case that the communication recorded between an attorney and his client is privileged without reviewing the contents of the Voicemail. Next, the Court can determine, again without resort to the privileged communication, that the attorney-client privilege has not been waived by the inadvertent disclosure by counsel.

A party need not give up the right to keep communications confidential in order to obtain judicial protection of attorney-client confidences. Listening to the Voicemail is not necessary to determine that Plaintiff has met all the elements of the test established in *State Fund v. WPS, Inc*., Columbia Court of Appeal, 1999, where the court stated:

> When a lawyer who receives materials that *obviously appear to be subject to an attorney-client privilege* or otherwise clearly appear to be confidential and privileged and *where it is reasonably apparent that the materials were provided or made available through inadvertence* . . . [t]he parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. (Emphasis added.)

Indeed, the court in *State Fund* did not resort to the contents of the documents claimed to be privileged. Instead the court relied on testimony by counsel about the contents

and purpose of documents to decide that it clearly appeared that the documents contained confidential communications.

C. Defendant Cannot Rebut the Presumption or Phenom's Affirmative Evidence that the Electronically Eavesdropped Conversation Between a Senior Officer of Phenom and its Counsel Were Privileged Attorney-Client Communications.

Columbia Evidence Code Section 917 provides that "[w]henever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential."

Additionally Columbia Evidence Code Section 952 provides that "in confidence" means a communication that "so far as the client is aware, discloses the information to no third persons other than those who are present." The section's comments make clear that so long as the client, in this case the authorized representative of Phenom, Mr. Banerjee, believed that his conversation with his lawyer was not being overheard, then their communications were "in confidence."

At the time that the Voicemail was recorded, Mr. Matthew Gross was the General Counsel of Phenom, and Mr. Banerjee was a senior Phenom executive, second only to its Chairman and Chief Operating Officer Suhan Bizhar. Mr. Banerjee, as Executive Vice-President, and Vice-Chairman of the Board of Directors, is "a person who is authorized to claim the privilege by the holder of the privilege" pursuant to Columbia Evidence Code Section 954. Their conversations must be presumed to be attorney-client communications.

Additionally, the Plaintiff has affirmatively shown that the conversations between Messrs. Banerjee and Gross during the period of the negotiations with Jasmine included, for example, Phenom's rights and obligations in the negotiations, Phenom's

confidential assessment of Jasmine's technology, and requested confidential legal advice from Gross.

Phenom has met the burden of establishing the foundation facts that its communication was "in confidence in the course of the lawyer-client relationship" requiring application of the attorney-client privilege. (Evid. Code § 917.) The presumption and proof of confidentiality will not and cannot be rebutted. There could not be a clearer case of confidential attorney-client communications.

D. Phenom Has Aggressively Defended its Privileged Communications, And a Waiver Cannot be Inferred From the Inadvertent Disclosure By Its Counsel.

Columbia Evidence Code Section 912 states the general rule that the attorney-client privilege can be waived only if the privilege holder discloses the communication or consents to the disclosure by another. "The language of the statute [Evidence Code Section 912] indicates that we are to look to the words and conduct of the holder of the privilege to determine whether a waiver has occurred." (*State Fund v. WPS, supra*.)

Jasmine will be hard-pressed to present any evidence of disclosure of the communication by Phenom. The only evidence is that presented by Phenom from Banerjee and Gross that the only time during the period of negotiations that both Messrs. Banerjee and Gross were on a telephone line was once, when they called Ms. Valerie Wong, Jasmine's Senior Director of Legal and Business Affairs. If the Voicemail was made during this call, then it was an inadvertent disclosure by counsel.

This case is clearly controlled by *State Fund v. WPS, supra*, wherein the court stated:

> Based on the language of Evidence Code section 912, we hold that "waiver" does not include accidental, inadvertent disclosure of privileged information by the attorney.

Thus, if there was an inadvertent disclosure it was by Gross's accidental operation of the telephone. There is no evidence that Banerjee or any other officer of Phenom

consented to the inadvertent disclosure. A wrongful electronic capture of privileged information is not voluntary, but coercive to the holder of the privilege.

E. Relief Sought

For the reasons set forth, Plaintiff respectfully requests (1) an order sealing the Voicemail and providing that it may not be considered, heard, or read in this proceeding, and (2) for a preliminary injunction restraining use or disclosure in any format, whether electronic or written transcript, of the Voicemail and its contents in any future pleading or proceeding.

Dated: February 27, 2007 **MADISON AND SUTRO**

Lisa Fong

By Lisa Fong, Esq.
Attorneys for Plaintiff

TUESDAY AFTERNOON
FEBRUARY 27, 2007

California Bar Examination

Performance Test A

LIBRARY

PHENOM NETWORKS v. JASMINE SEMICONDUCTOR

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA EVIDENCE CODE

§ 912. Waiver of privilege. Except as otherwise provided in this section, the right of any person to claim a privilege provided by section 954 (lawyer-client privilege) is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege.

LAW REVISION COMMISSION COMMENTS: This section states the general rule that the privilege is waived in one of two ways: the holder of the privilege may waive it by making an uncoerced disclosure, or waiver may occur by the holder's intentional consent to disclosure by a third party. If disclosure is made by the privilege holder, intent to waive the privilege is not required. Reckless, negligent, accidental, as well as conscious relinquishment by the privilege holder, can result in a waiver. In *People v. Castro*, Columbia, 1975, a court reporter was permitted to testify to a conversation which he overheard between a client and his attorney during a recess; the conversation was privileged because the client was not aware that the conversation was overheard, and "no question of surreptitious eavesdropping [was] presented," but the privilege was waived by the uncoerced, inadvertent, even unknown disclosure by the privilege holder. Under this view, inadvertent disclosures result in waiver because strict liability suffices to disclosures by the privilege holder. (8 *Wigmore on Evidence*, 3d ed., § 2326, 1940.)

* * *

§ 915. Disclosure of privileged information or attorney work product in ruling on claim of privilege. The presiding officer may not require disclosure of

information claimed to be privileged under section 954 (lawyer-client privilege) in order to rule on the claim of privilege.

LAW REVISION COMMISSION COMMENTS: Section 915 is solely applicable to claims of privilege where the information has not been previously disclosed. It has no applicability where the communication has been disclosed. In *Roe v. Superior Court*, Columbia, 1991, the Court of Appeal held that where the "confidential material has already been disclosed, the superior court did nothing to force the disclosure of previously undisclosed communications, and accordingly the superior court did not violate Evidence Code section 915." Similarly in *Klang v. Shell Oil Co*., Columbia, 1971, where an attorney disclosed to an investigating police officer allegedly privileged information, without the client's consent, the court ruled that section 915 did not apply "because the disclosure had already occurred without action of any kind by the court."

*** * ***

§ 917. Presumption that certain communications are confidential. Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

LAW REVISION COMMISSION COMMENTS: When a party asserts the attorney-client privilege, it is incumbent upon that party to prove the preliminary fact that a privilege exists. Once the foundational facts have been presented, i.e., that a communication has been made "in confidence in the course of the lawyer-client relationship," the communication is presumed to have been made in confidence, and "the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential," or that an exception exists.

*** * ***

§ 952. Confidential communication between client and lawyer. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

LAW REVISION COMMISSION COMMENTS: Whether a communication between a client and attorney is “in confidence” turns on the client’s state of mind or consciousness; the test is whether the client was aware that the communications were disclosed to persons who were not entitled to it, not whether he or she should have been aware.

* * *

§ 956. Exception: Crime or Fraud. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.

LAW REVISION COMMISSION COMMENTS: Section 956 codifies the common law rule that the privilege protecting confidential attorney-client communications is lost if the client seeks legal assistance to plan or perpetrate a crime or fraud. The crime-fraud exception expressly applies to communications ordinarily shielded by the attorney-client privilege by Evidence Code section 954.

State Fund v. WPS, Inc.

Columbia Court of Appeal, 1999

Adam Telanoff, counsel for WPS, Inc., received copies of State Fund Compensation Insurance's (State Fund) internal documents containing privileged attorney-client communications because State Fund's outside lawyers inadvertently sent them along with other documents produced for use at trial. State Fund had produced for discovery approximately 7,000 pages of documents. Erroneously included were 273 pages of "Civil Litigation Claims Summaries" prepared by employees of State Fund. The heading at the top of each claim form reads: "ATTORNEY-CLIENT COMMUNICATION / ATTORNEY WORK PRODUCT." The word "CONFIDENTIAL" is repeatedly printed around the perimeter of the page of the form.

Telanoff gave some of the privileged documents to an expert witness he consulted for the WPS matter. The expert witness then provided those documents to another lawyer who was pursuing a different claim against State Fund, who used the documents to formulate a discovery request for the production of the claims forms. Counsel for State Fund in the other case was able to trace the claims forms back to the documents produced to Telanoff. In the meantime the WPS case was tried to a jury, resulting in a verdict in favor of State Fund.

State Fund's counsel then requested that the documents be returned, but Telanoff refused. State Fund's counsel then gave Telanoff ex parte notice that he would appear and seek an order for return of the documents. The court heard arguments and testimony regarding the confidential nature of the documents, and entered its order, finding that the claims forms were privileged, were inadvertently produced, and the production did not waive the privilege. The court further found that Telanoff's refusal to return the documents was in violation of counsel's ethical obligations and imposed monetary sanctions.

The primary question presented by this appeal is what is a lawyer to do when he or she receives through the inadvertence of opposing counsel documents plainly subject to the attorney-client privilege? Before answering the abstract question posed, we must first consider the predicate issues of whether the documents here did in fact contain privileged information and whether the inadvertent disclosure of the documents resulted in a waiver of the attorney-client privilege that would excuse any use of the document by the receiving attorney.

Based on the testimony from State Fund's general counsel it clearly appears that the claims forms contained confidential communications between State Fund and its counsel. She testified that the forms were intended by State Fund as a means of confidential communications between its claims department and its in-house lawyers. The forms were used by the legal department to communicate with claims agents, to identify issues, and then for the legal department to communicate the action that the agents should take in cases. The claims forms were also used by the legal department to assess the strengths and weaknesses of cases and then to communicate this to management of State Fund. According to the general counsel the claims forms typically contained summaries of counsel's assessments of the outcome of cases, settlements, and legal positions.

Evidence Code section 912 provides that the privilege is waived if the holder of the privilege discloses the communication or consents to the disclosure by another. The statute clearly provides that it is the holder of the privilege, in this case the client State Fund, who may waive the privilege, either by disclosing or conduct that consents to the disclosure. The language of the statute indicates that we are to look to the words and conduct of the holder of the privilege to determine whether a waiver has occurred. In this case, it is clear that State Fund did not itself disclose to appellants the claims summaries, but rather its counsel effected the inadvertent disclosure. We therefore focus on whether any statement or conduct of State Fund indicates that it consented to counsel's disclosure.

State Fund had no intention to disclose nor any role in the disclosure by its counsel. There is nothing indicating that State Fund participated in selecting the documents for production in the WPS litigation. It was unaware of the inadvertent disclosure and in no way demonstrated its consent to the disclosure. Also, the promptness with which counsel for State Fund moved to secure return of the documents indicated that there was no intent on the part of State Fund to waive the privilege. It is clearly demonstrated that State Fund had no intention to voluntarily relinquish a known right.

Based on the language of Evidence Code section 912, we hold that "waiver" does not include accidental, inadvertent disclosure of privileged information by the attorney. Telanoff invites us to adopt a "gotcha" theory of waiver, in which an underling's slip-up in a document production becomes the equivalent of actual consent. We decline. The substance of an inadvertent disclosure under such circumstances demonstrates that there was no voluntary release.

Telanoff contends that even if the documents were privileged and the privilege was not waived, that sanctions were not properly awarded because his conduct was not clearly proscribed by the law of this state. He contends that the case of *Aerojet Corp. v. Transport Indemnity* (Columbia, 1993) is substantially similar to the one before us and compels a reversal of the sanction order. In *Aerojet,* an attorney received a packet which included a document prepared by an opposing counsel. The document was not marked confidential, but it was "undeniably a privileged communication between opposing counsel and his client." The document revealed the existence of a witness who would have knowledge about matters involved in the lawsuit. The receiving attorney kept receipt of the document secret, and then deposed the witness. After the trial, in which a jury found against the client of the receiving attorney, the court imposed monetary sanctions for failure to disclose receipt of the document. The Columbia Court of Appeal reversed the sanction order.

Telanoff relies on this language from *Aerojet*:

> We think that the manner in which counsel obtained the information in this case -- through documents inadvertently transmitted to him -- is irrelevant to resolution of the issue. Assuming no question of waiver, the problem would be no different if counsel had obtained the same information from someone who overheard the matter in a restaurant or a courthouse corridor, or if it had been mistakenly sent to him through the mail or by facsimile transmission. Once he had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands that he utilize his knowledge about the case on his client's behalf. *Aerojet Corp. v. Transport Indemnity, supra.*

Without adopting this broad statement, we note that the actual basis of the Court of Appeal's decision in *Aerojet* was that the information used by counsel, the existence and identity of a potential witness, was non-privileged and would have been subject to discovery. As the court itself stated in *Aerojet*:

> Consequently, whether the existence and identity of a witness or other non-privileged information is revealed through formal discovery or inadvertence, the end result is the same: the opposing party is entitled to the use of that witness or information. This fundamental concept was lost in the skirmish below. *Aerojet Corp. v. Transport Indemnity, supra.*

The facts in *Aerojet* are simply very different from those before us. The claims forms were privileged and conspicuously labeled as confidential. State Fund has demonstrated that the claims forms have been disseminated to other lawyers, and unless preventive measures are taken, State Fund could expect to be regularly subjected to requests for production in other cases.

We are particularly concerned with preserving confidentiality given the burgeoning of multi-party cases, the availability of xerography and the proliferation of facsimile machines and electronic mail that make it technologically ever more likely that through inadvertence, privileged or confidential materials will

be produced to opposing counsel by no more than the pushing of the wrong speed dial number on a facsimile machine.

Accordingly, we hold that the obligation of an attorney receiving privileged material is as follows: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact, and refrain from using and return the privileged material.

The conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state. Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served. We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information.

The order imposing sanctions is affirmed.

Hopwood Oil Exploration v. Nahama Exploratory Company

Columbia Court of Appeal, 1988

The basic issue involved in this appeal is the proper standard for determining whether the party seeking discovery of an otherwise privileged attorney-client communication has made the prima facie showing of crime or fraud required to negate the privilege.

Respondent Nahama Exploratory Company (Nahama) claims it had unique, confidential geological ideas based on many years of research and analysis to develop underground oil and gas reserves in an area known in the industry as the Bakersfield Arch controlled by Tenneco Oil Company (Tenneco). To persuade Petitioner Hopwood Oil Exploration (Hopwood) to participate in a large-scale exploration venture in the Arch area, Nahama disclosed confidential information about five prospects on Tenneco land and other prospects on adjoining property. Nahama delivered maps, montages and other proprietary data to Hopwood for its use in evaluating the proposal.

After Nahama introduced geologists of Hopwood to Tenneco, Hopwood's chief geologist called Nahama and said that Hopwood was not interested in the Nahama proposal.

Nahama learned of a Hopwood-Tenneco exploration agreement when it was announced in trade publications months later and threatened to sue because of its exclusion from the exploration agreement, claiming that based on the discussions of the parties and the industry custom that there was an implied agreement that Nahama would participate in the Tenneco venture.

Because of the threat of litigation, Mike Brownhill, Hopwood's vice president in charge of exploration, asked Frederick Dorey, Hopwood's general counsel, to assist Brownhill in investigating Nahama's claims. Sometime during the investigation, Dorey sent a report to Hopwood officers regarding the investigation.

Thereafter, Rod Nahama met with Brownhill, Dorey, and Hopwood's chief geologist to discuss each side's position. After the meeting, Brownhill prepared a memorandum summarizing the meeting and sent copies to other Hopwood personnel for their evaluation. General counsel Dorey reviewed and approved the memorandum.

At the conclusion of the investigation and with the approval of general counsel Dorey, Brownhill wrote Nahama on December 23, 1985, denying that Nahama had any right to participate in the Tenneco agreement and stating various reasons for his conclusion. Nahama contends the December 23, 1985 letter contains several misrepresentations of fact which were aimed at convincing Nahama that the confidential information Nahama provided to Hopwood did not contribute to Hopwood's decision to proceed with the Tenneco exploration agreement. Nahama sought discovery of the report prepared by Dorey, Hopwood's general counsel, and the memo by Brownhill, prepared at the direction of general counsel Dorey, and describing the meeting with Nahama.[1]

Respondent court granted the motion finding Nahama had made a prima facie showing of fraud so the attorney-client privilege did not apply.

To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer "were sought or obtained" to enable or to aid one to commit or plan to commit a crime or fraud.

Mere assertion of fraud is insufficient; there must be a showing that the fraud has some foundation in fact. A prima facie case is one which will suffice for proof of a particular fact unless contradicted and overcome by other evidence. In other words, evidence from which reasonable inferences can be drawn to establish the fact asserted, i.e., the fraud.

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[1] The contents of these documents have not been disclosed to either the trial court or this court. Columbia Evidence Code § 915.

Hopwood submits Nahama must show each element of a fraud cause of action to make a prima facie case -- a false representation as to a material fact, knowledge of its falsity, intent to defraud, justifiable reliance and resulting damage. Since Nahama was not misled by the allegedly false statements in the December 23 letter, Hopwood argues there is no showing of reliance or damages by Nahama.

Hopwood's argument, however, misses the point. Evidence Code section 956 does not require a completed fraud. It applies to attorney communications sought to enable the client to plan to commit a fraud, whether the fraud is successful or not. Moreover, we are not reviewing the merits of a fraud cause of action (none of the causes of action allege a fraud) but rather we are reviewing the merits of a discovery order to determine if Nahama will have access to communications between Hopwood and its attorneys to aid Nahama in proving its causes of action. Without passing judgment in any way on the truth or falsity of the fraud allegations, it is entirely possible that Hopwood could have planned to commit a fraud when it investigated and sought legal advice from its attorneys on Nahama's claim in November 1985, i.e., that Hopwood intended to use the attorney's advice to avoid liability to Nahama by falsely representing the facts concerning the use of Nahama's confidential data in putting together the Tenneco deal. If this is shown, then Hopwood has forfeited the benefits of the attorney-client privilege for discovery purposes even though Nahama has not shown at this stage of the proceedings that it relied on and suffered damages from the misrepresentations contained in the December 23 letter.

We conclude that because section 956 applies where an attorney's services are sought to enable a party to plan to commit a fraud, the proponent of the exception need only to prove a false representation of a material fact, knowledge of its falsity, intent to deceive and the right to rely.

Nahama points to several alleged misstatements in the December 23 letter. The first statement reads: "The only proposals for a joint venture with Nahama that were considered by Hopwood were your suggestions for participation in Tejon

Ranch, the Arroyo Hondo, and English Colony exploration ventures." Nahama claims that Hopwood in fact considered additional areas for exploration that were proposed by Nahama.

Nahama presented documents received from Hopwood in response to Nahama's requests to produce that referred to three other prospects identified by Nahama. In addition, the documents showed Hopwood had prepared financial analyses of these additional prospects. Also, confidential maps and documents which were returned to Nahama were cut up, pasted, colored, marked up and annotated. Hopwood did not explain the alterations to Nahama. Nahama presented a map prepared by a Hopwood geologist that outlined areas for exploration that is substantially the same as the area outlined and recommended on the Nahama maps.

The next challenged statement reads: "After we declined your suggestions for the joint ventures, Hopwood determined to focus their onshore Columbia exploration efforts on the Stevens Sand within the Bakersfield Arch area. The major landowner in this area is Tenneco. Accordingly, Hopwood contacted Tenneco . . . ."

Nahama interprets the paragraph to represent that Hopwood decided to go to Tenneco only after it had rejected Nahama's proposals. That representation is belied by documents prepared by its geologists stating that meetings with "Nahama produced very attractive prospects" and that these prospects were "currently under discussion between Nahama and Tenneco." And that "we understand that Tenneco does not know about this attractive play which has been identified on their land by Nahama. Reserves could be as high as 50 million barrels at a risk of one in five."

This evidence supports the conclusion that Hopwood intended to deceive Nahama into believing that Nahama's confidential information had nothing to do with the Tenneco agreement. It constitutes a prima facie showing the letter was an attempt to defraud Nahama and to dissuade it from pursuing its claims.

Finally, Hopwood contends that, even assuming a prima facie showing of fraud was made by the misrepresentations contained in the December 23 letter, Nahama did not establish that Hopwood engaged in the attorney-client communications in furtherance of the fraudulent scheme. In this case, Nahama proved that the Hopwood communications with counsel were made as part of the investigation that resulted in the fraudulent December 23 letter. This established the reasonable relationship between the subject matter of the fraud and the privileged communications. Mr. Dorey, Hopwood's corporate counsel, was made a member of the team investigating Nahama's claims to which the December 23 letter responded. This evidence permits a reasonable inference that the fraudulent scheme reflected in the December 23 letter evolved from the privileged communication.

We emphasize, again, that our holding is not to be construed in any way as an indication that the fraud inferences are true -- only that they exist from the present record.

The discovery order is affirmed.

Answer 1 to Performance Test A

1)

Attorney Applicant
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Menlo Parque, Columbia
Attorneys for Defendant

SUPERIOR COURT OF COLUMBIA

IN AND FOR THE COUNTY OF PALA

PHENOM NETWORKS,

Plaintiff

Case No. 6586359

vs.

JASMINE SEMICONDUCTOR,

Defendant

_____/

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION TO PROHIBIT USE AND DISCLOSURE OF RECORDED ATTORNEY-CLIENT COMMUNICATION

Statement of Facts

Jasmine Semiconductor is a small start-up company that has developed a breakthrough technology called TocTec. Phenom Semiconductor is a large, publicly traded company that worked on the same technology but had not yet achieved the results that

Jasmine had.

Phenom represented to Jasmine that it was interested in buying the TocTec technology and entered into negotiations with Jasmine regarding the acquisition of that technology. Jasmine was hesitant to reveal too much of the technology but was interested in a deal with Phenom so Jasmine began showing Phenom just enough of the technology to entice Phenom to enter into an agreement. Jasmine was interested in a partnership with Phenom, but not in an [sic] straight buyout of TocTec technology. Although Phenom continued to push for more disclosure, Jasmine refused several requests, attempting to protect its trade secrets, and made Phenom sign a nondisclosure agreement.

Jasmine attempted to prevent Phenom from removing any documents relating to the technology, from gaining knowledge of the names of key employees and engineers or with respect to the contract and personnel information of such engineers in order to prevent Phenom from stealing the technology and/or their important employees. Unbeknownst to Jasmine, however, Phenom was actually in the process of acquiring detailed information regarding the identity of the engineers, their salaries and stock options, the designer's personnel files, and TocTec patent disclosure that Jasmine had made through the theft of such information by Kathleen Schaus, a former employee of Jasmine and current employee of Phenom.

Jasmine was alerted to Phenom's fraudulent and criminal activities on August 16th when Kai Banerjee, the Executive VP of Phenom, left a message for Ms. Wong, Jasmine's Senior Legal Director. The message began as an ordinary message, requesting that Miss Wong contact Banerjee regarding the ongoing negotiations but then continued. Ms. Wong was not at first aware of what was happening and asked Barney Ng, Jasmine's CEO, to listen to the message with her. Upon a second listening with Mr. Ng, it became clear that Banerjee had failed to disconnect the phone after leaving the voicemail for Ms. Wong and had continued to talk with Mr. Gross, Phenom's in-house counsel, regarding the situation with Jasmine. The conversation revealed that Phenom had taken Jasmine's technology on the pretense of evaluating it but had actually been putting in into their own product. In addition, the conversation also revealed that Kathleen Schaus, an employee of Jasmine at that time, had been stealing confidential information from Jasmine and sending it to Phenom.

Jasmine immediately fired Kathleen and informed security not to allow her back into the building. However, the damage had already been done. The TocTec technology is now tainted and Jasmine has been unable to promote it to anyone else in the industry as acquisition of the technology will result only in a fight with Phenom. Jasmine has filed a complaint against Phenom for fraud and theft of trade secrets and Phenom has now filed a motion to prohibit the disclosure of the message left on Ms. Wong's voicemail, claiming that the message is protected by the attorney-client privilege.

This brief presents Defendant Jasmine Semiconductor's arguments in opposition to that motion.

Argument

The Recorded Communications Are Not Privileged Because Phenom, Through the Actions of Banerjee, Waived its Privilege.

Under Columbia Evidence Code Section 912, the right of any person to claim a privilege provided by Section 954 is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to a disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure.

Further, according to the comments of the law revision commission, if disclosure is made by the privilege holder, intent to waive the privilege is not required. Reckless, negligent, accidental, as well as conscious relinquishment by the privilege holder can result in waiver. For example, in People v. Castro, the court found waiver of privilege where a court reporter overheard a conversation between a client and his attorney during a recess even though the client was not aware that the conversation was overheard and no question of surreptitious eavesdropping was presented.

First, there is no indication of coercion and Phenom has made no assertion that the disclosure was in any way coerced. Banerjee voluntarily made the phone call to Ms. Wong, counsel for Jasmine. Banerjee knew that he was being recorded as he intended to leave a voicemail. Banerjee failed to disconnect the call, allowing the recording to continue. Neither Jasmine nor Ms. Wong took any action to cause the continued recording of the conversation between Banerjee and Matthew Gross. In fact, Ms. Wong did not even realize what was going on and that the conversation had been unintentionally recorded until she had listened to it for a second time with Barney Ng, who pointed out that they must not have known that they were still on voicemail when they continued to discuss the matter.

Second, no intent is required on behalf of Banerjee or Phenom to waive the privilege. While Banerjee may have been unaware that the conversation was still being recorded, as the client in Castro was unaware that the court reporter could overhear his conversation with his attorney, a lack of intent or even knowledge that the conversation is being overheard does not prevent the waiver of the privilege. Consent is manifested by any conduct on behalf of the holder. Here, Banerjee voluntarily made a phone call to opposing counsel and failed to ensure that the phone had been disconnected prior to continuing in a conversation regarding the case with his attorney. Although the information may have concerned the case and Banerjee may have intended that discussion to be confidential, the conduct on behalf of Banerjee, the holder of he privilege, resulted in a waiver of the privilege.

Even if the Disclosure was Inadvertent, It Constitutes a Waiver Because It Was Not Made By Counsel But Rather Was Made by Banerjee, Acting on Behalf of Phenom, the Holder of the Privilege.

Phenom argues in its brief that a waiver cannot be inferred from the inadvertent disclosure by its counsel. Phenom relies on State Fund for this argument and while State Fund does stand for the proposition that inadvertent acts by counsel do not constitute waiver, this is not a case where the attorney acted independently to make an inadvertent disclosure. State Fund does not discuss cases such as the present case in which the client, the holder of the privilege, him or herself engages in conduct consistent with waiver.

Contrary to State Fund, the comments to Section 912 point out that under the view of the court in People v. Castro, as accepted by the law revision commission, an uncoerced, inadvertent and even unknown disclosure by the privilege holder results in

waiver because strict liability suffices to disclosures by the privilege holder.

Phenom argues in its brief that the disclosure was inadvertent and thus, under State Fund, it does not constitute a waiver of the privilege. However, State Fund applies to cases in which the inadvertent disclosure is made by the attorney. The court clearly states that "we are to look to the words and conduct of the holder of the privilege to determine where a waiver has occurred." The court found that because State Fund had no intention of disclosure nor any role in the disclosure by its counsel, the inadvertent disclosure did not result in a waiver. As Phenom points out, the public policy behind this rule is to allow for full disclosure by clients to their counsel without fear that an inadvertent error by its counsel could result in the waiver of privileged information. Nothing in State Fund indicates that this same rule does or should apply to a situation in which the client does play a role in the inadvertent disclosure of privileged information. In fact, based on the commentary following Section 912 as discussed above, where a client makes an inadvertent disclosure, strict liability results in a waiver of privilege for such disclosures.

First, as discussed above, there was no coercion in this case.

Second, Banerjee, as a representative for Phenom, is responsible for, or at the very least played a role in, the disclosure. Banerjee is the one that made the call to Valerie in the first place. Banerjee further requested that Valerie give Banerjee a call as soon as possible in response to the message. Thus, the evidence indicates that Banerjee initiated the call and left the message for Valerie. Banerjee should have then ensured that the call had in fact been disconnected before continuing the conversation with Matthew Gross, counsel for Phenom. At the very least Banerjee played a role in the disclosure, even if it was inadvertent, and the disclosure was not based solely on the negligence or error of Phenom's counsel.

As such, State Fund does not apply in this case and under Section 912 of the Columbia Evidence Code, the disclosure results in waiver because strict liability applies to even inadvertent and unknown disclosures by the privilege holder.

Section 915 of the Columbia Evidence Code Does Not Operate to Bar Disclosure of the Allegedly Privileged Recorded Communications Because the Disclosure Has Already Occurred Without Any Action By the Court.

Phenom also argues in its brief that the court may not require disclosure of the voicemail and that its contents must be sealed, relying on Section 915 of the Columbia Evidence Code and State Fund. Section 915, however, states only that the court may not require disclosure of information claimed to be privileged in order to rule on the claim of privilege. Phenom has attempted, in its brief, to improperly broaden this rule in order to prevent the court from hearing the communication in order to rule on privilege in this case.

The comments to Section 915 clearly state that the rule applies only where the information has not been previously disclosed. In Roe v. Superior, the court held that where the confidential material has already been disclosed, the superior court did nothing to force the disclosure of previously undisclosed communications, and thus did not violate Section 915. Even where disclosure was without the client's consent, as in Klang v. Shell Oil, the court found that Section 915 did not apply because the disclosure had already occurred without action of any kind by the court.

Here, the disclosure had already occurred and the court had no involvement in that

disclosure. Jasmine is not attempting to gain access to documents that are privileged that it has not yet seen and asking the court to rule on such a request. Jasmine is simply asking the court to rule on the admissibility of an already disclosed communication. Thus, the court has had no role in the disclosure and would not violate Section 915 by examining the disclosure itself in ruling on the question of whether or not the disclosure is privileged.

Whether or not listening to the voicemail is necessary to determine that Plaintiff has met all the elements of the test established in State Fund, as Phenom argues, is irrelevant. It is true that in State Fund, the court did not resort to the contents of the documents but in State Fund, the documents stated in [sic] clearly and conspicuously on their face that they were privileged, confidential, and work product and the court was seeking to protect State Fund from further requests for production in other cases. Here, the conversation made no express statement that it was privileged or confidential and in the conversation has already been disclosed through no fault of the court. Thus, State Fund does not apply to preclude the court from examining the conversation and under Section 915 the court may do such.

The Recorded Communications Are Not Privileged Because They Were Not Made in Confidence in the Course of the Lawyer-Client Relationship.

Under Section 917, the presumption that certain communications are confidential arises only once the foundational facts that a communication has been made in confidence in the course of the lawyer-client relationship have been presented. Additionally, the comments to Section 917 clearly lay out that even once the presumption is raised under such foundational facts, the presumption is rebuttable by the opponent establishing that the communication was not confidential or that an exception exists.

Phenom argues in its brief that Jasmine cannot rebut the presumption set forth by Section 917 that the conversation is privileged. However, even if the court accepts the assertion by Phenom that the communication was made in confidence in the course of the lawyer-client relationship such that the presumption in Section 917 applies, the presumption is rebuttable and Jasmine has offered several solid basis for rebutting the presumption. First, any privilege was waived by the conduct of Banerjee, acting on behalf of Phenom. Second, as discussed below, the conversation falls under the exception of Section 956 as it was sought to enable or aid Phenom in a plan to commit a crime or fraud against Jasmine.

The Recorded Communications Are Not Privileged Because The Services of the Attorney, Matthew Gross, Were Sought or Obtained to Enable or Aid Phenom to Commit a Crime or Fraud.

Under Columbia Evidence Code Section 956, there is no privilege if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud. Section 956 applies to communications ordinarily shielded by Section 954.

According to Hopwood v. Nahama, Evidence Code Section 956 does not require a completed fraud. It requires only that the attorney communications sought to enable the client to plan to commit a fraud, whether the fraud is successful or not. The party claiming an exception to privilege based on Section 956 does not need to make a prima facie

showing of all of the elements of fraud in order to make a prima facie showing of fraud such that the attorney-client privilege does not apply. A prima facie case is one which will suffice for proof of a particular fact unless contradicted and overcome by other evidence. The court in Hopwood concluded that the proponent of the exception need only to prove a false representation of a material fact, knowledge of its falsity, intent to deceive and the right to rely.

Here, Phenom sought the advice of its attorney for the purposes of enable [sic] a fraud and the crime of theft of trade secrets against Phenom. Phenom signed a nondisclosure agreement and represented to Jasmine that it was only interested in making a deal with Jasmine regarding the rights to the TocTec technology. Jasmine took continual measures to protect the technology as much as possible during these negotiations and had a right to rely on the representations by Jasmine that it was interested in acquiring the technology and on the nondisclosure agreements signed by Phenom. However, it now appears that Phenom's intention was instead to simply incorporate the new technology into its own products.

The conversation itself is admissible to determine whether the advice was sought to enable a crime or fraud based on the discussion of Section 915 above. The conversation itself clearly indicates that a crime and fraud are being committed by Phenom with the advice of Gross. Banerjee states that "we took their technology on the pretense of just evaluating it, not putting it in our product" and goes on to say that "if they (Jasmine) realize what we're doing, they could hold out for more. Use it as leverage, use it as blackmail." This clearly indicates that Phenom has made false representations to Jasmine concerning its intentions with respect to the TocTec technology. These representations are of material fact as the technology is Jasmine's main product and the only reason that it gave Phenom any access in the first place was with the understanding the [sic] Phenom was interested in purchasing the technology but needed to know what it would be purchasing. The conversation between Banerjee and Gross also clearly indicates that Phenom had knowledge of the falsity and they intended to deceive Jasmine. Finally, these statements were made in negotiations over the acquisition of the TocTec technology and Jasmine had a right to rely on such statements. Based on these facts, Jasmine has made the requisite showing under Hopwood for the court to apply Section 956 to remove the protection of privilege under Section 954.

In addition, Banerjee and Gross go on to discuss a plan to cover up the theft of trade secrets by Kathleen Schaus, a former employee of Jasmine that was acting on behalf of Phenom in stealing trade secrets from Jasmine. Gross advices Banerjee to send an e-mail to Schaus, "so we leave a paper trail," and to make false statements in the e-mail in order to give the impression that Phenom had not been involved in the trade secrets. This is clearly advice sought and given to enable a crime or fraud. Thus, the privilege does not apply under Section 956.

In addition, even in the absence of review of the recording itself, there is sufficient evidence of the enabling of a crime. Jasmine has discovered evidence that Kathleen Schaus did in fact steal trade secrets and Schaus is now an employee of Phenom. This is adequate evidence to raise the inference under Section 956 of enabling a crime and thus Section 956 applies on these facts as well and the recording is not privileged.

Conclusion

For the reasons set forth, Defendant respectfully requests 1) that Plaintiff's request for an order sealing the voicemail and providing that it may not be considered, heard, or read in this proceeding be denied, and 2) that Plaintiff's request for a preliminary injunction restraining use or disclosure of the Voicemail and its contents also be denied.

Answer 2 to Performance Test A

Defendant's Memorandum of Points & Authorities In Opposition to Plaintiff's Motion for a Preliminary Injunction to Prohibit Use & Disclosure of Recorded Attorney-Client Communication

I. Statement of Facts

Defendant Jasmine Semiconductor ("Jasmine") is a small start-up company. Jasmine designs and develops telecommunications technology. Plaintiff Phenom Networks ("Phenom") is a large, publicly-traded company in the business of producing telecommunications equipment in Columbia. For two years, Jasmine has been in the process of developing its proprietary TocTec technology. (Wong Trans. at 4) Jasmine is now ready to commercialize this technology into a product for market. (Wong Trans. at 4)

Phenom expressed an interest in buying Jasmine's TocTec technology. Id. Phenom had been working in the same technology area, but determined that Jasmine was substantially ahead of Phenom in the development process. Id.

Jasmine, interested in a potential partnership with Phenom in producing the product but not wanting a straight buyout, began a process of showing Phenom enough of the technology to facilitate such a deal. Id. Jasmine's goal was to keep control of the TocTec product & have a full share in the product development. Id.

Phenom & Jasmine's negotiations did not get very far. Although Phenom accepted & signed a nondisclosure agreement & Jasmine permitted restricted, tightly controlled sharing of technological information, Phenom put off negotiations on the deal & continued to ask for more product information. Id.

This sharing of product information provides the context for what happened next.

Valerie Wong, Jasmine's Senior Director of Legal & Business Affairs, received a voicemail message from Kai Banerjee, Phenom's Executive VP & Matthew Gross, Phenom's General Counsel. The start of the message was routine & simply stated who was calling & asked Ms. Wong to call back Mr. Banerjee.

However, after 5 seconds of silence in which Mr. Banerjee must have thought he hung up the phone, the callers have a discussion amongst themselves that reveals a deliberate & conscious plan to misappropriate Jasmine's trade secrets regarding its proprietary TocTec technology.

Mr. Banerjee begins by telling his counsel, Mr. Gross, to "keep this unsettled" with "legal maneuvers" so Phenom has time to get enough of the TocTec technology & can get Jasmine engineers to quit & join Phenom. See Voicemail Trans. at 9, lns. 9-11.

Mr. Banerjee goes on to sound out Phenom's position to cover their fraudulent acts,

thereby revealing Phenom's intentional & premeditated false representations. See id. at lns. 14-16, 17-21. ("We took their technology on the pretense of just evaluating it, not putting it in our product. . .But they gave it to us. So that's how I . . .can defend it, and that's how we can defend it. They gave it to us to use. If we end up having to pay Jasmine, it's no harm, no foul."

Mr. Gross advises Mr. Banerjee of the effectiveness of the position being tested by stating that everything would probably "be fine" if Phenom & Jasmine were to close the deal at this point. See id. at lns. 17-18.

Finally, Mr. Banerjee solicits, & Mr. Gross provides, legal advice on perpetrating this fraud. Mr. Banerjee states that he is worried that Kathleen Shaus, Jasmine's TocTec Project manager, is transferring too much information all at once. See id. at 10, lns. 3-6. In particular, Mr. Banerjee frets that the information, such as engineers' salaries & stock options, product designers' personnel files & the TocTec patent disclosures, "are coming too fast" & could "give her away."

Mr. Gross directly responds to this concern by advising Mr. Banerjee to e-mail Ms. Shaus, to "leave a paper trail." See id. at ln. 13. He recommends that Mr. Banerjee write that he appreciates her courtesy & her cooperation "exceeds Jasmine's commitments." See id. at lns. 14-15. Mr. Gross suggests the e-mail should make it look like it was her idea to disclose all of this information to Phenom. Mr. Gross was assisting in covering up Phenom's intentional misappropriation of Jasmine's trade secrets.

Kathleen Shaus, after turning over all of this confidential information to Phenom, has left Jasmine & applied for an engineering position with Phenom. A review of Ms. Shaus's files & e-mail messages confirms that she sent to Phenom almost the entire Jasmine TocTec patent disclosure file — Jasmine's most important intellectual property. See Wong trans. at 6, lns 6-13.

II. Argument.

A. Phenom Waived its Privilege in the Voicemail By Making an Uncoerced & Voluntary Disclosure.

Section 12 of the Columbia Evid. Code provides that a person waives the right to claim atty-client privilege in a communication where the person has disclosed a significant part of the communication "without coercion" or has consented to its disclosure. The official comment explains that the holder of the privilege may waive it by making an "uncoerced disclosure." See § 912 Col. Evid. Code, official comment (emphasis added).

Here, the voicemail message was left by Phenom completely voluntarily. Though presumably inadvertent, nobody coerced the disclosure of Mr. Banerjee's communications with Phenom's attorney. Thus, leaving this voicemail waived the privilege & Jasmine should not be enjoined from using it on its trade secret action against Phenom.

Phenom asserts that the disclosure of the voicemail cannot be deemed a waiver of privilege b/c waiver means only intentional relinquishment of a right. As discussed above, this is not so under § 912, which has no intent requirement for waiver but only lack of coercion.

Phenom relies on State Fund v. WPS, quoting dicta that the court was concerned w/ inadvertent disclosure of confidential communications in an increasingly high-tech world. In State Fund, it was the party's counsel who effected the inadvertent disclosure in document production. Here, Mr. Banerjee, a senior Phenom director — i.e., the client himself, left a voicemail message. Thus, State Fund is distinguishable on its facts. Counsel is not the holder of the privilege, under § 912 either.

Further, People v. Castro is more on point here. In Castro, the court found a client waived the atty-client privilege where a reporter overheard a conversation between the attorney & client. The official comment notes that there was no question of eavesdropping & the court held there was a waiver b/c the disclosure was uncoerced, inadvertent & unknown. Such is the case here, where the voicemail message was left w/o any coercion or knowledge by Mr. Banerjee. There was a waiver b/c strict liability suffices for such inadvertent disclosures. See 8 Wigmore on Evidence, 3d Ed. § 2326, 1940. Thus, Phenom's argument that no waiver can be inferred from inadvertent disclosure has no merit.

B. The Court May Require Disclosure of the Voicemail to Rule on This Issue Because the Communication Has Already Been Disclosed.

§ 915 of the Col. Evidence Code governs disclosure of information claimed to be privileged to a tribunal for purposes of ruling on a claim of privilege. This provision generally prohibits such disclosure.

However, the official comment to this section clearly states that § 915 is "solely applicable to claims of privilege where the information has not been previously disclosed" & has no applicability where the communication has been disclosed.

The rationale is to avoid disclosure of privileged communications that have not been waived. In Roe v. Superior Court, the Col. Court of Appeal held that the lower court had not violated § 915 where it required disclosure to the court b/c the material had already been disclosed.

In the instant case, the voicemail message has already been left in Ms. Wong's mailbox. The communication has been disclosed, so § 915 does not apply here.

Phenom asserts that listening to the voicemail is not necessary to determine whether the communication is privileged. Pl's Brief at 15. Phenom notes that the State Fund court did not review that allegedly privileged documents there, but instead relied on counsel's testimony about the contents & purpose of the documents. Id. at 15. Finally, Phenom

asserts that § 915 proscribes review of the voicemail here.

Jasmine does not dispute that the court here could hear testimony from its counsel as to the contents of the voicemail. But Phenom's assertion that § 915 forbids review of the voicemail, as discussed above, is patently false. The court may require disclosure of the voicemail b/c its prior disclosure removes it from the purview of § 915.

Further, hearing the voicemail would be the best method of assessing the nature of its contents. Phenom cannot testify about it b/c they deny hearing it or seeing a transcript of it & Phenom admits that they do not know its verbatim contents. See Phenom Brief at 13, lns. 5-6.

Thus, the court may & should require disclosure of the voicemail for purposes of deciding this motion.

C. Jasmine Can Rebut the Presumption of Privilege Because the Communication Was Made in Furtherance of a Fraud.

§ 917 of the Col. Evidence Code provides that a communication made in confidence in the course of a lawyer-client relationship is presumed to be confidential & the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.

Jasmine can meet its burden of proof here. § 956 provides that there is no attorney-client privilege if the services of the lawyer were sought or obtained to enable or aid anyone in committing a crime or fraud.

The communications here were provided by Mr. Gross to Mr. Banerjee to assist in perpetrating the theft of Jasmine's trade secrets. Jasmine can show a sufficient prima facie case of fraud to rebut the presumption of § 917.

In Hopwood Oil, the Columbia Court of Appeal held that § 956 does require that the opponent of privilege show a completed fraud. Rather, the proponent of the crime fraud exception need only prove (1) a false representation of a material fact, (2) knowledge of its falsity, (3) intent to deceive & (4) the right to rely.

Here, Phenom made the false representation to Jasmine that they only wanted to look at the TocTec technology to evaluate it, when they really intended to misappropriate the technology. See voicemail trans. at 9, lns. 14-16 ("we took their technology on the pretense of just evaluating it, not putting it in our product"). Mr. Banerjee's statement demonstrates that Phenom knew that they were lying & truly intended to steal the technology. Phenom also clearly intended to deceive Jasmine into thinking the two companies could partner so Jasmine would provide access to the technology. Like the plaintiffs in Hopwood Oil, Phenom intended to deceive Jasmine into thinking the disclosure of confidential information was only for evaluation & not for Phenom's true purpose.

Finally, Jasmine had a right to rely on Phenom's representations & promise of secrecy because the two companies were in good faith negotiations & Phenom signed a nondisclosure agreement. See Wong Trans. at 6, lns. 22-27.

Therefore, Jasmine has made the required showing that Phenom planned to commit a fraud. Because Mr. Gross provided advice to his client on how to cover up their request to Ms. Schaus, the communication disclosed in the voicemail was advice sought & provided to aid Phenom in committing a fraud. Thus, under Hopwood Oil & § 956, Phenom has "forfeited the benefits of the attorney-client privilege" & Jasmine has overcome the presumption that the communication is privileged.

D. Conclusion

For the reasons set forth above, Defendant Jasmine respectfully requests that Phenom's motion for a preliminary injunction restraining use or disclosure of the voicemail & its contents be denied.

Further, Defendant Jasmine submits that the court may & should review the contents of the voicemail to decide this motion if it so wishes & Phenom's request to seal the voicemail should be denied.

THURSDAY AFTERNOON
MARCH 1, 2007

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

IN RE ERGOMETRIX, INC.

FILE

IN RE ERGOMETRIX, INC.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Martinez, Petit & Liefer, LLP
Attorneys at Law

MEMORANDUM

TO: Applicant

FROM: Alma Martinez

DATE: March 1, 2007

SUBJECT: **Ergometrix, Inc. – Schaeffer Stock Options**

Melinda Choy, Chief Executive Officer of our client, Ergometrix, Inc. ("Ergometrix"), has asked for our advice on whether Arthur Schaeffer, who recently resigned from Ergometrix, can be prevented from accepting employment with a competitor and from exercising certain stock options issued to him pursuant to a company stock option plan. Mr. Schaeffer worked for Ergometrix as its Senior Vice President of Engineering and, despite his agreement that he would not do so, accepted a job with a competitor immediately upon his resignation. Also, at various times over the course of his employment, Mr. Schaeffer received stock options to acquire a total of 100,000 shares of Ergometrix common stock. As of the time of his departure, he had not exercised any of the options. He has now attempted to exercise the options and, through his attorney, has demanded that Ergometrix issue 100,000 shares to him.

Ergometrix has put a "hold" on Mr. Schaeffer's stock options pending receipt of our advice.

Your task is to draft for me an objective memorandum analyzing whether Mr. Schaeffer's agreement not to work for a competitor and the forfeiture provisions of the Ergometrix stock option plan are enforceable against Mr. Schaeffer.

Specifically, address the following issues:

1. Whether the covenant not to compete contained in the employment agreement is enforceable.

2. Whether Mr. Schaeffer can exercise any of his stock options, i.e.,

(a) Whether any and, if so, which of the stock option grants have lapsed by the passage of time.

(b) Whether the stock options are “wages” within the meaning of Columbia Labor Code section 200.

(c) Whether either the lapse or the forfeiture provisions in the stock option plan violate Columbia Labor Code sections 221 and 222.

(d) Whether the forfeiture effected by the noncompetition component of the stock option plan violates Columbia Civil Code section 1600.

Discuss all the issues and reach a reasoned conclusion on how each should be resolved.

EXCERPT OF TRANSCRIPT OF INTERVIEW WITH MELINDA CHOY

February 25, 2007

*** * ***

Alma Martinez ("Martinez"): So, the problem is twofold: first, that Arthur Schaeffer violated his agreement not to go to work for a competitor and, second, that he wants to exercise his stock options, and Ergometrix doesn't believe he's entitled to. Is that right?

Melinda Choy ("Choy"): That's right. Mr. Schaeffer – Art – quit us at a crucial time and went to work for Indonix, a major competitor of ours. I'd like to know if I can keep him from working for Indonix, and I certainly don't want him to end up with 100,000 shares of our company.

Martinez: Well, I know you're about to launch your initial public offering – your IPO – and Ergometrix stock will be offered on the market at $10 a share. Is that what you mean when you say Art left at a crucial time?

Choy: Yes, that and the fact that we're rolling out some new products he was instrumental in developing and marketing.

Martinez: OK, let's go back to the beginning. What's the main issue as far as you're concerned?

Choy: Well, it's prompted by a letter we got from Art's attorney – here it is. He's basically claiming that we can't stop Art from working for Indonix, that the forfeiture language in our stock option plan is void, and that Art has the right to exercise all his options.

Martinez: Let's deal first with the fact that he's gone to work for Indonix. Why do you think he shouldn't be allowed to do that?

Choy: Well, he signed our standard non-compete agreement – all our key employees agree not to work for a competitor for six months after leaving Ergometrix. Art was one of our original employees when we started up the company eight years ago – that was in 1999. He was a very talented product engineer, and he moved up steadily in

the ranks and ended up as one of our key executives. Here's the employment contract he signed containing that agreement.

Martinez: Were any of the terms of Art's employment covered by a union contract?

Choy: No, we've never been unionized.

Martinez: What are you concerned about – that Art will give up your trade secrets to Indonix or issues like that?

Choy: No, not really. Our customers, pricing, and products are pretty much in the public domain, so there's not much harm he can do to us on that score. It's just that he'll give Indonix a competitive advantage because of his engineering talents.

Martinez: OK. Let's talk about the stock options. How did Art acquire the options?

Choy: Like most high-tech start-up companies, we used stock options to create incentives for our employees, you know, to give them a stake in what we hoped would be our success. At different times, Art received five separate stock option grants under our stock option plan – 20,000 shares each time. The option prices were anywhere from 50¢ to $2.00 a share. In other words, each grant gave him the right to buy 20,000 shares at whatever the option price was in that particular grant.

Martinez: So, by exercising the options at the option prices, he could buy the shares for just a fraction of the $10 per share the stock will be offered for when the IPO goes through.

Choy: That's right. I mean, the underwriters have set the opening IPO share price at $10 – it might be lower or higher, depending on how the market reacts. For sure, it will be more than Art's option prices, and he stands to make a killing.

Martinez: What's the harm if you just let him exercise the options?

Choy: The harm is that he will end up holding 100,000 Ergometrix shares. This is especially a problem because he's now working for Indonix, a head-on competitor of ours. But even if he just turns around and sells the stock at the market price, he will end up with about a million dollar windfall. He shouldn't be able to breach his contract with us and then get rich at our expense. And, if he gets away with it, what's to stop others from doing the same thing?

Martinez: You've got a good point there. The letter from Art's attorney says the stock options were part of Art's wages. Is that right?

Choy: You know, we never thought of it in those terms. He received a fairly high salary and the usual fringe benefits – health insurance and vacation – that's what we figured his compensation was. It's not like he gets the stock for free. He has to put up his own money to exercise the options, so I don't see how it can be considered part of his pay. The stock options were really intended as an incentive to stay with the company and give him a stake in making it a success. If we succeeded, which we did, he could share the wealth. If we had failed, the options would have been worthless. So he took a chance along with the rest of us.

Martinez: How did you determine whether an employee would receive option grants and how large the grants would be?

Choy: We – the board of directors – met periodically and decided who the key employees were and roughly how many options shares to grant to each one.

Martinez: What guidelines or criteria did you apply?

Choy: Nothing very definite. We started out as a very small company, and we're still not very large. We know who's doing a good job for us and who isn't – just a general sense of how valuable the particular employee was and what he or she had accomplished for the company. Art was always a hard worker and top producer, so he got fairly large grants.

Martinez: Did the options depend to any degree on how much work he produced or how many hours he worked? In other words, how was it decided when and how many options he'd get?

Choy: No. They had nothing to do with volume or hours of work by Art or anyone else. The timing and the size of the options pretty much depended on what we thought it would take to keep our key people committed. Of course, we wanted to be sure that whoever got stock options was a good, hard working employee.

Martinez: Let's take it a piece at a time. First, were Schaeffer's options vested? In other words, was there any reason he couldn't have exercised them while he was still working for you?

Choy: I don't think so. You can look at the stock option plan and figure that out. But Art never attempted to exercise any of them while he was still with us.

Martinez: Why do you suppose that is?

Choy: We all knew we were eventually going to take Ergometrix public and that the stock would shoot up in value, so maybe he didn't think it made much sense to put out his own money to buy the shares before he really had to. Besides, I think some of the options have lapsed by now. I think that's somehow stated in the Plan.

Martinez: Why would Art have let any of them lapse?

Choy: Probably just by inadvertence. In the early days we were all so busy and focused on getting the business headed in the right direction that no one paid much attention to that. Plus, the business didn't look too promising, so I guess he thought it wasn't worth the risk to pay the option price for stock that might end up being valueless.

Martinez: What was the reason for having the lapse provisions?

Choy: Well, the idea was that it would induce employees to exercise the options, and every time they did it would generate some cash for the company. It worked to some extent but not very much.

Martinez: Did the company ever extend or renew any of the "lapsed" grants?

Choy: A couple of other employees came to me just before some of their grants lapsed, and I signed extensions for them. I guess if Art had asked, I would've done it for him too, but he never asked, and I didn't even think anything about it.

Martinez: When did Art quit, and what were the circumstances?

Choy: He came in to my office about three weeks ago and told me that he'd received a very attractive offer from Indonix and that he had accepted it. He gave two weeks notice and has been gone a week. He said he'd made up his mind and wouldn't even discuss alternatives with me. When I reminded him about his non-compete

agreement, he just laughed and said his attorney told him it wasn't worth the paper it was written on.

Martinez: Did you have any discussion with him about his stock options?

Choy: Yes. I told him the Plan says his unexercised options – which are all of his – are rescinded. He said his attorney told him I couldn't rescind his unexercised options, no matter what the forfeiture clause in the Plan says.

Martinez: Did he try to exercise the options?

Choy: Yes. He said he wanted to exercise them all immediately. He handed me a letter so stating and his check for $115,000 to cover the option prices. I gave him his letter and check back and told him, "Get lost!" And, you can see, he didn't waste any time in getting his attorney to write us a nasty letter.

Martinez: Is the information in the letter from Art's attorney accurate as to the dates, amounts, and option prices?

Choy: Yes, and the tender of $115,000 is the correct amount if we have to allow him to exercise all the options.

Martinez: Is this the first experience you've had with someone leaving and wanting to exercise his stock options? I mean have you ever had to invoke the forfeiture provisions before?

Choy: No, it's the first time this has happened.

Martinez: All right. Let me look into it, and I'll get back to you in a few days with an answer. I know that a federal court, in a case called *Ball v. International Machinery Corp.*, recently dealt with some of these issues and certified to the Columbia Supreme Court the question whether stock options are wages. But the parties settled the case and mooted the question before the Columbia court had a chance to decide the issue. So this may be a matter of first impression.

Choy: Thanks. I'll look forward to hearing from you.

END OF INTERVIEW

Law Offices of Rankin Bayard III
44 Melton Plaza, Suite 2400
Anniston, Columbia 94501
(490) 531-4333

February 24, 2007

Melinda Choy
Chief Executive Officer
Ergometrix, Inc.
820 Miramar Parkway, Building 5
Anniston, Columbia 94502

Re: Arthur Schaeffer – Stock Options

Dear Ms. Choy:

I write on behalf of my client, Arthur Schaeffer, to demand that Ergometrix, Inc. honor Mr. Schaeffer's request to exercise all five grants of stock options awarded to him while in the employ of Ergometrix.

In the eight years of Mr. Schaeffer's employment with your company, he earned and was awarded the following stock option grants:

1st Grant: May 1, 1999 – 20,000 shares @ 50¢ per share; fully vested as of August 1, 1999

2nd Grant: May 1, 2000 – 20,000 shares @ 75¢ per share; fully vested as of August 1, 2000

3rd Grant: May 1, 2002 – 20,000 shares @ $1.00 per share; fully vested as of August 1, 2002

4th Grant: October 1, 2004 – 20,000 shares @ $1.50 per share; fully vested as of January 1, 2005

5th Grant: July 1, 2005 – 20,000 shares @ $2.00 per share; fully vested as of October 1, 2005

On February 8, 2007, Mr. Schaeffer announced his resignation to accept employment with Indonix, an acknowledged competitor of Ergometrix, and his intention to exercise

all outstanding stock options. You crassly told him that Ergometrix would refuse to honor the options. I can only assume that, in refusing to honor the options, you were relying on the forfeiture provisions contained in the stock option plan. Those provisions are unlawful and unenforceable for the following reasons.

First, the stock options constitute "wages" as that term is defined in Columbia Labor Code § 200. They were fully vested, and, under the 1982 holding of the Columbia Supreme Court in *Suarez v. Dressers, Inc*., any forfeiture of earned and vested wages is unlawful.

Second, both the lapse and forfeiture provisions violate Columbia Labor Code § 221, also because the options are fully vested wages. Those provisions also violate Columbia Labor Code § 222 because they constitute an unlawful withholding of wages previously agreed to.

Third, the provision in the stock option plan that calls for a forfeiture in the event a participant becomes employed by a competitor of Ergometrix violates Columbia Civil Code § 1600, which voids any contract to the extent that it restrains a person from engaging in a lawful profession, trade, or business. The obvious effect of the forfeiture provision is to restrain Mr. Schaeffer from accepting employment with a competitor. Such "covenants not to compete" are void and unenforceable as a matter of public policy in Columbia. *McGill v. Donald Reuben Corp*., Columbia Supreme Court (1965).

Finally, if you have any inclination to try to challenge Mr. Schaeffer's having accepted employment with Indonix, please disabuse yourself of that notion. The noncompetition clause of your standard employment agreement is a blatant violation of Columbia Civil Code § 1600. Any effort on your part to disrupt his relationship with Indonix will be resisted vigorously.

On behalf of Mr. Schaeffer, I hereby tender the sum of $115,000 to cover the cost of exercising the options on all 100,000 shares, and I demand that you forthwith issue 100,000 shares to Mr. Schaeffer.

I am authorized by Mr. Schaeffer to file suit against Ergometrix to enforce the options if I have not received a satisfactory response from you within 30 days of the date of this letter.

Very truly yours,

Rankin Bayard IIII

Rankin Bayard III

EXCERPTS FROM ERGOMETRIX, INC.'S EMPLOYMENT AGREEMENT

* * *

Sec. 22. COVENANT NOT TO COMPETE

EMPLOYEE agrees that during the term of his employment and for a period of six months after the termination thereof, whether said termination be voluntary or involuntary, he will not render, directly or indirectly, any services, whether as an employee or otherwise, to any business that is a competitor of Ergometrix. This covenant not to compete is voluntarily undertaken by EMPLOYEE at the time of his initial employment.

* * *

Date: February 2, 1999 *Arthur Schaeffer*

Employee

EXCERPTS FROM ERGOMETRIX, INC.'s STOCK OPTION PLAN

Sec. 1.01 – Purpose: Ergometrix, Inc. promulgates this Stock Option Plan to gain the commitment of its key employees to the success of the company. Its purpose is to allow the employees to acquire an ownership interest in the company through the investment of their own time, effort and money and to give them the opportunity to share in the success and growth of the company.

* * *

Sec. 4.01 – Vesting: The right to exercise all options granted pursuant to this Plan shall fully vest in the Participant to whom the grant is awarded three months after the date of the grant. "Vesting" shall mean that, subject to the lapse and forfeiture provisions of this Plan, the Participant shall have the right to exercise the option at the stated option price, whereupon the company shall issue to the Participant the number of Common Class A shares stated in the grant so exercised.

Sec. 4.02 – Exercise: At any time after vesting of any grant awarded hereunder, the Participant shall have the right to exercise the option to acquire up to the number of shares stated in the grant. "Exercise" means a timely tender to Ergometrix by the Participant of the option price for the number of option shares the Participant wishes to acquire accompanied by a written demand that Ergometrix issue said shares to the Participant.

Sec. 4.03 – Lapse: Unless the Participant exercises an option granted hereunder within three years of the date of the grant, all rights conferred by said grant shall lapse, and, unless the grant is expressly renewed or extended, the Participant shall lose all rights thereunder.

* * *

Sec. 8.01 – Forfeiture of Options: The Participant under this Plan understands and agrees that in the event a Participant directly or indirectly accepts employment with, or performs any work for, any person or entity that is engaged in the same line of business and in competition with Ergometrix, either while the Participant is employed by Ergometrix or within six months after the Participant's termination of employment with

Ergometrix, all unexercised grants awarded to the Participant shall be deemed rescinded and all rights of the Participant thereunder surrendered.

THURSDAY AFTERNOON
MARCH 1, 2007

California Bar Examination

Performance Test B

LIBRARY

IN RE ERGOMETRIX, INC.

LIBRARY

EXCERPTS FROM THE COLUMBIA LABOR CODE

Section 200. Wages

As used in this Code, the term “wages” includes all amounts for labor of every kind or description performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

* * *

Section 221. Repayment of Wages to Employer

It shall be unlawful for any employer to receive from an employee any part of wages theretofore paid by said employer to said employee.

Section 222. Withholding of Part of Wage

It shall be unlawful, in the case of any wage agreement arrived at through collective bargaining, for an employer to withhold from any employee any part of the wage agreed upon.

* * *

Section 227. Vested Vacation Wages

Unless provided by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacation and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate of pay; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination.

* * *

Section 407. Investment in Business in Connection with Employment

Investments and the sale of stock or an interest in a business in connection with the securing of a position are illegal as against the public policy of this State and shall not be advertised or held out in any way as part of the consideration for any employment.

EXCERPT FROM THE COLUMBIA CIVIL CODE

Section 1600. Unauthorized Contracts

Every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

McGill v. Donald Reuben Corp.

Columbia Supreme Court (1965)

Plaintiff appeals from an adverse judgment in an action for declaratory relief to establish his right to be reinstated in the employees' retirement plan of the defendant corporation.

Plaintiff left defendant's employ on July 1, 1960, after meeting all the requirements for benefits under the retirement plan. On October 24, 1960, he went to work for a competitor of the defendant. On December 5, 1960, the retirement committee that administers the plan notified plaintiff that his rights to receive payments had been terminated pursuant to section 7.1 of the plan on the ground that he had entered the employ of a competitor.[1] Plaintiff then brought this action against the corporation seeking a declaration that he was entitled to reinstatement on the ground that the section invoked by the retirement committee was against public policy and unenforceable. The trial court held that section 7.1 was valid.

Section 1600 of the Columbia Civil Code provides that "Every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void." This section invalidates provisions in employment contracts prohibiting an employee from working for a competitor after leaving his employment with his previous employer or imposing a penalty if he does so. The pension plan is part of an employee's contract of employment. See *Bos v. U.S. Rayon Co.*, Columbia Court of Appeals (1958).

As this Court said long ago in *Car-Na-Var-Corp. v. Mossler*, Columbia Supreme Court (1944):

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1 Section 7.1 provides: "The annuity payments to any retired Employee shall be suspended or terminated in the event such retired Employee at any time enters any occupation or does any act which, in the judgment of the Retirement Committee, is in competition with any phase of the business of the Employer."

> Equity will to the fullest extent protect the property rights of employers in their trade secrets and the preservation of their hard-won business advantages, but public policy and natural justice require that equity should be solicitous for the inherent right in all people, not fettered by negative covenants upon their part to the contrary, to follow any of the common occupations of life. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for the business of those who had been the customers of his former employer, provided such competition is fairly and legally conducted.

That principle emanates from the common law and is embodied in section 1600 of the Civil Code. It is true that a number of states have abandoned the common law prohibition of covenants restraining competition in employment agreements, adopting instead an approach enforcing such covenants to the extent they are reasonable. It may even be correct to say that this "rule of reason" represents a majority rule among jurisdictions that have considered the question.

However, the Columbia courts, led by this court, have been clear in their expression that section 1600 represents a strong public policy of the state that should not be diluted by judicial fiat.

The forfeiture imposed upon the plaintiff by the defendant corporation in this case therefore violates section 1600.

The judgment is reversed.

Suarez v. Dressers, Inc.

Columbia Supreme Court (1982)

At issue is the question of when vacation time becomes "vested" under Columbia Labor Code § 227, which provides, essentially, that upon termination an employee is entitled to receive pay for all vested vacation time and that "an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination."[1]

Emilio Suarez was employed by Dressers, Inc., a non-union employer, from December 1, 1972 until July 1, 1978, at which time he was laid off in a general reduction in Dressers' workforce. Throughout the period of his employment, Suarez received an hourly wage for the hours he worked each week. In addition, he received certain fringe benefits, including holiday and vacation pay.

The company's vacation policy provided that each hourly employee was entitled to between one and four weeks of paid vacation annually, depending on the length of his or her employment. Under the policy, an employee did not become eligible for a paid vacation until the anniversary date of his or her employment; vacation must be taken during the year of eligibility; vacation could not be carried over from one year to the next; and employees were not entitled to receive pay in lieu of vacation.

Suarez regularly took his accumulated vacation time through December of 1977, at which time his length of service was such that he was in the three-weeks-per-year

1 Suarez also invokes Labor Code §222, which forbids an employer from withholding any part of earned wages "arrived at through collective bargaining." We dismiss this claim inasmuch as Suarez's employer was non-union, and his wages were not subject to a collective bargaining agreement.

eligibility category. However, from December 2, 1977 until the date of his termination in July 1978, he did not take any paid vacation time.

On July 1, 1978, the company paid Suarez a final paycheck covering his accumulated hourly wage but refused to pay him anything for pro-rated vacation pay. The company's position was none of Suarez's vacation pay "vested" until his next anniversary date of December 1, 1978 and, since he was not employed on his anniversary date, he had no "vested vacation time."

Suarez asserted in the court below that his annual paid vacation was a form of wages earned for labor performed throughout the year and "vested" as it was earned. He claimed that, as an employee who worked for some part of a year, he had a "vested" right to a proportionate share of his vacation pay at the time of termination. The court below ruled in his favor.

When considering the meaning of the phrase "vested vacation time" as used in § 227, it is important to keep in mind the nature of vacation pay. It is well established that vacation pay is not a gift or gratuity but is, in effect, additional wages for services performed. The consideration for annual vacation is the employee's year-long labor. Only the time of receiving these "wages" is postponed until the employee goes on vacation. This court has adopted the view that vacation pay is a form of deferred compensation in the form of a reward of additional wages for constant and continuous service. In the modern economy, employers have devised increasingly complex use of compensation in the form of "fringe benefits," some types of which are not payable until a time subsequent to the performance of the work that earned the benefits.

Recently, this court had the occasion in *Maynard v. State of Columbia* (1980) to consider whether and when pension entitlements are a "vested right." We held that the right to pension benefits vests upon acceptance of employment, even though the right

to immediate payment of the pension may not mature until certain conditions are satisfied. The employee earns *some* pension entitlements as soon as he or she has performed some substantial services for the employer even though the payment of the pension earnings is to be made at a future date. The pension right continues to vest cumulatively as the work for which it is intended as compensation is performed. Although the right to a pension may still be, in whole or in part, subject to divestiture upon the happening of certain contingencies (e.g., insufficient length of service, employee's failure to pay required contributions), that does not prevent the right from vesting.

Likewise, the right to vacation pay, being a form of wages, vests cumulatively and proportionately as the employee performs his or her work for the employer. The requirement in Dressers' vacation policy that the employee must be employed on his or her anniversary date in order to be entitled to receive paid vacation does not prevent the vacation entitlement from accruing and vesting *pro rata*. At most, it is a condition that attempts to effect a forfeiture of vacation pay already vested. Unlike the situation with a pension plan, where there *may* be valid conditions that result in lawful forfeiture, [2] Columbia law forbids the forfeiture of vested vacation pay, i.e., Labor Code § 227 specifically provides that "an employment contract or employer policy *shall not provide for forfeiture* of vested vacation time upon termination." (Emphasis added.)

Dressers argues that its policy requiring that an employee be employed on his or her anniversary date in order to be entitled to vacation pay is not a condition that effects a

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2 However, there are limits to circumstances under which forfeitures can lawfully occur. For example, in *McGill v. Donald Reuben Corp*. (1965), this court found invalid a retirement plan provision that made an employee's pension forfeitable if the retired employee at any time enters into any occupation or does any act in competition with the firm from which he retired. This provision, we held, violated Columbia Civil Code § 1600, which expresses a strong, immutable principle of Columbia public policy invalidating any contract that purports to restrain one from engaging in a lawful profession, trade, or business.

forfeiture. Rather, says Dressers, it is a condition that prevents those rights from vesting at all. That is to say, it is intended as an incentive to the employee to remain in the company's service and vacation pay is a reward for fulfillment of that condition. Dressers claims that failure of that condition prevents vesting.

There may very well be employer benefit and incentive plans that are designed to reward employees for remaining on the job for periods of time. Vacation pay is not one of them. If, in fact, vacation pay served simply to induce employees to remain on the job for a certain period of time, then interpreting Dressers' eligibility requirement as a condition would be entirely reasonable and the forfeiture would be lawful because the vacation time would not be vested. However, there are at least two flaws in the argument: first, it is not necessarily within the employee's control whether to remain employed until the anniversary date. In this case Suarez was laid off in a reduction in force prior to his anniversary date. Second, once it is acknowledged that vacation pay is part of the employee's wage, the justification for requiring the employee to remain employed for the entire year disappears. It would be like arguing that an employee who is terminated before payday is not entitled to receive the accrued wages earned up to the moment of termination because he was no longer employed on payday.

Accordingly, we hold that the right to a paid vacation constitutes deferred wages for services rendered that vests *pro rata* and that, once vested, is protected from forfeiture by § 227 and we affirm the judgment.

Ball v. International Machinery Corp.

United States Court of Appeals, 15th Circuit (2005)

In this case, we consider the question whether stock options granted by an employer to any employee are wages.

Dr. William Ball worked as a senior scientist in the research and development department of International Machinery Corp. (IMC) in Mayville, in the neighboring State of Olympia, which is where IMC is incorporated and headquartered. In the course of his employment, Dr. Ball acquired stock options issued by IMC. The options were worth more than $900,000 when he exercised them. The IMC stock option plan included a promise that if an employee/participant worked for a competitor within six months after exercising the options, he would return to IMC all profits from the options. A week after exercising his options, Dr. Ball resigned from IMC and went to work for a competitor in Bay City, Columbia. IMC therefore notified him that his stock options were cancelled and demanded that he return the $900,000 in profits.

Dr. Ball filed this suit for declaratory relief in the Columbia federal district court, seeking a declaration that the forfeiture provisions of IMC's stock option plan are unenforceable. Dr. Ball claims that the forfeiture provisions violate two provisions of Columbia law: Labor Code § 221, which makes it unlawful "for any employer to receive from an employee any part of wages theretofore paid by said employer to said employee," and Civil Code § 1600, which voids "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business." The trial court entered judgment for Dr. Ball on both claims.

Jurisdiction in Dr. Ball's suit is based on diversity of citizenship. Both Columbia and Olympia are within this, the 15th Circuit. The IMC stock option plan contains a choice of

law clause providing that any dispute arising under the terms of the plan shall be governed by the laws of the State of Olympia.

A. Choice of Law

The threshold question is whether the dispute is governed by the substantive law of Olympia as prescribed in the stock option plan, or, as Dr. Ball claims, by the substantive law of Columbia.

The choice of law question turns on whether the Columbia statutes in issue – Labor Code § 221 and Civil Code § 1600 – are applicable to the transaction and reflect fundamental public policies of the State of Columbia that would be impermissibly offended if the laws of Olympia were applied.

B. Columbia Labor Code §§ 200 and 221

As we have noted, § 221 makes it unlawful "for any employer to receive from an employee any part of wages theretofore paid by said employer to said employee." Dr. Ball's theory is that allowing IMC to recover the profits he made by exercising his stock options would be tantamount to allowing IMC to "collect or receive" from him "wages theretofore paid" to him. This statute, passed in 1937, has as its purpose the prevention of employers extracting "kickbacks" from employees and protecting employee expectations regarding receipt of the wages the employer has contracted to pay.

There is no question whatsoever that § 221 expresses a fundamental public policy in protecting the wages of employees in the State of Columbia. See *Alton v. Emery Iron Foundry*, Columbia Supreme Court (1956): ("The Legislature has expressed in the strongest possible terms this state's public policy that wages, once earned by and paid to employees, is theirs and cannot be taken back by the employer.")

The more difficult question, however, is whether stock options are "wages." The controlling law in the State of Olympia is that stock options are not "wages." The courts of Columbia have not considered this question, so this court has two choices on how to proceed on this issue: we can review tangentially related Columbia court decisions and other authorities and try to deduce therefrom how the Columbia courts would rule if confronted by the question; or we can certify this question of law to the Columbia Supreme Court pursuant to Columbia Appellate Rule 12.2 and request the Columbia court to determine it.

In Columbia, "wages" are defined in Labor Code § 200 as "all amounts for labor of every kind or description performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

The courts in different states that have considered the question in the context of statutory language similar to that in § 200 have reached differing conclusions. For example, the courts of the State of Franklin, applying that state's Wage Payment and Collection Law, have concluded that stock options *are* wages "if the employer specifically agreed to deliver the option as employment compensation." The courts in Olympia, as we have noted, have determined the opposite – that stock options *are not* wages under any circumstances.

Although we do not pretend to suggest how the Columbia Supreme Court would ultimately rule on the question, we are inclined toward the view that stock options are not wages under § 200 because the concept underlying stock options does not seem to fit into the § 200 definition of "all *amounts* for *labor* of every kind or description performed by employees, whether the *amount is fixed* or ascertained by the *standard* of time, task, piece, commission basis, or other method of calculation." (Emphasis added.) Parsing the statute and examining it in terms of the words we have italicized tends to

demonstrate what we mean when we say that the stock option concept does not seem to fit.[1]

First, stock options are not "amounts," i.e., money. They are contractual rights to buy shares. The employee is free to exercise the options or not as he or she sees fit.

Although the amount of money for which the stock can be purchased may be "fixed" in the sense that each option has a stated exercise price, that cannot be a criterion for determining whether stock options are wages because the option price is money the employee must pay, not the employer. The value to the employee is the amount for which the stock acquired through the option can be sold, and that "amount" varies unpredictably depending on market conditions, so it is not "fixed or ascertainable" by any method of calculation when the options are awarded. Moreover, the amount is not fixed or ascertained by any "standard" related to the quantity or units of work performed, which are usually the criteria by which wages are determined. Nor can stock options be analogized to pension plans or profit sharing plans because the latter are ordinarily based on continued length of service and the earnings of the participating employee and are usually fixed in amount.

However, we are cognizant that there are important public policy overtones peculiar to the State of Columbia that will inform the Columbia court's decision on this question of first impression. For that reason, we decline to speculate on the outcome, and we shall certify the following question for determination by the Columbia Supreme Court:

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1 We note in passing that Columbia Labor Code § 407 makes it illegal for an employer to condition on an employee's acquisition of stock or an interest in the business. If stock options were considered to be "wages," it would be difficult to reconcile such a characterization with the proscription of § 407, i.e., would having to pay his or her own money for the acquisition of the shares be tantamount to requiring an employee to pay for part of his or her "wages?" Given that stock options plans are an increasingly common form of employee incentive plan, such an interpretation would run counter to a trend that is generally acknowledged as a significant benefit to workers.

> Are stock options awarded employees by their corporate employers and the proceeds therefrom "wages" within the meaning of Columbia Labor Code § 200?

If the Columbia Supreme Court answers the question in the affirmative, we will at that time turn to the question whether it would offend Columbia's public policy to apply Olympia law.

C. Columbia Civil Code § 1600

It is also beyond dispute that § 1600, which voids any contract to the extent that "anyone is restrained from engaging in a lawful profession, trade, or business," expresses a strong and fundamental public policy of the State of Columbia. The courts of Columbia strictly enforce the spirit and letter of that statute. See *McGill v. Donald Reuben Corp.* The statutory and case law in Olympia is to the contrary. Olympia follows the majority view that allows and enforces reasonable and limited restraints in the nature of covenants not to compete.

However, it is not necessary for us to decide whether the forfeiture provision that Dr. Ball objects to runs afoul of § 1600 and, if so, whether it would offend Columbia's public policy to apply Olympia law. That is because the forfeiture provision is *not* one that restrains Dr. Ball from working for a competitor. He was entirely free to do so. It is undisputed that he agreed that, if he did so within six months of exercising his options, he would give back any money he got from the stock options. Moreover, Dr. Ball could have exercised the options six months before he quit, kept the money, and *then* gone to work for the competitor. Or he could have continued to work unrestrained in his profession, gone to work for a non-competitor, and kept the money. Thus, it was no restraint at all. It was simply a contractual obligation to give back the money if he did what he had agreed not to do.

Thus, § 1600 is simply inapplicable here. Therefore, as to Dr. Ball's claim of violation of § 1600, we hold that Olympia law will be applied because there is no public policy to be vindicated by applying Columbia law. Of course, if the Columbia Supreme Court rules that stock options are wages, we will then have to revisit the choice of law issue to determine whether applying Olympia law would offend Columbia's public policy as expressed in § 221.

Accordingly, the judgment is reversed in part, and further proceedings in this matter are stayed pending the return of the question certified to the Columbia Supreme Court.

Answer 1 to PT-B

To: Alma Martinez

From: Applicant

Date: March 1, 2007

Re: Ergometrix, Inc. ("Ergometrix") - Schaeffer Stock Options

You asked for an objective memorandum analyzing:

1. Whether Mr. Schaeffer's agreement not to work for a competitor of Ergometrix; and

2. Whether Mr. Schaeffer is entitled to exercise all or any portion of his stock options.

These issues are addressed below.

1. Covenant Not to Compete

Mr. Schaeffer, one of Ergometrix's original employees, who is a key executive, has resigned from Ergometrix and commenced employment with Indonix, a direct competitor. This is a clear violation of §22 of Mr. Schaeffer's employment agreement, which prohibits rendering services, as an employee or otherwise, within 6 months of termination from Ergometrix, whether voluntarily or involuntarily. Mr. Schaeffer commenced employment with Indonix immediately, prior to expiration of the 6-month period.

However, §1600 of the Columbia Civil Code ("Civil Code") provides that contract provisions "restraining" anyone from engaging in a lawful trade, profession or business of any kind is void. In McGill, the Columbia Supreme Court noted that while the strong majority trend among states is to permit "reasonable" covenants not to compete, §1600 of the Civil Code represents a strong public policy to invalidate contract provisions prohibiting work with a competitor or imposing penalties to do so. This is contrary to the majority trend.

While the United States Court of Appeals in Ball found that a provision requiring forfeiture of stock options upon leaving a company and working with a competitor is not a restraint subject to §1600, §22 of the Employment Agreement is a direct prohibition of work for a competitor. This provision is therefore likely void under Civil Code §1600 and McGill, and so Ergometrix is unlikely to succeed in enforcing the prohibition to prevent Mr. Schaeffer from working for Indonix.

2. Stock Options

(a) Have any of Mr. Schaeffer's Options Lapsed with the Passage of Time?

§4.03 of the Ergometrix Stock Option plan provides that unless exercised within 3 years of the grant date, all rights under the options will lapse unless the grant is expressly renewed or extended.

Of the stock options held by Mr. Schaeffer, all but 40,000 have grant dates more

than 3 years prior to Mr. Schaeffer's effort to exercise his options about 3 weeks ago. Ms. Choy states that Mr. Schaeffer made no prior effort to exercise the options, made no request to extend or renew any of the options for which 3 years have passed, and no such extension or renewal was granted. Ms. Choy noted that extensions were granted to employees who requested them, but Mr. Schaeffer did not do so. The 60,000 options with grant dates of May 1, 1999, May 1, 2000 and May 1, 2002 will therefore have lapsed by passage of time under §4.03, provided it is enforceable.

Counsel for Mr. Schaeffer argues that this lapse provision is unenforceable as the options are "wages" under §200 of the Labor Code, and violate §221 and §222 of the Labor Code. Thess issues are addressed below. As explained above, the options are unlikely to be deemed wages, and so the lapse provision is likely to be enforceable, resulting in the lapse of the 60,000 options.

(b) Are the Stock Options Wages?

§200 of the Labor Code defines wages to include "all amounts for labor of every kind or description performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

The question of whether §200's definition of wages applies to stock options has not been addressed by the courts of Columbia. However, the United States Court of Appeals considered this issue in Ball. While the court did not decide the issue, it noted that the concept of stock options does not fit the §200 definition. First, stock options are not easily defined as an "amount," which would normally refer to money. Rather, the options are rights, which may or may not be exercised.

Second, because the value of options varies depending upon the market price of the underlying stock, any "amounts" are not susceptible to being fixed, ascertained or calculated at the time of the award. Third, the stock options are not fixed or amounts determined based upon a "standard." Stock options also require the payment of monies by employees at the time of exercise, and so it is difficult to argue that the employees are granted an "amount."

The Columbia Supreme Court held in McGill that vacation days are considered wages, and in Suarez that pension plans are wages. These also are not fixed or definite dollar figures, and so it could be argued that, by analogy, the Columbia courts may find stock options to be wages relying on these cases. Both are rights also that vest over time, as stock options often do. However, stock options, and in particular the options granted by Ergometrix, differ in important ways. First, while vacation days and pension plans are not necessarily clear "amounts," vacation days may easily be reduced to an amount by applying the employee's daily salary, and are frequently cashed out in this way. Pension plans also vest according to clear rules, and so the value can normally be readily calculated in a way not possible with stock options. Second, it is common, and as Ms. Choy noted is the case here, for the granting of stock options to be at the discretion of the company, normally by decision of the board of directors. Thus, the inevitable vesting of rights to vacation days and pensions over time based on length of employment emphasized in McGill and Suarez is not present in the case of stock options, especially in the case of grants made at the discretion of the board.

The stock option plan here may also be more clearly analogized to an incentive plan,

given the discretion of the board of directors to determine whether or not to grant options.

Moreover, as noted in Ball, if stock options are characterized as wages, it would be very difficult to reconcile the granting of options with §407, as this may be construed as requiring the employee to use wages to acquire an interest in the company.

While the lack of case law makes the outcome unclear, the better view is that stock options should not be treated as wages under §200 of the Labor Code.

(c) Are §221 or §222 of the Labor Code Violated by the Forfeiture or Lapse Provisions?

The simplest issue to address is application of §222, preventing the withholding of wages under a wage agreement "arrived at through collective bargaining." On its face, this provision applies only to agreements arrived at through collective bargaining. Moreover, Suarez further emphasizes the point by noting that this provision does not apply where the employer is non-union.

Ms. Choy noted that Ergometrix has no union. There appears to be no basis to conclude that either Mr. Schaeffer's wage agreement or the stock option plan were arrived at through collective bargaining, and so §222 has no application here.

§221 applies to "wages." If stock options are found not to be "wages," §221 would not apply. Even if stock options are found to be wages, it is not clear that §221 would invalidate the lapse or forfeiture provisions of the stock option plan. Suarez provides an argument that §221 would prevent forfeiture, as provisions for forfeiture of unused vacation days of the employer were found to be invalid. Arguably, by analogy, stock options forfeiture provisions may be found invalid. However, there are important differences. First, the court in Suarez relied upon a specific provision, §227 of the Labor Code, expressly preventing forfeiture of vacation days, rather than on §221. There is no analogous provision for stock options.

Second, the Suarez court noted that vacation days are not generally considered an incentive plan, while other benefit arrangements may be. It may be argued that a discretionary stock option plan is more in the nature of an incentive plan.

The Suarez court also noted that some benefit plans, such as pensions, may be divested by later conditions. This would support the argument that Ergometrix may divest stock options previously granted upon the occurrence of conditions, as it has done here, upon the passage of 3 years from the grant date or employment with a competitor. The primary reason the court did not permit such conditions for vacation days was the existence of the specific provision, §227, as noted above.

The Lapse and Forfeiture provisions are therefore unlikely to violate §221, whether or not stock options are deemed wages.

(d) Does the Forfeiture Provision of the Stock Option Plan Violate Civil Code §1600?

§8.01 of the Ergometrix Stock Option plan provides for forfeiture of any options granted if a participant accepts employment or performs any work for a person or entity in the same line of business with or in competition with Ergometrix. Mr. Schaeffer's acceptance of employment with Indonix, a direct competitor of Ergometrix, is a clear violation of §8.01, and will result in forfeiture of all options of Mr. Schaeffer if enforceable,

based upon Mr. Schaeffer's acceptance, as communicated to Ms. Choy, of employment with Indonix prior to his attempt to exercise the options.

The Columbia Supreme Court held in McGill that §1600 of the civil code, which by its terms applies to contract provisions which "restrain. . ." engagement in lawful profession, trade or business, invalidates provisions in employment contracts prohibiting working for a competitor or "imposing a penalty" for doing so. This reads §1600 broadly in two important ways. First, it reads restraint on "professing trade or business" to include restraints on working for competitors. Second, McGill interprets "restrained" to include not only prohibitions, but penalties. The court then held that forfeiture of a pension for working with an employer violates §1600.

It can be argued that the forfeiture provision in the stock option plan is analogous to the provision in the pension plan in McGill, and therefore represents a penalty for accepting employment with a competitor, in violation of §1600.

By contrast, the U.S. Court of Appeals in Ball found §1600 inapplicable to stock option plans. The Ball court reasoned that a provision requiring the disgorging by a former employee of profits where stock options are exercised after leaving to work for a competitor is not a "restraint," because the employee was free to work for a competitor, but would merely no longer be entitled to certain contractual benefits if he did so. The court further noted that the employee could have exercised six months prior to leaving, or worked for a non-competitor, and enjoyed the benefits of his options.

In the instant case, the stock option provision in the Ergometrix plan is less restrictive and less harsh than the Ball provisions, in that the employee forfeits only unexercised options, and is not forced to disgorge profits from options already exercised. Moreover, the Ergometrix plan does not potentially reach back to options exercised prior to leaving employment with Ergometrix, as the Ball plan does, except in the case that an employee engages in work for or accepts employment with a competitor while still employed with Ergometrix.

Similar to Ball, Mr. Schaeffer could have avoided losing the options simply by exercising the options at an earlier time.

The forfeiture provision of stock option plan is therefore likely to be subject to the rule under Ball, rather than McGill. As such, §1600 would not be applicable. However, as this is a US Court of Appeals decision, there is a risk that the Columbia Supreme Court may find McGill to be a better analogy, and find that §8.01 is a penalty in violation of §1600.

Answer 2 to Performance Test B

MEMORANDUM

TO: Alma Martinez

FROM: Applicant

DATE: March 1, 2007

SUBJECT: Ergometrix, Inc. - Schaeffer Stock Options

1) Is the covenant not to compete contained in the employment agreement enforceable?

According to the transcript of the interview with Melinda Choy, Chief Executive Officer of our client, Ergometrix, Inc. ("Ergometrix") Arthur Schaeffer, who recently resigned as Senior Vice President of Engineering of Ergometrix, signed the company's standard non-compete agreement contained in his employment contract voluntarily and as far as we know - knowingly and intelligently.

However, under the Columbia Civil Code §1600 (which states that every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void) - this non-competition covenant in the Ergometrix employment contract would seem to be invalid as against public policy and therefore unenforceable.

In McGill v. Donald Reuben Corp., a Columbia Supreme Court case from 1965, the court states that §1600 "invalidates provisions in employment contracts prohibiting an employee from working for a competitor after leaving his employment with his previous employer or imposing a penalty if he does so." (P. 3) Furthermore the McGill court goes on to quote an earlier case of theirs, Cor-Na-Var-Corp. v. Mossler (1944), which states that "a former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer, even for business of those who had been the customers of his former employer, provided such competition is fairly and legally conducted." (p. 4).

And while the McGill court goes on to point out that this rule to prohibit covenants restraining competition is not a majority rule - Columbia upholds §1600 of the Civil Code because it represents a strong public policy of the state. This can even be seen in the opinion from the 15th Circuit United States Court of Appeals 2005 case Ball v. International Machinery Corp. where it was stated that CCC §1600 "expresses a strong and fundamental public policy of the State of Columbia" (p. 13) and that "the Courts of Columbia strictly enforce the spirit and letter of that CCC §1600 statute." (P. 13).

Thus, it seems relatively clear that in Columbia the kind of covenant not to compete found in Ergometrix's employment contract would be found to be unenforceable. We may argue, however, that Columbia, in this case, should use the same public policy argument usually used to strike down non-competition clauses to uphold it by using our particular facts. This is not a situation where an employee has been let go from their position and a

no-compete covenant would keep them from finding gainful employment elsewhere. Here, Art was a valuable asset to Ergometrix, and he abruptly left the company of his own free will at a time when the company was in particular need of his time and services to move on to a more lucrative position with a competitor. Melinda said it best when she said in her interview, "he shouldn't be able to breach his contract with us and then get rich at our expense." (p. 4).

This is a difficult argument to make considering the longstanding public policy against these covenants, however, and my opinion is that this Ergometrix covenant not to compete is unenforceable in Columbia (elsewhere, of course, it may be).

2) Ability of Mr. Schaeffer to exercise any of his stock options:

(a.) Have any of the stock options lapsed? And, if so, which ones?

Under the Ergometrix Stock Option Plan Sec. 4.03 "unless the Participant exercises an option granted hereunder within three years of the date of the grant, all rights conferred by said grant shall lapse, and, unless the grant is expressly renewed or extended, the Participant shall lose all rights thereunder." (p. 11) Discussion of whether this lapse provision in the stock option plan is valid will take place below is subsection (c) - so for purposes of the discussion here, we will presume the lapse provision is valid. Thus, looking at the grants made throughout Mr. Schaeffer's eight years with Ergometrix and following the lapse provision in the stock option plan it seems as if the first 3 grants made on the respective dates of May 1, 1999, May 1, 2000 and May 1, 2002 have all lapsed. Nothing indicates that Mr. Schaeffer utilized his ability to renew or extend these grants (as other employees did by coming to Melinda Choy and having her sign extensions).

Thus, it can be concluded that 3 of the 5 grants made to Mr. Schaeffer have lapsed - but that there may still b an ability to exercise the options granted on October 1, 2004 and July 1, 2005.

(b.) Under Columbia law, specifically CLC §200, are stock options considered wages?

§200 of the CLC states that the term "wages" includes "all amounts for labor of every kind or description performed by employees, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

Mr. Schaeffer's attorney has cited the case Suarez v. Dressers, Inc. (1982) to assert that the stock options in this case are "wages" under Columbia law because in Suarez vacation time was considered to be "wages" and this "vested" as it was earned. The Suarez court held that vacation time was considered to be "wages" because of its nature. The court stated that it is "well established that vacation pay is not a gift or gratuity but is, in effect, additional wages for services performed." (p. 6). The court adopted the view that "vacation pay is a form of deferred compensation in the form of a reward of additional wages for constant and continuous service." (p. 6).

Similarly, the Suarez court points to another case, Maynard v. State of Columbia, where pension benefits were considered to be a form of wages because "the employee earns some pension entitlements as soon as he or she has performed some substantial services for the employer. . ." (p. 6).

While there may be a case for stock options to be considered in the same vein - as

a form of "deferred compensation" - I believe that a strong argument can be made to consider stock options in a wholly different light that excludes it from being thought of as "wages" under §200.

In the US Ct. of Appeals, 15th Cir. case Ball v. International Machinery Corp. (2005), while the court declined to speculate on the determination of whether stock options would be considered "wages" in the State of Columbia - they did provide some argument as to why they would not be considered so that is persuasive. Parsing the language of the Columbia statute defining "wages" (noted above from §200) asserted that the stock option concept did not fit the definition of "wages" in CLC §200. First, it was asserted that stock options are not "amounts" - they are only contractual rights to buy shares. Next, it was asserted that they are not "fixed or ascertainable" because while the option price the employee pays may be fixed, the price at which it can be sold varies according to market conditions. Third, whereas "wages" are determined by a standard related to the quantity or units of work performed, and even pension plans and profit sharing plans are determined by a standard related to continued length of service and the fixed amount of earnings of the participating employee, the same cannot be said for stock options.

According to Melinda Choy in her interview Ergometrix used the stock options not to compensate and reward employees for their service to the company, but as an incentive for the employees to stay with the company and have an interest in its success. Employees were given salaries and "fringe benefits" such as health insurance and vacation as compensation, and furthermore, the participants had to put up their own money in order to exercise the option and there never was a guarantee that the company would do well and the option would be of value. Also, as Melinda points out the grants were not given based on volume or hours of work; they were simply given based on management's subjective belief at the time that some incentive was necessary to keep a valuable employee around.

Arthur Schaeffer may try to argue that the stock options can be considered wages and compensation for work performed because the hardest workers and top producers (according to Melinda) got the largest grants - but on the whole I conclude that the Columbia court will not consider stock options to be "wages" under CLC §200.

(c.) Are the lapse and forfeiture provisions in the stock option plan valid under Columbia law?

Lapse Provision

Mr. Schaeffer asserts that the lapse provision in the stock option plan is invalid under Columbia Labor Code §221 and §222, which respectively hold that it is : (1)unlawful for any employer to receive from an employee any part of wages theretofore paid by said employer to said employee; and; (2) unlawful, in the case of any wage agreement arrived at through collective bargaining, for an employer to withhold from any employee any part of the wage agreed upon.

First, it should be noted that §222 of the CLC does not have any application to our case because, as affirmed by Melinda Choy, Ergometrix has never been unionized and as was similarly the case in Suarez (1982) where the employer is non-union the wages were not subject to a collective bargaining agreement.

Next, is the lapse provision violative of CLC §221? Only if the stock options are

considered "wages" and thus vest "cumulatively and proportionately as the employee performs his or her work for the employer." (Suarez, p. 7). However, as discussed earlier it is likely that the options are not wages and thus do not vest pro rata, so that the lapse would not be considered receiving of wages from an employee to an employer theretofore paid.

Forfeiture Provision

The Ergometrix forfeiture provision provides that in the event the participant violates the non-competition covenant in the employment contract he forfeits his rights to any unexercised grants they had been awarded. Mr. Schaeffer claims that this provision is also violative of CLC §221 and §222.

As already discussed, §222 is not applicable to this case. And as discussed above with respect to the lapse provision, this provision cannot be seen to violate §221 unless it is found that the stock options are "wages." And, again, as discussed early it is most likely that stock options are not "wages" under Columbia law.

(d) Does the forfeiture effected by the noncompetition component of the stock option plan violate CCC §1600?

As already discussed earlier in regards to the Ergometrix noncompetition covenant in the employment contract - the state of Columbia has a long history of upholding its policy-based decisions to void noncompetition covenants even though that is not a majority view in this country.

Thus, it can be seen as a different argument to make to uphold the forfeiture provision of the stock option plan that is based upon a noncompetition clause the court is likely to find distasteful.

However, there may be some chance to succeed on this issue. Even in the Suarez case, where the court found that vacation pay is a vested interest and "wage" that cannot be forfeited - they did admit that there are certain situations where even a vested interest may run up against valid conditions that result in lawful forfeiture. Of course, this statement was made in relation to a pension plan and the footnote asserts that lawful forfeiture is limited - pointing to the McGill case presented earlier where a forfeiture provision was invalid when effected by a noncompetition clause.

Thus, it seems likely from precedent that even if the forfeiture provision would have been valid on its own - the noncompetition clause that effects it may make it invalid.

Another argument, made in the case discussed earlier, Ball, is that the forfeiture provision itself does not violate §1600 and keep the participant from working for a competitor. Mr. Schaeffer could have exercised his option at any time prior to quitting his position with Ergometrix and he would not have had to forfeit the proceeds even after going to work for the competition. Thus, as the court in Ball states, the forfeiture provision was "no restraint at all. It was simply a contractual obligation to give back the money if he did what he had agreed not to do." (p. 13) This would make §1600 inapplicable to the forfeiture provision.

I believe this is a strong argument, however, as noted earlier, Ball is not a Columbia Supreme Court case and the Ball court may have been influenced in their decision by Olympia law, which generally upholds noncompetition clauses, unlike Columbia. I do, however, think since this is a matter of first impression that it is an argument worth making

and believe that we can be successful on this issue.

TUESDAY AFTERNOON
JULY 24, 2007

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2007 California Bar Examination and two selected answers to each test.

The answers selected for publication received good grades and were written by applicants who passed the examination. These answers were produced as submitted, except that minor corrections in spelling and punctuation were made during transcription for ease in reading. The answers are reproduced here with the consent of their authors.

Contents

CARTER v. RESTON HEALTH

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

CARTER v. RESTON HEALTH

FILE

COLUMBIA SUPERIOR COURT
DARBY COUNTY

MEMORANDUM

TO: Applicant

FROM: Judge Melissa Grant

DATE: July 24, 2007

RE: **Carter v. Reston Health**

The litigation in Carter v. Reston Health involves claims by Roseanne Carter, an indigent health care patient, that Reston Health engaged in discriminatory and predatory billing practices adversely affecting her and others similarly situated.

I have just concluded a hearing on a motion by counsel for Reston Health to disqualify the attorneys for Roseanne Carter because of a conflict of interest.

I conducted the hearing by receiving written declarations in support and opposition and by examining Mallory Jergens *in camera*. Ms. Jergens is the attorney whose status is alleged to have created the conflict. I believe Ms. Jergens was truthful in her statements to me and that she has not made any disclosure to National Center for Health Care (NCHC) of confidential information relating to Reston Health.

I haven't yet decided how to rule on the motion. Please prepare an objective memorandum that analyzes the legal and factual issues raised by the motion to disqualify plaintiff's law firm, NCHC. After objectively analyzing each issue, your memorandum should conclude with a recommendation as to how I should rule.

Malcolm Richardson
Suzanne Feldman
National Center for Health Care
100 Placer Street, Suite 300
Rincon, COL 83013
Telephone: (111)557-7887

Attorneys for Plaintiff Roseanne Carter

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,
Defendant.
_____/

Case No. C06-030355MG

COMPLAINT - CLASS ACTION

Causes of Action:

Count One: Third Party Breach of Contract
Count Two: Breach of Contract
Count Three: Breach of Duty of Good Faith and Fair Dealing
Count Four: Breach of Charitable Trust
Count Five: Violation of the Columbia Unfair Competition Act
Count Six: Violation of the Consumers Legal Remedies Act
Count Seven: Unjust Enrichment

* * *

10. Defendant Reston Health is a private, not-for-profit corporation incorporated in Columbia. Reston owns and operates more than 20 hospitals in Columbia, including Perkins Memorial Hospital.

11. Plaintiff Roseanne Carter received services at Defendant's Perkins Memorial

Hospital in 2002. She sought emergency room services and indicated at the time the services were rendered that she did not have medical insurance to pay for the services. She received two stitches in her finger for a cut. Since receiving the services, Ms. Carter has received bills for over $2400, despite the fact that similar services for an insured patient would have been billed at one-half this amount. She has been subject to numerous collection calls at home and at work, despite requests that these calls desist. She has not been informed of any rights that she might have to negotiate the terms of repayment, or to reduce the amount allegedly owed.

* * *

16. Defendant Reston currently receives a federal income tax exemption as a purported "charitable" institution. Defendant Reston is required to operate "exclusively" in furtherance of a charitable purpose, with no part of its operations attributable directly or indirectly to any noncharitable commercial purpose. By accepting this favorable tax exemption, Defendant Reston has explicitly and/or implicitly agreed to provide uninsured patients with medical care at reasonable rates, and to not engage in aggressive and unreasonable collection practices. Reston has failed to comply with these obligations.

17. Reston also engages in discriminatory pricing practices which have a significant detrimental impact on the very population Reston has obligated itself to assist.

* * *

25. Reston gives private insurance companies and governmental third party payers like Medicare and Medicaid significant discounts. It charges its uninsured patients 100% of the "full sticker price."

* * *

NATIONAL CENTER FOR HEALTH CARE

By: *Malcolm Richardson*

Malcolm Richardson
Attorneys for Plaintiff

Hugo Brenner
Austen, James & Eliot, LLP
1 Jeremiah Plaza
Fort Meade, COL 83020
Telephone: (111) 430-8500

Attorneys for Defendant Reston Health

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,

Defendant.
_____/

Case No. C06-030355MG

DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS

Defendant Reston Health ("Reston") hereby moves the court for disqualification of the National Center for Health Care ("NCHC") from this legal proceeding. This motion is based upon the following facts, more fully set forth in the Declaration of Hugo Brenner, which is attached and by this reference incorporated herein:

1. Mallory Jergens, an attorney now employed by NCHC, was formerly

employed by Coburn, Bronson & McQueen, a law firm that formerly represented defendant Reston.

2. During the period of her employment at Coburn, Bronson & McQueen, Ms. Jergens engaged in legal work on behalf of Reston that is identical to the matters at issue in this litigation.

3. Ms. Jergens acquired confidential information relating to defendant Reston, creating a direct conflict of interest. The confidential information relating to defendant Reston is, as a matter of law, imputed to all members of the NCHC law firm, which must therefore be disqualified.

Dated: May 14, 2007

Respectfully submitted,

AUSTEN, JAMES & ELIOT, LLP

By: *Hugo Brenner*

Hugo Brenner, Esq.
Attorneys for Defendants

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Austen, James & Eliot, LLP
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Fort Meade, COL 83020
Telephone: (111) 430-8500

Attorneys for Defendant Reston Health

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,

Defendant.
_____/

Case No. C06-030355MG

DECLARATION OF HUGO BRENNER IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS

I, Hugo Brenner, declare as follows:

1. I am the managing partner of the law firm of Austen, James and Eliot, LLP.

2. Our firm has been retained by Reston Health (Reston) to represent it in this action.

3. We learned from Reston that it had previously received representation from the law firm of Coburn, Bronson & McQueen (Coburn). One of the associates attended

law school with attorney Mallory Jergens, and knew that she had worked at Coburn and now works at Plaintiff counsel's firm, National Center for Health Care (NCHC).

4. The essence of the complaint filed by Plaintiff Roseanne Carter ("Carter") is that Reston failed to fulfill its legal and contractual obligations to provide indigent medical services to her and a class of persons similarly situated.

5. The essence of a research memorandum written and presented to Reston by Ms. Jergens during her tenure at Coburn is Reston's legal and contractual obligations as a charitable institution to provide medical services to indigents. The memorandum advises Reston on how to meet and limit its obligations. The allegations of the complaint filed in this action relate directly to many of the issues that Ms. Jergens opined on in her research memorandum.

6. NCHC asserts that there is no other counsel available to represent Carter in this litigation. This is not true. I have personally contacted the managing partners of five prominent firms in the County of Darby who have reputations for providing significant amounts of pro bono services. Each of these firms indicated that it would have seriously considered helping Carter with regard to her collection dispute with Reston. Since the firms we contacted are willing to represent Carter on a pro bono basis, there is no cost concern present.

7. A review of the complaint in this case shows that NCHC is not particularly expert in the causes of action presented. The claims are based in contract, constructive trust, and tax law. None of these are areas in which NCHC has particular expertise which couldn't be available from any private firm.

8. Reston will suffer prejudice if NCHC is permitted to continue representing Carter inasmuch as Reston can never by assured that client confidential material has not been and will not be passed on from Ms. Jergens to other staff at NCHC.

9. NCHC is a small firm consisting of no more than 10 lawyers, of whom Ms. Jergens is a supervising attorney. In such a small office, it is impossible to create an effective ethical screen.

10. We are bringing this motion as soon as reasonably possible after learning of the facts. Reston was served with the complaint in this matter on approximately February 23, 2007. We learned of Ms. Jergens' conflict approximately March 23, 2007. We conducted an investigation of the facts, and brought this motion promptly upon completing our investigation.

11. Neither Reston nor my firm are motivated by anything except the interests of Reston in ensuring the continued confidentiality of attorney-client privileged information.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on June 22, 2007, in Fort Meade, Columbia.

Hugo Brenner

Hugo Brenner

Malcolm Richardson
Suzanne Feldman
National Center for Health Care
100 Placer Street, Suite 300
Rincon, COL 83013
Telephone: (111) 557-7887

Attorneys for Plaintiff Roseanne Carter

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated, Plaintiff, vs. RESTON HEALTH, a Columbia corporation, Defendant. _____/	Case No. C06-030355MG **DECLARATION OF MALCOLM RICHARDSON IN OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS**

I, Malcolm Richardson, declare as follows:

1. I have personal knowledge of the statements contained in this declaration. If called to testify, I would attest to the truth of these statements.

2. I am the current Executive Director of the National Center for Health Care (NCHC). I have served in this capacity for the past 15 years.

3. NCHC is a nationally recognized, not-for-profit public interest law firm specializing in policy and advocacy on behalf of low income clients in the health care area. NCHC derives 50% of its funding from foundation grants, 25% from private donations, and 25% from attorneys' fees awards. Our current $2 million annual budget supports the work of 15 advocacy staff, including 10 attorneys with over 100 years of health care-related legal experience among them. We have filed over 30 state and nationwide class actions in the past 15 years. Defendants have included the federal government, various state and local governmental agencies, and several private health care providers.

4. Mallory Jergens was hired by NCHC about three years ago. As required by our hiring policy, Ms. Jergens furnished a list of the clients for whom she provided legal services while an associate at Coburn, Bronson & McQueen. This client list was added to our office's conflict database which contains a searchable listing of all NCHC's past and current clients, opposing parties, law firms, and former client lists.

5. Roseanne Carter, the plaintiff in this action, contacted NCHC approximately six months ago. We ran a conflict check after determining who the potential opposing party or parties might be. This conflict check revealed that Reston Health, the defendant in this case, was a former client of Mallory Jergens. When this was brought to my attention, I issued the memorandum attached hereto as Exhibit 1, which by this reference is incorporated herein. I have confirmed that all of the steps in the memorandum have been carried out, and have been maintained to date.

6. This case is a class action involving a defendant with $4.4 billion in assets

that earned more than half a billion dollars in the past two years alone. Reston is a Columbia-based health care provider that operates more than 20 hospitals throughout Columbia.

7. Taking on a class action such as this litigation is a major undertaking for any firm. This dispute is not just about a collection action for $2,400 against Ms. Carter.

8. Our firm has made numerous inquiries with prominent private law firms throughout the state. We have been unable to find co-counsel, much less any firm to represent Ms. Carter. In addition, while Hugo Brenner, Counsel for Reston, is correct that the causes of action sound in areas of the law in which NCHC has no extraordinary expertise, the overarching area of the law that is at the heart of this litigation is health care for the indigent. We are the unquestioned preeminent national law firm in this area of the law. Ms. Carter evidently sought us out to represent her because of our reputation.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on July 10, 2007, in Rincon, Columbia.

Malcolm Richardson

Malcolm Richardson

National Center for Health Care

MEMORANDUM

To: All Staff
From: Malcolm Richardson
Date: January 24, 2007
Re: Roseanne Carter Ethical Screen

It is essential that the following be instituted immediately and that all legal and clerical staff abide by these provisions for the foreseeable future. Our office has been retained by Roseanne Carter to explore potential courses of action against Reston Health related to health care Ms. Carter received as a patient of a Reston Health hospital. Ms. Carter will probably be the named plaintiff in a class action we are considering filing against Reston Health. Mallory Jergens used to work for a firm, Coburn, Bronson & McQueen, which formerly represented Reston Health. In order to avoid any potential claim of a conflict of interest, Ms. Jergens must be screened from <u>any</u> access to or participation in this case. Therefore:

4. When reception staff receives a call related to this case, the call should be transferred to the appropriate staff member. The staff member who receives the call should ensure that Ms. Jergens is not in his/her office when taking the call.
5. All files related to this case shall be stored in a separate, locked file cabinet, and only staff directly working on the case, including assigned support staff, shall have keys to this cabinet. A sign-in and sign-out log shall be maintained, and all persons removing or replacing files in the locked cabinet

shall sign and date the log. No staff shall give access to this cabinet to Ms. Jergens, and Ms. Jergens shall not seek access to the cabinet.

6. Staff must ensure that any files and internal work product related to this case shall be kept in the dedicated locked file cabinet except when in use. When in use, care should be taken to not leave the files or other materials in public areas of the office such as the library. When materials are temporarily being kept in an office, they should be in closed files, with any written materials not in plain view. Ms. Jergens will not seek access to any files or materials related to this case.

7. A password-protected computer filing system will be maintained for the computer files related to this case. Only staff directly involved in the case will have access to the password. Ms. Jergens shall refrain from seeking access to the computer files related to this case.

8. Staff shall not engage in conversations or discussions regarding this case in public areas of the office, such as the library, unless the doors are closed and Ms. Jergens is not present. Ms. Jergens will not engage in conversations with other staff regarding Reston Health matters. Ms. Jergens will not supervise any staff regarding this case.

HEARING TRANSCRIPT OF *IN CAMERA* TESTIMONY OF MALLORY JERGENS

Judge Melissa Grant: In the matter of Roseanne Carter versus Reston Health, we are now on the record. This is an *in camera* proceeding with attorney Mallory Jergens present. Let the record reflect that other than court personnel and Ms. Jergens, no other parties are present. Ms. Jergens, you understand that you are under oath, don't you?

Mallory Jergens: Yes, I understand, your honor.

Q: Ms. Jergens, please describe your legal career.

A: After graduating from law school eight years ago, I went to work as an associate for Coburn, Bronson and McQueen. I worked there for five years. I did exclusively transactional work while I was there, and specialized in health care law. In 2004, I went to work for the National Center for Health Care. It is a private, not-for-profit law firm doing both litigation and policy work on behalf of low income people in health-care related issues, including Medicare and Medicaid.

Q: While you were at Coburn, did you do any work for Reston Health?

A: Yes, Reston had been a client of the firm for several years before I worked at Coburn, and I was assigned to work for the partner who oversaw the firm's work on behalf of Reston.

Q: Please describe the specific work you did on behalf of Reston.

A: For the first couple of years, I just reviewed various contracts between the various Reston hospitals and various vendors, as well as between the hospitals and various entities, such as counties, the feds, and HMOs on the provision of health care.

Q: Did you meet with the client at all during these first couple of years?

A: No, I analyzed the contracts, made various suggestions, and then passed on these comments to the partner who would meet or speak with the various hospital administrators.

Q: I gather that the nature of your work on behalf of Reston changed at some point?

A: Yes, your honor. I was gradually given more responsibility. One specific project

that I recall involved an extensive memorandum advising Reston on its obligations as a charitable not-for-profit in terms of its obligation to provide indigent medical services in order to preserve its not-for-profit status under federal and state tax laws. I remember that this project took me at least a month to complete.

Q: Do you know what happened to your memo?

A: Yes, I gave it to the CEO of Reston. I also made a presentation to Reston's Board of Trustees highlighting the conclusions of my research.

Q: Did you advise the Reston Board to take specific actions as a result of your research?

A: Yes, I did, your honor. Would you like for me to go into detail?

Q: I'm trying to avoid the disclosure of confidential attorney-client communications, so please don't. Can you recall any other specific assignments you had regarding Reston?

A: No, I don't, your honor. I continued to review contracts. I also re-drafted a number of contracts. I also conducted research as requested, but I honestly don't recall any other specific assignments.

Q: Throughout your five years at Coburn, what percentage of your time was devoted to work for Reston?

A: I would say that it averaged about 10%, your honor, but that's really a guess.

Q: Okay, please tell me about your work at the National Center for Health Care.

A: I started working for NCHC about three years ago. I was hired to head the Indigent Health Care Project.

Q: What does that project do?

A: We are concerned with litigation and legislative proposals to improve the medical care for the poor and working poor.

Q: Could that include hospitals' services to the uninsured, such as are at issue in this case?

A: Yes. This case is being handled by one of the Project's attorneys.

Q: How many attorneys are in the Project?

A: Two of us.

Q: Are you both in the same office?

A: Our offices are adjacent.

Q: Do you supervise any of the work on this case?

A: No. None. But on all other matters I supervise the other Project attorney.

Q: When you were hired, were you asked about your work at Coburn?

A: Of course. I think that my experiences made me particularly valuable. The Executive Director, Malcolm Richardson, also had me obtain a client list – a list of all the clients on whose behalf I'd performed work while I was at Coburn. Mr. Richardson made it clear that this list would be incorporated into NCHC's database for conflicts checks.

Q: What's your understanding of how the conflict system at NCHC works?

A: I don't know the specifics, but I know that before we undertake representation of a client, a conflict check is run. If a potential conflict comes up, it is brought to the attention of Mr. Richardson, who takes appropriate action.

Q: Do you know what happened when this case against Reston first arose?

A: Yes. Mr. Richardson sat down with me and said that we were considering filing a case against Reston. He then went over the provisions of the memo he was going to circulate that explained how I was to be screened from the case. He also told me that I must observe the terms of that memo scrupulously. I think the memo is attached to his declaration filed in this proceeding.

Q: So what do you know about this litigation?

A: I don't know, except from what I've read in the newspapers. It concerns the billing practices of Reston as it relates to uninsured patients. That's all I know.

Q: As far as you know, have all of the procedures in the memo been carried out?

A: I don't know for sure. All I know is that I have not had any conversations with anyone at NCHC about this case since that initial conversation with Malcolm Richardson. No one in the office has approached me about the case. I have not heard any conversations about the case, even inadvertently.

Q: Ms. Jergens, did you take any research files or other work product with you from

Coburn to NCHC?

A: No, but I did take general research files with me. That is permitted under Coburn's policies. However, I retained no work product, meaning any work specifically related to a particular client. This work could not be removed from Coburn.

Q: At NCHC have you had any conversations about the law involved in hospitals' obligations to uninsured patients?

A: Yes, I have. But I have only discussed the law generally. I was never asked about and never disclosed any specific information about Reston.

Q: Thank you, Ms. Jergens. That's all I have. The hearing is closed.

END OF TRANSCRIPT

TUESDAY AFTERNOON
JULY 24, 2007

California
Bar
Examination

Performance Test A

LIBRARY

CARTER v. RESTON HEALTH

LIBRARY

HOGLUND v. FORSYTH

United States Court of Appeals (15th Circuit, 2001)

James Forsyth, the plaintiff in the underlying case, *Forsyth v. County of Putnam*, is represented by attorney Stephen Younger and the law firm of Younger, Younger & Reichmann. Joseph Reichmann is a retired United States Magistrate Judge who, five years ago, presided over settlement negotiations in *Thomas v. County of Putnam*.

Forsyth and *Thomas* are police brutality cases, arising out of different incidents separated in time by several years. They are related only in the sense that the County of Putnam and one of its deputy sheriffs, Scott Hoglund, are defendants in both cases.

Defendants moved to disqualify the Younger firm on the ground that, during the settlement negotiations in *Thomas*, Reichmann met with defense counsel ex parte and therefore had access to confidential information pertaining to the County of Putnam and Deputy Sheriff Hoglund. Younger did not contest the disqualification of Reichmann but proffered the following evidence: Reichmann joined the Younger firm as a partner on November 1, 1999, and has had no involvement in the *Forsyth* case. Moreover, a week before Reichmann joined the firm, Stephen Younger removed all of the files pertaining to the case to his home and instructed the firm's only other lawyer, partner Marion Younger, not to discuss the case with Reichmann. Reichmann himself submitted a declaration stating that he had no recollection of the settlement discussions in *Thomas*, and that he does not recall having received any confidential information from defendants' lawyer in that case. Reichmann, moreover, explained that "as a magistrate judge from 1980 to 1996, it was my long-standing, regular, and continuing practice in conducting settlement conferences (1) not to go into the merits of actions, (2) not to request or receive either confidential or strategic information from counsel, and (3) to discuss only monetary matters." Reichmann Declaration at page 2.

For their part, defendants submitted the declaration of Richard Kemalyan, defense counsel in *Thomas*, who stated as follows: "I do not have a specific recollection of the details of what communications were made between declarant and Magistrate Judge Reichmann outside the presence of plaintiff's counsel. I am sure that in the normal course of the Settlement Conference, I did have private and confidential communications with Magistrate Judge Reichmann. I cannot recall the details of those communications." Kemalyan Declaration at page 1.

The district court denied the motion to disqualify the Younger firm, finding no evidence that Reichmann received confidential information during the settlement negotiations in *Thomas*. The court also found that the wall of confidentiality erected to shield Reichmann from the Youngers was adequate to protect the interests of the defendants. Defendants brought this petition for a writ of mandamus seeking reversal of the district court's order and disqualification of the Younger firm.

Until recently, the practice of judicial officers returning to law firms was rare, and the relevant authorities are sparse. The case law draws a distinction between situations where a judicial officer acted merely as an adjudicator and those where he acted as a mediator or settlement judge.

A judge who has participated in mediation or settlement efforts becomes a confidant of the parties, on a par with the parties' own lawyers. Under those circumstances, the judge will be conclusively presumed to have received client confidences in the course of the mediation, and his later participation in the case will be governed by the same rule that governs lawyers: He may not participate in the case and neither may his law firm.

The district court erred by inquiring whether confidential information actually passed from the parties to the mediator. As this case demonstrates, memories as to what transpired during these off-the-record proceedings are likely to be dim, making the fact-

finding process highly perilous. More importantly, allowing an inquiry into what transpired during settlement negotiations will surely chill the candor of the parties in speaking to the mediator. Suffice it to say that the mediation process inherently leads to the disclosure of confidential information, as Reichmann's declaration confirms. While Reichmann claims not to have requested or accepted confidential information during settlement negotiations, he admits that he did discuss "monetary matters." Information as to a party's bottom-line settlement position, or the degree of flexibility in settling a particular case, is itself a significant piece of information that the opposing party would love to have. In litigation, as in life, monetary matters *are* confidential matters.

Reichmann presided as settlement judge over a case other than the present one. Presuming that Reichmann learned confidential information as settlement judge in *Thomas*, it doesn't follow that any of that information pertains to *Forsyth*. When the two cases involve different parties and/or different incidents, disqualification of the former judge and his law firm is appropriate only if the two cases are "substantially factually related." The “substantially factually related” standard entails significant overlap of facts between the two cases. This standard also applies when an attorney is disqualified from representing a client because the attorney previously represented a party adverse to the client in a related case.

The "substantially factually related" standard provides that if there is a *reasonable probability* that confidences were disclosed in an earlier representation which could be used against the client in a later, adverse representation, a substantial relation between the two cases is presumed. To determine whether *Thomas* and *Forsyth* are sufficiently related, we must decide whether "there is a reasonable probability" that the confidences we presume were disclosed during the settlement discussions in *Thomas* would be useful to the plaintiff in *Forsyth*. This inquiry calls for a careful comparison between the factual circumstances and legal theories of the two cases. We cannot, on the record before us, determine whether *Forsyth* and *Thomas* are substantially related.

Yet we need not leave this matter unresolved and open for future dispute, which would further delay resolution of the underlying litigation. We will *assume* the two cases are substantially related, so Reichmann is presumed to have learned confidential information in *Thomas* that is relevant to *Forsyth*. This, in turn, will give rise to the further presumption that he shared those confidences with the Younger firm. If this latter presumption is irrebuttable, "the firm as a whole is disqualified whether or not its other members were actually exposed to the information" Reichmann learned from the earlier case.

Because we apply state law in determining matters of disqualification, we must follow the reasoned view of the state supreme court when it has spoken on the issue. For a long time, the Columbia Supreme Court was silent as to whether the presumption of shared confidences is rebuttable, leaving the question to the state's intermediate appellate courts. The Columbia courts of appeal developed a general rule that the presumption is not rebuttable.

But the Columbia Supreme Court has recently cast doubt on this approach. In *Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.* (2001), an attorney represented one party while the firm where he was former counsel represented an adverse party to the *same* litigation. *SpeeDee Oil* presented a situation on all fours with appellate case law holding that the presumption of shared confidences is irrebuttable. The Supreme Court, nevertheless, held that it "need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures," because the firm had failed to set up an effective screen. Observing that federal decisions have taken "a more lenient approach to conflicts disqualification than prevails in Columbia," the Court left open the possibility that screening can rebut the presumption of shared confidences within the firm. We read *SpeeDee Oil* as sending a signal that the Columbia Supreme Court may well adopt a more flexible approach to vicarious disqualification.

SpeeDee Oil was the kind of case most likely to give rise to automatic disqualification because the same firm represented adverse parties in the same litigation. The Columbia Supreme Court recognized that "discrete, successive conflicting representations in substantially related matters" - as are presented in our case - may pose less of a threat to the attorney-client relationship. Magistrate Judge Reichmann joined the Younger firm years after presiding over the *Thomas* settlement negotiations, and the Younger firm does not seek to represent a party to the *Thomas* litigation. The current case, though we assume it to be related, involves largely different facts. These circumstances create an even more compelling case than *SpeeDee Oil*, where the court nonetheless refused to hold that the presumption is irrebuttable.

The vicarious disqualification of an entire firm can work harsh and unjust results, particularly in today's legal world where lawyers change associations more freely than in the past. A rule that automatically disqualifies a firm in all cases substantially related to the tainted lawyer's former representation could work a serious hardship for the lawyer, the firm and the firm's clients. An automatic disqualification rule understandably would make firms more reluctant to hire mid-career lawyers, who would find themselves cast adrift, and clients would find their choice of counsel substantially diminished, particularly in specialized areas of law. Such a rule also raises the specter of abuse: A motion to disqualify a law firm can be a powerful litigation tactic to deny an opposing party's counsel of choice. This is a case in point: Forsyth's counsel, Stephen Younger, has a formidable reputation as a plaintiffs' advocate in police misconduct cases; defendants in such cases may find it advantageous to remove him as an opponent.

Several of our sister circuits have held that a firm can rebut the presumption of shared confidences when it seeks to represent a party in a case substantially related to one in which a new member of the firm has participated. Although not adopted in Columbia, the ABA Model Rules of Professional Conduct also recognize that the increased

mobility of lawyers between firms calls for a less rigorous application of the disqualification rules.

We would nevertheless accept the costs of automatic disqualification, if it were the only way to ensure that lawyers honor their duties of confidentiality and loyalty. But it is not. A client's confidences can also be kept inviolate by adopting measures to quarantine the tainted lawyer. An ethical wall, when implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm. The ABA Model Rules explicitly approve the use of screening procedures to avoid vicarious disqualification where a former judicial officer or government lawyer has joined the firm. Here, Stephen Younger removed all files concerning the *Forsyth* case from the law office before Reichmann joined the firm; all attorneys were instructed not to discuss the case with Reichmann. The district court found "ample evidence of appropriate screening measures: all members of the firm have declared that they have not discussed the pending case and that Reichmann does not have access to the case file." We agree that the measures taken by the Younger firm adequately protect any legitimate interests of the defendants.

The changing realities of law practice call for a more functional approach to disqualification than in the past. In resolving this case, we take our cue from the Columbia Supreme Court's recent indication that it may be inclined to follow the path taken by other federal courts. We hold that the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge, where the settlement negotiations are substantially related (but not identical) to the current representation. Screening mechanisms that are both timely and effective, as the Younger firm erected here, will rebut the presumption that the former judge disclosed confidences to other members of the firm. Because the district court here found that the ethical wall adopted by the Younger firm was being scrupulously enforced and there is no reasonable possibility that confidential information will leak to Younger from

Reichmann, or vice versa, we find no basis on which to disqualify the Younger firm from serving as counsel for plaintiff *Forsyth*.

Petition for writ of mandamus DENIED.

CITY AND COUNTY OF AMES v. MAMBO SOLUTIONS, INC.

United States Court of Appeals (15th Circuit, 2004)

Dennis Hammond (Hammond), now the City Attorney of Ames, represented Mambo Solutions, Inc. (Mambo), while in private practice, in a matter that was substantially related to this case. Thus, there is a conclusive presumption that Hammond had access to confidential information in the course of the earlier representation that is relevant to the current litigation and his disqualification is mandatory. We must decide whether his disqualification automatically extends to the entire City of Ames City Attorney's Office (Office) or simply requires that the Office effectively screen Hammond from any participation in this case. We hold that the presumption that Hammond will share the confidences of his former client with others in the Office is rebuttable by establishing the existence of an effective ethical screen. We remand to the trial court for a determination on the effectiveness of the ethical screen.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2000, Hammond was still in private practice. Mambo retained Hammond and his firm to represent it in a range of business matters, including dealings with the City of Ames (City) and an ongoing dispute with the City's Department of Building Inspections.

In November 2001, Hammond was elected Ames City Attorney and shortly thereafter left private practice.

In September 2001, under Hammond's predecessor, the Ames City Attorney's Office (Office) began an investigation that turned up evidence that Marcus Armstrong, the head of the City's Department of Building Inspections, had authorized prepayments on a city contract with Government Computer Sales, Inc. (GCSI) in violation of City law, and that GCSI had failed to fulfill the contract.

In February 2003, the City sued GCSI, Armstrong, and others, alleging that GCSI paid Armstrong kickbacks through various fictitious business entities in order to have him select GCSI for the contract and authorize illegal prepayments.

In March 2003, further investigation uncovered evidence of payments by Mambo, another City contractor, to Armstrong's fictitious business entities, and in April 2003 the City added Mambo as a defendant in the GCSI lawsuit.

One month later, Mambo moved to disqualify Hammond and the entire City Attorney's Office due to Hammond's previous representation of Mambo in matters substantially related to the current lawsuit. The City Attorney's Office responded that it had instituted an ethical screen immediately upon discovering Mambo's alleged involvement in the kickback scheme. All responsibilities for decisions concerning the matter were passed from Hammond to his chief deputy, Jesse Smith, and Hammond had no further involvement in the case. It also argued that Hammond's prior representation of Mambo was not substantially related to the current litigation, and that disqualification was therefore unnecessary.

The trial court granted the motion to disqualify Hammond and the City Attorney's Office. Critically important to our analysis are the trial court findings that Hammond had personally represented Mambo, that he had obtained confidential information from Mambo, and that the subject of the prior representation was substantially related to the current lawsuit. The trial court held that as a matter of law disqualification of both Hammond and the City Attorney's Office was required.

A conflict of interest may arise from an attorney's successive representation of clients with adverse interests. With successive representation of adversaries, the chief fiduciary value jeopardized is that of client *confidentiality*. The former client's expectation of confidentiality must be preserved to ensure the right of every person to freely and fully

confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. The attorney must maintain those confidences inviolate and preserve them at every peril to himself or herself. Because of this duty, an attorney in actual possession of material containing confidential information from a former client may not represent an adverse party without the former client's consent.

A trial court may disqualify a party's counsel to enforce these ethical standards. A trial court's authority to disqualify an attorney derives from the power inherent in every court to control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

In deciding a motion to disqualify, however, the court must balance the interests of a client in preserving its confidences with the interests of disqualified counsel’s client. These interests included a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.

In successive representation cases, the "substantially factually related" standard mediates between these competing interests. Absent a substantial factual relationship between the subjects of the two representations, the current client's choice of counsel will be honored and the motion to disqualify must be denied. However, if a substantial factual relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is

mandatory. This mandatory rule applies unless the court finds that other countervailing factors exist, such as tactical abuse underlying the disqualification motion.

VICARIOUS DISQUALIFICATION

In addition, the general rule is that disqualification extends from the affected attorney to her entire firm. The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. (*SpeeDee Oil*). Vicarious disqualification is required "to assure the preservation of [the client's] confidences and the integrity of the judicial process." (*Id*.).

The Rules of Professional Conduct of the State Bar of Columbia do not address the vicarious disqualification of an entire law firm when a member of that firm has a former client conflict. For this reason, the vicarious disqualification rules have essentially been shaped by judicial decisions.

The appellate courts' current rule that rigidly applies vicarious disqualification in certain contexts was developed decades ago. The realities of a modern law practice compel a more flexible approach. Lawyers are increasingly mobile, and mid-career shifts are common. Gone are the days when attorneys typically stay with one organization throughout their entire careers. Law firm mergers, dissolutions and acquisitions of other firms' practice groups occur with regularity. International mega-firms have been formed, with offices in numerous countries, containing lawyers who are unlikely to meet, let alone discuss confidential matters, even if they share a common language. In this context, the automatic disqualification of the law firm may result in harsh consequences for the lawyer and the firm, without any compelling reason. Further, the firm's clients are likely to find their counsel of choice limited, particularly in specialized areas of the law. The rule that the presumption of shared confidences is conclusive also creates a substantial potential for abuse. A motion to disqualify is an effective litigation tactic

depriving an opposing party of its counsel of choice, and, possibly, driving up its legal fees significantly. This is particularly true in a situation where a client and the challenged law firm have a long-term relationship.

None of these problems detracts from the primacy of preserving "public trust in the scrupulous administration of justice and the integrity of the bar." (*SpeeDee Oil).* But, the disqualification of the conflicted lawyer's current firm is not the sole means to preserve these important values. (*Hoglund*). A client's confidences can be maintained by isolating the lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate *under the circumstances* to protect information that the isolated lawyer is obligated to protect. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Vesting the trial court with the discretion to approve a screen when the head of a public law office is disqualified will permit an evaluation of all relevant circumstances. It is, of course, significant that the conflicted attorney has office-wide supervisory responsibilities, or helps in the formulation of office policy or plays a major role in the hiring, firing and promotion of subordinates. But, in evaluating the effectiveness of any screen imposed, other factors should come into play. For example, the size of the office should be considered, at least to the extent it affects the number of levels of supervision, and, therefore, the ease with which another supervisor can replace the conflicted office head in the current case. Further, the trial court should consider whether the attorneys actually handling the case, and the office files they utilize, are in the same physical location as the disqualified head of the office.

In a motion to disqualify the current law firm because of an attorney's former client conflict, the presumption that the law firm is disqualified should be rebuttable by evidence that the conflicted attorney has been effectively screened.

Remanded.

DISSENTING OPINION BY JUSTICE JONES

I respectfully dissent. The majority's decision reaches far beyond the narrow issues presented. In one fell swoop, this Court precipitously overturns a host of decisions made by careful deliberations by appellate courts over many years and presumes to predict how the Columbia Supreme Court will decide its own rules.

The Court ignores the holding of *SpeeDee Oil*: "The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. . . . Vicarious disqualification is required to assure the preservation of the client's confidences and the integrity of the judicial process." It is not for this court to depart

from this holding. We are not called upon to decide whether an ethical screen or some other lesser prophylactic measure might suffice.

I would affirm.

Answer 1 to Performance Test A

To: Judge Melissa Grant
From: Applicant
Date: July 24, 2007
RE: Carter v. Reston Health, Motion to Disqualify Counsel

Overview

The following memo provides an objective analysis of the legal and factual issues relevant to the motion to disqualify the Plaintiff's Attorney and law firm in the above referenced action. By way of brief overview, the plaintiff is represented by National Center for Health care (NCHC), a nonprofit legal aid organization which provides representation to low income clients in matters related to health care. The NCHC employs Jergens, a staff attorney who was formerly employed by the Coburn firm, which formerly represented the defendant, Reston Health Care. Pursuant to her employment at Coburn, Jergens had access to confidential information regarding Reston as a result of working directly on matters involving Reston. NCHC became aware of this conflict, and has taken certain steps to screen off Jergens from disclosing confidential information she may have learned during her representation of Reston. Reston is now represented by Austen firm, which has filed a motion to disqualify both Jergens and the NCHC from representing the plaintiff.

Legal Analysis

I. Duty of Confidentiality and Imputed Disqualification

When a conflict of interest arises from an attorney's "successive representation of adversaries" in litigation, the fiduciary duty of confidentiality to the clients is "jeopardized." Mambo. As the court noted in Mambo, this duty is essential to ensuring that each client feels free to confide confidential information with their attorney. Therefore, as a basic matter, "an attorney in actual possession of material containing confidential information from a former client may not represent an adverse party without the former client's consent." Mambo. The trial court, therefore, has the authority to disqualify a party's counsel to enforce the ethical standards. Mambo. However, the court must also balance the interests of the duty of confidentiality with the interests of the client whose counsel is disqualified, and may suffer a financial burden, or be the victim of improper tactical abuses of the motion to disqualify simply to harass or delay the client's rights.

In balancing these two competing concerns, the court has used the "substantially factually related" standard. Mambo; Speedee; Hoglund. Where there is no substantial factual relationship between the "subject of the two representations", the court will uphold the client's choice of counsel. Id. Where such a conflict exists, the attorney is mandatorily disqualified, unless some other countervailing factor is demonstrated, as an abusive tactical procedure to frustrate the plaintiff's rights. Id. Further, the court will impute this disqualification to the other attorneys in the firm, absent screening measures taken by the firm, which are discussed below. Id.

A. Substantially Factually Related Matter

A threshold question to determine whether a conflict of interest will be assigned to an attorney who represents two adverse clients in successive representation is whether there is a "substantial factual relationship between the subjects of the two representations." Mambo. This standard is applicable where there is "significant overlap of facts between the two cases." Hoglund. (applying the standard to a judge who had participated in an earlier case, but holding that the standard applies equally to a lawyer). The focus of the standard is to identify those cases where there is a reasonable probability that information was disclosed in the first representation which might be useful to the plaintiff in the second action. Where the moving party is able to demonstrate that a substantial factual relationship between the prior and current representation exists, access to that information by the attorney is presumed, and the disqualification of that attorney is mandatory. Mambo.

In Hoglund, the court considered a case of a judge who had overseen an ex parte examination of the defendant while presiding over a case involving police brutality, and subsequently represented a plaintiff in an unrelated case against the same defendant on an unrelated allegation of police brutality. The court, without deciding the issue, focused on the question of whether the two matters were discreet, were close in time, involved largely different facts. The court presumed in Hoglund that the conflicted attorney had gained confidential information, and presumed that it was substantially factually related, though it did not decide the issue.

In the current case, NCHC and the plaintiff are alleging that Reston Health Care has engaged in discriminatory pricing practices, and has violated their obligations pursuant to their tax status as a charitable organization. While employed at Coburn, Jergens worked directly on matters involving Reston Health Care, and in fact prepared a memo and presentation to the Reston Board of Trustees regarding Reston's obligations as a tax free charitable organization in providing indigent medical services to preserve its nonprofit status. This memorandum would have covered issues and facts directly related to the part of the claim involving the charitable status. Further, given that only three years have passed since Jergens left Coburn, the information she obtained is likely still true and relevant.

Jergens also reviewed contract matters involving Reston during her time at Coburn, which may have involved reviewing billing agreements with insurance companies, bill collectors, and various levels of government. This would give her access to information regarding the pricing practices of Reston, which is also directly an issue in this case. The scope of Jergen's practice regarding Reston while working at Coburn involves issues that are substantially factually related to the current litigation. Therefore, Reston has argued that this entitles them to have Jergens disqualified.

However, Jergens has testified under oath, in camera, that she has not worked for Reston or Coburn in several years. Further, she only spent approximately 10% of her time working on matters involving Reston, and does not specifically remember any specific assignments with Reston other than the memorandum discussed above. Therefore, there is an argument that Jergens is not in fact in possession of any confidential information. This argument is without merit, however, under Mambo and Hoglund, which have both held that possession of confidential information will be presumed if the attorney had worked on substantially factually related matters in the prior representation.

Therefore, the court should rule that because the two matters involving Jergens are substantially factually related, Jergens is disqualified from representing the plaintiff in this action.

B. Abuse of Tactical Motion

The courts have also indicated that even where the information in the matters is substantially factually related, the court should balance the interests of the plaintiff in seeking counsel of their choice, and, as such, should not allow the defendant to use the motion to impede the plaintiff's claim. The court in Mambo noted that the mandatory rule of disqualification applies unless the court finds that "other countervailing factors exist, such as tactical abuse underlying the disqualification memo." As the court held in Hoglund, "a motion to disqualify a law firm can be a powerful litigation technique." (noting that the lawyer for the disputed firm has a formidable reputation in the area of litigation, and "defendants in such cases may find it advantageous to remove him as an opponent").

In this case, the defendant's counsel has stated in their declaration that they are not pursuing this motion for any improper purpose, but solely to preserve their fiduciary rights to confidentiality. They have further asserted in their declaration that they have made attempts to locate alternative counsel for the plaintiff, indicating a desire to have the litigation proceed under different representation. Finally, they have declared that they have raised this issue as soon as was practicable given their knowledge of the situation. If NCHC is disqualified, it will no doubt set the plaintiff's case back, as this is a complex matter of a class action lawsuit.

On the other hand, NCHC has asserted in their declaration that they have also attempted to find co-counsel or alternative representation, but have been unsuccessful in finding anyone to take the case, calling into question the assertions of the defense. And, similar to the facts of Hoglund, NCHC is a formidable opponent in the area of health care litigation, and therefore Reston would gain substantial benefit by removing them from the action, regardless of whether they have access to confidential information. NCHC is a "preeminent national law firm" in the area of healthcare litigation.

However, in the absence of any direct allegations of improper purpose by the defendant, the court should not deny the motion on this basis. Though the matter involves providing indigent health care, it also involves specific issues of contract law and tax law, for which NCHC may not in fact be the most formidable opponent. Therefore, the motion should not be denied on this motion.

C. Vicarious Disqualification

As discussed above, given the substantial factual related nature of this action and Jergens' representation of Reston, the court should rule that Jergens is disqualified from participating in the litigation. However, NCHC has not argued that Jergens should be permitted to participate, but is instead seeking to prevent its own disqualification in the matter on the basis of its efforts to screen off Jergens from any participation in the matter. The state of the law in Columbia courts is somewhat unclear in this regard. Both the State Supreme Court and the federal courts interpreting Columbia law have indicated some willingness to permit this type of ethical wall in the circumstances of successive representation conflicts being imputed to the firm.

The California Rules of Professional Conduct do not address whether an entire firm is disqualified on the basis of a conflict arising from a member of the firm's former client. Mambo. Therefore, the rules of imputed disqualification have been primarily judge made. Id. Traditionally, the Columbia state courts have held that where an attorney has gained confidential information from a former client, there is an irrebuttable presumption that the entire firm is also disqualified. Hoglund. However, this harsh rule has been somewhat eroded in Columbia state courts by the decision in Speedee, where the court noted in dicta that "it need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures." Though the court did not directly indicate that the presumption could now be rebutted with this type of ethical wall subsequent opinions have interpreted the case that way. Mambo; Hoglund. Though the Columbia Supreme Court has not adopted the view of a rebuttable presumption, the federal courts have adopted this view, which is described below.

i. Rebuttable Presumption

In both cases interpreting Speedee, the courts cited policy reasons to justify moving away from the irrebuttable presumption of the old state court decisions. Specifically, the court noted that vicarious disqualification can lead to "harsh and unjust" results. Hoglund. The court noted that such disqualification can work a hardship on both the lawyer and the client. Id. First, in the modern world of lawyers who are more mobile between firms, and law firms which contain hundreds of partners who may never meet each other, an automatic disqualification may result in firms becoming "more reluctant to hire mid-career lawyers." Hoglund; Mambo. Where the lawyers are not even in the same geographic location, the risk of information being disclosed is slight, and the disqualification may "result in harsh consequences. . .without any compelling reason." Mambo. Second, such disqualification is likely to have adverse effects on the client in two ways. Primarily, it will deprive the client of their choice of counsel without justification. Additionally, it will have the effect of preventing lawyers from moving between firms, and may ultimately limit the plaintiff's choice of counsel, "particularly in specialized areas of the law." Mambo. Finally, as noted above, disqualifying the counsel may have the effect of driving up the client's fees in finding alternative counsel, and thus is ripe for abuse as a litigation tactic. Additionally, the ABA model rules are in accord with the position advocated by the 15th circuit, in allowing an ethical wall to prevent total disqualification of the attorney's firm.

Though the federal courts have clearly decided that the presumption is no longer irrebuttable, the precedent is not binding on this court, and as the dissent in Mambo noted, the court in Speedee actually held that the presumption of access to confidential information extends to the entire firm. Mambo. The dissent noted that "vicarious disqualifications required to assure the preservation of the client's confidences and the integrity of the judicial process." Id.

Though the Columbia Supreme Court has not specifically adopted the rebuttable presumption, the federal courts are likely correct in noting that the decision in Speedee casts doubt on the viability of the irrebuttable presumption. Many of the concerns voiced above are implicated in this case, particularly the hardship to the plaintiff in in finding alternative counsel in this specialized area of healthcare litigation. Though Reston has argued that even NCHC is not directly qualified to litigate this case, given their lack of experience in this area of contract and tax law, they are a nationally recognized law firm in the area of health litigation concerning indigent clients, which is primarily within their area of expertise. Disqualifying NCHC from working on a case involving a healthcare provider operating 20 hospitals in the state will significantly limit indigent plaintiffs' ability to seek representation. Further, there is a legitimate issue of whether the plaintiff can find alternative counsel in this matter, as even the defendant's declaration does not assert that any law firm has in fact agreed to take the matter on, only that it would be seriously considered.

ii. Effective Ethical Wall

Recent decisions have indicated that the vicarious disqualification of a lawyer's firm arising from representation of a former client who is now adverse to the moving party is rebuttable if the party can show that they have effectively screened off the disqualifying attorney. In Mambo, the court laid out a number of factors to consider when determining whether an attorney has been effectively screened off. The court stated that the test of whether the steps taken are adequate are to be considered in the context of whether they are timely taken, and are "reasonably adequate under the circumstances." Id.

The court indicated that reasonably adequate steps include having the screened attorney make written assurance that they will avoid communications with other firm personnel or files related to the screened-off matter. Additionally, the firm should issue written notice to all other personnel not to communicate with the screened lawyer regarding the screened matter, and should offer periodic reminders of the screening policy. Such measures should be implemented as soon as possible after the firm knows or should reasonably know of the conflict.

Additionally, the court noted that it is a significant factor whether the screened lawyer has office wide supervisory power, and thus the role in formulation of office policy or hiring and firing subordinates might raise a temptation for revealing confidential information. Finally, the court noted additional factors that might come into play, including the "size of the office, at least to the extent that it affects the number of levels of supervision, and therefore, the ease with which another supervisor can replace the conflicted office head in the current case," and whether the attorneys occupy the same physical space as the disqualified party.

In the current case, there are facts cutting both for and against the disqualification of NCHC despite the attempts to form an ethical wall. First, in support of finding sufficient screening, NCHC put the screening policy into effect as soon as reasonably possible. They have a proper screening mechanism in place to identify conflicts as they arise. Jergens properly disclosed her prior representation when she was hired, and the conflict was identified. When the conflict was brought to the attention of the Executive Director, he immediately issued a written memorandum to the office. This memorandum took extensive measures to protect the case from being affected by Jergens, including taking care to prevent phone calls relating to the case being taken while Jergens was in the office, a locked file cabinet with a strict practice of signing files in and out. All staff were ordered not to discuss the case with Jergens or to provide her with access to the files either purposefully or inadvertently. Finally a password protected electronic filing system was instituted. Additionally, the executive director initially sat Jergens down and discussed with her the policy addressed in the memo, and that she was to observe the terms "scrupulously." The procedures arguably have been effective, as Jergens stated under oath that she has not disclosed any confidential information regarding Reston to

any of her colleagues. She stated that she has only discussed issues involving hospitals' duties to provide indigent care in a general way, careful not to disclose any specific information regarding Reston.

Cutting against finding the wall to have been sufficient, Jergens was never asked to sign an agreement not to disclose information, as was suggested in Mambo. Further, the court noted that the fact that the screened lawyer works in the same geographic location may be a factor. In this case, Jergens works adjacent to the attorney who is supervising the litigation with Reston. Further, Jergens supervises the Project attorney on all other matters, which was also noted as a factor in Mambo. Additionally, the size of the NCHC makes it difficult to replace the screened attorney as a supervisor, because Jergens is the head of the Indigent Health Care Project, which only has two attorneys total in the group. Therefore, despite NCHC having 10 attorneys on staff, Jergens and the attorney handling the Reston litigation work closely together on many matters, and therefore there is an increased risk of inadvertent or intentional disclosure.

This is an extremely close case, given the commendable efforts of NCHC to screen off Jergens and the potential hardship to the plaintiff in this case, balanced against the important goals of client confidentiality and risk of inadvertent disclosure. However, given that Jergens is supervising the work of the Project Attorney, and that their offices are adjacent to each other, the court should rule that NCHC is disqualified from handling this matter. The rule allowing rebuttal of the presumption of disqualification provides sufficient flexibility to accommodate the modern realities of legal employment, but the fact that Jergens has such related confidential information, and the size of operations, the risk of disclosure is too great, and NCHC has not effectively screened off Jergens from the matter, and given the constraints of their operation, it does not seem likely that they can.

D. Conclusion

As discussed above, the motion should be denied on the basis of the presumption that Jergens has access to confidential information based on her having worked on matter substantially similar to those in litigation now, and that disqualification should be imputed to NCHC, despite their efforts to screen Jergens. Finally, there is insufficient evidence that the motion has been submitted for any improper purpose, and therefore should be granted.

Answer 2 to Performance Test A

MEMORANDUM

To: Judge Melissa Grant

From: Applicant

Date: July 24, 2007

Re: Carter v. Reston Health disqualification motion

I. Introduction

You have requested that I write a memorandum analyzing the legal and factual issues raised by the motion by defendant's counsel to disqualify plaintiff's law firm, NCHC. Below is my analysis of these issues, along with my recommendation for how you should rule.

II. Issue presented

National Center for Health Care (NCHC) employs Mallory Jergens, an attorney who has previously been adverse to Reston Health during her employment with another firm. The issue here is whether NCHC should be disqualified as an entire firm from representing Roseanne Carter, an indigent health care patient, in an action against Reston Health for discriminatory and predatory billing practices adversely affecting her and others similarly situated.

III. Analysis

A. Is this substantially related to a matter that Jergens previously worked on with Reston Health?

In order to determine whether the entire firm of NCHC should be disqualified, the threshold issue must be established of whether Jergens herself, and therefore possibly her firm, should be disqualified from working on Carter v. Reston Health because of her previous affiliation with Coburn, Bronson & McQueen ("Coburn").

As the court in Hoglund v. Forsyth (15th Cir. 2001) stated, disqualification of an attorney, and possibly her law firm, is appropriate only if the case on which an attorney previously represented the client is "substantially factually related" to the case where the attorney is now adverse to the client. This standard requires a significant overlap of facts between the two cases. If there is a "reasonable probability that confidences were

disclosed in an earlier representation which could be used against the client in a later, adverse representation," then the court will assume that there is a substantial relation between the two cases.

The current case involves claims of breach of contract, breach of duty of good faith and fair dealing, breach of charitable trust, violation of the Columbia Unfair Competition Act, violation of the Consumers Legal Remedies Act, and unjust enrichment. These charges stem from Reston's care of plaintiff Roseanne Carter at Perkins Memorial Hospital in 2002. She did not have medical insurance but required two stitches in her finger for a cut. She has received bills for over $2400, despite the fact that similar services for an insured patient would be less. In addition, because Reston receives a federal income tax exemption as a "charitable" institution, it is required to operate in furtherance of a charitable purpose.

Some of Jergens' prior work is substantially factually related to the claims in this case. Jergens first represented Reston Health in 1999 in her capacity as an associate at Coburn and did work for Reston until she left the firm in 2004 to work for the NCHC. For the first couple of years, her work on behalf of Reston consisted of reviewing various contracts between the numerous Reston hospitals and its vendors. She would analyze the contracts, make suggestions and then pass those comments on to the partner who would meet or speak with the various hospital administrators. She devoted about 10% of her time working on Reston activities.

The most relevant matter on which she worked was an extensive memorandum that she researched and wrote advising Reston on its obligations as a charitable not-for-profit in terms of its obligation to provide indigent medical services in order to preserve its not-for-profit status under federal and state tax laws. In that memo, which took over a month to complete, she advised the Reston Board to take specific actions relating to its obligations under the tax laws.

That memo is substantially factually related to this case. In that memo Jergens outlined what Reston must do as part of its obligations as a charitable not-for-profit as far as its obligation to provide indigent medical services. Here, Carter is alleging that Reston has not done enough to provide indigent medical services and is not doing what it is required to do as a result of its charitable tax status. As a result, it is appropriate to presume that confidences were disclosed to Jergens in her earlier assignment with her previous law firm, and that she should therefore not be able to work on a case adverse to Reston Health, her former client.

B. Should NCHC be disqualified as an entire firm?

Although Jergens should certainly be disqualified, the law is less clear about whether her entire firm should also be disqualified. The Rules of Professional Conduct of the State Bar of Columbia do not address the vicarious disqualification of an entire law firm

when a member of that firm has a former client conflict. Instead, various court decisions have shaped the rules for vicarious disqualifications.

1. Historical rule and modern trend

Historically, there has been an irrebuttable presumption that when an attorney is disqualified, her entire firm must also be disqualified. This rule was established by Columbia's intermediate appellate courts, as the state Supreme Court was silent about this issue for many years. Recently, however, in Dep't. of Corps. v. SpeeDee Oil Change Sys., Inc. (2001), the Columbia Supreme Court specifically reserved ruling on that issue, indicating that perhaps there is not an irrebuttable presumption after all. Instead, the Court stated that it "need not consider" if a firm could avoid disqualification by setting up effective screening procedures, because the firm in that case had clearly not done so. Hoglund. Therefore, it is possible that the State Supreme Court would allow this presumption of disqualification to be rebutted by an effective screening wall. In addition, the case in which the Court left the rebuttable presumption option open was one where an attorney and his firm were adverse on the same case. The Court recognized that "discrete, successive conflicting representations in substantially related matters" might be less of a threat to the attorney-client relationship. Here, Jergens' involvement with Reston Health was not in the same case; instead, it was several years prior on a related matter. Therefore, it is even more likely that the Court would support a rebuttable presumption in this type of situation.

Two recent Court of Appeals cases have also adopted the rebuttable presumption standard – Hoglund and City and County of Ames v. Mambo Solutions, Inc. (15th Cir. 2004). In addition, other circuits have also held that a firm can rebut the presumption of shared confidences. The ABA Model Rules of Professional Conduct also recognizes that there should be a more lenient application of disqualification rules. Hoglund. While the ABA Model Rules have not been adopted in Columbia and decisions by other circuits are not binding, these decisions may be informative as to the policy reasons behind such a decision.

2. Policy reasons to relax disqualification rules

The court in Mambo outlines the various policy reasons that should be considered in deciding to allow a firm to rebut the presumption that it should be disqualified as a result of the disqualification of a newly hired attorney from work she did at a previous firm. The most emphasis is placed on the fact that lawyers are "increasingly mobile," and tend to move from job to job frequently. The consequence of this is that lawyers are constantly exposed to new clients, and imputing their previous knowledge of confidential information of one client to their entire new firm would be debilitating to firms' ability to take cases.

In addition, there are now many "mega-firms" which have offices in numerous countries,

meaning that many attorneys never interact with other attorneys in their firms, let alone share confidential communications with them. Disqualifying an entire firm would result in "harsh" consequences, both for the firm and for potential clients seeking a firm to represent them. Mambo.

Some firms may also use the irrebuttable presumption as a litigation tactic in order to disqualify formidable opponents. Even if the parties involved do not truly believe that there is a conflict, a firm can move to disqualify another firm on the basis of the irrebuttable presumption of vicarious disqualification in order to eliminate them from the case.

3. Policy reasons to maintain disqualification rules

Although there appears to be a trend toward relaxing disqualification rules for the reasons stated above, it is not certain that this standard will ultimately be adopted. For example, in the SpeeDee decision the Columbia Supreme Court specifically avoided answering the question. While this may indicate that a rebuttable presumption might be acceptable, it could also indicate that the Court was satisfied with the development of the case as of 2001, which required an irrebuttable presumption of vicarious disqualification.

As the dissent said in Mambo, a court overturning many years of precedent by attempting to predict that the Columbia Supreme Court would rule in their favor is speculating and may be incorrect. As a result, it is far from clear whether the Supreme Court would accept the reasoning in Hoglund and Mambo.

4. Balancing the interests of both clients

In deciding whether or not a firm should be vicariously disqualified because of the disqualification of one of its lawyers, it is necessary to balance the interests of the former client whose confidences may be revealed with the interests of the current client who is seeking to vindicate her rights. Mambo. In order to do so, the court must look at the client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Id.

a. Current client's right to chosen counsel

Here, Carter's interest in being able to choose which counsel represents her is in jeopardy. According to Malcolm Richardson, the current Executive Director of the NCHC, NCHC is a nationally recognized, not-for-profit public interest law firm that specializes in policy and advocacy on behalf of low income clients in the health care area. NCHC has filed over 30 state and nationwide class actions in the past 15 years.

Carter's case falls exactly within NCHC's specialty and it is reasonable for her to want them to represent her; she apparently sought out NCHC to represent her because of its reputation.

Reston Health, however, contends that NCHC is not special in its representation of Carter. According to Hugo Brenner, managing partner of the law firm of Austen, James and Eliot, LLP, which is representing Reston Health in this matter, NCHC is not particularly expert in the causes of action presented. Brenner claims that any private firm would have similar expertise in the areas of contract, constructive trust and tax law, and that therefore Carter would not be harmed by being represented by one of those firms instead.

b. An attorney's interest in representing a client

NCHC has an interest in representing Carter, as her case falls into the category of cases that they feel it is their mission to litigate. Jergens is an attorney of the Indigent Health Care Project, which is a part of NCHC. Receiving publicity from this case would help in its effort to receive foundation grants, from which it receives 50% of its funding, and private donations, from which its receives 25% of its funding. In addition, any contingency fees received from this class action would help to supplement the 25% of its funding that it receives from attorneys' fees.

Reston Health, however, would likely claim that there is no particular reason why NCHC must litigate this case. There are probably other health care related issues that are affecting indigents that NCHC may litigate, rather than this case.

c. Financial burden on the client

There could be a financial burden on Carter to be required to replace her disqualified counsel. NCHC is a not-for-profit organization, and it may not be possible to find other representation that would zealously litigate the case for no charge. Carter is an indigent client and would therefore not be able to pay an attorney; the $2400 charge for her medical emergency is already a fee well beyond her means. According to Richardson, NCHC has made "numerous inquiries" with prominent private law firms throughout the state and has not been able to locate a firm to serve as co-counsel. Therefore, it may be very difficult for Carter to find another firm to represent her.

According to Brenner, however, there are other firms that could represent Carter free of charge. Brenner states that he has contacted the managing partners of five prominent firms in the County of Darby who would have "seriously considered" helping Carter with regard to her dispute. If they would indeed take her case, then there would not be a significant financial burden on Carter. Delaying the case further, however, will likely increase her current financial problems with regard to the medical charges.

d. Possibility of tactical abuse

There is no direct evidence of tactical abuse on the part of the defendant. There is no direct evidence in the record that Reston is attempting to disqualify NCHC in order to remove a formidable opponent from the case; it appears that the motion is in good faith and is a result of Reston's concern that its confidential information may be revealed.

However, it is possible that there are tactical reasons for seeking this vicarious disqualification. Although Coburn learned of Jergens' conflict on approximately March 23, 2007, the defendant waited until May 14, 2007 to move to disqualify the firm. As a result, it is possible that the almost two month delay in filing such a motion was not a result of researching the issue, but was instead in response or retaliation to some other aspect of the litigation.

Overall the balance of these factors seems to indicate that Carter has a strong interest in being able to maintain her current counsel and that she would be harmed if the entire firm were to be disqualified from this matter.

C. Was there an effective ethical screen?

If this court determines that it is possible for a firm to rebut the presumption that it should be vicariously disqualified because of the disqualification of one of its attorneys for work she did at a prior firm, the Court must determine whether there has been the timely and effective implementation of an ethical screen to prevent the client's confidences from being revealed to other members of the firm. Hoglund, Mambo. It is possible for a "client's confidences [to] be kept inviolate by adopting measures to quarantine the tainted lawyer." Hoglund.

In Mambo, the Court outlined several procedures that should be implemented in order to have an effective ethical screen. First, there should be something in writing which tells the screened lawyer to avoid any communication with other firm personnel and not to have any contact with firm files or other materials which relate to the matter from which she is screened; firm personnel should also be notified of these policies. In addition, the Court should consider the supervisory responsibilities of the screened lawyer, her responsibilities in the office, the size of the office, where the attorneys and files relating to the screened matter are located, and other factors which relate to the efficacy of the ethical screen. Mambo.

In this case, NCHC followed a very rigorous screening process and did so in a timely manner. According to Richardson, as soon as Jergens was hired by NCHC, she furnished a list of clients for whom she had provided legal services at her former firm. As a result, that information was in NCHC's searchable office conflict database. When Carter contacted NCHC approximately six months ago about the possibility of it representing her against Reston Health, NCHC immediately did a conflict check and

determined that Jergens would have to be screened from the case. Richardson's memo to all staff on January 24, 2007 verifies that this occurred.

Richardson's memo outlines various guidelines that all staff were required to follow in screening Jergens from the Reston case. All staff was required not to talk about the case anywhere in Jergens' presence; all files were stored in a separate, locked file cabinet which Jergens would not have access to; a computer filing system had a password that Jergens did not know. In addition to these instructions to the staff, Jergens testified that Richardson spoke with her personally about the memo and told her specifically how she was to be screened from the case. He told her that she must "observe the terms of that memo scrupulously."

Jergens also testified that she has not had any conversations with anyone at NCHC about the case, and she has not even inadvertently heard any conversations about the case. While she has had general conversations about the law involved in hospitals' obligations to uninsured patients, she has never disclosed any specific information about Reston.

Although the memo and NCHC's adherence to it appear to have been faithful, there are other arguments that indicate that an effective screen may not be possible. First, Jergens is the head of the Indigent Health Care Project and typically supervises the one other attorney that is in that group. Therefore, it may not be possible for her to stay completely removed from the case. In addition, there are only 10 attorneys in the office, which makes it more difficult for Jergens to not see or hear something that is related to the case. Further, all of the files and the attorneys working on the case are in the same office as Jergens and she works in very close proximity with them. Although she has had no inadvertent contact with the files or attorneys working on the case as of yet, it is still possible that such contact will occur in the future.

IV. Conclusion/Recommendation

Although it is not certain how the Columbia Supreme Court will rule on the issue of vicarious disqualification, its recent decision as well as current judicial and societal trends indicate that it is likely that the Court would find that a rebuttable presumption that a firm should be disqualified because of an attorney's disqualification is preferable to an irrebuttable one. Reston's confidentiality interests are strong here, but Carter's interests in effective representation are also compelling. Therefore, a rebuttable presumption is the appropriate standard. NCHC has gone to great lengths to implement a timely and effective ethical screen and there is no indication that Reston's confidences are likely to be revealed. As a result, you should rule that NCHC has overcome the rebuttable presumption that it should be disqualified and allow it to continue to represent Carter in this action.

THURSDAY AFTERNOON
JULY 26, 2007

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

TANYA AND MARK GROSS v. BAKER

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

TANYA AND MARK GROSS v. BAKER

FILE

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

MEMORANDUM

TO: Applicant

FROM: Robert Popper

DATE: July 26, 2007

RE: **Tanya and Mark Gross v. Baker**

Our clients are Tanya and Mark Gross, children of Claude Gross, a prominent local businessman who recently died. Shortly before his death, while hospitalized and mentally deteriorated, he married his companion, Maxine Baker, and amended his will to leave her most of his property. Tanya and Mark believe that both actions are invalid and do not want Ms. Baker to benefit from taking advantage of Claude's debilitated condition.

Maxine Baker was represented by Rudolph Philmore in an action that Tanya and Mark brought to enjoin their father's marriage to Ms. Baker. I will contact him shortly to see if we can settle these matters prior to filing a lawsuit. Please prepare a letter to Mr. Philmore that persuasively explains that our clients should get their father's entire estate because:

A. The bequest to Claude's first wife Irene is no longer effective; and
B. The bequest to Maxine is invalid; and
C. The marriage to Maxine should be annulled because of Claude's incapacity.

Do not discuss fraud or undue influence. Also, in connection with your discussion of the validity of the bequest to Maxine (Part B above) do not discuss Claude's mental capacity to execute the codicil. Another associate is looking into those issues.

This case will be won or lost on our ability to marshal facts to support our legal position. The ability to weave the facts of our clients' case into our argument and to anticipate the factual arguments that will be raised against our position, therefore, are critical.

Popper & Sayles, LLP
245 Vaughn Drive
Rosslyn, Columbia 22222

TO: File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 19, 2007

RE: Interview with Tanya Gross

Tanya and her brother Mark lost their father 2 weeks ago. Father was Claude Gross, a well-known successful businessman. Relationship between father and children was strained since divorce from mother 10 years ago, but Tanya said it had been improving and would have been restored had their father not been involved with Maxine Baker, who was a continuing obstacle to full reconciliation.

Tanya discovered that right before her father went into the hospital he signed a codicil to his will that left most of his money to Maxine, $10 million of what is likely to be a $12 million estate. In addition, while her father was in the hospital and on his deathbed, Maxine arranged for a marriage license to be issued and staged a marriage ceremony. Tanya believes he was barely conscious. Tanya tried to stop the wedding by going to court, but the "wedding" happened and her father died before the court acted.

Tanya and Mark want to challenge both the marriage to Maxine and the amendment to the will. They believe that their father was "extremely generous with Maxine and she doesn't deserve to have any more than she already got."

Tanya expresses anger over her father's behavior toward her mother during 50 years of marriage. He had numerous affairs, but his affair with Maxine was notorious, made it into the newspaper and was very embarrassing. The breakup with the mother was

tumultuous. Her mother was a quiet but essential partner in her father's business successes and was involved in his best decisions. During the divorce, there was a lot of litigation over who owned what, who would be left with what, and who would get control of which businesses. After two years of litigation, Tanya and Mark persuaded them to settle. As part of the settlement, her mother got the house and its contents, including some expensive paintings, and cash, stock and other assets worth $3 million. Claude also agreed to continue to fund the Gross Family Foundation to increase its assets to at least $7 million and to let her mother decide which charities it would fund. The bitterness from the divorce never faded.

Her father believed that she and Mark should not have taken sides, that they didn't appreciate "the unhappiness their mother inflicted upon me." He told Tanya that she had "ruined me for marriage. I will never marry again. Even though I love Maxine, I will never marry her or any other woman." Maxine was a wedge between the father and his children and grandchildren. Maxine told lies about the family, did not relay phone messages, and sowed discord. Although her father seemed to love his four grandchildren (she and her brother each have two kids), he saw them only once or twice a year.

Before his illness, Tanya last saw her father four months ago. His manner was jaunty, but his health had clearly deteriorated. He did not get up to greet her and his breathing seemed labored. He said that he didn't go out much anymore but that he was lucky that Maxine was there to take care of him. He expressed regret that they didn't spend more time together and said, "Maxine can't stand it when I see you and I would rather not fight with her." He was going to work on it and promised to call more often.

Tanya didn't know about his hospitalization -- he had not notified his children, and Maxine hadn't bothered to call. She found out when a friend who saw him in the Intensive Care Unit (ICU) called. When she entered his hospital cubicle on June 15,

2007, she was stunned. Intravenous lines were in his arms, a tube was in his nose, and he was hooked up to all kinds of machines. His skin was grayish-yellow. A sign nearby read "Fall Risk." A private nurse was with him.

His situation seemed dire. He had a blank look and seemed confused. Tanya spent about 90 minutes with her father, holding his hand. He talked distractedly about his service in World War II, something he never talked about, interspersed with questions about his businesses. He didn't seem to know where he was, what date it was or what was going on. He came around after a while and asked her about her family but he was "in and out, mostly out." The whole time Tanya was there Maxine wasn't, so she had no trouble. Tanya departed, alarmed at his condition. Afterward, she telephoned her brother, Mark, who was out of town, and urged him to come home and see their father.

The next day, when Mark went to visit, his way was blocked by Maxine and her son Edward, who claimed to be Claude's lawyer. They told him that his father didn't want to see him. Mark argued with them and they finally let him go into the room, but his father was asleep. After that, Tanya and her brother timed their visits to avoid Maxine and her son. Tanya often waited in the parking lot outside, where she could see her father's room, and went in only after she saw the others leave.

On June 17, 2007, Tanya brought along one of her daughters. He was happy to see his granddaughter and asked to see her sister. The next day Tanya took both granddaughters and Mark took both of his children as well. Maxine and her son were there, briefly barring them from seeing Claude. Maxine relented after Tanya begged her. The grandchildren were allowed a quick visit after Maxine cautioned them, "No hugs in the ICU." He did not seem to recognize any of them and seemed largely out of it. Tanya asked one of the nurses to call her when her father was in better shape. Later that day the nurse called and told her about the wedding scheduled for a few days later.

The nurse said that she hoped the wedding would take place on “one of his good days” since she didn’t see how he could take part otherwise.

Tanya said the wedding confirmed her worst fears that Maxine would take advantage of her father’s incapacity. She and her brother were determined to prevent it.

Tanya and Mark immediately called Larry Fox, a lawyer they knew, and he agreed to petition the court to name them as conservators for Claude and to block the wedding. He filed papers the next day and the judge appointed a psychologist to report on whether enjoining the marriage was warranted. It wasn’t until two days later that the expert showed up at the hospital and by then the marriage had already occurred. When her father died on July 5, 2007, the court dismissed the petition. Tanya brought the report from the court- appointed expert, Dr. Quint, and it contains excerpts from medical records that he consulted when he went to the hospital.

Tanya and her brother are determined not to let Maxine benefit from what they see as a phony marriage or a sham amendment to the will, especially since their father was so generous to Maxine.

Popper & Sayles, LLP
245 Vaughn Drive
Rosslyn, Columbia 22222

TO: File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 23, 2007

RE: Meeting with Mark Gross

Mark Gross came to the office to confirm that he wants us to represent him along with his sister to challenge both the codicil and the marriage. (We discussed possible conflicts issues with both siblings. Since we do not envision any scenario in which the two siblings would have conflicting interests and they have agreed to the representation, we have agreed to represent both of them.)

Mark's story about the relationships among mother, father, siblings and Maxine Baker is essentially the same as Tanya's. He said that he had reached out to his father numerous times in the past three years and that his father seemed to welcome the communication. They met for lunch three or four times in 2006 and that each time they met he sensed that his father "was getting older, walking slower, speaking slower." The resentment Mark felt toward Maxine and her jealousy in return was a constant barrier to having the kind of relationship he wanted with his father.

He learned about his father's kidney and liver problems about 4 months ago when his father was hospitalized for the first time. He visited him in the hospital when Maxine wasn't there. He said that once his father left the hospital "it was as if Maxine built a fence around him. She wouldn't let us in to see him, claiming that he needed his rest and that he didn't want company. I really regret giving deference to her but after all of these years I didn't want an argument. I thought I was doing what was right for him."

He reiterated Tanya's story about his father's final hospitalization. He feels guilty that he couldn't do more but Maxine and her lawyer son, Edward, actively tried to keep him away. He fully supported his sister's attempt to stop the marriage. "They were preying on an old dying man when he couldn't think clearly."

He said that he met his father's housekeeper at his father's funeral. She told him that for much of the past two months at home his father had been very sick and noncommunicative. She said that Maxine kept friends and family away and did an excellent job taking care of Claude Gross.

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

TO: Memo to File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 24, 2007

RE: Phone Conversation with Marvin Stevens

I had a phone conversation with Marvin Stevens on July 24, 2007. He is the named executor under Claude's first will and is a lifelong friend of Claude. He had the original in his office and received the codicil hand-delivered by messenger from the law office of Edward Baker one week before Claude died. He told me that Edward is the son of Maxine.

Stevens called Edward right after receiving the codicil. Edward told Stevens that the night before Claude went into the hospital for the second time, Claude told Maxine that he wanted to rewrite his will to be sure that she got the bulk of his estate. According to Edward, Claude was quite sick by then and wasn't sure he had much more time to live. Edward got a call from his mother at 8:00 pm on the evening before the hospitalization asking him if he could write a new will. He agreed, if there was time. Edward got on the phone with Claude and asked him if he was sure he wanted to change his will. Claude said yes. Edward asked if Claude had a copy of his current will and Claude said Maxine would fax it to him immediately. Claude then said that he wanted to give Maxine $10 million, which would leave a few million for his children. He wanted to do right by Maxine and also to be sure that his first wife didn't get any of the money. Claude also said that he had made his children rich through trusts and gifts over the course of their young lives and didn't feel the necessity of rewarding their ingratitude. Edward drafted the codicil

and took it over first thing the next morning, showed Claude where to sign and had Claude's housekeeper and gardener sign as witnesses.

Stevens said he told Edward that all of this surprised him. Stevens said that he had spoken to Claude regularly and that Claude frequently expressed his sorrow over the state of his relationships with his children. Claude was pleased at recent moves toward reconciliation and talked of doing more to regain their affection and companionship. He wanted to be closer with them and particularly with his grandchildren.

Stevens told me that the marriage to Maxine surprised him almost as much as the change of the will. He said that Claude said often and in public that he didn't want to marry again and that he said it in the presence of Maxine. Also, Claude said that he had provided for Maxine by giving her the house and "a nice nest egg on top of it."

The Columbia Times

July 7, 2007

Family Feud Reaches Beyond Grave;
As Gross Lay Dying, Questions About Companion, Competency Swirled

Early evening on June 21, 2007 they gathered at the bedside of legendary Columbia tycoon Claude Gross, who lay in a glass-enclosed cubicle in the intensive care unit of Rosslyn Memorial Hospital.

Wearied by age and illness, Gross, 83, was jaundiced from liver failure; his weakened heart maintained a feeble beat and his kidneys no longer functioned.

Short and pugnacious, the white-haired millionaire and former feisty businessman now seemed shrunken and frail against the expanse of his hospital bed.

He had just two weeks to live, but those who had assembled amid monitors, tubes and other hospital machinery that muggy night hadn't come to say farewell.

They were there to see Gross marry.

His fiancée, Maxine Baker, 69, wearing an elegant pink suit, looked nervous as a judge intoned, "Repeat after me." The wedding ceremony lasted about 5 minutes. There was no cake. The groom stayed behind as his bride headed out for dinner with friends.

With the fate of a fortune estimated at more than $12 million at stake, the issue is whether the wedding was the most wonderful thing to befall him in a decade or the deathbed manipulation of a befuddled man.

His bride and the new friends he had developed say the marriage was his heartfelt desire. The children of his first marriage worry that it was not.

A second act would take on legal consequences after Gross's death. His will was amended to leave the bulk of his estate to Baker with only the leftovers for his children.

It was signed in the shaky and barely legible handwriting of a sick, old man. Skeptical family members question whether he was making his own decisions. They suspect that he was half-delirious and being duped.

The wealth that paid for Gross's lifestyle was of his own making. He built his fortune marketing the unusual inventions of others. His first success, the “Flapjack Shoe,” involved a mechanism that replaced shoe laces with a flap that closed the shoe. The Flapjack Shoe became a fad in the 1950's and, through his partnership with the inventor, he made millions cleverly marketing it.

His estrangement from his wife Irene Hines was particularly bitter and involved allegations of infidelity and public verbal insult. It ended, about 10 years ago, with a divorce, the children estranged from him, the family name tarnished and millions spent on attorneys. Hines ended up with their mansion and many of their mutual friends sided with her.

In the aftermath, Gross found new happiness with a fresh circle of acquaintances, a sort of surrogate family. They said he grew devoted to Baker.

Baker has one adult child, Edward Baker, a well-known corporate lawyer in Rosslyn. Her first husband died in 1997.

After Gross's divorce, he vowed to friends that he would never wed again. But, according to their friends, he and Baker got on well. They traveled abroad and entertained. They lived in a house styled after the Taj Mahal, that he bought in 1999 as a gift for her. The house, which is currently appraised at $2,500,000, according to Rosslyn tax records, was featured in one of his lawsuits when he sued the swimming pool contractor for improperly installing several marble slabs.

But Gross's days of wheeling and dealing were nearing their end. He was admitted to Rosslyn Hospital, on April 7, 2007, where he was sent to intensive care and remained for five days.

"He was pure yellow," said Marvin Stevens, a friend who had known him for years. "It was clear he was not well." His liver was failing, and his kidneys were spent. He began dialysis three times a week, cleansing his blood of impurities. He was stabilized and sent home but returned for his treatments.

He was exhausted much of the time and he was unable to carry on his formerly active social life. Baker told friends and family to stay away to “let him recover his strength.” After several months of this regimen he was back in the hospital.

The wedding was set for the next day.

Tanya Gross filed a petition in the probate division of Columbia Superior Court to stop the wedding.

The court petition asked for an evaluation of his mental status and requested that the judge stop the marriage. The circumstances surrounding the marriage, she said, clearly suggested "that he was clearly incapable of making a reasoned decision."

The court appointed a psychologist to evaluate Gross, but took no immediate action.

The magistrate read a simple civil wedding service. The couple exchanged “I do’s,” slipped rings on each other's fingers, and Gross added: "I love Maxine very, very, very, very much.”

"We all laughed," Maxine said. "It was so cute."
Then the two kissed.

According to one member of the wedding party, they went to Guernsey’s Restaurant, where they showered Baker with flowers.

Baker and Gross were husband and wife for exactly two weeks. Baker said the couple planned a honeymoon for when he got out.

On July 5, 2007, Baker was summoned to the hospital. Gross needed a ventilator to breathe. He was semiconscious and failing. About 10:30 p.m., with Baker and three friends at his side, he died.

Stephen Quint, Ph.D.
Licensed Clinical Psychologist
277 Carly Way
Rosslyn, Columbia

June 25, 2007

The Honorable Jan Cole
Superior Court of Columbia
Rosslyn, Columbia

RE: Petition to Enjoin the Marriage of Claude Gross

Dear Judge Cole:

Upon appointment by the court to render my opinion regarding the mental capacity of Claude Gross, who is hospitalized at Rosslyn Memorial Hospital, I reviewed the medical records insofar as they shed light on the question and also conducted my own psychological examination of Mr. Gross.

My professional qualifications include that I am licensed to practice clinical psychology in this state, I specialize in geriatric care, I am a Clinical Professor of Psychology at Columbia State Medical School, and I have been qualified as an expert witness more than 300 times by the judges of the Columbia Superior Court.

On June 20, 2007, Tanya Gross, daughter of Claude Gross, filed a petition in the Probate Division of the Superior Court to enjoin the marriage of her father to Maxine Baker. Her petition claims that her father was "seriously medically ill and lacked the capacity to make the decision to marry." It described him as "weak and disoriented," "confused about his surroundings and his condition," and "near death and easily subject to manipulation," and quoted from conversations with one or more of the nurses who questioned "whether he was conscious enough to make a choice to marry."

I spent 3 hours at the hospital on June 22, 2007, the day after the marriage ceremony took place at the bedside of Mr. Gross. Before visiting him, I read through the medical records. The records indicated that the medical staff was concerned about Mr. Gross's mental ability to make his own medical decisions.

On June 16, 2007, **Dr. Eduaro Espinoza**, the attending physician, described his physical condition as "...profoundly jaundiced due to the failure of his kidneys and liver, resulting in fatigue and exhaustion. Patient can move only with assistance." Regarding his mental status, "He answers questions vaguely, has difficulty concentrating, and falls asleep easily. On some days, Gross clearly can't make a decision." Dr. Espinoza said "he is also lucid for short periods, particularly after dialysis restores the balance of his fluids." This doctor ordered a psychiatric evaluation.

On June 16, 2007, **Dr. Daniel Rosenblum**, chief of the Department of Psychiatry, conducted a mental status exam to determine whether Mr. Gross was competent to make medical decisions. He recited the medical history that included renal (kidney) failure and long-term underlying liver damage, as a result of which his blood tests

showed electrolytic abnormalities that would impair his ability to concentrate. He described Mr. Gross as “a very sick man with fluctuating mental states over the past week.” He suffers from “cognitive dysfunction that is presumably secondary to and resulting from renal encephalopathy. Renal encephalopathy is an organic brain disorder. It develops in patients with acute or chronic renal failure. Manifestations of this syndrome vary from mild symptoms (e.g., lassitude, fatigue) to severe symptoms (e.g., seizures, coma). Severity and progression depend on the rate of decline in renal function; thus, symptoms are usually worse in patients as renal function declines. The symptoms of this syndrome are readily reversible following initiation of dialysis. However, the beneficial effect and its duration vary. Thus, it is consistent with this diagnosis that Mr. Gross’s cognitive difficulties are now present about 35% of the time, according to the nurse’s observations. During the times of dysfunction he would be incompetent to participate in medical decisions. The rest of the time, I do not feel that the dysfunction is at a serious enough level to render him incompetent. As there is the possibility of further deterioration of his kidney and liver functions, his mental status may diminish, too, and he may have more frequent and severe periods of cognitive dysfunction. For that reason, I recommend frequent mental status examinations over the course of this treatment.”

I observed Mr. Gross on June 22, 2007, the day after the wedding. I saw him a few hours after his dialysis. His prior dialysis was the day before the wedding. He was in the Intensive Care Unit and was being fed through a nose tube and was receiving a constant flow of antibiotics and other fluids intravenously. I interviewed him for thirty minutes and, although he did not make eye contact, I found him to be oriented to person, place and time. He could remember things in a sequential order but was confused as to dates. For example, he did remember that he had married Maxine Baker but thought that the wedding took place three weeks prior rather than the day before I saw him. He thought that I was a court-appointed lawyer and that I had been there last week and my attempt to explain who I was did not dissuade him. He blamed the fact that the court was trying to intervene in his life on his ex-wife wanting to

continue to control him “as she always had.” He was clearly diminished cognitively as a result of his illness but when I saw him he was reasonably alert. He was trying hard to maintain an air of normalcy. He claimed that he was still active in his business and that he had just negotiated a large transaction to conclusion. I had no way to verify whether this claim was accurate.

It is my opinion that Mr. Gross’s physical condition has had a marked effect on his ability to function mentally and that this varies from day-to-day, perhaps even hour-to-hour. At good times, his cognitive powers enable him to focus and interact at a moderate level but at bad times he is unable to do so. It is my opinion that his competence will continue to vary and probably deteriorate if his medical condition worsens.

Respectfully submitted,

Stephen Quint

Stephen Quint, Ph.D.

LAST WILL AND TESTAMENT OF CLAUDE GROSS

I am Claude Gross, of 32 Harbor Court, Cameo, Columbia. This is my Last Will, and I revoke all previous wills and codicils.

1. At the present time my wife is Irene Hines and we have two children, Tanya Hines Gross and Mark Hines Gross.

2. I give all of my automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible articles of a personal nature at the time of my death to my wife, Irene Hines, if she survives me.

3. I give my wife, Irene Hines, Two Million Dollars ($2,000,000), if she survives me. This bequest is to be paid from my estate in cash or in stock of equivalent value as of the date of my death, or a combination of stock and cash, at the discretion of my executor.

4. The balance of my residuary estate after all debts are paid I give in two equal shares to my children, Tanya Hines Gross and Mark Hines Gross, or to their descendants, if either or both do not survive me.

5. I nominate my trusted friend Marvin Stevens to serve as executor of my estate and empower him to exercise all administrative and management powers conferred on an executor under the laws of the State of Columbia and direct that he not be required to post a bond.

IN WITNESS WHEREOF, I, Claude Gross, have signed this, my Last Will and Testament, on the 19th Day of October, 1995.

Claude Gross

Claude Gross

Witnesses:

David S. Klein
David S. Klein
3216 Chesterfield Road

Joanna Kelly
Joanna Kelly
109 Maple Avenue

Cameo, Columbia
October 19, 1995

Cameo, Columbia
October 19, 1995

CODICIL TO THE OCTOBER 19, 1995 LAST WILL AND TESTAMENT OF CLAUDE GROSS

I, Claude Gross of 475 Dean Street, Rosslyn, Columbia, declare this to be a Codicil to my Last Will and Testament dated October 19, 1995.

For the past eight years I have enjoyed the companionship and care of Maxine Baker, a woman with whom I am in love and with whom I share a home.

Accordingly, I hereby amend my Last Will and Testament dated October 19, 1995 as follows:

First, I give all of my automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible articles of a personal nature at the time of my death to my companion, Maxine Baker, if she survives me. She may distribute my personal effects to my children at her discretion.

Second, I give Ten Million Dollars ($10,000,000) to Maxine Baker, to be paid from the assets of my estate.

IN WITNESS WHEREOF, I, Claude Gross, have signed this Codicil on June 14, 2007.

Claude Gross
Claude Gross

Witnesses

Judith Stern
Judith Stern
1519 Wye Street
Rosslyn, Columbia

Dated: June 14, 2007

Stuart Levy
Stuart Levy
27 Blue Hills Avenue
Cameo, Columbia

Dated: June 14, 2007

THURSDAY AFTERNOON
JULY 26, 2007

California
Bar
Examination

Performance Test B

LIBRARY

TANYA AND MARK GROSS v. BAKER

LIBRARY

SELECTED COLUMBIA STATUTES

COLUMBIA FAMILY CODE

Chapter 2. Voidable Marriage

§ 221. Grounds for nullity

(a) A marriage is voidable and may be adjudged a nullity if at the time of the marriage either party lacked mental capacity, unless the party who lacked mental capacity, after coming to reason, freely cohabited with the other as husband and wife.

§ 222. Effect of judgment of nullity

(a) A judgment of nullity of marriage restores the parties to the status of unmarried persons.

(b) A judgment of nullity of marriage is conclusive only as to the parties to the proceeding and those claiming under them.

* * * * *

COLUMBIA PROBATE CODE

Chapter 8. Legal Mental Capacity

§ 810. Presumption of mental capacity

There exists a rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

§ 811. Mental incapacity

(a) A determination that a person lacks the mental capacity to make a decision or do a certain act, including to contract, to make a conveyance, to marry, to make medical

decisions, to execute wills, or to execute trusts shall be supported by evidence of a deficit in at least one of the following mental functions:

(1) Alertness and attention, including level of consciousness; orientation to time, place, person, and situation; and ability to attend and concentrate;

(2) Information processing, including short- and long-term memory; ability to understand or communicate with others, either verbally or otherwise; recognition of familiar objects and familiar persons; ability to understand and appreciate quantities; ability to reason using abstract concepts; ability to plan, organize, and carry out actions in one's own rational self-interest; and ability to reason logically;

(3) Thought processes, including severely disorganized thinking; hallucinations; delusions; and uncontrollable, repetitive, or intrusive thoughts;

(4) Ability to modulate mood and affect, including the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may constitute incapacity only if the deficit, by itself or in combination with other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient by itself to support a determination that a person lacks the capacity to do a certain act.

* * * * *

Chapter 10 . Wills and Trusts

§ 102 . Dissolution of marriage; Provisions revoked

(a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved, the dissolution revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former spouse.

(2) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.

(b) In case of revocation by dissolution, property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.

* * * * *

§ 720. Limitations on transfers to drafters, care custodians, and others

(a) No provision of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

* * * * *

§ 820. Right to elective share

The surviving spouse of a person who dies domiciled in Columbia has the right to a share of the estate of the decedent as provided in this part, to be designated the elective share. The elective share is an amount equal to 30 percent of the value of the estate.

In re Marriage of Sawyer

Columbia Supreme Court (2004)

This is an appeal from an order granting the petition of Charles Sawyer's conservator to annul the marriage of Charles and Lillie Sawyer. Charles was 86 years old at the time of the trial in July 2002. Charles died on October 12, 2003, one month after entry of the judgment of annulment.

Up until August 2000, Charles spent his days at the Alzheimer's Services Center. In August 2000, he was removed from the center because of his disruptive behavior caused by the advance of late-stage Alzheimer's dementia. From then until April 30, 2002, when he was placed in a locked unit in the facilities of the Adult Protective Service, he spent his time at his personal residence.

In February 2001, the probate court appointed Dovie White as conservator for Charles. In appointing the conservator, the court found that Charles was unable to provide for his personal needs, physical health, food, clothing, and shelter; that he was unable to manage his financial resources and to resist fraud and undue influence; and that he lacked the capacity to give informed consent for medical treatment. The appointment of Dovie White was approved by Charles's family and Dr. Norman Quan, his long-time personal physician.

On April 5, 2002, Charles married Lillie Marshall, his lifelong friend. On April 30, 2002, without notice to Lillie, Dovie White arranged to place him in the locked unit of the Senior Assisted-Living Facility. It was not until Charles called Lillie from there that Lillie knew where Charles had been taken. On May 14, 2002, Lillie managed to make arrangements for Charles to return to his home.

Later in May, 2002, Dr. Norman Quan issued a report to the probate court stating that, based on an April 2, 2002 examination, Charles had mild to moderate impairment

regarding alertness, attention, and information processing capability and that his periods of impairment did not vary substantially in frequency, severity, and duration. He opined that, although Charles had dementia, he was capable of giving informed consent to medical treatment and that there was nothing to be gained by placing him in a special care facility.

Also in May 2002, Teddy Kebede, a public health nurse who tendered care to Charles, wrote the court, stating, "Charles lives with his wife Lillie, whom he has known since childhood and whom he married last month. Lillie is a vibrant 80-year-old woman who takes good care of Charles and fills all his needs. When I visited Charles in the Senior Assisted-Living Facility last month, he was distraught. He is much better now that he is back at his home, and he deserves to live out his days at home with the person he loves."

In June 2002, Conservator Dovie White arranged for Charles to be examined by a University of Columbia neuropsychologist, Jeffrey Kixmiller. Dr. Kixmiller interviewed and tested Charles and spoke with Lillie. The conclusions stated in his report are that, although both Charles and Lillie believed Charles was safe and well taken care of at home, neither of them fully appreciated the safety or functional implications of Charles's condition or the increasing needs that would be imposed on both of them by Charles's predictable further deterioration. Dr. Kixmiller found that Charles had mild to moderate dementia, his capacity to make safe judgments and to solve problems was significantly impaired, and that, when confronted by minor stressors, Charles was subject to emotional disturbances. All this, concluded Dr. Kixmiller, made Charles especially subject to safety lapses, coercion, and abuse. Dr. Kixmiller's examination did not address the question whether, on April 5, 2002, Charles had the capacity to marry.

In July 2002, Dovie White filed the instant petition to annul the marriage under Family Code Section 221(a) based on Charles’s lack of mental capacity.

In addition to the foregoing, the often contradictory evidence that the lower court considered in making its order can be summarized as follows:

(a) Dovie White testified that both before and after the marriage, Charles was frequently confused. He did not know when his first wife had died. When Lillie, who, since 2000, had been serving as Charles's paid home health aide two days a week, told Dovie that she and Charles wanted to get married, Dovie advised her to first obtain the probate court's approval because she doubted that Charles understood what getting married meant. At the time, Charles's assets consisted of about $125,000 in cash and a home that was paid for. When Dovie learned of the marriage, she advised Lillie that Charles needed to be placed in an assisted living facility. Lillie resisted, saying she was perfectly capable of taking care of Charles. Dovie never discussed the marriage with Charles.

(b) Rick George, a social worker from Adult Protective Services, testified that, in October 2000, he had been assigned to conduct an investigation into allegations that Charles's money was being misused. He testified that he concluded that no misuse had occurred but that he found that Charles was impaired and incapable of managing his financial affairs. On April 30, 2002, when Dovie White arranged for Charles to be placed in a locked unit of the assisted living facility, Mr. George found Charles to be upset and disoriented. In George's discussions with Charles, Charles never indicated that he had not wanted to marry Lillie.

(c) Lillie testified that she and Charles had been close and constant friends since childhood and that as far back as 2000, soon after Charles's first wife died, Charles had asked her to marry him, and move in with and to care for him because he was sick and afraid to be home alone, especially at night. She said there was never any doubt that Charles knew what he was doing and what he wanted and that she and Charles were very happily married.

(d) John Dorion, Charles's friend of 40 years, testified that he regularly saw Charles about twice a week and had met Lillie in 2000. Charles had told him that he asked Lillie to marry him and that Lillie had at first resisted because she wanted to "think about it." Dorion thought Charles knew what he was doing and what was going on around him. Charles never told Dorion that he did not want to marry Lillie.

In granting the petition to annul the marriage, the trial court found that Charles had deficits in his mental capacity that substantially impaired his ability to understand the obligations and responsibilities attendant upon marriage. This is the correct standard. Family Code Section 221.

The court found that, notwithstanding that Charles and Lillie were happily married, Charles was incapable of taking care of himself on a daily basis. The testimony that he was alert and aware was outweighed by Dr. Kixmiller's neuropsychological assessment. The court found it significant that Lillie was a paid caregiver at the time of the marriage and that she was in a position to exploit her access to him and his dependence upon her to make and shape decisions. The court found convincing the evidence that suggested that Charles did not have the capacity to enter into a marriage.

Determinations of mental capacity are governed by Probate Code Sections 810 and 811, which require at least one statutorily enumerated deficit in mental function that, by itself or in conjunction with other deficits, substantially impairs the ability to understand and appreciate the consequences of marrying. The day of the marriage is the critical date for determination of lack of capacity, but proof of the party's condition before and after that date is admissible for purposes of determining capacity on the day of the marriage. The standard for determining capacity to marry is separate and distinct from the standard for the appointment of a conservator. The question whether one has capacity to marry is applicable even though a conservator has been appointed.

The court below followed the two steps required by Section 811: first, it marshalled the facts it found to establish a deficit in Charles's mental functions (specifically subsection (a)(2) of Section 811, because of his dementia, memory failures and confusion, and inability to manage his financial affairs); and, second, the court found that these deficits impaired his ability to comprehend the consequences of the marriage.

Lillie contends that the court should not have rejected the evidence supporting Charles's capacity to marry and should not have credited the testimony of biased witnesses as to Charles's incapacity on the day of the marriage. That may be true, and, if this court were the court of first impression, we might well have decided otherwise. However, the test is one of substantial evidence that Charles lacked capacity. For example, Dr. Kixmiller's authoritative report of June 2002, within two months after the wedding, that Charles had significant mental, emotional, and behavioral deficits that rendered him especially vulnerable to safety and emotional lapses and that his ability to make decisions was significantly impaired.

The court was entitled to reject inconsistent evidence from Dr. Quan and others based on other evidence that Alzheimer's dementia is a progressive disease that predictably gets worse and does not improve over time. With that premise, the court could have found that Charles was substantially impaired in his ability to make decisions, problem-solve, and understand the consequences of his decisions as well as upon the evidence that Charles's vulnerability to coercion and abuse could further undermine his ability to make decisions.

WE AFFIRM.

In Re Marriage of Vitale

Columbia Supreme Court (1957)

On the ground of his mental incapacity at the time of the marriage, Ralph Vitale was granted a judgment annulling it. Louise Vitale appeals, claiming that the evidence was insufficient to support the finding that Ralph lacked capacity on the day of the marriage. Louise correctly states that the degree of mental capacity at the precise time when the marriage is celebrated controls as to its validity and that if a marriage is contracted during a lucid interval the marriage is valid.

Ralph is a 56-year-old plumber and Louise is a 38-year-old employee of a telephone company. They met in 1952 and started dating. On May 24, 1954, they married. In June, 1954, Ralph entered Agnew State Mental Hospital and, in July, 1954, based on Louise's petition, he was committed to that institution.

Ralph presented numerous witnesses to the unsoundness of his mind. Ralph's son Frank testified that when his father returned in November 1953 from a trip to Europe he had changed. Frank related many instances in which his father talked incoherently, had hallucinations, and believed that television programs and cards in a drug store revealed plots against him. In Frank's opinion, his father was of unsound mind, although he did not show these behaviors every day. He did not see his father on the day of the marriage.

Laura Tharp, who knew Ralph for over 10 years, testified that after returning from Europe Ralph acted very odd, was upset, and heard voices. In August, 1954, when she visited Ralph at the hospital and mentioned the marriage, Ralph said he knew nothing about it.

Dr. Wilbur saw Ralph at his office two days before the marriage. When Ralph admitted that he had cut himself directly over an artery, Dr. Wilbur sent Ralph to Dr. Johnston, a

psychiatrist. Dr. Johnston saw Ralph two days after the marriage. Ralph told him about delusions he had on the boat returning from Europe. Dr. Johnston diagnosed him as suffering from paranoid schizophrenia and described his ability to do abstract thinking as greatly impaired. Dr. Johnston saw Ralph again on June 8, 1954, and testified that Ralph's paranoid schizophrenia had continued from November, 1953.

Louise also presented several witnesses. Ruth Carey testified that before Ralph went to Europe and after he returned, he stated that he would like to marry Louise. Richard Cavitt, a tax consultant and accountant, knew Ralph since 1948 and prepared his income tax returns from data given by Ralph, including in 1953 and 1954. Cavitt testified that during both of those years, Ralph reported income received from plumbing labor, that he clearly and concisely discussed his business affairs and showed no lack of understanding, and that about two weeks before the marriage, Ralph told him he planned to get married. He said Ralph was always lucid in his understanding of business matters.

Louise testified to her acquaintance with Ralph, his courtship, and the circumstances of the marriage. She described no abnormality in his actions. The taxi driver, who drove them from the airport to the wedding ceremony, served as a witness to the marriage, and drove them back to the airport after the ceremony, noticed nothing unusual in Ralph's manner, conversation or answers to the justice of the peace. The justice of the peace who performed the ceremony and his wife, the other witness to it, saw nothing unusual in Ralph's actions.

While Louise's evidence would have supported a finding that Ralph at the time of the marriage had capacity to marry, it does not compel such a finding. The finding of the jury that he lacked capacity is supported by substantial evidence. That no witness for Ralph testified to seeing him on the day of the wedding and witnesses for Louise had, does not mean there is no evidence of mental incapacity on that day. While it is the mental condition on that day that is in issue, that condition may be determined from his

condition prior and subsequent to that day. Louise further contends that the mental defect must be one having a direct bearing upon the particular act which is brought into question and that Ralph's delusions and hallucinations did not have a direct bearing upon the act of getting married. However, the delusions and hallucinations were only parts of the mental defect or derangement. His whole mental condition, those matters included, caused Ralph to have the inability to comprehend the act of marriage.

The judgment is affirmed.

Answer 1 to Performance Test B

Performance Test B

Popper & Sayles, LLP
245 Vaughn Drive
Rosslyn, Columbia 22222

July 27, 2007

Dear Mr. Philmore:

I am representing Tanya and Mark Gross and am writing to you with regards to the dispute over the will of the late Claude Gross. As you know, Mr. Gross was Tanya and Mark's father. I am hoping that you and I can discuss the legal aspects of the dispute to minimize the cost in money and bad blood between our clients. The last dispute over money in the Gross family tarnished the family name and cost millions of dollars in legal fees. It is my hope that we can avoid that result. I know that our clients do not get along well, but I think that we can conduct ourselves as professionals and achieve the proper legal solution.

My analysis of this case is that my clients are entitled to the entire estate under the residuary clause of the first will. I have three specific contentions that compel this result: (1) the bequest to Mr. Gross' first wife Irene Hines is no longer effective; (2) the bequest to Maxine Baker is invalid; and (3) the marriage to Ms. Baker should be annulled because of Claude's incapacity. My analysis of each individual contention is discussed below.

<u>The bequest to Mr. Gross' first wife Irene Hines is no longer effective</u>.

Mr. Gross' last will and testament dated October 19, 1995 created a gift to Ms. Hines. This gift included: all automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible items of a personal nature. The will also left Ms. Hines two million dollars. The critical provision of this will from our perspective, however, is that Mr. Gross left the residuary of the estate in two equal shares to his children. The children are Tanya and Mark, my clients.

The bequest to Ms. Hines is invalid by operation of law. Columbia Probate Code section 102 revokes all dispositions or appointments of property made by will to the former spouse upon dissolution of the marriage. Mr. Gross and Ms. Hines' 1997 divorce was widely-publicized and particularly messy.

The bequest to Maxine Baker is invalid.

On June 14, 2007, Mr. Gross executed a codicil to the October 19, 1995 will. This codicil purported to amend the October 19 will. The codicil left all of Mr. Gross' personal belongings to your client, Ms. Baker. This codicil appears validly executed, but I believe that the gift to Ms. Baker is invalid by operation of law. Columbia Probate Code section 720 states that "No provision of any instrument shall be valid to make any donative transfer" to "a person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the document."

The codicil attempts to make a donative transfer of personal property and money to Ms. Baker. The provision is invalid, however, because the will was prepared by Ms. Baker's blood relative, her son Edward Baker. According to Marvin Stevens, the executor of Mr. Gross' first will, Mr. Baker contacted him and requested that Mr. Stevens fax him a copy of the first will. Mr. Baker then apparently drafted the codicil and brought it to Mr. Gross for execution. Because Mr. Baker is Ms. Baker's son, the gift is invalid under section 720.

Please note that I am not discussing whether Mr. Gross had the mental capacity to execute the codicil. His capacity at the time might be an issue, but I am prepared to make a legal statement on that matter.

You might argue that the rule should not apply since Mr. Baker may not have known the probate code since he is a corporate lawyer. The law, however, makes no such exceptions. You might further argue that a gift made to a blood relative of the person who drafted the will creates only a presumption of invalidity. This statement is true in some jurisdictions. Columbia law, however, does not create such a presumption and includes no exception to strong statement of invalidity.

The marriage to Ms. Baker should be annulled because of Mr. Gross' incapacity.

The validity of the Baker-Gross wedding is important because Columbia Probate Code section 820 allows a surviving spouse to take an elective share equal to 30% of the value of the estate. The estate has a current estimated value of 12 million dollars. Thus, the elective share, if appropriate, would allow your client to claim 3.6 million dollars.

Columbia Family Code section 221 states that a marriage may be annulled if at the time of the marriage either party lacked mental capacity, unless the party after coming to reason, freely cohabitated with the other as husband and wife. Section 222 states that the effect of an annulment is to restore the parties to the status of unmarried persons. If Ms. Baker is an unmarried person, she is not entitled to take any part of Mr. Gross' estate.

According to Columbia Probate Code section 810, there is a rebuttable presumption that all persons have the capacity to make decisions. According to case law, however, that presumption may be overcome upon a demonstration that the person had "deficits in his mental capacity that substantially impaired his ability to understand the obligations and responsibilities attendant upon marriage." In re Marriage of Sawyer. A determination of substantial impairment may be based on deficits that are statutorily enumerated by section 811. These deficits include problems with (1) alertness and attention, (2) information processing, (3) thought processes, and (4) the ability to modulate mood and affect. In determining whether the deficit is substantial, section 811 further provides that the court may consider the frequency, severity, and duration of periods of impairment.

The determinative date to consider with regard to the substantial impairment is the date of the marriage. In re Marriage of Vitale. While that day is the one at issue the condition may be determined from the person's condition prior to and subsequent to that day. Based on the evidence that I have gathered, I believe that it is clear that Mr. Gross had deficits in his mental capacity that substantially impaired his ability to understand the obligations attendant to marriage. The determination of a person's mental capacity is extremely fact intensive. Please bear with me as I discuss the reasoning behind my conclusion.

Note that section 221 creates an exception to annulment if after the marriage the couple are freely cohabitants as husband and wife. It is unlikely that any court will find that Mr. Gross and Ms. Baker freely cohabitated as husband and wife. Mr. Gross died just two weeks after the wedding. He died in the hospital, and there is no evidence that he left after being married.

Source of lack of mental capacity: renal encephalopathy

Mr. Gross' lack of mental capacity likely stems from a physical ailment. According to the court-appointed psychologist, Dr. Stephen Quint, Mr. Gross suffers from renal encephalopathy. This disease is an organic brain disorder. It develops in patients with acute or chronic renal failure, and it results in cognitive dysfunction ranging from mild to sever symptoms. Dr. Quint suggested that the severity and progression of the symptoms depend on the rate of decline in renal function and that the symptoms are usually worse in patients as renal function declines.

Near his death, Mr. Gross was on dialysis three times a week because of his failing kidneys. He also died just two weeks after the wedding. Under these circumstances, it stands to reason that Mr. Gross was very sick at the time of the wedding. Furthermore, based on Dr. Quint's analysis, this level of sickness would indicate that Mr. Gross suffered from severe cognitive dysfunction.

I will address specific evidence of mental capacity likely stemming from renal encephalopathy below. The following examples mirror section 811's factors for consideration of mental capacity.

Alertness and attentiveness

Section 811 suggests that deficits to a person's alertness and attention can demonstrate a person's lack of mental capacity. The statute suggests that this category includes level of consciousness; orientation to time, place and person, and situation; and ability to attend and concentrate.

There is ample evidence of Mr. Gross' lack of alertness and attentiveness. My client Tanya Gross reported that on June 15 she visited her father. Her father had a "blank look and seemed confused." Her father did not know what date it was or what was going on. On June 17 Tanya Gross reported that her father did not seem to recognize his grandchildren, even though he seemed to love them. Mr. Stevens even indicated that Mr. Gross had told him that he wanted to be closer to his children and grandchildren. Dr. Quint visited Mr. Gross on June 22, 2007, the day after the wedding. According to Dr. Quint, Mr. Gross was confused on dates. He believed that he had married your client three weeks earlier than the day before the visit. These incidents seem to highlight a problem with alertness and attentiveness before and after the marriage.

I suspect that you will point out that the day in question is not prior to or after the marriage, but instead on the date of the marriage itself. As noted above, In re Marriage of Vitale suggests that evidence of prior and post mental capacity is admissible to determine capacity on the date in question. I further suspect that you will point out that Dr. Quint's report indicated that Mr. Gross was "reasonably alert" when he saw him on June 22. Since this is just one day after the marriage, this fact might indicate that Mr. Gross was alert for his wedding.

While you make a good point, it is important to note that June 22 was the day of Mr. Gross' dialysis. Furthermore, Dr. Quint reports that he visited just a few days after dialysis. Dr. Quint's report indicates that the symptoms of Mr. Gross' disease are readily reversible following initiation of dialysis. Therefore, Mr. Gross was at his most alert in the hours after dialysis. His alertness on that day was not necessarily indicative of his typical state. The wedding occurred the day after his dialysis. By that time he might have been very sick.

This deficit in alertness and attentiveness prevented Mr. Gross from recognizing the consequences of entering into marriage. He could not even recognize his grandchildren, let alone contemplate marriage. He was also unaware of dates and time. He could not recall that he got married the day before rather than three weeks ago. A person with such limited mental capacity cannot have understood the consequences of entering into such an important legal relationship.

Information Processing

Section 811 states a deficit in attention processing, which includes short and long term memory, ability to communicate with others, recognition of objects and familiar persons, and the ability to plan and reason logically, may indicate a lack of capacity.

There are several instances that indicate Mr. Gross lacked the ability to process information. When Mr. Gross was undeniably lucid, he mentioned to many people that he would never marry again. His daughter reported this statement as well as Mr. Stevens, Mr. Gross' lifelong friend. Mr. Gross even went as far as to ensure that Ms. Baker was taken care of financially, since he gave her a house and a "nice nest egg on top of it." Although Mr. Gross affirmed his love for Ms. Baker, he indicated that his first marriage had dissuaded him from ever attempting marriage again. As you may recall, his first marriage ended in a bitter divorce. It is therefore surprising that even with this strongly held conviction Mr. Gross would decide to get married anyway. This dramatic change in decision may be evidence of a man who has lost his capacity to reason logically.

Further evidence of Mr. Gross' lack of capacity comes from his housekeeper. Mark Gross met her at the funeral where she reported that Mr. Gross had been noncommunicative for the past two months. This inability to communicate was noticed by other individuals as well. Dr. Quint indicates that Dr. Espinoza noticed that Mr. Gross had difficulty concentrating and answered questions vaguely. Furthermore, Dr. Espinoza noted that Mr. Gross has trouble making decisions. It is surprising therefore that Mr. Gross would make such a dramatic decision, one that had gone against 10 years of strongly held conviction.

I suspect that you will argue that people can and do reasonably change their minds. You are probably right in this regard. This specific case, however, raises some strong questions. People often change their minds, but it is unusual that they would choose not to tell their friends or family. Tanya Gross found out about the wedding from a nurse. If Mr. Gross wanted to be closer to his children, it seems that he would have likely informed them of this important decision personally. Furthermore, it is surprising that Mr. Gross did not personally speak to Mr. Stevens regarding the codicil. Mr. Gross was allegedly lucid enough to speak to Mr. Edwards on the phone, but he never reached out to his lifelong friend Mr. Stevens.

The most likely reason for Mr. Gross's decision to get married was that he lacked the capacity to understand his actions. Getting married was certainly a step that Mr. Gross took seriously, and it is unlikely that he would have taken it at all. If he chose to take it, it is unlikely that he would have done so without informing his friends or family. This dramatic change in his opinion is likely attributable to his deficit in information processing, which suggests that he lacked capacity for marriage.

Thought processing

Section 811 provides that a deficit in thought processing can be evidence of mental incapacity. Such a deficit includes hallucinations and delusions.

There is evidence of delusions. Dr. Quint indicated that Mr. Gross believed that he was a court-appointed lawyer. Mr. Gross thought that he had met him last week and had to be persuaded that he was a new person. Mr. Gross further blamed the court for trying to intervene in his life and said that his "ex-wife" was always trying to control him. This incident indicates that Mr. Gross may have suffered from a thought processing defect.

Ability to modulate mood and affect

Section 811 provides that a deficit in the ability to modulate mood and affect may be indicative of a lack of mental capacity. Such evidence includes the presence of pervasive and persistent or recurrent states of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances. There is less evidence of this deficit than the others. One indication of his deficit may be a report by Tanya Gross that her father expressed regret that he didn't spend more time with his daughter. He cited Ms. Baker's influence. This resignation seems surprising for a man described as "a former feisty businessman." Furthermore, Mr. Gross apparently never wanted to see his children, at least according to your client. This rejection from a man who wanted to be close to his children is surprising. His lack of desire to see his loved ones may be an indication that he lacked the ability to modulate his mood.

It is clear that Mr. Gross lacked the ability to say no to Ms. Baker. Given Mr. Gross' statements of wanting to be close to his family, his actions are particularly surprising. Because these actions are out of character, it is likely that Mr. Gross' inability to modulate his mood had a substantial impact on his understanding of marriage. He was particularly susceptible to Ms. Baker's suggestions. This susceptibility was likely a result of his sickness and mental deficit.

Conclusion

I have relisted some of the factors that I believe demonstrate Mr. Gross' lack of capacity to enter into his marriage. As noted above, the deficits in mental functions must substantially impair his ability to understand marriage. The discussion of specific facts indicating a lack of capacity give many examples of how his deficits may create a substantial impairment. Specifically, there were times that he did not recognize his grandchildren. He also believed that the court-appointed psychiatrist was a court-appointed lawyer that he met last week. Mr. Gross spent ten years strongly denying his interest in ever marrying again. He further went out of his way to provide for Ms. Baker outside of his will. His sudden change of heart was out of character and unexpected. It is likely that such a change was induced by his medical condition. Consequently, I

believe that a court will find that Mr. Gross lacked the mental capacity to enter into marriage. Because the marriage is null, the court will award the residuary of the estate, in this case all of it, to my clients.

I hope that I have persuaded you that my analysis is correct. Please contact me with your views so that we may discuss this case. Again, let me reiterate my faith that we will be able to resolve this dispute without the negative publicity and problems that has eroded our clients' relationship.

Sincerely,

Applicant

Answer 2 to Performance Test B

To: Mr. Rudolph Philmore
From: Applicant
Date: July 27, 2007
Re: Tanya and Mark Gross v. Baker

Dear Mr. Philmore:

As you are well aware, Tanya and Mark Gross, the children of Claude Gross, are contesting Ms. Maxine Baker's intentions to benefit from the will of the late Claude Gross. Claude executed his initial will in 1995, when he was still married to Irene Hines. As you will undoubtedly agree, that portion of that will that created a gift to Irene Hines has been statutorily revoked, due to the divorce between Claude Gross and Irene Hines. Shortly before his death, Claude also executed a codicil that left much of his estate to Maxine. However, since the one who drafted the will was Maxine's son, Edward Baker, the Columbia statutes will not permit a gift to be given to a relative of the person who drafted the instrument. However, even if the will is valid, Maxine would take 30% of Claude's estate through her elective share rights. However, and I hope you will agree with our analysis, is that Claude's illnesses made him unable to have the necessary capacity to consent to the marriage. Therefore, Claude's children, Tanya and Mark, ought to inherit his estate. However, Claude hardly left Maxine bereft. He left Maxine significant assets, including their house and a nice nest egg on top of that, that Mark and Tanya do not challenge.

(a) The bequest to Claude's first wife Irene is no longer effective.

A codicil will revoke a gift from a previous will if it purports to distribute the same assets as contained in the will. This codicil does so, distributing much of the money in Claude's estate as well as the personal property (listed in greater detail below) although we will argue below that it is not a valid codicil. So if the codicil is valid, Irene will not take any of Claude's property. Yet, even if the codicil is deemed invalid, Irene will not take her share of Claude's estate.

Under Columbia Wills and Trusts Code, section 102(a), "if after executing a will the testator's marriage is dissolved, the dissolution revokes. . .any disposition or appointment of property made by the will to the former spouse." In the 1995 will, Claude left Irene $2 million if she survives him as well as all of the furniture, furnishings, household items, clothing, jewelry, and other tangible items. Claude divorced Irene in 1997. Therefore, under section 102, the gift to Irene was revoked. There is an exception in section 102 that a will could expressly provide otherwise and allow the gift to the divorced spouse. However, no such intention was present in Claude's 1995 will.

Under section 102(b), when a gift is revoked by dissolution, the property does not pass to the former spouse, but instead passes as if the former spouse failed to survive the

testator. Thus, the gift to Irene would enter into the residuary, which belong to Tanya and Mark Gross.

(b) The bequest to Maxine is invalid.

Columbia Wills and Trusts Code section 720 limits transfers to drafters and others: "No provision of any instrument shall be valid to make any donative transfer to any of the following. . .(2) a person who is related by blood or marriage to. . .the person who drafted the instrument." Marvin Stevens, a lifelong friend of Claude and the executor under Claude's first will, spoke to Edward Baker after Stevens received the codicil a week before Claude's death. Edward described the circumstances that led up to the creation of the codicil and these circumstances indicate that it was Edward, son of Maxine, who drafted the will.

According to Edward, Claude had told Maxine that he wanted to rewrite his will. Claude received a call from Maxine at 8:00 pm before Claude went back into the hospital, asking Edward if he could write a new will. Edward then spoke personally to Claude and asked him if he was sure he wanted to change his will; Claude responded yes. Maxine then faxed over a copy of Claude's current will. According to Edward, the will reflected the instructions that Claude had wanted in terms of the gifts. Edward then drafted the codicil and took it over first thing the next morning. Although Edward did not sign the will himself, he clearly drafted it. Thus, because Edward is related by blood to Maxine, his mother, the codicil will be invalid under section 720.

(c) The marriage to Maxine should be annulled because of Claude's incapacity.

Grounds and effect of judgment of nullity of marriage

When a marriage is null, it restores the parties to the status of unmarried persons (Columbia Family Code section 222). If the marriage is deemed to be valid, the surviving spouse has the right to an elective share of the estate, equal to 30 percent of the value of the estate (Columbia Wills and Trusts Code, section 820). Thus, the issue of whether Maxine and Claude's marriage is valid will determine whether Maxine has a right to the 30% elective share of Claude's estate (over $3 million) or does not receive anything beyond what Claude has already given her.

A marriage is voidable "if at the time of the marriage either party lacked mental capacity, unless the party who lacked mental capacity, after coming to reason, freely cohabitated with the other side as husband and wife" (Columbia Family Code section 221). There is no question about Maxine's capacity, just Claude's, but that is sufficient grounds to nullify the marriage. Nor does the exception apply here, as Claude remained in the hospital after their marriage, and never returned home to freely cohabitate with Maxine. While they may have had plans to cohabitate together once Claude got out of the hospital (Maxine indicated in the Columbia Times article that they planned their honeymoon for when he got out), they never did manage to do so.

Standards for mental capacity

There is a rebuttable presumption that all persons have the capacity to make decisions (Columbia Probate Code section 810). Thus, it is presumed that Claude has the capacity, unless enough evidence can be marshaled to prove otherwise. However, there is clearly enough evidence to find that Claude did not have sufficient capacity, at the time of his marriage, to consent.

The standard for mental capacity "shall be supported by evidence of a deficit in at least one of the following mental functions:
(1) Alertness and attention, including level of consciousness; orientation to time, place, person and situation; and ability to attend and concentrate
(2) Information processing, including short and long term memory, ability to understand or communicate with others, either verbally or otherwise; recognition of familiar objects and familiar persons. . ."
(3) Thought processes, including severely disorganized thinking; hallucinations; delusions. . ."
(4) Ability to modulate mood and affect, including the pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear. . .that is inappropriate in degree to the individual's circumstances." (Columbia Probate Code 811 (a)).

To at least some degree, Claude exhibited all four of these traits, as will be discussed below. However, the most important one appears to be Claude's level of alertness and attention.

"A deficit in the mental functions may constitute incapacity only if the deficit, by itself or in combination with other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." (Columbia Probate Code 811 (b)). Thus, if the deficit of one of the above four mental functions significantly impacts Claude's ability to understand and appreciate the consequences of his marriage to Maxine, it will constitute incapacity. When analyzing mental impairment, the court may consider the "frequency, severity and duration of periods of impairment." (Columbia Probate Code 811 (c)). The courts readily use this standard, as in In re Marriage of Sawyer.

As noted above, the critical moment to analyze Claude's incapacity is "at the time of marriage" (Columbia Family Code 221), a fact that has been emphasized in the cases; "the day of marriage is the critical date for determination of lack of capacity;" Maxine and Claude got married on June 21, 2007. A marriage is valid if "contracted during a lucid interval." (Vitale). Nevertheless, courts are willing to look both in the past and after the marriage to determine capacity, finding "proof of the party's condition before and after that date is admissible for purposes of determining capacity on the day of the marriage" (Sawyer), a finding echoed in Vitale.

Although I will analyze Claude's mental functions below, it is important to note that one looks at the "whole mental condition" (Vitale), and not just examines these factors independently.

Claude's alertness and attention level probably began to deteriorate when he began experiencing kidney problems, about 4 months ago. Dr. Daniel Rosenblum, chief of the Department of Psychiatry and thus an expert in this field, indicated that renal (kidney) failure leads to electrolytic abnormalities that would impair Claude's ability to concentrate. A patient with chronic renal failure, as Claude started to experience, develops renal encephalopathy, an organic brain disorder. Manifestations of this syndrome vary from mild (lassitude, fatigue) to severe symptoms; severity and progression depend on the rate of decline in renal functions; thus, symptoms are usually worse in patients as renal function declines. Thus, Claude may have been experiencing some of the milder functions a couple of months prior to his death; Claude's housekeeper indicated that he had been very sick and noncommunicative. As these conditions worsened, Claude became progressively unable to be alert and pay attention. However, Claude would have better moments, particularly after dialysis, which readily reverse the symptoms of renal encephalopathy. However, the beneficial effect and its duration vary.

When Tanya saw Claude on June 15, 2007 at the hospital, Claude had a blank look and seemed confused, indicating a loss of his ability to concentrate. Claude talked distractedly about his service in WWII, an unusual topic of conversation for him, thus indicating that he was confused as to his orientation of time. He interspersed this discussion of WWII along with questions about his present-day business, indicating both that he was confused as to his orientation to time as well as that he was unable to focus on one topic, indicating he had a limited ability to concentrate.

On June 16, Dr. Rosenblum conducted the mental status exam on Claude to determine his competency. At this time, he estimated Claude's cognitive difficulties were present at about 35% of the time, where he would be incompetent to participate in medical decisions. Again, however, it is important to note that as Claude's renal problems became worse, his level of competency would decrease due to the renal encephalopathy. The wedding itself did not occur until June 21, 5 full days for Claude's health and mental capacity to deteriorate further. Even an attending nurse noted a few days later that Claude had his good days and bad days.

On the same day, Dr. Eduardo Espinoza examined Claude and noted that Claude was fatigued and exhausted. He found Claude to not be alert, as he answers questions vaguely, has difficulty concentrating (one of the factors in the alertness and attention analysis), and falls asleep easily. Espinoza also reiterated the notion that dialysis did help Claude remain lucid for short periods.

On June 17, Claude apparently had one of his better days, as he recognized his granddaughter and asked to see her sister, indicating that his information processing, including his ability to recognize familiar persons, was working well.

On June 18, however, he did not seem to recognize either Tanya or Mark, or their children, indicating that his ability to process information through recognizing familiar persons, was lacking.

On June 21, Claude and Maxine got married. Claude appeared "shrunken and frail," indicating that his renal and liver problems were continuing. His previous dialysis session was the day before the wedding. The wedding ceremony lasted a mere 5 minutes, and Claude did not need to say anything on his own, merely repeat after the judge who conducted the ceremony. Thus, the ceremony itself sheds little light on whether it was one of his good or bad days. However, Claude did comment "I love Maxine very, very, very, very much;" his repetitive use of the word "very" may indicate that his thought processes were disorganized, as the statutory definition indicates "repetitive" thoughts are an indication that his thought processes became muddled.

On June 22, an expert, Stephen Quint, examined Claude. This was but a day after the wedding and also a few hours after his dialysis, so Claude should have been about as close to the best state of mental health as he was capable of at this time. And, as it was just a day after the wedding, it provided a window of what Claude was capable of at the time of the wedding. Here, Quint found that Gross was oriented as to person, place and time, thus indicating some alertness and attention. However, Quint's conclusion is at odds with some of the details he divulged. Claude believed that Quint was a court-appointed lawyer who had been present last week. However, Quint had never before seen Claude; this, this incident indicates Claude's inability to recognize familiar persons, a failure of information processing. Moreover, Quint's attempt to explain who he was did not dissuade him, thus indicating Claude's inability to reason logically (information processing) and a delusion (a failure of thought process). Furthermore, he indicated that he was still active in his business and that he had just negotiated a large transaction to the conclusion; however, there is no evidence to support the notion that he was still involved to this degree in his business. Thus, this is again a failure of information processing and thought processes.

Claude was confused about dates, although he could remember things in sequential order. Nevertheless, his information processing was suspect at this time. He believed that he had married Maxine three weeks prior, while the wedding was just a day before. This indicates that his short term memory (information processing) was in poor shape, as he did not slearly remember the timing of a wedding that occurred but a day before.

Again, however, it is important to recognize that when Quint examined Claude, it was but a day after the wedding, the critical time to examine his lucidity. Moreover, Claude had his dialysis just a few hours before Quint examined him. Nevertheless, even when

examining Claude when Claude was in relatively good mental shape after the dialysis, Claude exhibited severe problems in information processing, thought processes, and alertness and attention. But when the wedding occurred, it was a full day after Claude's last dialysis session, not just a few hours. Additionally, the wedding was in the early evening, which increased the period of time from his previous dialysis session to the wedding.

Thus, it is quite likely that at the time of the marriage, Claude likely suffered from a deficit from either information processing or thought processes that prevented him from having the requisite capacity to consent to the marriage.

Claude's unwillingness to marry

Claude also exhibited a strong unwillingness to marry again after his bitter divorce from Irene. Thus, it is suspicious that he would overturn a long-held belief by choosing to marry Maxine, and so provides a strong ground that Claude suffered from a defect in one of his mental functions. According to Stevens, Claude stated often and in public that he didn't want to marry again and that he said it in the presence of Maxine. In fact, his statement appeared in the Columbia Times article when he vowed to friends that he would never wed again. He also told Tanya the same thing, in strong words: "Even though I love Maxine, I will never marry her or any other woman." He had been with Maxine for a long time; his feelings towards her remained strong throughout the years they were together. This provides evidence that he would not suddenly change his mind and choose to get married.

Claude's desire to renew relations with his children

Claude also expressed a desire to get closer to his children. Although they had been estranged for a period of time, Stevens indicated that Claude frequently expressed sorrow over the state of his relationships with his children and was pleased at recent moves toward reconciliation and talked of doing more to regain their affection and companionship. Both children also indicate that they felt similarly. Also, even though relations with the children were strained at times, those difficulties did not extend to the grandchildren, a sentiment which Stevens found that Claude echoed; he particularly wanted to be closer with his grandchildren.

Naturally, Edward Baker will disagree, noting that Claude would still leave a few million for his children, and that he had made his children rich through trusts and gifts; Claude felt that they had treated him with ingratitude. However, part of their strained relationship was in fact due to Maxine, who tried very hard to keep them apart. Maxine prevented them from visiting Claude, told lies about the family, and refused to relay phone messages; her actions made it very difficult for Claude and his children to have a relationship. In fact, Claude even admitted as such, because he chose not to fight with Maxine because she couldn't stand it when Claude saw his children. Nevertheless, Claude did want to try to repair the relationship.

Thus, it could be viewed as a symptom of lack of mental capacity that he would suddenly change his will to exclude his children and grandchildren from the bulk of his estate.

Other cases

Other cases indicate that the court is willing to find a lack of mental capacity in situations where the mental capacity is less extreme than in this case. In Sawyer, the court found that Charles Sawyer did not have sufficient capacity to enter into the marriage because he was substantially impaired in his ability to make decisions, problem-solve and understand the consequences of his decisions. As in this case, the court relied heavily on expert doctors to determine his mental capacity.

In In re Marriage of Vitale, Ralph was deemed to not have sufficient capacity to marry even though some of the time he clearly exhibited a desire to marry his spouse before he became sick on a trip which substantially injured his mental capacity. Another friend noted that he was always lucid in his understanding of business matters. Nevertheless, the doctors declared that he suffered from paranoid schizophrenia and believed that his ability to do abstract thinking was greatly impaired, one of the factors above. The analysis is very fact-sensitive, but court placed great weight on these experts and other observers and found that he lacked capacity to get married.

Conclusion

Though this is a close case and it is possible that Claude might have had the capacity at the time to get married, it is likely that the time from his dialysis was too great for him to have necessary capacity.

California
Bar
Examination

Performance Tests
and
Selected Answers

February 2008

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2008 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2008 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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California
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Performance Test A
INSTRUCTIONS AND FILE

ONE-STOP EQUIPMENT LEASING v. FRANK REEVES

FILE

ONE-STOP EQUIPMENT LEASING v. FRANK REEVES

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Engles, Clay & Medrano, LLP
10 Anderson Center
Plainview, Columbia

MEMORANDUM

TO: Applicant

FROM: Joan Clay

DATE: February 26, 2008

RE: **One-Stop Equipment Leasing v. Frank Reeves**

About three weeks ago we filed a malpractice action against a local attorney, Frank Reeves, on behalf of our client One-Stop Equipment Leasing, Inc. ("One-Stop"). David Matchie, the CEO and sole shareholder of One-Stop, came into our office last October with a box of files and materials he had obtained from Reeves when they parted company in November, 2006. Reeves had been One-Stop's attorney for about six years at that point, and he had managed to create quite a mess. Matchie asked us to go through the files and see if there were grounds for a malpractice action, and sure enough, there were. The problem was that Reeves had told Matchie not to bother with the "formalities" of filing the required annual statements and tax returns for the corporation, so at the time Matchie first contacted us, the corporation had been suspended and had no power to institute litigation. By the time we got those problems cleared up, about a month ago, the statute of limitations on some of the claims appeared to have run. We filed the claims anyway, after my preliminary research indicated the statute of limitations might not be a bar. As we expected, Reeves demurred to the complaint.

I need your help in drafting certain sections of our memorandum of points and authorities in opposition to the demurrer. I have attached for your reference our office guidelines for drafting Persuasive Briefs and Memoranda. Please draft those portions of the memorandum that persuasively argue that:

1. The Third Cause of Action was timely filed under the applicable statute of limitations;

2. The Fourth Cause of Action was timely filed under the applicable statute of limitations; and

3. The defendant should be equitably estopped from asserting the statute of limitations against all causes of action.

As you probably remember from law school, demurrers and responses to them can only rely on facts that are alleged in the complaint. I have included a couple of brief memos from the file to give you some background, but you should not refer in your draft to anything covered in those memos that is not also mentioned in the complaint.

Engles, Clay & Medrano, LLP
10 Anderson Center
Plainview, Columbia

MEMORANDUM

TO: All Attorneys
FROM: Executive Committee
RE: **Persuasive Briefs and Memoranda**

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs, including briefs in support of motions (also called memoranda of points and authorities), whether directed to an appellate court, trial court, arbitration panel or administrative officer shall conform to the following guidelines.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER:** COLUMBIA HAS PERSONAL JURISDICTION. **PROPER:** DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

In writing a first draft, the attorney should not prepare a table of contents, a table of cases, a summary of argument, an index, or, unless specifically requested to do so, a statement of facts. These will be prepared, where required, after the draft is approved.

MEMORANDUM TO FILE

TO: File, One-Stop Equipment Leasing Matter

FROM: Joan Clay

DATE: October 8, 2007

RE: **Summary of Client Interview**

David Matchie, sole shareholder and officer of this Columbia corporation, came in to discuss filing a malpractice action against the corporation's former attorney, Frank Reeves. Matchie is a self-made businessman who worked his way up from operating heavy equipment to owning and leasing it, forming a corporation in the early 1990's. Reeves represented One-Stop in a variety of matters from sometime in 2000 until Matchie fired him on November 20, 2006, after he found out Reeves had been concealing the fact that he had allowed a default judgment to be entered against the corporation some two years earlier. Matchie demanded and obtained the files in all the matters Reeves had handled for One-Stop on that same day, November 20, 2006.

Matchie brought all these files to the interview in a large box, and also gave me a thick folder of delinquency notices and other communications from the Columbia authorities regarding the corporation's failure to pay taxes and file its required annual statements for the last few years. Matchie said Reeves had told him these corporate obligations were "mere formalities" that he could safely ignore, and that he could continue to carry on the corporation's business, including engaging in any necessary litigation, in his own name. I told him I didn't think that was the case, but would get back to him after doing some research. I also told him it would take a few days to go through the files and see if there was a viable malpractice action. We scheduled a follow-up appointment for next week.

MEMORANDUM TO FILE

TO: File, One-Stop Equipment Leasing Matter

FROM: Joan Clay

DATE: October 14, 2007

RE: **Corporate Matters and Possible Malpractice Actions**

1. Re: Corporate matters. A review of the documents brought in by David Matchie on behalf of the corporate client revealed that it has been suspended under *both* § 2205 of the Corporations Code and § 23301 of the Revenue and Taxation Code for failing to file its annual statements and pay its taxes from 2003 to the present. Until it applies for a certificate of revivor, files the statements, pays taxes, penalties and interest it can transact no business of any kind, including filing lawsuits or even *defending* any lawsuits that might be filed. I called the two offices that handle these matters in Columbia – the Secretary of State's office and the Tax Board – and learned that it will take at least three to six months to complete all the paperwork, and there is no way the process can be accelerated. They are sending a complete accounting of all the amounts due, and in our meeting yesterday Mr. Matchie retained us to straighten all this out for him and assured me he could pay our fees as well as the back taxes, penalties and interest. He gave me a $10,000 retainer as a beginning.

2. Re: Possible malpractice actions. It is absolutely clear from my research that Matchie cannot prosecute the corporation's claims as an individual, so we will have to wait until the corporation is reinstated before filing a malpractice action against Frank Reeves. It looks like Reeves egregiously fouled up One-Stop's claim against Goodfellows Development Corporation and also the lawsuit by A.B. Construction against One-Stop. Reeves turned over all the files on both of these matters to Matchie on November 20, 2006. Thus, these claims were fully accrued and with reasonable diligence Matchie or any lawyer for One-Stop could have discovered that the statute began to run on that date. The one-year statute of limitations expires next month, and it

may be as much as six months before we can file. I think we should still file these actions when it becomes possible, arguing the statute should not be a bar, and there may be claims based on the grossly erroneous advice that put the client in this predicament.

Joan Allen Clay, State Bar #10239
Engles, Clay and Medrano, LLP
10 Anderson Center
Plainview, Columbia
Attorney for Plaintiff

FILED

Clerk, Fulton County Superior Court
February 5, 2008

IN THE SUPERIOR COURT FOR THE STATE OF COLUMBIA

COUNTY OF FULTON

ONE-STOP EQUIPMENT LEASING, INC. Case No. 320016

Plaintiff,

v. **COMPLAINT FOR DAMAGES FOR PROFESSIONAL NEGLIGENCE AND FRAUD**

FRANK REEVES, Attorney-at-Law,

Defendant.

_____)

Plaintiff alleges as follows:

FIRST CAUSE OF ACTION

(Negligent Failure to Commence Action on Timely Basis)

1. Plaintiff One-Stop Equipment Leasing, Inc., is a Columbia corporation engaged in the business of equipment leasing and finance.

2. Defendant Frank Reeves resides in Fulton County, Columbia, and at all times herein mentioned was licensed to practice law in the State of Columbia and maintained a law office at 710 Main Street, Plainview, Columbia.

3. On or about March 12, 2000, plaintiff and defendant entered into a written retainer agreement under which defendant was retained by plaintiff to advise it on non-litigation matters and also to represent it in litigation matters on an ongoing basis. Defendant accepted such employment and commenced to handle all legal matters on which plaintiff needed assistance. This arrangement continued until November 20, 2006, when plaintiff terminated the agreement and obtained from defendant all files pertaining to matters in which defendant had advised and represented plaintiff.

4. In accordance with their retainer agreement, on or about June 25, 2003, plaintiff employed defendant to represent plaintiff in commencing and prosecuting a contract claim against Goodfellows Development Corporation. Defendant assured plaintiff that he was diligently prosecuting said claim.

5. In fact, defendant failed to exercise reasonable skill, care and diligence in representing plaintiff in said matter and negligently failed to commence such action within the three-year statute of limitations.

6. Plaintiff is informed and believes and on that basis alleges that such claim was at all times mentioned meritorious; that plaintiff would have recovered on such claim; and that at all times mentioned Goodfellows Development Corporation was solvent with sufficient assets and property to satisfy a judgment in the amount claimed.

7. As a proximate result of the negligence herein alleged, plaintiff's cause of action in this matter is now barred and its claim rendered worthless, all to plaintiff's damage.

SECOND CAUSE OF ACTION

(Negligent Failure to Defend Action)

8. Plaintiff refers to and herein incorporates Paragraphs I through 3 of the First Cause of Action.

9. In accordance with his retainer agreement with plaintiff, defendant was employed to defend plaintiff in an action filed in the Superior Court of Columbia, County of Fulton, entitled A.B. Construction vs. One-Stop Equipment Leasing. Plaintiff was identified as a defendant in said action, and defendant Reeves accepted service on plaintiff's behalf on January 17, 2005. Defendant accepted such service without notifying plaintiff and knew he was obligated to represent plaintiff in defending said action under the retainer agreement.

10. Defendant was very familiar with the subject matter of the above action and knew plaintiff had a meritorious and sufficient defense to the complaint. Had plaintiff been advised of the action, it was also available, willing and able to provide the facts comprising its defense from the time the complaint was filed until expiration of the time to file an answer or other responsive pleading.

11. Instead, defendant failed to exercise reasonable care and skill in representing plaintiff and in defending such action, and neglected to file an answer or any responsive pleading within the time required by law and negligently permitted a default judgment to be entered against plaintiff.

12. Plaintiff is informed and believes and on that basis alleges that if defendant had exercised due care and skill in representing plaintiff, judgment would have been entered in plaintiff's favor in such action.

13. As a proximate result of such negligence, a default judgment was entered against plaintiff on April 5, 2005 in the sum of $37,698.00, as prayed for in such action.

14. Defendant concealed the entry of this default judgment against plaintiff, and as a result plaintiff was unable to obtain other counsel and seek to set aside the default or obtain other relief, and also incurred further expense in the form of accrued interest amounting to $4,435.00.

15. As a proximate result of defendant's negligence and subsequent concealment plaintiff has been damaged.

THIRD CAUSE OF ACTION

(Negligence in the Giving of Advice)

16. Plaintiff refers to and herein incorporates Paragraphs 1 through 3 of the First Cause of Action.

17. Beginning in February, 2004 and continuing until the termination of their attorney-client relationship on November 20, 2006, following a period in which lapses in record keeping and incomplete financial information caused plaintiff to be unable to file an accurate corporate tax return for the 2003 calendar year, defendant advised plaintiff not to file a return at all, because to do so would subject plaintiff to fines, and plaintiff's sole shareholder, officer and director, David Matchie, to both fines and imprisonment for filing false tax returns. Defendant further advised plaintiff that it need not observe any normal corporate formalities, including, among other things, maintaining corporate minutes or filing the statement of information required by Corporations Code section 1502. Defendant advised that the failure to observe these "mere formalities" would result in suspension of plaintiff's corporate status, but that its corporate status could be renewed by merely paying the back taxes at any time, without affecting any of plaintiff's business or legal claims. Defendant also advised that David Matchie could prosecute in his own name any legal claim plaintiff One-Stop might have. This advice was rendered periodically from February, 2004, when it was first given, until the parties terminated their relationship.

18. The advice specified above was erroneous, and in giving such advice defendant was negligent in that he failed to research the law or investigate the factual basis of his assertions, thus failing to exercise the degree of care, skill and diligence he owed to plaintiff.

19. Plaintiff relied on this advice and failed to file corporate tax returns, keep corporate minutes, file required information statements or comply with other legal requirements for the period 2003 to 2006. Plaintiff so acted only on the advice of defendant and would not have so acted without such advice. Plaintiff continued to rely on defendant's advice until October 13, 2007, when, in the course of consulting counsel in the present action about the claims set forth in the First and Second Causes of Action, above, plaintiff began to learn the true facts concerning the erroneous legal advice defendant had given.

20. As a proximate result of defendant's negligent advice, plaintiff was damaged as follows: First, plaintiff was suspended from doing business in Columbia and incurred fines and penalties as well as charges for accrued interest. Second, plaintiff also had to employ legal counsel to assist in undoing the harm caused by defendant's negligent and erroneous advice, and thereby incurred substantial legal fees. Third, as a result of its suspended corporate status, plaintiff was prevented from filing claims against defendant Reeves and other possible defendants within the time period specified by the applicable statutes of limitations, thereby jeopardizing and in some cases foreclosing plaintiff's ability to prosecute valid legal claims. Plaintiff continues to incur damages as a proximate result of defendant's negligence as alleged herein.

FOURTH CAUSE OF ACTION

(Fraud)

21. Plaintiff refers to and herein incorporates Paragraphs I through 3 of the First Cause of Action, and Paragraph 17 and 20 of the Third Cause of Action, above.

22. By virtue of the attorney-client relationship that existed between defendant and plaintiff, defendant owed to plaintiff a fiduciary duty, and by virtue of plaintiff's having placed confidence in the fidelity and integrity of defendant and entrusting

defendant to provide accurate, reliable advice on the conduct of plaintiff's corporate affairs, a confidential relationship existed at all times herein mentioned between plaintiff and defendant.

23. Despite having voluntarily accepted the trust and confidence of plaintiff with regard to giving accurate and reliable advice on the conduct of plaintiff's corporate affairs, and in violation of this relationship of trust and confidence, defendant abused the trust and confidence by giving the patently erroneous advice summarized above.

24. Plaintiff in fact placed confidence and reliance in defendant's advice until October 13, 2007, when, in the course of consulting counsel in the present action about the claims set forth in the First and Second Causes of Action, above, plaintiff began to learn the true facts concerning the erroneous legal advice defendant had given. Plaintiff reasonably relied on the defendant because of their attorney-client relationship.

25. As a result of defendant's aforementioned breach of fiduciary duties to plaintiff, defendant gained a financial advantage in that from February, 2004 to November 20, 2006, plaintiff continued to employ defendant and pay his fees, and even after that continued to rely on his advice concerning the consequences of the course of action he had recommended. Furthermore, by giving advice that resulted in the suspension of plaintiff's corporate status, defendant prevented plaintiff from being able to prosecute its claims against defendant himself within the period specified by the applicable statute of limitations, which, unless remedied by this court, would also result in a substantial financial benefit to defendant.

26. Defendant knew that the advice summarized above was erroneous but repeated it on numerous occasions and also concealed from plaintiff the legal consequences of some of the actions it had taken in reliance on this advice as these consequences began to occur. Defendant did these acts with the intent to deceive and

defraud plaintiff, and with the intent to induce reliance by plaintiff in the continuing fidelity of its attorney.

27. Plaintiff relied on this advice and failed to file corporate tax returns, keep corporate minutes, file required information statements or comply with other legal requirements for the period 2003 to 2006. Plaintiff so acted only on the advice of defendant and would not have so acted without such advice.

28. As a proximate result of defendant's breach of his fiduciary duty to plaintiff by intentionally giving erroneous advice, plaintiff was damaged as set out in paragraph 20, referred to and incorporated above. Plaintiff continues to incur damages as a proximate result of defendant's fraudulent conduct as alleged herein.

29. In doing the acts alleged herein, defendant intentionally concealed the true and material facts known to defendant with the intention of thereby depriving plaintiff of property and legal rights, and plaintiff is entitled to punitive damages against defendant.

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION:

1. For compensatory damages in the amount of $450,000;

ON THE SECOND CAUSE OF ACTION:

2. For compensatory damages in the amount of $42,133;

ON THE THIRD CAUSE OF ACTION:

3. For compensatory damages in the amount of $157,000 comprising penalties, interest, and attorneys' fees incurred to this date;

ON THE FOURTH CAUSE OF ACTION:

4. For the compensatory damages identified in the Third Cause of Action, above;

5. For punitive damages of $1,000,000.

ON ALL CAUSES OF ACTION:

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.

Dated: February 5, 2008

Engles, Clay and Medrano, LLP

By: Joan Allen Clay

JOAN ALLEN CLAY
Attorney for Plaintiff

Lewis Farrington, State Bar #13465
Robey, Smith and Brown, LLP
712 Main Street
Plainview, Columbia
Attorney for Defendant

IN THE SUPERIOR COURT FOR THE STATE OF COLUMBIA

COUNTY OF FULTON

ONE-STOP EQUIPMENT LEASING, INC. Case No. 320016

Plaintiff,

v.

FRANK REEVES, Attorney-at-Law,

Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF DEFENDANT FRANK REEVES TO COMPLAINT OF PLAINTIFF ONE-STOP EQUIPMENT LEASING

Defendant demurs to plaintiff's complaint on the ground that it fails to state a cause of action in that it appears on the face of the complaint that each cause of action is barred by the applicable statute of limitations, in that the alleged wrongful acts and omissions of which plaintiff complains were all discovered by plaintiff on or before

November 20, 2006, and this action against defendant was not brought until February 5, 2008.

A. Objection by Demurrer. The party against whom a complaint has been filed may object by demurrer, as provided in Section 430.30 of the Columbia Code of Civil Procedure, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). When any ground for objection to a complaint appears on the face thereof, that ground may be taken by a demurrer to the complaint or any of the separate claims therein. Code Civ. Proc. § 430.30(a).

B. Raising Statute of Limitations by Demurrer. The objection that an action is barred by a statute of limitations may be set up by demurrer. *Krusesky v. Baugh* (Columbia Court of Appeals, 1982). This objection is deemed to be included in the general ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action. *Id.*

C. Limitation on Commencement of Action. Civil actions, without exception, can be commenced only within the periods prescribed in Title 2 of Part 2 (Section 312 et seq.) of the Columbia Code of Civil Procedure, after the cause of action shall have accrued.

D. Commencement of Action. An action is commenced, within the meaning of Title 2, Part 2, Section 312 et seq. of the Code of Civil Procedure when the complaint is filed. Code Civ. Proc. § 350.

E. Accrual of Cause of Action. A cause of action invariably accrues when there is a remedy available. *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (Columbia Supreme Court, 1998).

F. Period of Limitation. An action against an attorney for wrongful acts or omissions arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence

should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. Code Civ. Proc. § 340.6.

G. Running of Period of Limitation. In this case, it is apparent on the face of the complaint that plaintiff discovered the facts constituting the alleged wrongful acts and omissions complained of on November 20, 2006. The applicable one-year period of limitation began to run on that date and expired one year later, on November 20, 2007. Since plaintiff failed to file its complaint within that time period, its claims are barred and the complaint must be dismissed.

WHEREFORE, defendant prays that his demurrer be sustained without leave to amend, and that the complaint be dismissed.

Dated: February 21, 2008

Respectfully submitted,

Robey, Smith and Brown

By Lewis Farrington

LEWIS FARRINGTON
Attorney for Defendant

TUESDAY AFTERNOON
FEBRUARY 26, 2008

California
Bar
Examination

Performance Test A

LIBRARY

ONE-STOP EQUIPMENT LEASING v. FRANK REEVES

LIBRARY

COLUMBIA CODE OF CIVIL PROCEDURE

§ 335. Periods of limitation prescribed.

The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

* * * * * * * *

§ 338. Statutory liability; injury to property; fraud or mistake; three years.

Within three years:

(a) An action upon a liability created by statute, other than a penalty or forfeiture.

(b) An action for trespass upon or injury to real property.

(c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

* * * * * * * *

§ 340.6. Action against attorney for wrongful act or omission, other than fraud.

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitation; or

(4) The plaintiff is under a mental or physical disability which restricts the plaintiff's ability to commence legal action.

Krusesky v. Baugh
Columbia Court of Appeals (1982)

Plaintiff, Donna Krusesky, filed this action against her divorce lawyer, defendant Clyde A. Baugh, alleging that he negligently failed to tell her the military retirement benefits paid to her husband Alex at the time of their 1977 divorce were community property. The divorce ended a 23-year marriage during which Alex served continuously in the United States Navy. Donna alleges she remained unaware of her rights to the pension until February 25, 1980, when a lawyer she consulted on another matter pertaining to the divorce judgment advised her of her community property interest in the pension. Donna filed this suit for malpractice on November 3, 1980. Baugh successfully demurred on the ground Krusesky's action was barred by the statute of limitations, Code of Civil Procedure section 340.6.

On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, the reviewing court must accept as true not only those facts alleged in the complaint, but also facts that may be inferred from those expressly alleged. A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint: it is not enough that the complaint shows that the action may be barred. We proceed on the premise that Donna states a valid cause of action for legal malpractice where the pension involved consists of federal retirement benefits which were both vested and matured at the time of the divorce.

The statute of limitations applicable to this action, Code of Civil Procedure section 340.6, provides that a legal malpractice case, other than one for actual fraud, "shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first...." Since Donna filed her action less than four years after her divorce became final,

on September 23, 1977, she is not barred by the four-year occurrence rule of section 340.6.

There remains the question of whether Donna's action is barred by the one-year discovery rule of section 340.6. Donna alleges she did not discover she was entitled to share in her husband's military retirement pension benefits until February 25, 1980, less than one year before she filed her malpractice action against Baugh. Assuming this allegation to be true, Donna actually discovered the facts constituting Baugh's negligent act within the one-year period.

Whether Donna "through the use of reasonable diligence should have discovered" those facts more than one year before she filed her malpractice action depends on whether she had notice of circumstances sufficient to put a reasonable person on inquiry. What constitutes such notice turns on the facts of each case. In some cases, sustaining known physical or monetary damages may be a fact sufficient to alert a plaintiff to the necessity for investigation and pursuit of her remedies. In other cases, however, because of the nature of legal advice, a financial loss will pass unnoticed.

An attorney stands in a fiduciary relationship to his clients. A client damaged in the context of such a relationship is under no duty to investigate her attorney's actions unless she has actual notice of facts sufficient to arouse the suspicions of a reasonable person. In light of Baugh's advice, Donna's lack of suspicion about not receiving part of her husband's pension benefits is understandable and her delay until February 25, 1980, to investigate Baugh's competence was reasonable. To conclude otherwise and hold that Donna acted unreasonably would in effect require a client to consult a second lawyer in every case for another opinion on every subject. Because Donna filed her malpractice action within one year after her reasonable discovery of the facts constituting Baugh's negligent act, she is not barred by the one-year limitations period of section 340.6.

The judgment is reversed.

Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison

Columbia Supreme Court (1998)

This case involves the question of when a plaintiff suffers "actual injury" within the meaning of Code of Civil Procedure section 340.6 (a)(1) so as to start the statute of limitations running in an action for attorney malpractice.

Jordache Enterprises, Inc. retained the law firm of Brobeck, Phleger & Harrison (Brobeck) in 1984 to defend it in a lawsuit filed in Los Angeles (the Marciano action). This action involved several claims, including that Jordache was marketing "knockoffs" of Guess?, Inc. apparel. Jordache did not request from Brobeck, and Brobeck did not offer, any advice concerning insurance coverage for the Marciano action. Brobeck did not ask about Jordache's insurance or otherwise investigate whether any potential for coverage might trigger an insurer's duty to defend the Marciano action.

In April, 1987, Reavis & Pogue replaced Brobeck as Jordache's counsel of record in the Marciano action. Its new counsel advised Jordache there was potential insurance coverage for that action. In August, 1987, Jordache instructed its counsel to demand that its insurers defend the Marciano action and the two related actions then pending in Delaware and Hong Kong. Counsel contacted Jordache's insurance broker, Advocate Brokerage Corp., and asked it to submit the claims to Jordache's insurers. In December, 1987, Jordache gave Reavis & Pogue "exclusive authority" to make and prosecute claims concerning the Marciano action against Jordache's liability insurers. From the outset, Jordache and its new counsel discussed the predicament in which Jordache found itself. A "big issue" in these early discussions was the probability that the insurers would raise a "late notice" defense to Jordache's coverage claim. Thus, by December, 1987, Jordache had discovered Brobeck's alleged negligence in not notifying or advising Jordache to notify its insurers of the Marciano action.

More than three years after the Marciano action began, Reavis & Pogue formally tendered defense of the action directly to Jordache's liability insurance carriers. Soon after, in February, 1988, Jordache sued its insurers, alleging they failed to provide a defense and wrongfully refused to acknowledge coverage. Jordache sought reimbursement for $30 million it had allegedly paid for attorney fees and costs in the Marciano action. Jordache also asserted that it lost millions of dollars in profits because the funds spent on legal fees would otherwise have been used for profitable investments.

In May, 1990, the Marciano action settled. Jordache and one of its insurers then filed cross-motions for summary adjudication of issues in their insurance coverage litigation. After an adverse ruling on some of these issues, Jordache settled its insurance coverage suits for $12.5 million on July 31, 1990.

Jordache's legal malpractice claim against Brobeck was filed on August 15, 1990, alleging only omissions: (1) failure to recognize that Jordache's insurance might cover the Marciano action; (2) failure to investigate or advise Jordache to investigate whether it did, and (3) failure to notify or to advise Jordache to notify its liability insurers whose policies potentially covered the action.

Brobeck moved for summary judgment, asserting that section 340.6 barred Jordache's claims because, no later than 1987, Jordache discovered the alleged omissions and sustained actual injury in the form of (1) lost profits from business investment monies diverted to defense costs in the Marciano action, and (2) forgone insurance benefits for defense costs incurred before Jordache tendered defense of the Marciano action. Jordache agreed that it discovered Brobeck's alleged omissions by December, 1987. Jordache opposed the motion on the ground that it did not sustain actual injury until it settled with its insurers for less than the full amount of its claim.

The trial court granted summary judgment, finding that more than one year before its suit was filed, Jordache sustained actual injury within the meaning of section 340.6

because it claimed it lost millions of dollars of business profits before it tendered the Marciano action's defense to its insurers. The Court of Appeals reversed, holding that Jordache suffered no actual injury within the meaning of section 340.6 until it settled its actions against the insurers in July, 1990. We granted Brobeck's petition for review on this single issue.

This court most recently considered the actual injury provision in *Adams v. Paul* (1995). *Adams* reconfirmed the following: (1) determining actual injury is predominantly a factual inquiry; (2) actual injury may occur without any prior adjudication, judgment, or settlement; (3) nominal damages, speculative harm, and the mere threat of future harm are not actual injury; and (4) the relevant consideration is the fact of damage, not the amount.

Ordinarily, the client already has suffered damage when it discovers the attorney's error. In this case, the client alleged its attorneys failed to advise it about, or to assert a timely claim to, liability insurance benefits covering a third party's suit against the client. The client acknowledged it discovered its attorneys' alleged malpractice more than one year before it commenced this action. However, the client also contends it did not sustain actual injury until it later settled its action against its insurer for less than the full benefits it claimed.

We conclude that actual injury occurred before the court's settlement with the insurer. In reaching this conclusion, we reaffirm the basic principles reiterated in *Adams.* Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions. Under section 340.6, subdivision (a)(1) will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.

Here, the attorneys' alleged neglect allowed the insurers to raise an objectively viable defense to coverage under the policies. The insurer's assertion of this defense

necessarily increased the client's cost to litigate its coverage claims and reduced those claims' settlement value. Moreover, because of the attorneys' alleged neglect, the client provided its own defense in the third party action for several years. Consequently, this client not only lost a primary benefit of liability insurance, it also lost profitable alternative uses for the substantial sums it paid in defense costs. These detrimental effects of the attorneys' alleged neglect were not contingent on the outcome of the coverage action. Further, that action could not establish either a breach of duty to provide timely insurance advice or a causal relationship between the alleged neglect and the claimed damages. Instead, the coverage action settlement simply reflected the client's preexisting predicament – the attorneys' alleged omissions had diminished the client's rights to its liability insurance benefits.

The loss or diminution of a right or remedy constitutes injury or damage. Neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate. The coverage action settlement was not the first realization of injury from the alleged malpractice; the settlement simply resolved one alternative means to mitigate that injury. Accordingly, we agree with the trial court that the undisputed facts establish that the client sustained actual injury more than one year before it commenced this suit.

Reversed.

Battuello v. Battuello

Columbia Court of Appeals (1998)

Appellant Craig Batuello has, for many years, worked on the family vineyard located in the Grappa Valley. Ever since appellant was a young boy, his father, Dominic, and his mother, Ellen, told appellant repeatedly that they would give him the vineyard when Dominic died. In reliance on those promises, appellant went to college to learn the formal aspects of running a business; and from 1970 through 1995, appellant farmed and managed the vineyard.

In 1988, Dominic and Ellen executed a trust which specified that appellant would receive the vineyard upon the death of the survivor of Dominic and Ellen. Dominic died on December 10, 1995. Shortly thereafter, appellant learned that in 1994, Dominic and Ellen had executed another trust and related documents (the 1994 trust) which stated that appellant would not receive the vineyard as he had been promised.

Appellant objected when he learned the terms of the 1994 trust, and he entered into settlement negotiations with his mother and her legal advisors. As a result of these negotiations, Ellen promised appellant he would receive the vineyard no later than the end of 1996. In reliance on those promises, appellant refrained from making any objection when Ellen filed a petition in the Superior Court to confirm that the 1994 trust had title to the vineyard. In December, 1996 the court did, in fact, rule that the trust had title to the vineyard pursuant to the 1994 trust document.

Shortly thereafter, Ellen repudiated the settlement agreement, taking the position that appellant did not have any right to the vineyard other than that to which he might be entitled under the 1994 trust. Faced with this breach of the settlement agreement and the potential loss of the vineyard, appellant filed the present action against Ellen, both individually and in her capacity as trustee of the trust, and against Dominic's estate, seeking to enforce his father's promise to give him the vineyard when he died.

Ellen, acting individually, as trustee of the trust, and apparently on behalf of Dominic's estate, demurred to the complaint on the grounds that the action was barred by the one-year statute of limitations set forth in Code of Civil Procedure section 366.2. The trial court agreed and sustained the demurrer without leave to amend. This appeal followed.

In the trial court, appellant argued that even if the statute of limitations set forth in section 366.2 applied, respondents should be equitably estopped from asserting that statute as a defense. The trial court rejected this argument based on section 366.2, subdivision (a)(2) that states, "The limitations period provided in this section for the commencement of an action is not tolled or extended for any reason." Appellant now claims the court incorrectly concluded the quoted language prevented it from applying the principles of equitable estoppel. We agree.

Before an estoppel to assert an applicable statute of limitations may be said to exist, certain conditions must be present: the party to be estopped must be apprised of the true state of facts; the other party must be ignorant of the true state of facts; the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and the other party must rely on the conduct to its prejudice. All those factors appear to be present here.

While section 366.2 clearly states that the one-year statute of limitations may not be "tolled" or "extended," it says nothing about equitable estoppel. The doctrines are distinct. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the statute of limitations itself. Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be stopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. Its application is wholly

independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it may apply no matter how unequivocally the applicable limitations period is expressed.

While section 366.2 subdivision (a)(2) clearly shows the Legislature intended that the statute of limitations set forth therein not be "tolled" or "extended," the statute says nothing about equitable estoppel. The Legislature could have easily stated it intended to abrogate long-established equitable principles. It did not do so. In the absence of such language, or legislative history suggesting that was what the Legislature intended, we conclude the doctrine still applies.

Having reached that conclusion, we agree appellant has alleged sufficient facts to come within the doctrine. Appellant claims that during the settlement negotiations which followed his father's death, Ellen convinced him not to file a timely suit by telling him that he would receive the vineyard. By the time appellant learned Ellen's promise was false, the statute of limitations had passed. We conclude these allegations were sufficient to support a claim of equitable estoppel.

The judgment is reversed.

Answer 1 to Performance Test A

1. PLAINTIFF'S THIRD CAUSE OF ACTION WAS TIMELY FILED BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL PLAINTIFF COULD HAVE REASONABLY DISCOVERED THE FACTS UNDERLYING THE CAUSE OF ACTION; ALTERNATIVELY, THE CLAIM WAS TIMELY FILED BECAUSE THE STATUTE OF LIMITATIONS WAS TOLLED BECAUSE THE PLAINTIFF HAD NOT YET SUSTAINED AN ACTUAL INJURY.

There are two alternative reasons why the Third Cause of Action was timely filed. The first is that the statute of limitations had not begun running until Plaintiff could have reasonably discovered the facts constituting the cause of action; the second, alternative argument is that the running of the statute of limitations was tolled because the Plaintiff had not sustained an actual injury until it had a legally cognizable claim against Defendant.

Code Civ. Proc. Section 340.6 gives two alternative statutes of limitations for actions against an attorney. 340.6. The statute of limitations is either one year from the time that the plaintiff "discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission," or "four years from the date of the wrongful act or omission," whichever occurs first. The first wrongful act alleged in the complaint occurred in February 2004 (and that act was subsequently repeated several times throughout the course of Defendant's representation of Plaintiff), and therefore the four-year statute of limitations has not yet run. In reference to Plaintiff's actual discovery of the facts constituting the Third Cause of Action, this discovery occurred on October 13, when counsel in the present action advised Plaintiff of such.

A crucial issue, therefore, is at what time Plaintiff should have discovered, through reasonable diligence, the facts constituting the Third Cause of Action. The Columbia Supreme Court held in Krusesky v. Baugh that this determination depended upon whether a plaintiff "had notice of circumstances sufficient to put a reasonable person on

inquiry." Krusesky. Defendant will argue, ironically, that due to his negligent advice and representation in other matters (see the First and Second Causes of Action), that Plaintiff should have been on notice from the time of that discovery that all of Defendant's advice—including the advice at issue in the Third Cause of Action—was suspect.

Plaintiff did not have notice of circumstances sufficient to put a reasonable person on inquiry. Plaintiff was aware that Defendant had negligently represented him in one suit, and had failed to prosecute another suit effectively; this is insufficient, however, to put a reasonable person on notice that every act of their attorney is suspect. Plaintiff still believed, due to Defendant's advice about Plaintiff's legal rights as a suspended corporation, that Plaintiff would be able to bring an action against Defendant. Plaintiff had no notice that it was barred from bringing an action against Defendant on other claims due to its following Defendant's advice. Plaintiff therefore did not have notice of circumstances sufficient to put a reasonable person on inquiry. Following Krusesky, this court should hold that the statute of limitations did not run until Plaintiff actually discovered the facts constituting the Third Cause of Action, and that the statute of limitations did not commence running until October 13, 2007, and that thus the Third Cause of Action was timely filed.

If the court holds that Plaintiff should have discovered the facts underlying the cause of action on November 20, 2006, then the court should alternately find that the statute of limitations was tolled until Plaintiff sustained actual injury. Section 340.6(a)(1) states that the statute of limitations will be tolled if the plaintiff "has not sustained actual injury." 340.6. The Columbia Supreme Court addressed the issue of actual injury—and when it occurs—at length in Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison ("Jordache"). The court initially noted that actual injury is ordinarily sustained when the client discovers the error. Thus, in this case, actual injury occurred when Plaintiff discovered that Defendant's advice had caused it to be unable to file the claim. The

Jordache Court, however, gave a more thorough analysis as to when the actual injury is sustained.

The Jordache Court held that the plaintiff in that case had sustained actual injury prior to the result of the claim underlying the malpractice claim—before, that is, the plaintiff was aware of the extent of the actual injury—and that therefore the "actual injury" tolling provision was inapplicable. The Court stated: "Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based upon the asserted errors or omissions." Jordache. In this case, the injury was not legally cognizable, because Plaintiff was unable to bring the claim asserted in the Fourth Cause of Action because of its suspended status—and was unaware of this injury.

The Jordache Court gave several reasons supporting its decision to find the actual injury tolling provision inapplicable—none of those reasons is found in the present case. First, the Court noted that there was no causal relationship between the outcome of the underlying action and the alleged neglect of the attorneys. In this case, the negligence alleged in the Third Cause of Action—that Defendant negligently advised Plaintiff to act in a way that prevented Plaintiff from timely filing his claim against Defendant—is directly related to the detrimental effect of the negligence, i.e., that plaintiff was unable to file a claim based upon the negligent behavior.

Next, the Jordache Court noted that there had been no affirmative duty breached by the defendant attorneys. Here, however, Defendant clearly breached his duty of competence by negligently giving advice, which is the focus of the Third Cause of Action. Further, the Court noted that the plaintiffs in Jordache were fully aware of the cause of action that they had against the defendant attorneys. That is not the case here; Plaintiff was completely unaware of the facts constituting the Third Cause of Action until October 13, 2007. Finally, the Jordache Court noted that 340.6(a)(1) "will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice." Jordache. In this case, Plaintiff was unable to

plead damages that could establish a cause of action for legal malpractice, because following Defendant's negligently given advice had rendered it unable to do so. The several distinguishing factors between the present case and Jordache weigh in favor of finding that Plaintiff's injury in this case was not sustained until it was actually discovered.

This court should hold that according to the ordinary method of determining actual injury, Plaintiff did not sustain actual injury until he was made aware of the injury on October 13, 2007. Because actual injury was not sustained until October, the statute of limitations was tolled by 340.6(1), and the Third Cause of Action was timely filed. Plaintiff did not have a legally cognizable injury it was able to file claims [for]. As a suspended corporation, Plaintiff was unable to file claims until recently. This argument is further evidenced by the distinguishing factors between the present case and Jordache, including the relatedness of the injury (the inability to bring the claim) to the alleged negligence (the negligent advice which produced the inability to bring the claim), and the breach of the duty owed by Defendant to Plaintiff. This court should hold that the statute of limitations was tolled until Plaintiff had a legally cognizable injury, which was actually discovered on Oc[tober 13, 2007].

In either of the two cases, the court should hold that the actual injury tolled provision in 340.6(1) applies to the Third Cause of Action, and that the Third Cause of Action was therefore timely filed.

2. PLAINTIFF'S FOURTH CAUSE OF ACTION IS BASED UPON ACTUAL FRAUD BY THE DEFENDANT, AND IS THEREFORE SUBJECT TO THE THREE-YEAR STATUTE OF LIMITATIONS IN COLUMBIA CODE OF CIVIL PROCEDURE SECTION 338.

Defendant asserts in his demurrer that Plaintiff's Fourth Cause of Action is barred by the one-year statute of limitations in Code Civ. Proc. section 340.6, which states that actions against attorneys must be commenced within one year after the plaintiff "discovers, or should have discovered through reasonable diligence, the facts constituting the wrongful act or omission." Code Civ. Proc. section 340.6. This section does not apply to actions against an attorney concerning fraud, however. As 340.6(a) states, the one-year statute of limitations applies to "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud." 340.6(a)(emphasis added).

Plaintiff's Fourth Cause of Action is an action against Defendant, an attorney, for actual fraud. The complaint states directly after the title of the Fourth Cause of Action that it is for fraud. The Fourth Cause of Action additionally states all of the required elements for fraud, including that Defendant intended to defraud Plaintiff, made false statements of law intending to induce reliance thereupon, that Plaintiff did in fact rely upon Defendant's misrepresentations, and that Plaintiff was damaged thereby. Because the Fourth Cause of Action is clearly an action against Defendant for actual fraud, the one-year statute of limitations in 340.6 does not apply to the Fourth Cause of Action.

Instead, the applicable statute of limitations is found in section 338. Section 338 gives a three-year statute of limitations for certain types of actions. Section 338(d) states that the three-year statute of limitations applies to "[a]n action for relief on the ground of fraud or mistake." As noted above, the Fourth Cause of Action is based upon fraud, and therefore the three-year statute of limitations in Section 338(d) applies to the Fourth Cause of Action.

Additionally, 338(d) states: "The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Unlike the one-year statute of limitations in 340.6, which commences the running of the statute of limitations upon discovery or when a party reasonably should have discovered the facts surrounding the wrongful act, 338 only commences running

the statute of limitations upon actual discovery of the facts constituting the cause of action.

Plaintiff did not actually discover the facts constituting the Fourth Cause of Action until October 13, 2007, in the course of consulting counsel in the present action. Upon this actual discovery, therefore, the three-year statute of limitations in 338 began running. The statute of limitations on the Fourth Cause of Action will thus finish on October 13, 2010. The Fourth Cause of Action was filed with this court on February 5, 2008; this filing was timely, therefore, because it was filed well before the applicable statute of limitations had run.

3. BECAUSE THE DEFENDANT'S KNOWING CONDUCT IN MISREPRESENTING THE LAW TO PLAINTIFF PREVENTED PLAINTIFF FROM BEING ABLE TO BRING THE CAUSES OF ACTION IN THE COMPLAINT AGAINST THE PLAINTIFF, THE DEFENDANT SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS AGAINST ALL CAUSES OF ACTION.

The doctrine of equitable estoppel is based upon the equitable principle that "no man will be permitted to profit from his own wrongdoing in a court of justice." Battuello. Equitable estoppel is a legal doctrine that stops a party from asserting that a statute of limitations has run. Battuello. Thus, the doctrine of equitable estoppel is only available after the statute of limitations has run. In this case, if the court determines that the statute of limitations has run on any of the four causes of actions listed in the complaint, then the court should hold that Defendant is equitably estopped from asserting the statute of limitations.

Equitable estoppel applies to the statutes of limitations at issue in this case. The Columbia Court of Appeals, in addressing this principle on an unrelated statute of limitations, stated that, in the absence of language which specifically abrogated equitable estoppel, equitable estoppel should apply to statutes of limitations. Battuello.

The Court of Appeals held that this was true even though the statute of limitations at issue in that case stated that "[t]he limitations period provided in this section for the commencement of an action is not tolled or extended for any reason." Even such strong language, if it didn't address equitable estoppel specifically, will not affect the application of equitable estoppel.

The statutes of limitation at issue in this case implicitly allow the application of equitable estoppel. First, there [is] no language in either 340.6 (the one-year statute of limitations on actions against an attorney) or 338 (the three-year statute of limitations on fraud) specifically denying the applicability of equitable estoppel. Second, the statutes of limitations at issue in this case have no language like that in the previous case, denying the extension of the statute. Section 338 doesn't address tolling or equitable estoppel at all, and section 340.6 specifically allows for tolling in a number of circumstances. Because the statutes of limitations do not specifically abrogate equitable estoppel, and because they are even less stringent as the statute in the Battuello case, this court should hold that equitable estoppel is applicable in the present case.

The Battuello Court noted four elements that were necessary to establish equitable estoppel: (1) the party to be estopped must be apprised of the true state of facts; (2) the other party must be ignorant of the true state of acts; (3) the party to be estopped must have intended that this conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and (4) the other party must rely on the conduct to its prejudice. Battuello. Each of these four elements has been met in the present case.

First, the party to be estopped, in this case Defendant, was apprised of the true state of facts. An ordinary attorney would be aware that a corporate client who is suspended will not be able to file claims. Therefore, Defendant was no doubt aware of the true state of the facts. Second, the other party must be ignorant of the true state of facts. The other party in this case, Plaintiff, was unaware of the true state of facts as to its rights as a corporation if it was suspended. Plaintiff did not have Defendant's legal knowledge, training and resources. Additionally, Plaintiff relied upon Defendant's

assertions to the contrary. Thus, Plaintiff did not have awareness of the true state of the facts.

Third, Defendant acted in a manner that Plaintiff had a right to believe meant that Defendant intended his conduct to be acted upon. Defendant repeatedly advised Plaintiff that he did not need to file tax returns or follow corporate formalities. As Plaintiff's attorney, Defendant's advice to Plaintiff was no doubt intended to be followed; even if Defendant did not intend his advice [to] be followed. Defendant should have been aware that by giving the advice, plaintiff would be likely to act on the advice. Therefore, the third element of equitable estoppel applies because Defendant intended, or acted in a way that Plaintiff took to mean that defendant intended, Plaintiff to follow Defendant's negligently given advice.

Finally, Plaintiff was prejudiced by Defendant's advice. If any of Plaintiff's causes of action are prevented from being brought by the relevant statute of limitations, then Plaintiff will be unable to receive deserved legal relief. Any delay on Plaintiff's ability to file timely was caused by Defendant's negligent advice that corporate formalities and tax returns need not be complied with or filed, respectively. Defendant's conduct caused Plaintiff's inability to file timely causes of action; because of this delay caused by Defendant, Plaintiff will be harmed if the statute of limitations bars the causes of actions. Therefore, Plaintiff has shown that the fourth element of equitable estoppel has been met.

Because all four elements of equitable estoppel have been met, and because equitable estoppel is applicable to the statutes of limitations at issue in this case, the court should hold that Plaintiff is equitably estopped from asserting that the statute of limitations has run.

Answer 2 to Performance Test A

I. PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION WITH RESPECT TO ITS THIRD CAUSE OF ACTION FOR NEGLIGENCE IN THE GIVING OF ADVICE BECAUSE THE THIRD CAUSE OF ACTION WAS FILED WITHIN ONE YEAR OF DISCOVERY OF THE FACTS GIVING RISE TO THE CAUSE OF ACTION IN COMPLIANCE WITH COLUMBIA CODE SECTION 340.6.

Plaintiff One-Stop Equipment Leasing ("One-Stop") discovered the negligent and fraudulent behavior of its former attorney, Frank Reeves ("defendant") on October 17, 2007. One-Stop filed suit on February 5, 2008, less than one year from the discovery of the defendant's tortious conduct. As a result, One-Stop fully complied with the statute of limitations as set forth in Columbia Code Section 340.6, subdivision (a). The Court should therefore deny the defendant's demurrer as to this cause of action.

A. <u>One-Stop complied with the one-year statute of limitations because it did not discover defendant's tortious conduct until meeting with another attorney on October 17, 2007</u>.

The Columbia Code Section 340.6 outlines the applicable statute of limitations in an attorney malpractice action. Specifically, "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful omission, or four years from the date of the wrongful omission, whichever occurs first."

Here, since One-Stop filed its complaint on February 5, 2008, less than four years from defendant's termination on November [20, 2006], One-Stop is not barred by the four-year rule in the statute. However, defendant asserts that the November 20, 2006 date is actually the date when One-Stop discovered or should have discovered

through reasonable diligence the omissions giving rise to the negligence in giving advice cause of action, thereby creating a one-year statute of limitations from that point under the statute. Defendant is wrong, because as of that date, One-Stop had not yet discovered the facts giving rise to the negligence in giving advice cause of action.

While it is true that One-Stop terminated the defendant on November 20, 2006, One-Stop did not have any knowledge on that date of defendant's negligently given advice not to file tax returns or corporate information statements as required by Corporations Code 1502. The cause for defendant's termination on that date was not the discovery of the negligent advice, but the discovery that defendant had failed to commence an action against Goodfellows Development Corporation, and also had allowed a default judgment to be entered against One-Stop by A.B. Construction. It was not until One-Stop consulted its present counsel on October 13, 2007, that One-Stop had any idea that the advice defendant had provided was negligently given, wholly erroneous, and had produced injurious consequences. Therefore, because October 13, 2007, was the date that One-Stop discovered the defendant's tortious conduct, a February 5, 2008 filing was timely because it falls within the one-year time frame allowed by Section 340.6, subdivision (a).

Defendant may argue that November 20, 2006, was the day of discovery because pursuant to Section 340.6, subdivision (a), One-Stop could have discovered, through reasonable diligence, defendant's negligent advice giving rise to the cause of action. This contention is simply unsupported by the law.

In Krusesky v. Baugh, the plaintiff sued her attorney after the attorney negligently failed to inform her that her husband's military retirement benefits were community property at the time of their divorce in 1977. She didn't discover the truth until February 25, 1980, when she consulted with another who advised her of the community property interest. The court there held that because of the nature of the relationship between a client and her attorney, "a client damaged in the context of such a relationship is under

no duty to investigate her attorney's actions unless she has actual notice of facts sufficient to arouse the suspicion of a reasonable person." (Krusesky.) The court went on to state that in light of the attorney's advice, the plaintiff's lack of suspicion was understandable, and to hold differently "would in effect require a client to consult a second lawyer in every case for another opinion on every subject." (Ibid.)

Similarly, beginning in February, 2004, defendant failed to inform One-Stop that failure to observe corporate formalities such as maintaining corporate minutes or filing an information statement would result in suspension of the ability to do business, which could also affect One-Stop's ability to prosecute legal claims. In addition, defendant instructed plaintiff not to file a tax return in 2003 because it would subject One-Stop and its sole shareholder, officer, and director, David Matchie, to fines and possible imprisonment for Mr. Matchie. Relying on the relationship between attorney and client, and the fiduciary nature of defendant's position, One-Stop followed defendant's erroneous and negligently given advice to its detriment. There was no actual notice of facts to arouse the suspicion of a reasonable person, and One-Stop was entitled to rely on its attorney in these matters. As the Krusesky court noted, to hold otherwise would require One-Stop and any corporation to consult a second lawyer in every case for another opinion on every subject. Krusesky rejected that outcome, and this Court should do the same.

B. Even if the November 20, 2006 date started the statute running, the statute of limitations was tolled until October 13, 2007, because One-Stop had not yet suffered actual injury until that date.

Section 340.6, subdivision (a)(1), provides that the statute of limitations is tolled if the plaintiff has not sustained actual injury. Here, One-Stop had not sustained actual injury until October 13, 2007, when it became aware of the negligent advice and the detrimental repercussions resulting from it.

In Jordache v. Brobeck, Phleger & Harrison, the Supreme Court of Columbia set forth four factors to consider when determining when actual injury has occurred. The inquiry is predominantly factual, and may occur without any prior adjudication or settlement. In addition, nominal damages, speculative harm or threat of future harm are not actual injury, and the relevant consideration is the fact of damage, not the amount. In that case, the plaintiff had become aware of the omissions by its attorneys and suffered actual injury before it accepted a settlement for less than its losses. The Court reasoned that the settlement was not the actual injury; the plaintiff suffered injury well before the settlement, in the form of increased legal costs and loss of alternative profitable uses for the money it expended in litigation.

Here, and as discussed above, October 13, 2007, was the day One-Stop became aware of defendant's wrongdoing. It was then, and only then, that One-Stop discovered the injuries that defendant tortiously caused: suspension of ability to do business, fines and penalties for accrued interest, employment of counsel to undo the harm caused, and prevention of filing of claims. These injuries, like defendant's conduct, were not discovered nor could have been discovered through reasonable diligence at any time prior to the October 13 date.

Therefore, because actual injury was not discovered until October 13, 2007, the statute would have been tolled until that date, making One-Stop's February 5, 2008 filing timely.

Because One-Stop did not have knowledge of the facts giving rise to the cause of action, in that it did not discover defendant's negligent advice, until October 13, 2007, and had no reason to know of those facts prior to that date, One-Stop complied with the one-year statute of limitations by filing its complaint on February 5, 2008. In addition, even if the November 20, 2006 termination had started the running of the statute, One-Stop did not suffer actual injury until the meeting with its new counsel on October 13, 2007, and its complaint filed on February 5, 2008 was timely. One-Stop's complaint

does state a cause of action with regard to its cause of action for negligence in giving advice, and the Court should deny defendant's demurrer accordingly.

II. PLAINTIFF'S COMPLAINT ALSO STATES A CAUSE OF ACTION WITH REGARD TO ITS FOURTH CAUSE OF ACTION FOR FRAUD BECAUSE THE STATUTE OF LIMITATIONS FOR FRAUD IS THREE YEARS AND GOVERNED BY SECION 338, NOT 340.6.

Section 340.6 explicitly states that the provisions therein apply to attorney malpractice cases "other than actual fraud." Thus, the one-year discovery statute of limitations does not apply.

Instead, the statute of limitations for fraud is governed by Section 338, subdivision (d), of the Columbia Code, which states that an action for fraud is brought within three years. The action itself "is not deemed to have accrued until the discovery… of the facts constituting fraud…"

One-Stop's fourth cause of action explicitly pleads an action for fraud. Thus, the three year provision of Section 338 governs. As discussed above, because One-Stop discovered the true facts giving rise to the fraud on October 13, 2007 and filed its complaint on February 5, 2008, the complaint was well within the statute of limitations and was thus timely. Therefore, the Court should deny defendant's demurrer as the fourth case of action as the complaint states a valid cause of action for fraud.

III. EVEN IF ONE-STOP'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS, DEFENDANT IS EQUITABLY ESTOPPED FROM ASSERTING A STATUTE OF LIMITATIONS DEFENSE BECAUSE DEFENDANT MISLED ONE-STOP WITH FULL KNOWLEDGE OF THE FACTS, ONE-STOP WAS IGNORANT OF THESE FACTS, AND RELIED UPON DEFENDANT'S REPRESENTATIONS TO ITS DETRIMENT.

Defendant acted negligently failing to prosecute a lawsuit on behalf of One-Stop, in allowing a default to be entered against One-Stop, and in failing to provide competent legal advice regarding One-Stop's corporate formalities and tax situation. In addition, defendant acted intentionally and fraudulently in keeping from One-Stop facts and information that would have allowed One-Stop to assert malpractice claims against defendant. One-Stop relied in good faith on defendant's representations to its detriment. Thus, defendant is equitably estopped from raising the statute of limitations as a bar to all causes of action.

The court in Battuello v. Battuello provided the conditions that must be present before an estoppel to assert an applicable statute of limitations may be said to exist. They are that (1) the party to be estopped must be apprised of the true facts; (2) the other party must be ignorant of the true state of facts; (3) the party to be estopped must have intended that its conduct be acted upon; and (4) the other party must rely on the conduct to its prejudice.

In Battuello, the court held that the defendant was equitably estopped from raising a statute of limitations defense when she made false promises to convey a vineyard to the plaintiff. In reliance on defendant's representations, plaintiff did not file a lawsuit to compel the delivery of the vineyard. By the time the plaintiff discovered the promise was false, the statute had already passed. Nevertheless, because the four conditions were present, the court held that the defendant was estopped from asserting the defense.

Similarly to Battuello, all factors are present here:

A. <u>Defendant was apprised of the true facts.</u>

As discussed above, defendant was the attorney of One-Stop. Although defendant told One-Stop that he would prosecute the Goodfellows suit and defend the

A.B. suit, defendant did not do either. Defendant knew the true state [of] affairs when he did nothing on those cases, all to One-Stop's detriment.

In addition, defendant knew that the advice he gave to One-Stop was erroneous: his advice to refrain from filing a tax return, that it was permissible not to observe normal corporate formalities, that failure to observe would result in a suspension which could be easily renewed by payment of back taxes, without [a doubt] affected One-Stop's legal claims. Yet, he continued to advise One-Stop in this way, knowing all the while that the statements were false, would cause injury to One-Stop, and most importantly, foreclose One-Stop's ability to prosecute lawsuits on its behalf.

Defendant was apprised of the true facts at all times, and as such, this condition is met.

B. <u>One-Stop was ignorant as to the true state of the facts.</u>

One-Stop had no knowledge that its claims were not being prosecuted against Goodfellows, nor that it was not being defended in the A.B. action. One-Stop only learned of these consequences when it was too late: the Goodfellows statute had expired, and A.B. had obtained a default judgment.

Moreover, One-Stop had no knowledge that defendant's advice was negligently and fraudulently given, and patently erroneous. One-Stop only discovered the true state of the facts upon consulting present counsel on October 13, 2007.

One-Stop was ignorant as to the true state of the facts, and this condition is also met.

C. <u>Defendant intended that his conduct be acted upon.</u>

Especially with regard to his negligent and fraudulent advice, defendant intended that his conduct be acted upon. Defendant's advice was consistent, beginning in February, 2004, until his termination in November of 2006, and garnered him financial gain: One-Stop continued to pay fees and employ defendant during this period.

In addition, by giving One-Stop advice that suspended One-Stop's corporate status, defendant rendered One-Stop unable to prosecute its claims within the statutory period. What defendant obtained through his negligent and fraudulent conduct shows that he intended his conduct to be acted upon because by acting upon it, One-Stop provided defendant with financial gain and immunity from suit.

Defendant intended that his conduct be acted upon, and this condition is also met.

D. One-Stop relied to its detriment

Trusting defendant in his fiduciary capacity as the corporation's lawyer, One-Stop relied to its detriment on defendant's negligent and fraudulent representations.

Believing defendant to be prosecuting on behalf of and defending One-Stop, it did not inquire further into defendant's handling of the cases, thus relying on defendant. The consequence of this reliance was detriment: the statute of limitations expired on the Goodfellows case, rending the claim worthless, and A.B. obtained a default judgment against One-Stop.

Believing and relying on defendant's expertise and experience, One-Stop followed defendant's advice and did not file a 2003 tax return, nor observe statutorily require corporate formalities.

Again, the consequence of this reliance was detriment: the suspension of One-Stop, making it unable to prosecute claims on its behalf, and necessitating the hiring of legal counsel to fix the problems.

One-Stop clearly relied to its detriment on defendant's negligent and fraudulent representations, and this final condition is met. Because all four conditions are met, the Court should adhere to the equitable principle that "no man will be permitted to profit from his own wrongdoing in a court of justice." (Battuello.) The court should hold that because of defendant's fraudulent behavior, he is now equitably estopped from raising a statute of limitations defense.

THURSDAY AFTERNOON
FEBRUARY 28, 2008

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

FILE

SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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.
6. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

POLACEK & SCHEIER
5700 North Prospect, Suite 2600
Springville, Columbia

MEMORANDUM

To: Applicant

From: R. J. Morrison

Re: Snyder v. Regents of the University of Columbia

Date: February 28, 2008

We have been retained by Dr. Norm Snyder to represent him in claims arising from his removal as Chairperson of the Department of Medicine at the University of Columbia. The Regents of the University terminated him as head of the Department following his very vocal and public opposition to the relocation of the Medical School from its current location here in Springville to Palatine, some 20 miles away. The termination is to become effective almost a month from today. He will retain his professorship after his termination as Chair.

Dr. Snyder wishes to pursue injunctive relief to stop his termination, if possible. Please write me an objective memorandum in which you analyze the likelihood of obtaining a preliminary injunction based on retaliatory employer action in violation of Dr. Snyder's First Amendment right to free speech under the State of Columbia Constitution. For tactical reasons, we are going to rely on the Columbia State Constitution rather than the United States Constitution. We will do so because the Columbia State Constitution is more protective of public employee First Amendment rights. Since the facts will be woven throughout your memorandum, limit your statement of facts to a brief one-paragraph summary.

SPRINGVILLE STAR BULLETIN
February 12, 2008

PROFESSOR'S LETTER SPARKS
OUTCRY: REGENTS SCHEDULE HEARING

A "letter to the editor" to the *Star Bulletin* on December 28, 2007 by a University of Columbia department chair complaining about plans to relocate the School of Medicine has erupted into a public protest and the scheduling of a special hearing by the Board of Regents. The letter of Dr. Norm Snyder, longtime chair of the Department of Medicine of UC's Medical School, called the Regents' expected approval of the move to Palatine, 20 miles from its present Springville location, "ill-conceived, fiscally reckless, and detrimental to the needs of our indigent citizens." Snyder also urged *Star Bulletin* readers to refer to the report he submitted to the medical school dean and the Regents and posted on his UC website (http://www.ucolum.hsc.medschool.edu/snyder).

Community activists have used Dr. Snyder's letter to rally people, particularly those in the Homewood area, to attend the Regents' hearing on February 26, 2008 and to speak against moving the school. Mary Rankin, president of the Homewood Citizens' Association, said, "Many of Springville's most vulnerable residents are totally dependent on the Med School for virtually all of their health care needs." Ms. Rankin pointed specifically to emergency room services available through the School of Medicine. Rankin also added, "The School's specialized clinics and research studies provide a broad range of medical services that will disappear." Rankin went on to note that there is "no public transportation between Springville and Palatine."

The Regents are expected to make a decision after the close of public testimony.

EXCERPT FROM DR. NORM SNYDER'S WEBSITE

Background information:

The University of Columbia is a public university comprising four campuses, one of which is the Health Sciences Center. In turn, the Health Sciences Center embraces five schools, one of which is the School of Medicine. The School of Medicine consists of eight Basic Science Departments and sixteen Clinical Departments, including the Department of Medicine.

Dr. Snyder, a nephrologist and medical academician, was appointed Professor of Medicine in the School of Medicine on or about July 1, 1982. He received continuous tenure and was subsequently appointed Head of the Renal Division of the Department of Medicine. In 1986, the doctor was appointed Chair of the Department of Medicine, the largest department within the School of Medicine. Department Chairs are responsible for the organization of their department and for implementing policies initiated by the Chancellor and Dean of their respective units. Dr. Jack Blake became Chancellor of the Health Sciences Center in 1995 and Dr. Paul Simmons has served as Dean of the School of Medicine since 1999.

In early 2004, the University began considering the possibility of moving the School of Medicine, located at Ninth Avenue and Prince Boulevard in Springville, Columbia, to a campus to be established at the former Palatine Army Medical Center in Palatine, Columbia, some 20 miles away. The University engaged in a three-plus year planning process to consider the pros and cons of the relocation plan. The possibility of the transition of the School of Medicine from its Ninth Avenue location to Palatine has been the subject of extensive debate within the University community.

EXCERPTS OF TRANSCRIPT OF INTERVIEW WITH DR. NORM SNYDER

R. J. Morrison: Dr. Snyder, I've just turned on the tape recorder. As I explained earlier, this will mean that others and I can easily review this interview.

Dr. Norm Snyder: Makes sense. That's fine with me.

Q: Dr. Snyder, you showed me the letter dated yesterday terminating you from your position as Chair of the Department of Medicine at the University of Columbia. You wanted to meet today to explore the possibility of seeking injunctive relief -- a preliminary injunction -- stopping that action from taking effect.

A: You know, I was and still am extremely angry about this letter. I have spent the last 20 plus years of my career building up this department into one of the best in the country. I have always prided myself in taking principled positions and speaking my mind on controversial issues. Here's a recent article on the controversy.

Q: Thanks. Doctor, can you tell me more about concerns you have about the proposed relocation of the School of Medicine to Palatine?

A: Of course. First, the University is the primary public research facility in basic science and medicine in Columbia. I feel that separating the School of Medicine from the Basic Sciences Research facilities at Springville would unnecessarily isolate the Med School from its Basic Science colleagues. Second, from a fiscal standpoint, the citizens of Columbia would not be getting their money's worth. The bonds floated to pay for the construction will take 40 years to pay off without a certain benefit to the community. This is particularly true because the new school would be located some 20 miles from the urban center of Springville. That would mean that most people who use the medical facilities would have to travel longer distances to areas not supported by public transportation. This would have a detrimental effect on the lower income members of our community. Finally, I thought I had a good compromise proposal — essentially splitting the medical school into two — with some faculty and facilities being located in Springville and some in Palatine.

Q: And I assume you made these views known?

A: You bet. I wrote a pretty comprehensive report that I circulated widely among the faculty at the Medical School soon after the proposal was first floated in 2004. There were a number of faculty and university-wide forums held in 2004 and 2005. I attended them, and presented my position at each of those forums. In early 2006, Blake and Simmons asked me to meet with them.

Q: Who are they again?

A: Jack Blake is the Chancellor of the Health Sciences Center. Paul Simmons is the Dean of the Medical School. They asked me to tone down my criticism of the relocation proposal, stating that it was divisive. I told them that I thought this issue needed to be fully debated so that a decision in the Medical School's and greater community's best interests would be made. I also told them that if their position eventually prevailed, I would accede, but that I wouldn't go down without a fight.

Q: How did they respond?

A: They seemed to be pretty upset. They said that it was important that the administration present a united front, and that my actions indicated my unwillingness to be a team player.

Q: Dr. Snyder, how would you respond to that statement?

A: I question both the premise and the conclusion they drew about me. I certainly understand that it's important that once a policy is adopted or a decision is made that it is critical that members of the administration implement that policy or decision whether they agree with it or not. Then it's important to present a united front. But the Regents hadn't made a decision yet. We were debating the issue as a community. I have been on the losing side of many such battles over the years, and I defy anyone to point to an instance when I wasn't a good team player. This reminds me of a similar battle over the reorganization of the Health Sciences Center a number of years ago. I opposed the current division of the various schools and made my views known. When the decision went against me, I implemented the decision wholeheartedly.

Q: How closely do you, Blake and Simmons work?

A: The departments are pretty autonomous. Simmons has bimonthly meetings with Department Chairs. Chancellor Blake and I see each other very infrequently. So, we don't work very closely together at all.

Q: Did they direct you not to make any further statements about the relocation?

A: No, they knew better than that. Not that I would have listened anyway.

Q: Can you say more about what you mean?

A: I'm a stubborn cuss, I guess you could say. I felt very strongly — still do — that the relocation plan was misguided, and I felt that I owed it to the Med School, to all my colleagues, and to Springville, to do my best to convince the Regents that I was right. I wanted to make sure the right thing was done.

Q: Did anything happen after the meeting with Blake and Simmons?

A: The next thing that happened was the Regents' meeting where the proposal was considered. That happened about two months ago. I presented my report and oral testimony, as well as a petition signed by some 45 out of 50 of my faculty colleagues at the Medical School opposing the relocation. The Regents tabled their decision for a couple of months. I then wrote a letter to the *Star Bulletin*. That ran in the paper about 7 weeks ago, about a week after the Regents' meeting where I testified. That's the straw that broke the camel's back, I guess.

Q: How so?

A: Earlier this week at the Regents' most recent meeting, lots of community members showed up to testify against the proposal. I'm pretty sure that my letter was the impetus for all the community opposition. The meeting was supposed to last for 4 hours, and ended up going an extra 3 hours.

Q: Did the Regents vote?

A: Yes, they did. Even after all that, they decided to go ahead with the proposal to relocate the Med School to Palatine. I was very disappointed to say the least.

Q: I'm sure you were. And that wasn't the last of it, was it?

A: No, the next thing I know I get this letter dated the day after the Regents' vote. They canned me! I still can't believe it. I just hope there's something you can do about this.

Q: I certainly hope so. We'll start doing research and will draft preliminary injunction papers if we think we have a shot. You've given me a copy of the newspaper article and the termination letter. Did you bring anything else?

A: Yes, here's the letter to the newspaper and a print-out of background information from my website, too. I can't think of anything else that's relevant.

Q: I want to get back to an earlier point you made. You said that you are pretty angry about the proposed termination. Would you say more about the effect of this on you?

A: It's quite a slap in the face. This feels like a blatant attempt to send a stern message to the rest of the faculty: dissent at your peril; don't buck the administration if it's already made up its mind. It feels unfair too, since I told everyone all along that I'd abide by the Regents' decision — whether my position prevailed or not.

Q: Can you say anything about the effect the termination might have on your career?

A: It's absolutely devastating on a professional level, too. I am in the midst of very delicate licensing negotiations with a pharmaceutical company. Everyone will know about my change in position here at the University — and that will likely cause the company to back away from the negotiations. A huge part of my leverage in these negotiations comes from my authority as Department Chair to assign research funds, graduate assistants and lab space to particular research and development teams. This authority will be stripped from me as soon as I'm removed as Chair. We're talking millions of dollars here. Not to mention years of work will go down the tubes. It will be virtually impossible to continue the research, conduct the clinical trials, and do the marketing without the licensing deal. And it's unlikely that another company will step forward at this point.

Q: What kind of research is this?

A: My team is developing a new method of dialysis that is much faster and can be done at home.

Q: That sounds exciting. I would think that it would be in the University's interest to preserve the team as you've set it up, wouldn't it?

A: These pharmaceutical companies are pretty sensitive about these issues. I'm afraid that my removal will be sufficient to cause them to back away regardless of any assurances anyone might give them.

Q: How do you think that will affect you personally?

A: Well, first it will certainly affect my professional prestige and over time that will affect future opportunities for research, research grants, publication opportunities, and future royalties from licenses. It will even limit speaking engagements and conferences.

Q: Can you put a dollar value on that?

A: That would really be problematic, perhaps impossible.

Q: Dr. Snyder, I glanced at the termination letter. What would you say in response to their allegations about disharmony among faculty and staff?

A: When you've been around as long as I have, you make enemies, I'm afraid. Yes, there were some who disagreed with me — mostly because they wanted to be on the opposite side of the issue from me. I think I know which faculty members said they felt intimidated. I don't intimidate people. That's not my style. You will find that I am widely respected by my faculty colleagues and the staff. Those few are just out to get me.

Q: What about that statement about your effectiveness as Chair?

A: It's a bunch of hooey. You can ask the 45 faculty who signed my petition. All of them are in my department, and I' be willing to bet that all of them would say that things continue to run well.

Q: Well, Dr. Snyder, I know that the termination is set to become effective almost a month from yesterday. I will get back to you by the end of the day and let you know where things stand. Thanks for coming in today.

END OF TRANSCRIPT

LETTER TO THE EDITOR

Springville Star Bulletin

December 28, 2007

Dear Editor:

I write to you as a private citizen who is concerned about the recent direction taken by the Regents of the University of Columbia. I have been a good soldier. I have limited the expression of my concerns to the University community up until this point. I was hopeful that I would be able to persuade the powers that be that the proposal to relocate the Medical School to Palatine is ill-conceived, fiscally reckless, and detrimental to the needs of our indigent citizens. Unfortunately, this has not been the case. I urge members of the general public to take a look at my report. It can be found at http://www.ucolum.hsc.medschool.edu/snyder. The Regents will be holding a public hearing on February 26, 2008. If you agree with me, come to the hearing and make your views known.

Norm Snyder, M.D.
Chairperson, Department of Medicine
School of Medicine
Health Sciences Center
University of Columbia

REGENTS OF THE UNIVERSITY OF COLUMBIA

OFFICE OF THE PRESIDENT
WALLACE PLAZA
SPRINGVILLE, COLUMBIA

February 27, 2008

Dr. Norm Snyder
Chair, Department of Medicine
School of Medicine
Health Sciences Center
University of Columbia
FG-705
Springville, Columbia

Dear Dr. Snyder:

After the public portion of last night's Regents' meeting was adjourned, we went into Executive session. At the joint recommendation of Chancellor Blake and Dean Simmons, we unanimously voted to terminate your Chairpersonship of the Department of Medicine, effective one month from today. As a tenured member of the faculty, you will retain all rights and perquisites of your position as a Professor of Medicine, and we sincerely hope that you will remain with the Department.

We greatly regret that the situation has deteriorated to such a degree that this decision is necessary, but it is. Given your more than 20 years of service as Chair of the Department, we believe that you are entitled to understand some of the reasons for this unfortunate decision.

More than three years ago the Regents embarked on the planning process culminating in yesterday's decision to relocate the Medical School to Palatine. Since day one, you have made it your singular mission to sabotage this effort. You are certainly entitled to your opinion. Let me assure you that the Regents' decision has nothing to do with that

opinion or your wide and vehement expression of that opinion. Rather, it has become apparent that your prominent role as an outspoken opponent of the relocation has caused widespread disharmony among the faculty and administration of the University. Several faculty members have expressed to Chancellor Blake and Dean Simmons that they feel intimidated by your insistence that the relocation not occur. This indicates that your performance as department chair has been impaired, as these faculty members clearly did not feel comfortable going to you directly to express their concerns. Most importantly, Chancellor Blake and Dean Simmons feel that you cannot be trusted to work as part of the team to implement the relocation plan, now that it has been approved.

Norm, you have been an invaluable member of the University community. This action is not a reflection of any animus toward you. Rather, as your employer, we need to operate efficiently. Your recent activities have adversely affected your effectiveness as Chair, undermined the University's confidence in your ability to be a team player, and caused disharmony among employees. This we cannot tolerate.

All the best,

Regents of the University of Columbia

Lauren D. Ryan

Lauren D. Ryan, President

THURSDAY AFTERNOON
FEBRUARY 28, 2008

California
Bar
Examination

Performance Test B

LIBRARY

SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

LIBRARY

Elkins v. Hamel

Columbia Supreme Court (2007)

This is an action brought pursuant to Columbia Civil Rights Code ' 1983 by two City of Tunbridge police officers against Steve Hamel, the City of Tunbridge police chief, alleging a violation of their First Amendment rights under the Columbia Constitution. In their complaint, plaintiffs Kenneth Elkins and George Chanel assert they have been illegally disciplined by Chief Hamel for exercising their rights to free speech. Plaintiff Elkins asserts he has been disciplined by a fifteen day suspension, and plaintiff Chanel asserts he has been disciplined by a one day suspension. They sought a preliminary injunction. Plaintiffs requested rescission of their suspensions. They further sought injunctive relief restraining and enjoining the defendant from further discipline or threat of discipline for the exercise of their rights to free speech. The request for injunctive relief was denied, and this appeal followed.

The verified complaint sets forth the following facts: On February 16, 2006, Glenda Oliver wrote a column in the *Tunbridge Journal* addressing several issues "concerning her perception of racism in the state court criminal system." The complaint notes: "Ms. Oliver's comments included her questioning the justice involved in the sentencing of a young African-American male on drug charges since no other African-Americans were involved in the young man's sentencing, including the jury, judge and attorneys involved." The column concluded with Ms. Oliver's e-mail address, which was provided for the public to contact her with comments.

On the next day, plaintiff Elkins sent an e-mail from his personal account at his home to several officers of the Tunbridge Police Department (TPD) and the editorial departments of the *Tunbridge Journal* and the *Tunbridge Metro News*. On February 19, 2006, plaintiff Chanel sent an e-mail from his personal account at his residence to Ms. Oliver in

response to her column. The complaint states: "Chanel commented that Ms. Oliver's article was racist in tone, and stated his belief that the young man referred to in her article was not sentenced because of his race." Ms. Oliver responded by e-mail to Chanel's e-mail. Chanel sent this e-mail to Elkins and TPD officer David Ernst. On February 22, 2006 Elkins sent an e-mail from his TPD account at his home to the e-mail accounts of Chanel, Ernst and Ms. Oliver. The complaint states: "The e-mail contained comments in response to Ms. Oliver's article regarding her allegations of racism in the state court system." On February 24, 2006, Elkins' comments that had been sent to the newspapers' editorial boards were published in both papers. On March 13, 2006, Chief Hamel instituted discipline in the form of a one day suspension without pay for Chanel and a fifteen day suspension without pay for Elkins.

We review the decision to deny a motion for a preliminary injunction for abuse of discretion. In order to obtain a preliminary injunction, a party must demonstrate the following: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) the injunction, if issued, will not be adverse to the public interest.

Substantial Likelihood of Success on the Merits

Plaintiffs are correct that public employees retain their First Amendment rights under the Columbia Constitution. However, in the public employment context, a public employer may impose some restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large. This is particularly true of police officers. Because police departments function as paramilitary organizations charged with maintaining public safety and order, police departments are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.

To determine whether a public employer's actions impermissibly infringe on free speech rights, this court has followed the *Boyer* test enunciated by this Court.[a] The test is as follows: (1) Does the speech in question involve a matter of public concern? If so, (2) we must weigh the employee's interest in the expression against the government employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace. If the employee prevails on both these questions, we proceed to the remaining two steps. In step (3), the employee must show the speech was a substantial factor driving the challenged governmental action. If the employee succeeds, in step (4) the employer, in order to prevail, must in turn show that it would have taken the same action against the employee even in the absence of the protected speech.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. In evaluating the nature of an employee's speech in a retaliatory discipline or discharge case, we have articulated that when an employee speaks as an employee upon matters only of personal interest the speech is not protected. To judge whether particular speech relates merely to internal workplace issues, courts must conduct a case by case inquiry, looking to the content, form, and context of the speech, which includes scrutinizing whether the speaker's purpose was to bring an issue to the public's attention or to air a personal grievance. An employee's speech must not merely relate generally to a subject matter that is of public interest, but must sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government. That is, we look beyond the general topic of the speech to evaluate more specifically what was said on the topic.

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[a] The language of the Columbia Constitution's First Amendment is identical to that of the U.S. Constitution. Historically, this Court has interpreted these words more expansively than the U.S. Supreme Court. As such, we choose not to follow the recent U.S. Supreme Court opinion in *Garcetti v. Ceballos* (2006).

Because Plaintiffs' letters concerned the integrity of the police department's operations, though arguably touching upon internal workplace issues, the speech addressed matters of public concern. Therefore, Plaintiffs satisfied the first prong of the *Boyer* analysis.

Once a court determines that the Plaintiffs' speech involves a matter of public concern, the *Boyer* balancing test requires a court to weigh the interest of a public employee in commenting on such matters against the interest of the employer in promoting the efficiency of its services. We balance these interests by weighing the following factors: (1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one on which debate was vital to informed decision-making.

While possible disruption of the employer's operations does not satisfy the *Boyer* test, the government need not wait for speech actually to disrupt core operations before taking action. The matters noted by the defendant at the hearing, i.e., the disruption of the prosecution of criminal cases and the disruption of personnel matters, were deemed by the trial court to tip the balance in favor of the employer. Thus, Plaintiffs were unable to show a likelihood of success on the merits.

Irreparable Harm

We have held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm. Nevertheless, we also must note that to show irreparable harm, the party seeking injunctive relief must at least demonstrate that there exists some cognizable danger of recurrent violation of its legal rights. Here, the legal foundation for "irreparable harm" is an underlying violation of the Plaintiffs' constitutional rights. But, it is evident that the trial court was unable to

conclude that such violations occurred or were occurring, and found that Plaintiffs did not demonstrate that they would have suffered irreparable harm if injunctive relief was not granted. We agree.

Furthermore, in the employment context, courts are loathe to grant preliminary injunctions because injuries often associated with employment discharge or discipline, such as damage to reputation, financial distress, and difficulty finding other employment, do not constitute irreparable harm. Plaintiffs wrongfully discharged from employment generally may be made whole by monetary damages after a full trial on the merits, such as in this case.

Balancing of harms

The moving party has the burden of showing that the threatened injury to the moving party outweighs the injury to the other party. The standard is easy to understand in common sense terms even if the expression is imperfect: the judge should grant or deny preliminary relief with the possibility in mind that an error might cause irreparable loss to either party. Consequently the judge should attempt to estimate the magnitude of that loss on each side and also the risk of error. That is, in deciding whether to grant or deny a preliminary injunction the court must choose the course of action that will minimize the costs of being mistaken. If the judge grants the preliminary injunction to a plaintiff who it later turns out is not entitled to any judicial relief - whose legal rights have not been violated - the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes to the defendant while it is in effect. If the judge denies the preliminary injunction to a plaintiff who it later turns out is entitled to judicial relief, the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the denial of the preliminary injunction does to the plaintiff. The court below found the potential harm to the efficient and smooth operation of the police department to outweigh the prospective minimal First Amendment deprivation to be suffered by the plaintiffs. We do not disagree.

Not Adverse to the Public Interest

The moving party must demonstrate that the injunction, if issued, is not adverse to the public interest. This court has recognized that the public has a strong interest in the vindication of an individual's constitutional rights, particularly in encouraging the free flow of information and ideas under the First Amendment. On the other hand, in cases such as this, the public has an interest in the efficient and dependable operation of law enforcement agencies. The court below did not reach this issue. We need not either. In the absence of a showing of substantial likelihood of success on the merits, the court below did not err in denying Plaintiffs' motion for preliminary injunction.

Affirmed.

Harlan v. Yarnell

Columbia Supreme Court (2002)

Defendants, two state university officials, appeal from the superior court's finding of a violation of Plaintiff's First Amendment rights under the Columbia Constitution and awarding him damages. We affirm.

Background

Plaintiff Myron Harlan is a tenured faculty member at Columbia State University ("CSU"). He was appointed as an assistant professor in the Department of Accounting in 1989. His field is taxation. Beginning in 1995, Dr. Harlan sought to revoke the tenure of a colleague (Dr. William Mosser) on grounds of plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and other charges. Administrators at CSU allegedly threatened Dr. Harlan with adverse employment-related actions unless his charges against Dr. Mosser were dropped. These threatened actions included termination of the Masters of Accounting (M.S.) degree program in which Dr. Harlan taught, assignment to teach courses outside his area of expertise, transfer to another department, and eventual termination due to overstaffing if the graduate program were eliminated.

Ultimately, a special university committee recommended that Dr. Mosser's tenure be retained, but it did so without considering evidence beyond the initial charges and without interviewing Dr. Harlan. In July 1996, Dr. Carlson became the Dean of the College of Business, and, after learning of the more than six years of divisiveness and dysfunction within the Department of Accounting, he proposed transferring Dr. Harlan out of the Department. In the summer of 1997, Dr. Harlan was transferred involuntarily from the Department of Accounting into the Department of Management, in which he claims he is not qualified to teach any courses, thereby resulting in a diminished ability

to attract research funds, publish scholarship, receive salary increases, teach summer tax classes, and obtain reimbursement for professional dues and journal subscriptions. As we discuss in depth later, Dr. Harlan aired his professional concerns about being removed from the Department of Accounting to Dean Carlson several times before he was transferred. Dr. Harlan contends that he was notified in May 1998 that he could only teach two classes, both in tax, in the Department of Accounting in any given year. He further contends that adjunct staff and temporary faculty have been hired to teach the courses he normally teaches.

In response to the transfer, Dr. Harlan filed a grievance. Eventually, the Provost denied the grievance.

Dr. Harlan filed suit alleging that his transfer to the Department of Management was in retaliation for his public allegations against Dr. Mosser. He was awarded damages and injunctive relief following a jury trial. This appeal followed.

Discussion

Dr. Harlan's Columbia Constitution First Amendment claim rested on the assertion that state actors may not condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression and cannot retaliate against an employee for exercising his constitutionally protected right of free speech. In considering this type of claim, it is essential to identify the speech which resulted in the alleged retaliation. Here, Dr. Harlan's Aspeech@ consisted of his statements in support of administrative revocation of tenure of Dr. Mosser and his statements refusing to withdraw his support for an investigation despite the university's opposition.

The four-part test for evaluating a Columbia constitutional claim for First Amendment retaliation is stated in *Boyer*. The test is as follows: (1) whether the speech is protected, i.e., on a matter of public concern; (2) whether the employee's interest in commenting

on matters of public concern outweighs the government employer's interest in promoting efficient government services. If the employee prevails on both these questions, step (3) requires the employee to demonstrate that his speech was a substantial or motivating factor in the adverse employment action. If the employee so demonstrates, step (4) considers whether the government employer has proven that it would have taken the same adverse employment action, even in the absence of the protected speech.

The trial court properly found that speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of state officials, in terms of content, clearly concerns matters of public importance. In deciding whether an employee's speech touches on a matter of public concern, or constitutes a personal grievance, courts look at the "content, form and context of a given statement, as revealed by the whole record." *Boyer.* They also consider the motive of the speaker B was the speech calculated to redress personal grievances or did it have a broader public purpose? Here, Dr. Harlan attempted to bring his concerns about Dr. Mosser to the CSU Administration, and stated in response to threats that if the charges were withdrawn, he would personally refile them. He wrote memos to the Provost about the lack of investigation that generated the recommendation that Dr. Mosser's tenure not be revoked and requested an investigation of the alleged threats made against him. The speech in this case fairly relates to charges at a public university that plainly would be of interest to the public, e.g., plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and a claimed inadequate investigation of the allegations and alleged retaliation against the person who made the allegations.

Dean Carlson contended that Dr. Harlan merely sought to establish internal order in the Department of Accounting, not bring to light governmental wrongdoing. Of course, speech relating to an internal department dispute will normally be classified as a

personal grievance outside of public concern. Dr. Harlan testified that while he knew that filing tenure revocation charges against Dr. Mosser would be divisive in the short run, in the long run it would lead to greater harmony in the Department because most of the problems were attributable to that issue. The fact that Dr. Harlan might receive an incidental benefit of what he perceived as improved working conditions does not transform his speech into purely personal grievances. Moreover, speech which touches on matters of public concern does not lose protection merely because some personal concerns are included. The trial court properly concluded that Dr. Harlan's speech related to matters of public concern.

As to the second step, the trial court balanced Dr. Harlan's right to speak out about this matter with the interests of his employer. In engaging in this balancing, courts consider the following factors: (1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one on which debate was vital to informed decision-making.

In weighing factor one, the trial court found that Dr. Harlan’s speech contributed to disharmony among coworkers. Its inquiry properly did not stop there. In a democratic society, healthy levels of dissent and debate are essential to the vitality of institutions. In particular, an academic institution strives to foster critical thinking skills in its students and does so in part by modeling the give and take of debate within the institution itself. Thus, the court must consider the ability of the employer to do its essential work without undue disruption in its operations despite the exercise of free speech rights of its employees. Defendants were unable to convince the court that the disharmony caused disruption in teaching, research or administration at the school, nor were Defendants able to demonstrate long-term morale or discipline problems caused by the speech.

The second factor goes to the essence of the specific employer-employee relationship in question. For example, an executive depends upon the loyalty and confidence of her administrative assistant. Similarly, a political appointee must rely upon the loyalty of her aides. The trial court found here that the nature of the relationship between a professor in a department and his superiors did not necessitate loyalty and confidence.

The third factor speaks for itself. Here, the court found that Dr. Harlan's speech had no effect on his ability to perform his duties as a professor. He continued to teach classes, hold office hours, serve on faculty committees, and participate in outside activities such as conferences and symposia.

The court also considered the time, place and manner of Dr. Harlan's speech. It is noteworthy that Dr. Harlan's speech occurred through proper channels. He filed charges according to university protocols. He spoke with colleagues privately and in faculty or committee meetings. He aired his concerns directly with the Dean of the College. He then filed a grievance. This is not to say that more public forums for expression of opinions are never appropriate, but Dr. Harlan followed authorized procedures and appealed to appropriate authorities.

The next factor considers whether the matter was one on which debate was vital to informed decision-making. The allegations addressed a matter of public concern, not mere public interest, because they involve charges of wrongdoing and malfeasance. Thus, debate was essential to potentially avoid the alleged ongoing wrongdoing.

The third step of the *Boyer* test requires the employee to demonstrate that his speech was a substantial or motivating factor in the adverse employment action. There is no question here that the employer's motivation for transferring Dr. Harlan was his speech.

The fourth step considers whether the government employer has proven that it would have taken the same adverse employment action, even in the absence of the protected

speech. Dean Carlson testified that "every expression of the reason for Dean Carlson's transfer of Dr. Harlan in August 1997 involved an attempt to resolve once and for all six years of divisiveness and dysfunction within the Department." We recognize that Dean Carlson testified that there were a variety of reasons (other than the content of Dr. Harlan's protected speech) for the transfer: (1) getting the Department of Accounting back on track after 8 to 9 years of divisiveness between the Accounting faculty and the Tax and Law faculty, (2) getting the Department to focus on the upcoming 150-hour requirement for accounting professionals, (3) increasing the productivity of the non-tenured faculty, and (4) finding a suitable fit between Dr. Harlan's non-accounting and interdisciplinary Ph.D. and the Department of Management. In examining the record before us, however, we are not persuaded that the court erred in finding that CSU would not have transferred Dr. Harlan in the absence of his speech.

Affirmed.

Answer 1 to Performance Test B

To: R.J. Morrison

From: Applicant

Re: Snyder v. Regents of University of Columbia Retaliatory Employer Action

Date: February 28, 2008

Statement of Facts

Dr. Norm Snyder is a tenured Professor and Chair of the Department of Medicine at the University of Columbia located in Springville, Columbia. The Department of Medicine is one of eight Basic Science departments and sixteen clinical departments that make up the School of Medicine at the University. In 2004, the University began consideration of a plan to move the School of Medicine to Palatine, Columbia, 20 miles from its current location. Dr. Snyder was opposed to this plan because it would be fiscally irresponsible and detrimental to the lower income members of the community. After using the appropriate channels at the University to voice his dissent, Dr. Snyder wrote a "Letter to the Editor" in the Springville Star Bulletin on February 12, 2208, urging members of the public to attend a public hearing regarding the proposed move. In response to Dr. Snyder's dissent and letter, the Regents of the University of Columbia voted unanimously to terminate his position as Chair of the Department of Medicine. As a tenured professor, Dr. Snyder retains his position at the University within the Department, but stands to incur substantial damage to his reputation and professional interests. The decision to terminate his position will become effective on March 27, 2008. Dr. Snyder has retained our firm to determine whether he has a cause of action for a preliminary injunction against the University for its retaliatory actions taken after he voiced his dissent to the plan to move the School of Medicine.

Analysis

In order to succeed in obtaining a preliminary injunction, Dr. Snyder will have to demonstrate that this case meets the standard for obtaining a preliminary injunction.

Dr. Snyder must demonstrate: 1) he has a substantial likelihood of prevailing on the merits, 2) he will suffer an irreparable harm in the absence of the injunction, 3) the threatened harm to him outweighs any damage the injunction may cause to the University, and 4) if the court issues the injunction, it will not be adverse to the public interest.

1. Substantial Likelihood of Prevailing on the Merits

Dr. Snyder must be able to demonstrate that his claim has a substantial likelihood of prevailing on the merits. To prove this, we must establish that Dr. Snyder has a proper claim for infringement of his First Amendment rights under the Columbia State Constitution. In the public employment context, courts in Columbia have adopted the four-part Boyer test to evaluate a constitutional claim for First Amendment retaliation by a public employer in the State of Columbia. See Elkins v. Hamel (2007); Harlan v. Yarnell (2002). Columbia courts recognize that public employees retain their First Amendment rights under the Columbia Constitution, subject to the employer's right to maintain a safe and orderly workplace. This allows a public employer to impose restraints on job-related speech in a way that would be unconstitutional if applied to a member of the general public. Elkins.

Under the Boyer test, the court must determine 1) whether the speech is on a matter of public concern; 2) if so, the court must balance the employee's interest in the expression against the government employer's interest in regulating the speech of employees to maintain an efficient and effective workplace; 3) if the employee's interest prevails, the employee must show the speech was a substantial factor driving the challenged governmental action; 4) if it was, the employer must show that it would have taken the action even in the absence of the protected speech. See Elkins; Harlan.

A. Matter of Public Concern

The court will look at the whole record and review the content, form, and context of the speech to determine if it was a matter of public concern. Elkins. In doing so, the court will consider the motive of the speaker: was Dr. Snyder speaking with the intent to

redress a personal grievance that he had or was he commenting for a broader public purpose? Harlan. If Dr. Snyder was speaking merely on matter of personal interest, the speech is not protected. The speech must be something that not only relates to a matter of public interest, but informs the issue in a way that is helpful to the public in evaluating the government conduct.

Dr. Snyder may assert that his letter was a matter of public concern because he was commenting on an issue that has an impact on the whole community in Springville. First, separating the Med School from the rest of the Basic Science departments would isolate members of the faculty. A university is founded on collaboration and the exchange of ideas. Interdepartmental cooperation is often necessary to advance the field of study, especially in the sciences, where members of the faculty can collaborate together to discover new treatment methods. This would be a matter of public concern because separating the medical school may inhibit the University's ability to promote medicine and the development of new treatments beneficial to the community.

We can also argue that his speech was a matter of public concern because there are negative financial consequences to the community. The bonds that were passed to support the construction of the new School will take 40 years to pay off and the community will not receive a benefit. The community has an interest in how public funds are being appropriated, especially if that appropriation will not benefit the community. The community has a fiscal interest of how the move is being paid for. The Harlan court noted that speech regarding the misuse of state funds by a professor at a public university constituted a matter within the public concern.

Most importantly, however, the new school would be located 20 miles from the urban center of Springville. Currently, the school of medicine treats many of the town's indigent citizens. Moving the school would have a detrimental impact on low income members of the community because there is not adequate public transportation between Springville and Palatine, the proposed site. This would prevent the low income citizens from receiving necessary medical treatment that they can afford. As a public institution, the medical school likely offers low cost treatment, especially to those who cannot afford to pay. Without the medical school in town, these citizens may be forced

to go without health care. We can argue that this situation is similar to Harlan, where a professor filed a grievance against another professor for various charges, including misappropriation of funds and abuse of students. The court found that because the professor was addressing subjects that had a broader public purpose, it was a matter of public concern.

The University will assert that Dr. Snyder is working on a personal motive to redress a personal grievance. The Regents will argue that Dr. Snyder was angry that the University rejected his proposal to split the medical school in two, leaving some faculty in Springville and some in Palatine. They will also argue that he is angry because his position was not adopted by the University and he sent a letter to the editor with a personal grudge against the administrators. It is true that Dr. Snyder was not satisfied with the Regents' rejection of his proposal. He admits that he is stubborn and feels very strongly that the relocation plan was misguided. But we can overcome this argument by citing previous decisions by the Regents that Dr. Snyder has disagreed with. Several years ago, the Regents made a decision to reorganize the Health Sciences Center. Dr. Snyder was adamantly opposed to this reorganization and went through a similar campaign to try [to] prevent that decision from taking place. But after he was outvoted and the Regents proceeded with their plan, Dr. Snyder, as Head of the Department of Medicine, implemented their decision wholeheartedly. Dr. Snyder agrees that the administration should implement policy whether they agree with it or not. The important fact in this situation is that the plan has not yet been decided because the debate within the community continues.

The University may also argue that Dr. Snyder was motivated by a personal interest he would receive if the school stayed. This argument is similar to the one that was made in Harlan. But this case is distinguishable from Harlan, because it involves a matter that affects the whole community. In Harlan, the university alleged that it was merely a matter relating to an internal department dispute because Harlan wanted to achieve a benefit of establishing the "internal order" of the department. But the court rejected this argument because the fact that the plaintiff might receive an incidental benefit from his speech does not transform it into a purely personal grievance. Dr. Snyder was already head of the Department, and by keeping the School of Medicine in

Springville, he would not receive a promotion or a better position within the school. The University cannot allege that he is working for a personal benefit.

Due to the harsh impact that this proposal will have on the indigent members of the community and their ability to obtain medical care, the court would likely find that this was a matter of public concern. The fact that Dr. Snyder previously implemented policy decisions that he disagreed with shows that he is capable for working within the system and that he had no personal bias or motive when sending the letter.

B. Balance of Dr. Snyder's Interest to Comment against the University's Interest in Promoting an Efficient Workplace

Under the second prong of the Boyer test, the court will look at several factors to weigh each side's interest, including: 1) whether the speech did or would create problems of discipline or harmony in the workplace, 2) whether the employment relationship requires personal loyalty and confidence, 3) whether the speech impeded Dr. Snyder's ability to perform his responsibilities, 4) the time, place, and manner of his speech, and 5) whether the matter was one on which debate was vital to informed decision making.

1. Discipline and Harmony in Workplace

The University will contend that Dr. Snyder's position has created tension among members of the faculty and has created disharmony in the University. Several faculty members have expressed to the Chancellor and Dean that they are intimidated by Dr. Snyder because of his insistence that the relocation decision should not happen. They will argue that this creates discipline problems because his ability to perform as a department chair has been impaired. The University will cite Elkins in support of their position, where the court found that the discipline and harmony within the police station was vital to community interests and outweighed the officers' right to speech.

But Dr. Snyder can rely on Harlan, where the court found that debate and dissent was essential to a democratic society. The court noted that academic institutions in particular are meant to "foster critical thinking skills in its students," and one way to

accomplish this is for members of the university to engage in healthy debate within the institution itself. The court must consider whether the speech of the employees would cause undue disruption of the ability of the university to function. The University contends that Dr. Snyder's authority has been undermined by his vocal dissent. This argument is weakened by the fact that Dr. Snyder has previously opposed plans submitted by the Regents yet has been able to effectively lead the department for over 20 years. The letter from the Regents terminating Dr. Snyder notes his years of service, which proves that his speech would not undermine the discipline and harmony because it has not done so in the past. Dr. Snyder's argument is bolstered by the fact that 45 of 50 members of the Med School faculty signed a petition in support of Dr. Snyder's position. This severely undercuts the University's argument that there is disharmony in the University.

2. Necessity of Personal Loyalty and Confidence

The necessity of having personal loyalty from an employee to his superiors depends on the nature of the employee-employer relationship in question. Harlan. The Harlan court found that in an academic institution, the relationship between professor and his superiors did not require loyalty and confidence.

We can argue that this situation is akin to Harlan because the eight departments in the School of Medicine act autonomously. Dr. Snyder is the chair of one department, the Department of Medicine. Although there are bimonthly meetings with Mr. Simmons and the department chairs, the departments basically run themselves. And there is even less contact between the chairs and Chancellor Blake. Dr. Snyder indicated that he sees him very infrequently. The need for there to be personal loyalty and confidence between Dr. Snyder and his superiors is not as necessary as in the police department. In Elkins, the court emphasized that it was necessary for the officers to follow the command of the captain and ranking officers because the public safety was at stake. But in an academic institution, the need for loyalty and confidence is lessened.

The University will counter that the medical school is distinguishable from a regular university because public health is at stake. The University will contend that the situation does resemble Elkins because, as doctors, it is necessary for them to follow

their superiors in order to protect patients and members of the community. This argument is weakened by the fact that the doctors do not rely on the university administration for orders on how to do their job. The situation is distinguishable from Elkins, where the police captain gives orders to an officer, who must then follow those orders to protect public safety. At the University, even though public safety and health are at stake, the administration does not give orders to the doctors on how to treat patients. The fact that health is involved does not take it out of the holding of Harlan. This situation is distinguishable from Elkins, where it was necessary for there to be loyalty and confidence among members of the police force, because they were charged with protecting the public, and having a clear chain of authority was important, because a fellow officer or a member of the public could be injured or killed if the rank and file was not properly followed. There is not a similar need within the Department because they work autonomously.

3. Whether the Speech Impeded Dr. Snyder's Ability to Perform

The Harlan court found that speech of a professor does not affect his ability to perform if he can carry on office hours, teaching classes, serving on committees and participating in outside activities related to his profession. Dr. Snyder's ability to perform as chair of the department has not been impeded by his speech. He has been able to attend faculty and university-wide forums and speak to members in the community. But, at the same time, he has headed a huge project within the Department aimed at developing a new method of dialysis that is faster and can be performed at home. This project involves coordinating graduate assistants and lab space. He has been in negotiations with several major pharmaceutical companies in order to secure funding for this research. We can argue that his ability to act as chair has not been disturbed by his speech regarding the proposal.

The University will contend that his ability to lead the department has been undermined and affected by his speech because members of the faculty are intimidated by him and do not feel comfortable going to him directly to express concerns. This is an important argument, because if Dr. Snyder cannot effectively manage the department,

the University will show that his speech impeded his ability to perform his job. Dr. Snyder can rebut with the same petition signed by the 45 faculty members. If some are intimidated by him, it is a small minority within the department. Additionally, Dr. Snyder may have enemies who are disagreeing with him just to disagree. They are people who said they feel intimidated because they want to be on the opposite side of the issue and may be acting for personal reasons and not out of true feelings of intimidation by Dr. Snyder. Calling members of the faculty to testify on his behalf would show that he is widely respected among colleagues and staff.

4. Time, Place, and Manner

Public forums are an appropriate place for expression of opinions, but if the speech occurs through proper channels, the court is more likely to uphold the speech as being the proper time, place, and manner for the expression. Dr. Snyder can argue that he followed the proper channels for his opinion because he first began his opposition to the proposed project by submitting a comprehensive report that he circulated widely among the medical school faculty in 2004. He also attended and presented his position at faculty and university-wide forums held in 2004 and 2005. In addition to these actions, Dr. Snyder also met with Jack Blake, Chancellor of the Health Sciences Center, and Paul Simmons, Dean of the School of Medicine. After his meeting, he also circulated a petition among the faculty, which 45 out of 50 signed onto in support of his position. He did not send the letter until all of these actions had been taken, when he felt that the community needed to be involved in this decision because it has such a heavy impact on them.

The situation is similar to Harlan, where Professor Harlan followed proper university protocols for voicing his opinion, including attending faculty meetings and airing concerns to the Dean of the College. The Harlan court found that the fact that Professor Harlan followed the proper channels before filing a public grievance demonstrated that the time, place, and manner of the speech was appropriate.

This prong of the balancing of interest weighs in Dr. Snyder's favor because he did not go to the public and air his complaint without first addressing it through channels

at the University. He had raised his position for years before submitting his letter to the editor for the Star Bulletin on December 8, 2007.

5. Vital to Decision-Making

Under this factor, the court must decide whether the matter is essential to the decision-making process. Here we can argue it is vital to the process because members of the community were unaware of the proposal. The Regents were holding a public hearing on the proposal but it is not clear if they invited members of the public or advertised the meeting. The Springville Star Bulletin article notes that the Regents are expected to make a decision at the close of public testimony. But how can the Regents make an informed decision if there are no members of the public there to support or argue against the proposal? Dr. Snyder's letter merely informed the public about an issue that affected them and invited them to come and speak out in favor [of] or against the proposal.

Weighing these factors, the court will likely find that Dr. Snyder's interest in the speech outweighs the University's interest in an efficient workplace because it does not have a substantial impact on his ability to perform and the workplace is not disrupted.

C. The Speech as a Motivating Factor for Employer's Action

Under the third Boyer factor, the court will look at whether the speech was a motivating factor for the adverse or retaliatory employment action taken by the employer. The Regents in their letter contend that the decision was not based on his speech, but on disharmony in the faculty. But the alleged disharmony was created by the speech. There appears to be no other reason to remove Dr. Snyder as chair of the department. The fact that he was negotiating a multi-million dollar deal with pharmaceutical companies indicates that he was performing his job adequately and bringing in revenue and new research opportunities to the University. Like Harlan, there is no question that the decision to remove Dr. Snyder from his position was motivated by his speech against the proposal.

D. Employer Must Show Action Would Have Been Taken Despite Speech

If the employee satisfies the other elements of the Boyer test, the burden shifts to the employer to show that the employment action would have been taken regardless of whether the employee was engaged in the protected speech. There must be some other reason that the employer had for taking the action. The University cannot show that the action would have been taken despite the speech.

2. Irreparable Harm in the Absence of Injunction

Elkins opined that the loss of any First Amendment freedoms, even for a minimal period, was an irreparable harm. But in the context of a preliminary injunction, Dr. Snyder must show that there is a danger of recurrent violation of his legal rights. The court, in dicta, suggested that in the employment context, a court will hesitate to grant a preliminary injunction where the employee can be made whole by monetary damages after a full trial.

Unlike other damages cited in Elkins, such as damage to reputation, financial distress or difficulty, Dr. Snyder stands to lose his contacts for his research, which would cause the loss of millions of dollars. It would also affect his professional standing and his ability to get research grants, publication opportunities, and future royalties from licenses. Unlike lost wages, all of these things would be problematic to put a dollar amount on. The ability to get a research grant or opportunity for research cannot be quantified in a dollar amount.

The fact that his speech has been impaired, combined with the fact that the pharmaceutical companies will back out of their deals for the research, demonstrates that Dr. Snyder stands to suffer irreparable injury if the preliminary injunction is not granted.

3. Balancing of the Harms

Dr. Snyder will have the burden of showing that his irreparable injury outweighs any injury the University might suffer if the court grants the injunction. The court will look at the course of action that will minimize the loss to each side and the risk of error. Under the balance of harms, if the university is forced to take him back, they will not

suffer injury because Dr. Snyder has previously accepted and implemented decisions with which he disagreed. He agrees that it is important for the faculty to put up a united front when it comes to policymaking. But the decision in this case has not been made. There is sill debate going on. Any dissension in the faculty may be based on personal bias and not true intimidation. Dr. Snyder stands to lose a great deal because he will lose licenses from pharmaceutical companies to do his research. These are opportunities that he may never be able to get back. The Elkins court said to look at the risk of making a wrong decision. If it makes a wrong decision in favor of the University, Dr. Snyder will be irreparably harmed. But if the court rules in favor of Dr. Snyder and is incorrect, the University will not suffer harm because Dr. Snyder has agreed that he will implement the policy regardless of whether he agrees with it.

4. The Injunction Will Not be Adverse to the Public Interest

Finally, the court will analyze whether the injunction is adverse to the public interest. The public has a strong interest in the "vindication of an individual's constitutional rights," so granting an injunction in this case may not be adverse to the public interest.

The Elkins court suggested that an injunction granted against the police department would have been against the public interest because there is a strong interest in having an efficient and dependable law enforcement system.

The injunction will not be adverse to the public because it will allow a prominent member of the faculty to continue research on dialysis, which would be affordable and easier. This would have a significant benefit to the community. Not granting the injunction would have a negative and adverse effect on the community because Dr. Snyder is researching treatment for dialysis, which many members of the community would likely benefit from. If he is terminated this research will cease and may not be able to continue, causing the public to lose out on a possible medical breakthrough.

Answer 2 to Performance Test B

To: R.J. Morrison
From: Applicant
Re: Snyder v. Regents of the University of Columbia
Date: February 28, 2008

Mr. Morrison:

In accordance with your direction, I have drafted an objective memorandum analyzing the likelihood of Dr. Snyder obtaining a preliminary injunction based on the University's alleged infringements of his free speech rights under the Columbia Constitution.

Statement of Facts

Dr. Snyder, a tenured professor at the University of Columbia, is currently the Chairperson of the Department of Medicine. He was recently terminated from his position, apparently because of his stand on the controversial issue of whether or not the Department of Medicine should be relocated. Dr. Snyder's first attempts to persuade the Board not to move were made entirely within the University system. Upon his failure to convince the Board, Dr. Snyder wrote a letter to the editor, attacking the move and urging the public to come to a public hearing which the Board was going to have regarding the relocation. Following this public meeting, the Board decided to relocate the Department and to terminate Dr. Snyder's position as Chairperson. He will remain a professor. The termination will take effect in about one month. Dr. Snyder desires a preliminary injunction to stop the termination.

Analysis

Requirements for a Preliminary Injunction

Dr. Snyder desires to seek a preliminary injunction based on a violation of his rights under the First Amendment of the Columbia Constitution. In order for a party to obtain a preliminary injunction, he must demonstrate "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) the threatened harm outweighs any damage the injunction may cause the party opposing it; and (4) the injunction, if issued, will not be adverse to the public interest." Elkins v. Hamel, Columbia Supreme Court, 2007.

In analyzing Dr. Snyder's claim, it will first be necessary to determine whether or not he is likely to prevail on the merits. Following this determination, the other requirements for a preliminary injunction will be analyzed.

Issue 1: Will Dr. Snyder Prevail On the Merits?

In order for Dr. Snyder to prevail in his request for a preliminary injunction, he will have to demonstrate that there is a "substantial likelihood" that he will prevail on the merits. Therefore, it is necessary to examine the merits of Dr. Snyder's underlying claim.

Dr. Snyder desires to bring a claim under the First Amendment to the Columbia Constitution, for violation of his right to free speech. Somewhat complicating this situation is the fact that Dr. Snyder is a public employee; therefore, it is possible that some restraints may be imposed on him "that would be plainly unconstitutional if applied to the public at large." Elkins. However, public employees still have substantial constitutional rights to free speech. In determining whether a public employee's right to free speech has been violated, the Columbia Supreme Court developed a four-part test

in Boyer. This test first looks to see whether the speech in question involves a matter of public concern. If it does, the court then weighs the "employee's interest in the expression against the government employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace." If the employee prevails on this step as well, the employee must next demonstrate that "the speech was a substantial factor driving the challenged government action." If the employee succeeds on this part, the employer is then permitted to raise the defense that "it would have taken the same action against the employee even in the absence of the protected speech." Elkins.

In analyzing Dr. Syder's claim, each of these elements will be examined separately.

Does the Speech Involve a Matter of Public Concern?

According to the Elkins court, the determination as to whether or not the employee's speech addressed a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." Moreover, "when an employee speaks as an employee upon matters only of personal interest the speech is not protected." Thus, courts essentially are required to "conduct a case by case inquiry, looking to the content, form, and context of the speech, which includes scrutinizing whether the speaker's purpose was to bring an issue to the public's attention or to air a personal grievance." The Elkins court furthermore stated that the speech must not merely be related to a public interest, but it must sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government."

In Dr. Snyder's case, it seems relatively likely that a court will conclude that his speech involved a matter of public concern. D. Snyder has indicated that the Medical School provides substantial medical services to the public. Moreover, the area in which the medical school is planning to relocate is a substantial distance away from the current users of these services, and there is no public transportation system between the current area in which the medical school is located and the proposed new area. Dr.

Snyder also noted that the medical school currently provides medical services to many indigent individuals, and these individuals apparently would be left without good health care if the medical school moved. Thus, it seems likely that the issue of the medical school's location was a matter of public concern.

Dr. Snyder has also indicated that the moving of the medical school will cause substantial inefficiencies. The medical school's current location, in Dr. Snyder's opinion, substantially increases its ability to communicate with colleagues on matters that are being researched. The public has a substantial interest in furthering medical research, and enhancing the efficiency of the University system as a whole.

Moreover, Dr. Snyder has indicated that it will cost a tremendous amount of money to move the medical school. Because the University is a taxpayer-funded institution, the taxpayers (i.e., the public) definitely have an interest in having their money spent wisely.

Dr. Snyder's speech was of such a nature that it sufficiently informed the public. He raised the issue to the public's attention, and then directed the public to his website, where they could obtain more information on the matter.

The Elkins court did note that speech only relating to an employee's personal interest is not protected. However, the Supreme Court in Harlan stated that even if the speaker receives an incidental benefit personally, his speech is not transformed into a "purely personal grievance." In this case, even though Dr. Snyder would receive some personal benefit in not having to commute to the new location, and in being able to research more effectively due to the current location's proximity to the division of the University, it seems likely that these benefits are not of such a nature that they transform his speech into a statement of purely personal grievances. The public concerns involved in this matter (medical services to the public, including indigents, fiscal responsibility issues, and government efficiency issues) appear to substantially outweigh any purely personal benefit that Dr. Snyder would receive in the matter.

Therefore, it seems quite likely that a court will conclude that Dr. Snyder's speech involved the mater of public concern.

Does Dr. Snyder's Interest in Commenting on these Matters Outweigh the University's Interest in Promoting Efficient Services?

In applying this second element of the four-part Boyer test, the courts will consider the following five factors: "(1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one of which debate was vital to informed decision making." Harlan v. Yarnell.

Problems Created by the Speech

The University has asserted that Dr. Snyder's actions created disharmony. It is probably true that vigorous dissent to a proposed plan will create disharmony – that is the very nature of dissent. However, the analysis of this element does not stop at this point. According to the Harlan court, "healthy levels of dissent and debate are essential to the vitality of institutions." This is especially true of academic institutions – an academic institution such as a university strives to foster "critical thinking skills in its students." Part of this is "modeling the give and take of debate within the institution itself." Therefore, the University has to demonstrate that substantially more problems were created by the speech than some other government organization (such as police stations) would need to do. The Harlan court essentially distilled this element, as applied to a University, into a consideration of whether or not the government's ability to do its "essential work without undue disruption" is unnecessarily impaired.

The University will cite the division created by Dr. Snyder's actions, and the fact that it is necessary for the upper level members of the University system to present a unified

front. However, Dr. Snyder indicated all along that even if the University declined to follow his recommendation, he would implement the university's decision whether he agreed with the decision or not. Dr. Snyder indicated that he has taken stands while employed by the University before, and when his recommendations were not followed, he would implement the University's decision wholeheartedly.

The University has also stated that Dr. Snyder's conduct caused several faculty members to feel intimidated. Dr. Snyder denies that he intimidates people; however, this is probably an open question at this point.

Dr. Snyder has also indicated that of the 50 faculty in the Medical School, 45 signed his petition to the Board regarding the moving of the school. It certainly doesn't appear that Dr. Snyder's speech caused significant disharmony – 90% of the faculty in the relevant department agreed with him.

Altogether, it does not appear that the University will be able to demonstrate that Dr. Snyder's speech significantly impaired its ability to do its "essential work without disruption." Part of the very essence of a University is the give and take of debate; thus, a certain amount of disruption should be taken for granted. Moreover, it does not appear that Dr. Snyder's speech will impair the University's ability to continue with its essential work – that of educating students and researching things. Dr. Snyder has testified, and his past conduct indicates, that he is fully willing and able to implement decisions with which he does not agree. Thus, Dr. Snyder's past assertions probably will not have much effect at all upon the University's current course.

Therefore, it seems that this factor weighs substantially in Dr. Snyder's favor.

The Employment Relationship is not One in Which Personal Loyalty and Confidence are Necessary

According to the Harlan court, significantly more latitude is granted to the government employer, where personal loyalty and confidence are necessary; such as an executive depending on his administrative assistant, or cases involving political appointees.

A professor's position in a university is not one which requires personal loyalty and confidence. Harlan. Moreover, even though Dr. Snyder was a chairperson of a department, and thus was a higher level employee, it seems quite unlikely that this position required personal loyalty and confidence. As discussed supra, the very nature of a university necessitates that the parties be involved in the give and take process of debate – a university is, after all, an academic institution. This is certainly not a case involving a political appointee or an administrative assistant to an executive.

Did Dr. Snyder's Speech Adversely Affect his Ability to Perform his Duties as a Professor?

The University has indicated that Dr. Snyder's speech did impair his ability to perform as a department chair. It asserted that certain faculty members were not comfortable working with him anymore, due to intimidation which they had suffered. Moreover, the University stated that it felt that he could not be trusted to "work as part of the team to implement the relocation plan."

Dr. Snyder, on the other hand, can assert that of the 50 faculty in the medical school, 90% of them agreed with him on this issue, as evidenced by their signing of the petition to the Board. He has also asserted that, in the past, he has fully implemented decisions with which he did not agree, and which he had protested before the decision was made.

There is evidence on both sides of the issue here. It seems that Dr. Snyder has a fairly good argument that his ability to perform will not be substantially impaired, especially based on his previous actions in supporting University decisions once they had been made. However, it can't be denied that vigorous opposition of a plan definitely can result in an adverse impact on the opponent's ability to perform, once the plan is

adopted. Everyone will remember his vigorous opposition, and there is necessarily a serious question of trust, especially when the opposition has been as broad and vigorous as Dr. Snyder's was in this case.

Therefore, it seems that Dr. Snyder's speech probably did adversely affect his ability to perform to some degree. The exact extent to which his ability to perform was affected is not entirely clear, although it appears that his ability to perform was not affected in a major way, due to the fact that he has opposed things in the past and then supported them after the University overruled his objections, and the University knows that.

The Time, Place, and Manner of Dr. Snyder's Speech

For a considerable period of time, Dr. Snyder confined his speech to the typical channels for objection within the University system. This was definitely the most appropriate way to raise objections, considering the nature of the problem. See also Harlan.

However, Dr. Snyder then sent a letter to the editor, stating that his attempts had failed; and that he had been unable to persuade the "powers that be" that the proposed relocation was "ill-conceived, financially reckless, and detrimental to the needs of our indigent citizens." He urged the public to look further into the matter at his website, and then attend the public hearing which the Board of Regents would be having regarding this issue.

This speech was definitely outside the normal process of objections within the University system, and Dr. Snyder's language is admittedly rather strong. However, it should be kept in mind that the letter was regarding a public hearing. Being that this was a public issue, the University Board had determined that it would hold a public hearing, apparently to listen to the views of the public on this issue. In order for the public to attend the hearing, they would have to understand the issue, and attend it.

Thus, Dr. Snyder will point out that his letter was merely attempting to get the public to address the issue in a way which the University desired them to – at the public hearing.

The Harlan court reviewed a situation in which a professor had raised unpopular opinions, but had stayed within University channels the whole time. The court noted that this was undoubtedly appropriate, but also stated that it was possible that expression of opinions in more public forums could be appropriate at times. It appears that Dr. Snyder can present an excellent argument that this was one of those times.

The University will point out that the nature of Dr. Snyder's language was unnecessarily strong – he referred to the board in a somewhat derogatory manner ("the powers that be"), and very strongly stated his opinion on the matter (it was "ill conceived, financially reckless, and detrimental to the needs of our indigent citizens.") This is admittedly strong language – probably somewhat stronger than was appropriate. On the other hand, this was a letter regarding a public meeting, and calls to public meetings must necessarily be couched in relatively strong terms if anybody is going to take notice of them.

Thus, it is not really clear who this factor favors. Dr. Snyder undoubtedly would have been better had he toned down his speech a bit; but on the other hand, it should be kept in mind that this was a call to a public meeting.

The Speech Involved a Matter in which Debate was Vital to Informed Decision Making

It is highly likely that this factor will weigh heavily in Dr. Snyder's favor. As discussed supra, the location of the medical school was a matter of public concern. The Board essentially admitted to this by holding a public hearing on the decision, where the public could weigh in with its opinions. Moreover, by holding the public hearing, the Board essentially admitted that debate was essential to making an informed decision.

It should also be noted that debate is vital to the principle of self-government. Under the American political system, the people have the right to engage in debate regarding the political system; and the people can also take action (through the polls) to change the actions of government. Because this was an issue involving a governmental decision, and the people have an interest in the actions of government, it seems likely that active, informed debate was vital to the making of an informed decision.

Conclusion

It appears that these factors, overall, are in Dr. Snyder's favor. It seems unlikely that his speech will create significant problems within the University; he does not hold a position of loyalty and confidence; and debate on this issue was vital to informed decision making. The University will point out that his speech probably does impede his ability to perform as a chairperson to some degree; and that Dr. Snyder's speech was unnecessarily strong. However, viewing the nature of this problem, and the fact that the University was going to hold a public hearing on the matter, it seems likely that Dr. Snyder's speech was not strong enough to cause this factor to weigh heavily in the University's favor. Moreover, his prior history demonstrates that his ability to perform will not be adversely affected in any substantial manner.

Therefore, it seems somewhat likely that Dr. Snyder will prevail on the balancing test. It should be kept in mind that a court could rule against Dr. Snyder at this point, especially due to his strong language; however, such a ruling does seem somewhat unlikely.

<u>Was the Speech a Substantial Factor Driving the Government Action?</u>

It seems undoubted that Dr. Snyder's speech was a substantial factor driving the action of the University. In fact, in the letter which Dr. Snyder received from the University, the Board essentially stated that his termination was due to his opposition to the relocation of the medical school.

Therefore, it seems unlikely that there will be any question as to this element.

Would the University Have Taken the Same Action Even in the Absence of the Protected Speech?

Again, this is not likely to be an issue in this case. The termination was solely because of Dr. Snyder's speech – if Dr. Snyder had not opposed this action, it seems unquestioned that he would not have been terminated.

Conclusion

It seems unquestioned that Dr. Snyder's speech involved a matter of public concern; that the speech was a substantial factor driving the government action; and that the University would not have terminated him if he had not engaged in the speech at issue. Therefore, the major issue involving Dr. Snyder's underlying claim will be the balancing test – did his interest in commenting on this matter outweigh the University's interest in promoting efficient government services? As discussed supra, it appears that the majority of the factors considered by courts in making this termination end to favor Dr. Snyder, and the ones that disfavor him do not appear to disfavor him in a substantial way. Therefore, it seems that there is a reasonable probability, but by no means a certainty, that Dr. Snyder will prevail on the merits.

It should be noted that in determining whether to grant a preliminary injunction, courts look for a substantial likelihood that the proponent will prevail on the merits. The lower the likelihood that the proponent will prevail on the merits, the more reluctant the court will be to grant the motion for a preliminary injunction. A proponent with a lower likelihood of prevailing on the merits can still obtain a preliminary injunction, however, if the irreparable damages element weighs strongly in his favor.

Issue 2: Will Dr. Snyder Suffer Irreparable Harm if the Preliminary Injunction is Not Issued?

The Columbia Supreme Court stated that the loss of First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable harm." However, in order to demonstrate irreparable harm for the purpose of obtaining a preliminary injunction, the moving party must also "demonstrate that there exits some cognizable danger of recurrent violations of its rights."

Dr. Snyder will argue that he is in danger of losing his position or being demoted again, if he speaks out on more issues which the University doesn't approve of. However, it doesn't really appear that Dr. Snyder has a really good argument here. There are no pending issues on which he is speaking, and the case involving the relocation is over.

Dr. Snyder may cite damage to his reputation; his ability to research; his ability to get research grants; and publication opportunities. However, the Columbia Supreme Court has held that things such as damage to reputation do not constitute irreparable harm, as they can be made whole by monetary damages after a full trial on the merits.

Dr. Snyder's strongest argument on the irreparable harm issue is that his termination will probably cause his ongoing negotiations with a pharmaceutical company regarding the development of a new method of dialysis to cease. He states that his termination will most likely cause the pharmaceutical company to back away, and that years of work and millions of dollars will be wasted. Dr. Snyder will point out that the new method of dialysis which is being developed will significantly improve the lives of the thousands of people who rely on dialysis to live, and that, if he is terminated now, these people will suffer irreparable harm due to the fact that all the research and negotiations which have been completed at this point will be wasted.

Assuming that Dr. Snyder's statements regarding the probability of the pharmaceutical companies' backing down and the research terminating are correct, it appears that irreparable harm would be present. However, the University will probably attempt to prove that the termination of Dr. Snyder will not cause all this harm. Evidence on this factor will probably be critical to this case. If Dr. Snyder is correct, it appears that there will be irreparable harm of a fairly significant magnitude.

The University might point out that the irreparable harm will not be suffered by Dr. Snyder, as he is not a dialysis patient, but by the public at large. This might raise a problem. More research is probably needed on whether Dr. Snyder can assert irreparable harm going to the public at large. However, Dr. Snyder can also assert injury to himself in losing this research, and a court might be more willing to consider the injury in this manner.

Therefore, if Dr. Snyder's statements regarding the probability of the pharmaceutical companies' backing away if he is terminated are correct, it will probably be possible to prove that there is irreparable harm. However, more evidence will be needed on this issue.

Issue 3: Does the Threatened Injury to Dr. Snyder Outweigh the Injury to the University which will Occur if the Injunction is Granted?

A preliminary injunction necessarily involves an analysis of probabilities and an evaluation of potential injuries. Because the preliminary injunction is issued before there has been a trial on the merits, the party against whom the injunction is given may suffer injury which he should not suffer at all (assuming that he will prevail on merits.) Therefore, in applying this element, the judge "should attempt to estimate the magnitude" of the loss for both sides and "also the risk of error."

As discussed supra, it seems probable, but not certain, that Dr. Snyder will prevail on merits. Moreover, it is possible that he will suffer substantial irreparable harm if the injunction is not granted, as discussed supra.

The University, on the other hand, will point out that it will suffer irreparable harm if it is required to keep Dr. Snyder in a position to which he is not entitled. The University may argue that it will not have his cooperation in the move, and that his effectiveness will be substantially reduced due to his prior arguments in opposition to the move. However, it is not abundantly clear that the university will suffer much harm down this line at all. If Dr. Snyder does support the move (as his past conduct seems to indicate that he will do) the University probably will not suffer much harm at all. Although some parties may be apprehensive about him, due to his prior opposition, it seems likely that his present support, especially considering the fact that 90% of the faculty in the medical school supported him in his opposition, will do more to aid the University than to harm it. On the other hand, it is not at all certain what Dr. Snyder will do in this point; thus, it is possible that he will still attempt to stop the move.

However, it seems likely that the move itself will probably take some time. Money must be raised; plans must be made; etc. Dr. Snyder might be able to hamper these plans and money-raising projects somewhat; but it should be kept in mind that the move itself is not actually occurring.

Dr. Snyder might also assert that the University's harm is not irreparable – it can be compensated for in money damages. However, a court is not likely to buy this argument. A government organization's ability to control what it does is highly important to the ability of the organization to function properly, and money damages are not really sufficient to remedy a loss of this ability.

Overall, it seems likely that the threatened irreparable injury to Dr. Snyder (the loss of years of research which will substantially benefit the public) substantially outweighs the

irreparable injury to the University (potential delay of the move; lack of cooperation within the University.) Combined with the fact that it appears somewhat likely that Dr. Snyder will prevail on the merits, it seems likely that this factor supports Dr. Snyder.

Issue 4: Is the Injunction Adverse to the Public Interest?

A court will not issue a preliminary injunction if the injunction is adverse to the public interest. This again involves somewhat of a balancing test – is the public interest stronger in favor of the injunction or in opposition to it?

The Supreme Court in Elkins stated that the public "has a strong interest in the vindication of an individual's constitutional rights, particularly in encouraging the free flow of information and ideas under the First Amendment." On the other hand, the public probably has an interest in the efficient operation of the University.

However, it seems likely that the public has a strong interest in the continuation of the research which Dr. Snyder has been working on.

Therefore, it seems unlikely that a court will conclude that this injunction is adverse to the public interest. In fact, it appears that the public has a strong interest [in] supporting the granting of this injunction.

Conclusion

In conclusion, it appears that Dr. Snyder has a good chance of prevailing on his motion for a preliminary injunction. As discussed supra, it seems somewhat likely that he will prevail on the merits.

A major issue in this case is going to be whether Dr. Snyder will suffer irreparable harm. As discussed supra, the mere injury to his reputation will not be sufficient, as the Supreme Court has concluded that this can be remedied through monetary damages.

A court might find Dr. Snyder's claims that all the research on the dialysis system will simply be lost if he is terminated to be somewhat preposterous. Any evidence which can be brought in to support Dr. Snyder's claim will definitely be to his advantage.

As far as the balancing test and the public interest elements, it seems likely that if Dr. Snyder is able to prove that he will suffer the type of irreparable injury which he alleges (the loss of years of research on the dialysis system), a court will rule that the risk of irreparable injury to him exceeds the potential injury to the University if the injunction is granted, and that the injunction is not adverse to the public interest.

Therefore, the primary issue in this case will be the irreparable injury element. It seems relatively likely that Dr. Snyder will prevail in his request for a preliminary injunction, if the irreparable damages which will [be] suffered are as dramatic as he asserts.

California Bar Examination

Performance Tests and Selected Answers

July 2008

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2008 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2008 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Contents

TUESDAY AFTERNOON
JULY 29, 2008

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

PEARSON v. SAVINGS GALORE

FILE

PEARSON v. SAVINGS GALORE

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

HAMLINE & BUTTRAM, LLP

Santa Claritan, Columbia

MEMORANDUM

To: Applicant

From: Mary Hamline

Date: July 29, 2008

Re: **Chris Pearson v. Savings Galore**

Our client, Chris Pearson ("Pearson"), was held for about an hour by the Savings Galore supermarket because his buddy, with whom he shopped, was suspected of shoplifting and took off when confronted. I've checked out the criminal aspect, and Pearson did not commit any illegal acts.

Please write a memorandum that evaluates his possible civil claim against Savings Galore. Your memorandum should do the following:

1. Explain the elements that must be proven in order for Pearson to succeed on a false imprisonment claim.
2. Apply the facts of Pearson's situation to the elements and assess the likelihood that Pearson would prevail on the merits of the claim.
3. Identify the injuries incurred by Pearson that would be compensable given these facts and assess the likelihood that punitive damages would be awarded given these facts.
4. Identify any defenses the store may raise, and explain and assess the likelihood that the store would prevail on each defense.

TRANSCRIPT OF JULY 24, 2008 INTERVIEW WITH CHRIS PEARSON

Mary Hamline (Q): The tape recorder is running now. As I said, the reason why I like to record initial interviews is that it will give me an accurate record of what you say, and I will be able to listen and use it later on.

Chris Pearson (A): Okay.

Q: I understand that you got into some sort of a dispute with a store, and that you might want to sue them, but that's about it.

A: Well, I live with about 5 other people in a rented house over near the campus.

Q: Okay. Are you a student at the University of Columbia?

A: Yes, I'm a student, a biosciences major. I'm going to finish up pretty soon. I'm 22 years old, single, and pretty much impoverished. Well, one of my roommates and I went to do the weekly food shopping for the whole house.

Q: Went where?

A: Right. We went down to that combined warehouse store and market, you know, that huge thing down on the corner of Euclid and Sligo?

Q: Do you mean Savings Galore?

A: Yes, that's the name of it. We almost always go there to do the shopping unless we can get a car, and then we go somewhere better.

Q: What was your roommate's name, the one who went with you?

A: Do I have to tell you that?

Q: It is always possible that we might need to talk to this person or even get him to testify, depending on what is going on. But for now, just use a first name at least, just so you can tell the story.

A: Okay. My roommate is named Jeff.

Q: Is he a student at the University of Columbia too?

A: No. He finished up about a year ago.

Q: Why don't you just tell me what happened when you and Jeff went shopping?

A: Well, we started to do the shopping, putting some stuff in the cart. We would split up to go get things; we had a list, but then we would come back to the cart and talk and look for other stuff, too. After we had been there for about 20 minutes, I thought I saw

Jeff open up a can of cashews and eat them while we were shopping. But I didn't pay too much attention to it.

Q: How long did it take you to shop?

A: About an hour. There was a long wait at the check-out stand, and we finally got up to the front and paid and headed out of the store. We were both kind of loaded down - I was carrying about 6 bags of groceries, and Jeff had about 4 bags.

Q: How were you carrying so many bags?

A: If you get your hand through the handle of those plastic bags, you can hold a whole bunch - I had three in each hand - well balanced.

Q: I'll have to try that some time. Had you paid for the cashews?

A: At that point, I didn't really notice. I didn't think we had, but there was quite a wait at the check-out stand and I had forgotten about it, to tell you the truth.

Q: How long ago was this?

A: About 2 months ago.

Q: What happened next?

A: We were walking out of the parking area and towards the street back to our house, when a big, strong-looking woman came walking right up to us. She yelled, "Hold it right there!" And I remember thinking "Who is this lady?" She got right next to us and grabbed me and said, "I saw you take those cashews and you didn't pay for them." I said, "I didn't take any cashews." She said, "That's right, you didn't; it was this guy, right here." And she grabbed hold of Jeff's arm. Jeff said something like: "Oh yeah, I forgot to pay for them; here, let me pay for them right now." And the lady said: "No, it was deliberate; I'm going to have to take you in."

Q: Interesting. Did you both go back to the store?

A: No. As soon as that woman said "I'm going to have to take you in" - and you could just tell she was trouble and meant it from the tone in her voice and her look - Jeff dropped his bags of groceries, shook himself off from her hold, and took off around the corner of the store. There is a wetlands area around the back.

Q: But you didn't go with him?

A: No. He split, and I was left holding the bags. I just stood there with my mouth open.

There I was with a couple of hundred dollars worth of groceries, that detective, and no Jeff.

Q: Did she identify herself as a detective?

A: Not until later. She just gave me a glare and said, “You come with me.” I said, “I didn’t do anything,” but she said, “I don’t care. You come with me right now. You and your fast friend are in big trouble.”

Q: Did you think at all about running yourself?

A: Not really. She looked like a big, strong football player, and I was holding a lot of stuff.

Q: Did she grab you or force you into the store?

A: Not exactly. She picked up the bags Jeff had dropped and got sort of in back and sort of to the side of me and herded me in, kind of like a dog herding sheep.

Q: What would have happened if you had tried to just walk away at that point?

A: I don't know for sure, but it didn't seem like an option to me. She would probably have tackled me.

Q: So did you go on your own?

A: I sure wouldn't say that. I went along, but I didn't see what else I could do.

Q: What happened when you got into the store?

A: We went into an office and she tossed the bags down, and I put the ones I was carrying down, and I said something like “Why don’t you leave me alone? I didn’t take any cashews and you know it.” She took me to another office, way in the back, one with no windows. I had no idea they had rooms like that in those buildings. We sat down in there and she called someone on the phone and after a few minutes two very large men, who looked like they were former boxers, came in. They left me in there for a while with the door locked and I could hear her talking to them right outside the door.

Q: How do you know the door was locked? Did you try to get out?

A: Well, no. It sounded like they locked the door. I wasn’t about to try to take off. I was pretty scared, actually. I get anxious sometimes, and I was having some trouble breathing and my heart was pounding, so I just sat there and tried to take some deep breaths. Then all three of them came back in. The woman told me she was the house detective, and the two guys were security staff, and that they just wanted to talk to me.

They said, “Let’s see some identification.” I told them, “You have no right to do this.” But I showed them my student registration card, partly because I figured it was better if they knew who I was and that I was a student at the University, and partly because I didn’t really see any choice. I didn't give them my address.

Q: Did you think they were going to rough you up?

A: Actually, no, even though Jeff and I look like young punks and they looked like professional wrestlers. I thought they were going to try to intimidate me somehow, and I didn’t think they were going to let me go for maybe a long time, but they didn’t say they were going to beat me up, either.

Q: Okay. What did they say to you?

A: They said: “Because you are a college kid, you must be pretty smart. Is your friend a college student too? He was pretty dumb to run.” I didn’t want to say anything about Jeff, so I tried not to look at them, and that kind of angered them. The lady said: “Your friend isn’t much of a friend - he took off and left you to take the rap. We’ve got you. But if you give us his name and address, we’ll let you go.” I was pretty scared about that. I was mad at Jeff, because he is always pulling stuff like that.

Q: What do you mean, stuff like that? Has he ever been caught shoplifting before?

A: No. But he is such a clueless idiot. He actually is kind of a slacker. You know, he opens up food in stores, forgets to pay for it, and I think he steals stuff from time to time. But he’s never been caught.

Q: What did you do when they asked you for his name?

A: They kept saying, “Give us his name and address and we’ll let you go.” And I was mad at him, especially for taking off and leaving me with all of this trouble but I wasn’t about to give them his name. So I kept saying: “You have no right to keep me here. I have not done anything illegal. Let me go immediately.” And they kept saying stuff like: “Hey, figure it out; we don’t have to let you go, but we will if you give us his name and address.” And I just kept saying the same thing: “You have no right to keep me here. I have not done anything illegal. Let me go immediately.” Sort of like a mantra. I just kept repeating that and trying not to make eye contact. I didn’t want to antagonize them.

Q: Did you think you were actually right about their having no right to hold you?

A: I didn't think they were going to let me go, but I didn't think they could prove I did anything illegal, because I hadn't. So I didn't know. I was trying not to be anxious.

Q: They must have eventually let you go?

A: Yeah. This went around and around, and they'd come ask, all three, and then they would leave for a while, and then come back and try again, and I'd say the same thing. I never tried to just walk out of there, but I thought if I did they would just grab me and put me back there, or arrest me, so I just waited. After I had been there quite a while, I'm guessing about an hour, I was starting to get worried, because the only person who knew I was there was Jeff, and he obviously wasn't going to get me out, and then they came in with a piece of paper and said, "Here, if you sign this, we'll let you go." I signed it and they let me go. I don't know what happened to the groceries; I didn't even think about them until much later.

Q: What did the piece of paper say?

A: Here. This is the copy of what they gave me. But I didn't read it too closely. I probably would have signed it no matter what it said. At the time, I just wanted to get out of there.

Q: Can I keep this?

A: Sure.

Q: Did they ever find out who Jeff was and have him arrested?

A: No, they never did. He was amazed I didn't tell. He was going around the house looking for anything the police would be interested in when I showed up. He also told me he had stuck a pair of garden gloves in his pants, which was one reason why he had taken off, as it was more than just the cashews.

Q: Am I right that they never physically harmed you, and never did arrest you or even really make a move to arrest you?

A: In thinking back on it, I'm not sure they ever actually touched me other than when the detective first put her hands on me in the parking lot. They never did strike or hit me, or arrest me. So maybe I should just leave it alone.

Q: Well, you can always just leave things where they are. But it sounds like you want to at least consider your options?

A: Yes. I'm kind of mad because of what they did, so I'm interested in knowing, I guess, if I can sue that store. I haven't really been able to sleep at all since then. If I do get to sleep I have nightmares about being locked away in little places. I've been to a psychiatrist quite a few times since this happened, and I don't have any health insurance, and that actually has been expensive. We all lost the money from the food. Who knows what they did with it? Although I guess that was sort of Jeff's fault for just dropping those bags, and mine for not remembering them. But I don't think they should be allowed to get away with that, when I didn't do anything except go shopping with a screw-up. I could have had a panic attack or heart failure in there. I was really scared and I'm not sure they had any right to do that to me. So I guess I think someone should call them on that, and not let them get away with it. And it sure can't be Jeff.

Q: Would it be okay with you if I talked with your psychiatrist briefly about how you are feeling and what treatment is necessary? It would be helpful if your doctor could verify your condition.

A: That's okay.

Q: What is his name, and if you have it, his phone number?

A: His name is Dr. Romeo. I don't have his phone number with me right now, but we could look it up in the phone book. That's what I do when I want to change an appointment.

Q: That's okay; we'll look it up. How do you spell it, like the Shakespeare character?

A: R-o-m-e-o. So do you think I should sue the store? Or is it not worth it?

Q: I'd like to have someone do a little research so we will know for sure what we are dealing with before we give you advice. Why don't you set up a meeting with my secretary and . . .my secretary is the guy sitting over in the other office. There isn't a real hurry on this. Can you come back in a week?

A: Sure.

END OF TRANSCRIPT

SAVINGS GALORE, INC.

SUSPECTED SHOPLIFTER RELEASE FORM

YOU HAVE THE RIGHT TO REMAIN SILENT. RATHER THAN SPEAK WITH US, YOU MAY FIRST CONSULT WITH AN ATTORNEY.

NOTICE: THIS IS A LEGALLY BINDING AGREEMENT. By signing this agreement, you waive your right to bring a court action to recover compensation or obtain remedy against Savings Galore, Inc.

WAIVER/RELEASE/COVENANT NOT TO SUE

In consideration for Savings Galore, Inc. releasing me from their custody, and in consideration for Savings Galore, Inc. not filing criminal charges against me or seeking civil liability against me, I hereby release Savings Galore, Inc., a Columbia corporation, and its officers, agents, and employees from and WAIVE MY SUBSTANTIAL RIGHTS TO ASSERT any cause of action, claims or demands of any nature whatsoever, including but not limited to a claim of false imprisonment, false arrest, intentional infliction of emotional distress, duress, or negligence which I, my heirs, representatives, executors, administrators and assigns may now have, or have in the future against Savings Galore, Inc. on account of the store detaining me on 5/29/08 for purposes of investigation of shoplifting. I further agree that Savings Galore, Inc. had reasonable cause to detain me because they suspected me of shoplifting and that they did not detain me for longer than a reasonable period of time. I understand that the terms of this agreement are legally binding and I certify that I am signing this agreement, after having carefully read it, of my own free will.

Chris Pearson 5/29/08	John de Majo
Signature and Date	Witness
Chris Pearson	Kent Wong
Printed Name	Witness

HAMLINE & BUTTRAM, LLP

Santa Claritan, Columbia

MEMORANDUM

To: Chris Pearson Client File

From: Mary Hamline

Date: July 24, 2008

Re: **Phone conversation with Dr. Fred Romeo, a psychiatrist treating Chris Pearson**

On July 24, 2008 I called Dr. Fred Romeo, phone # 555-3882, 550 Bootwide Ave., Santa Claritan, Columbia. Dr. Romeo is a psychiatrist who has been treating our client Chris Pearson. He has been a practicing psychiatrist for over 10 years. I explained that Pearson was our client, and that Pearson had authorized Dr. Romeo to discuss his current condition with me as a privileged communication. Romeo said that Pearson had told him I might call, so he wasn't surprised by it. We then had a conversation concerning whether Pearson had suffered emotional injuries due to the episode at Savings Galore, the nature of the suffering, and whether Romeo would be willing to sign an affidavit and/or testify if Pearson asked him to.

Dr. Romeo said he knows and remembers Pearson quite well, but he also went and retrieved and reviewed his notes. He said that Pearson had been to see him a couple of times before the episode at Savings Galore, so he had a chance to compare, but only a little. Dr. Romeo said he concluded that Pearson was currently suffering from significantly lower than usual energy and low motivation, as well as sleep disorder, loss of concentration, tearfulness, and loss of general interest in previously pleasurable activities. He said these symptoms were all quite consistent with posttraumatic stress disorder, and predicted that they may persist, on and off, for as long as a year, and

might return. He also said, however, that he had seen a lot worse cases of posttraumatic stress disorder, although Pearson does seem to be suffering.

I asked him if he was reasonably confident that the posttraumatic stress suffered by Pearson was brought about by the episode at Savings Galore. Dr. Romeo said yes. He said Pearson hadn't mentioned the episode extensively, but that his current condition was connected to a traumatic event. I asked if Pearson's symptoms could be triggered even though there was not any physical injury associated with the event. Dr. Romeo said, "Oh, sure. Posttraumatic stress is often created by a stressful event that turns out not to cause physical injury. It is the fear and lack of control over the situation that create the conditions for posttraumatic stress in a lot of cases."

Dr. Romeo said he has never testified in a court setting, but has had his deposition taken several times. He would be happy to sign an affidavit concerning Pearson's condition, and he would be willing to testify if necessary, although he'd like to avoid it. I thanked him and said that it was probable that we would get back to him on this, although that decision in the end was up to Pearson.

TUESDAY AFTERNOON
JULY 29, 2008

California
Bar
Examination

Performance Test A
LIBRARY

PEARSON v. SAVINGS GALORE

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA PENAL CODE

§13-1 Shoplifting; detaining suspect; defense to wrongful detention

A. A person commits shoplifting if, while in an establishment in which merchandise is displayed for sale, such person knowingly obtains such goods of another with the intent to deprive that person of such goods by:

1. Removing any of the goods from the immediate display or from any other place within the establishment without paying the purchase price; or
2. Charging the purchase price of the goods to a fictitious person or any person without that person's authority; or
3. Paying less than the purchase price of the goods by some trick or artifice such as altering, removing, substituting or otherwise disfiguring any label, price tag or marking; or
4. Transferring the goods from one container to another; or
5. Concealment.

B. Any person who knowingly conceals upon himself or another person unpurchased merchandise of any mercantile establishment while within the mercantile establishment shall be presumed to have the necessary culpable mental state pursuant to subsection A of this section.

C. A merchant, or a merchant's agent or employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person suspected of shoplifting as defined in subsection A of this section for questioning or summoning a law enforcement officer.

D. Reasonable cause is a defense to a civil or criminal action against a peace officer, a merchant or an agent or employee of such merchant for false arrest, false or unlawful imprisonment, or wrongful detention.

Alice James v. Smitty's

Columbia Court of Appeal (1998)

Alice James ("James"), her son Steven James ("Steven"), and her friend Nancy Robertson ("Robertson") were shopping at Smitty's, a supermarket chain store. James placed a pair of children's sandals in her shopping cart and covered them with an advertising flier. James later said she: (1) placed the sandals in the cart to quiet Steven, who wanted them; (2) covered them to make Steven forget them, planning to return them; and then (3) forgot them herself. Robertson later said she was only vaguely aware that James had placed the sandals in the cart and was entirely unaware that James had placed the flier over the sandals.

Karen Wilkerson, a Smitty's security officer, observed James's actions on a surveillance monitor and followed James and Robertson to the check-out stand. Though James paid for other items, she did not pay for the sandals, which remained in the bottom of her cart.

James and Robertson left the store. Robertson waited outside the car while James placed the groceries and her purse inside the car and then lifted Steven from the cart. She then picked up the sandals. She later said she had just discovered them and was about to return them to the store. At that moment, Wilkerson approached, identified herself as a Smitty's security officer, pointed to the sandals, and motioned James and Robertson back into the store. James, who is very hard of hearing, originally did not understand what Wilkerson said. She first thought Wilkerson wanted the advertising flier. When Wilkerson pointed at her purse, James thought Wilkerson was trying to rob her. When Wilkerson pulled at her purse and pointed at the sandals, James understood that Wilkerson thought she had stolen the sandals and, accompanied by Robertson and Steven, followed Wilkerson to the security offices inside the store.

Wilkerson directed Robertson to remain in one small office. (There is conflicting evidence concerning whether the door to Robertson's office was locked, but that fact is

not relevant to the issues in this appeal.) Wilkerson then escorted James and Steven to a separate office. Wilkerson searched James's purse, photographed her against her will, showed her part of the surveillance video, and presented a form letter demanding payment of a statutory civil penalty plus the sandals' purchase price. James, increasingly distraught, wrote her phone number on the form letter, hoping Wilkerson would call her husband. Wilkerson did not perceive a hearing problem and did not call the number that James had written. James (and Robertson, who claimed she could hear through the wall) claimed that Wilkerson was abusive, yelling and slamming objects. After about 45 minutes in the office, James hyperventilated and lost consciousness. Wilkerson and the night manager called for paramedic assistance. Wilkerson testified that she took Steven from the security office when the paramedics arrived to attend to James and that Robertson and one of the paramedics took Steven to the parking lot to see a fire engine. The paramedics took James to the hospital. Robertson called James's husband, who came to pick up Steven and went to the hospital where the paramedics had taken his wife.

James and Steven sued Smitty's for negligence and false imprisonment. The jury awarded James $8,500 in damages on her false imprisonment claim and awarded Steven $12,500 on his false imprisonment and negligent infliction of emotional distress claims. From judgment on the verdict and the denial of its posttrial motions, Smitty's appeals. These appeals concern the finding of liability and award to Steven.

At the close of Plaintiffs' evidence, Smitty's moved for a directed verdict on Steven's negligent infliction of emotional distress claim, arguing that Plaintiffs neither alleged nor presented evidence of compensable harm. Smitty's claims that the trial court was required to grant their motion for a directed verdict against Steven because there was no evidence offered that Steven suffered physical injury. His damages were transitory nightmares and sleep disturbance, for about two months, which subsided without medical treatment. Under these facts, this motion should have been granted.

In Columbia, a plaintiff may not recover for negligent infliction of emotional distress unless the shock or mental anguish is accompanied by or manifested as a physical injury. Transitory physical phenomena such as nightmares and sleep disturbance are not the type of bodily harm that would sustain a cause of action for emotional distress. In contrast to a negligence claim, however, a false imprisonment claim does not require proof of physical injury to go forward. Steven's false imprisonment claim is therefore not impeded by the absence of physical damages. Consequently, the injuries suffered by Steven are sufficient injuries to justify an award under a false imprisonment claim.

Smitty's, however, alleges errors concerning Steven's false imprisonment claim. It claims that the trial court should have directed a verdict because Smitty's neither accused nor suspected Steven of shoplifting. We disagree.

Smitty's intended to confine James with the necessary consequence of also confining Steven, her four-year-old child. Its liability to Steven under these circumstances is explained in the Restatement (Second) of Torts. According to Restatement §35, an actor is subject to liability for false imprisonment for the wrongful confinement of another if "he acts intending to confine the other or a third person within boundaries fixed by the actor. . .his act directly or indirectly results in such a confinement of the other, [and] the other is conscious of the confinement or is harmed by it." If a confinement of one party imposes confinement on another party, "the actor is subject to liability to such other as fully as though it were intended so to affect him."

These provisions are dispositive of Smitty's first argument. That Steven was merely an indirect, not the direct, target of confinement does not relieve Smitty's of liability on Steven’s false imprisonment claim. Steven is entitled to compensation for loss of time, for physical discomfort or inconvenience, and for any resulting physical illness or injury to health. Since the injury is in large part a mental one, he is entitled to damages for mental suffering, humiliation, and the like. The damages that flow

foreseeably from a false confinement of a caretaker flow equally foreseeably to an accompanying small child.

Smitty's also argues that Steven's false imprisonment case should have been dismissed due to the statutorily granted shopkeeper immunity for detaining suspected shoplifters. A merchant may detain a suspected shoplifter without incurring liability if the storekeeper has reasonable cause to believe that the person shoplifted and if the detention is performed in a reasonable manner and for a reasonable length of time. Columbia Penal Code §13-1 C and D. Reasonable cause for the shopkeeper to detain a suspected shoplifter is not dependent on guilt or innocence of the person detained, or whether a crime was actually committed. If the facts and reasonable inferences therefrom are not subject to material dispute, reasonable cause is a question of law to be determined by the court.

Smitty's argues that it had reasonable cause to detain James, and thus it had reasonable cause to detain Steven as well. While we agree that ordinarily reasonable cause to detain a parent suspected of shoplifting gives the merchant reasonable cause to detain minor children of the suspected parent, given the facts of this case we do not agree that Smitty's had reasonable cause to detain Steven.

We have previously indicated our acceptance of Restatement §35, which explains the potential linkage of false imprisonment of a suspect and another. Had Smitty's detained James without reasonable cause, it would have detained Steven without reasonable cause as well. But Smitty's had reasonable cause to detain James, because she picked up the sandals, placed them in the cart, covered them with an advertising flier, and left the store without paying for them. This may have been inadvertent; it may have been deliberate; but the appearance was such that it gave Smitty's reasonable cause for suspicion of shoplifting.[1]

[1] Because no fact-finder could reasonably conclude otherwise, the trial court could have directed a verdict for Smitty's on the issue of reasonable cause to detain James.

But the real question is whether Smitty's needed to detain Steven, a person not suspected of shoplifting, for as long as they did under these circumstances. We conclude that it was not reasonable under the circumstances for Smitty's to detain Steven for more than the time necessary to make sure Steven would be under proper supervision.

Smitty's had several alternatives available for Steven's supervision other than detaining him. Most notably, Wilkerson could have immediately asked Robertson to care for Steven while James was detained for investigation of shoplifting, yet she made no effort to do so and in fact impermissibly detained Robertson as well as James and Steven. There was no reasonable cause to detain Robertson. Wilkerson had no basis to believe Robertson had shoplifted or assisted in the shoplifting in any way, and Wilkerson testified that she did not consider Robertson to have been involved in any illegal activity. A merchant does not have immunity to detain a companion of a suspected shoplifter unless the store has reasonable cause to believe the companion was involved in the illegal activity. Because Smitty's did not have that reasonable cause, Robertson was a fully viable alternative for the supervision of Steven. If in fact James had not wished Robertson to supervise Steven, Smitty's would have grounds for avoiding liability for false imprisonment of Steven. Smitty's took all of that opportunity away by simply detaining James, Steven, and Robertson. In addition, they could have had Steven come into the store, asked James to call an acceptable supervisor for Steven, and detained Steven only until the acceptable supervisor arrived.

Accordingly, Smitty's was not by statute granted immunity from liability on Steven's suit for false imprisonment.

Affirmed.

Gaspard v. American Telco

Columbia Court of Appeal (2001)

Tracey Gaspard sued her former employer, American Telco, for retaliatory discharge after she filed a workers' compensation claim. The trial court granted summary judgment to her employer on the basis that Gaspard had signed a release of all claims against it. Gaspard appeals, contending that the release was ambiguous and procured by duress, and thus the trial court erred in granting summary judgment. We affirm.

Gaspard worked for American Telco as a district sales manager. While driving to the office after a sales appointment in August 1997, she was involved in a car accident in which she claimed neck and back injuries. She continued to work, although in pain and under the care of a chiropractor, for two months. Then, in October 1997, she was unable to get out of her bathtub without assistance. An MRI revealed two ruptured discs in her back. A doctor advised that she take several weeks off work in order to rest.

Just eleven days later, while at home on medical leave, an American Telco employee who "shared lodgings" with Gaspard came home with bad news. He told Gaspard that she was being fired from her job. He gave her a release, by which she was allowed to resign, receive $4,500, and keep her health insurance for another month in exchange for her waiver of all claims against her employer. If she did not sign the release, she would be terminated without continued benefits or pay. He told Gaspard she had until the next morning to make her decision.

Gaspard signed the release and received the month's insurance and money. Two years later, she brought suit for wrongful termination, alleging the discharge was in retaliation for her having filed a worker’s compensation claim. The trial court granted summary judgment to her former employer based on the release, and Gaspard appeals.

To prevail on a motion for summary judgment, a defendant must establish that no material fact issue exists and that it is entitled to judgment as a matter of law. If a

defendant moves for summary judgment on the basis of an affirmative defense, it has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. In conducting our review of the summary judgment, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor.

In general, a release surrenders legal rights or obligations between the parties to an agreement. A release is a complete bar to any later action based on matters covered by the release. American Telco, who in this case is the party asserting summary judgment on the basis of the release, undertook its burden to prove the elements of its defense as a matter of law by attaching a copy of the release signed by Gaspard to its motion for summary judgment. A signed release contains a strong presumption of enforceability. To presume otherwise would throw into doubt the validity of every settlement and create strong disincentives for parties to settle. Because American Telco has provided presumptive evidence of the release, the burden then shifts to Gaspard to directly attack the release or establish a fact issue in avoidance of it.

Gaspard first attacks the validity of the release by arguing it is ambiguous. The release that Gaspard signed states in pertinent part as follows:

"I hereby release American Telco from any and all claims, charges, liabilities, causes of action, and demands arising from or in connection with my employment with American Telco or the termination thereof, which I ever had, now have or may have from the day of the commencement of my employment to the date of this waiver and release. This waiver and release includes, without limitations, claims and causes of action arising under federal and state fair employment practice laws as well as the common law of torts and contracts, relating in any way to my employment with American Telco, treatment while employed with American Telco and the termination of my employment. I hereby agree not to bring any lawsuit, charge or claim against American Telco in any court or administrative proceeding relating in any way to my employment, my treatment while employed, and the termination of my employment."

This release expressly includes all claims arising from Gaspard's employment or termination from employment with American Telco. Because the release mentions claims arising from termination of employment, we hold that the release unambiguously bars Gaspard's retaliatory discharge claim.

Gaspard also argues that she was under duress when she signed the release. In the early common law, duress *per minas*, i.e., by threats, was available to void a contract where the threat involved imprisonment, mayhem, or loss of life or limb. Through the years, there has been a steady expansion of the duress principle such that direct dire harm is no longer essential, the focus instead being on whether the threat is so overbearing that the victim had no reasonable alternative. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Thus the modern defense of duress, used to avoid enforcement of an agreement, is met by demonstrating the following elements: (1) The promise must be made in response to a threat. Ordinarily it must be the promisee who created or issued the threat, although in some cases a successful showing of duress was made when the threat did not originate with the party seeking to enforce the promise. (2) The threat needs to be severe enough to reasonably convince the will of the promisor to make the promise. If sufficient alternatives to making the promise were available to the promisor, the threat will not be considered severe and duress will not succeed as a defense. (3) The threat must be improper rather than just hard bargaining.

A difficult issue is determining what type of threat is sufficient to invoke the rule. Courts tend to use as a shorthand summary, words such as "wrongful," "oppressive," or "unconscionable" to describe conduct, but the complexity of the term "threat" is demonstrated in Section 176 of the Restatement (Second) of Contracts, which provides:

> “(1) A threat is improper if:
>
> (a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property;

(b) what is threatened is a criminal prosecution;

(c) what is threatened is the use of civil process and the threat is made in bad faith; or

(d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on fair terms, and

(a) the threatened act would harm the recipient and would not significantly benefit the party making the threat;

(b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat; or

(c) what is threatened is otherwise a use of power for illegitimate ends."

In this case, Gaspard's argument is that she faced economic duress. She does not claim that she was physically threatened as a reason to have agreed to the release promise. Gaspard claims in her affidavit "I had no money in the bank and I was in financial straits." Economic duress may be claimed, however, only when the party against whom it is claimed was responsible for claimant's financial distress. None of the summary judgment evidence indicates that American Telco was responsible for Gaspard's economic distress. Accordingly, Gaspard has failed to meet her burden of establishing duress.

We find that American Telco established the requisites of release and there is no ambiguity in the language of the agreement. We have also concluded that the release was not obtained by economic duress. Accordingly, we overrule Gaspard's sole issue and affirm the trial court's judgment.

Peterson v. Zelie Corp.

Columbia Court of Appeal (1979)

Defendant Zelie Corp. (“Zelie”) appeals from a judgment finding it liable for false imprisonment and awarding $10,500 in actual damages and $20,000 in punitive damages to Plaintiff Mary Peterson (“Peterson”).

At the time the incidents leading to the false imprisonment suit took place, Plaintiff Peterson was twenty-three years old and pregnant. Plaintiff went to the Zelie store with instructions from her mother to complete the purchase of items which her mother had placed in the store's layaway department. She was driven to the store by a neighbor, Mike Taylor, and was accompanied by her two sons Tom and Jim, ages 1 and 3 years, and by her 14-year-old brother, Bill. The Plaintiff entered the store, went to the layaway department, and handed the clerk the layaway receipt that her mother had given her. According to Plaintiff Peterson, the clerk handed her, in addition to the items listed on the layaway receipt, a box containing a Chipshot hockey set. This item, as boxed, was approximately as large as the counsel's table in the trial court. Plaintiff accepted this item, she argued, because she did not know exactly what was to be picked up from the store.

Plaintiff Peterson paid the balance due on the items listed on the layaway receipt. She then put all the items except the hockey set in a shopping cart along with her two children. At Plaintiff's direction the hockey set was placed in another cart. Plaintiff's brother, Bill, pushed the cart containing the hockey set toward the store's exit, while Plaintiff propelled the cart containing her children and the balance of the items. As they neared the door Plaintiff found a "Paid” sticker on the floor and placed it on the box containing the hockey set. Plaintiff Peterson claimed Bill, her brother, told her that the sticker had fallen off one of the items she had purchased.

A guard at the store's exit checked each item for a paid sticker and allowed Plaintiff Peterson to pass. However, once outside the door Plaintiff was stopped by a security

guard, whose suspicion was aroused because he had observed Plaintiff place the paid sticker on the hockey set's box. The guard identified himself and asked Plaintiff whether she had paid for the hockey set. Plaintiff claimed she had paid for the item. The guard then asked Plaintiff and her brother to follow him to a room in the back of the store used by the security staff. Once in this room three security officers questioned Plaintiff, at various times.

Initially, Plaintiff Peterson maintained she had purchased the hockey set. However, when Plaintiff was shown the layaway receipt, which did not list the hockey set, she admitted that the hockey set was not one of the items that her mother had previously placed in the store's layaway department. She subsequently filed a suit for false imprisonment which resulted in the judgment from which defendant Zelie appeals.

Defendant Zelie argues that the facts did not warrant the imposition of punitive damages. Under Columbia law, punitive damages are recoverable for false imprisonment when the plaintiff proves, by clear and convincing evidence, that the defendant has been guilty of oppression, fraud, or malice. “Malice" is defined as conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" is despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

That the jury found Zelie's detention of Plaintiff Peterson constituted a false imprisonment does not necessarily mean the jury concluded the interview was conducted with the intent to cause harm or was despicable. The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion. Thus, the intent element of false imprisonment does not entail an

intent or motive to cause harm; indeed false imprisonments often appear to arise from initially legitimate motives.

Similarly, even if some force had been used to detain Plaintiff Peterson it would not mean there was sufficient evidence of oppression, fraud, or malice to warrant a trial on the punitive damages issue. In *Beau v. Ketchum* (Columbia Supreme Court, 1953) for example, the plaintiff recovered only nominal damages for being falsely imprisoned, because no actual damages were sustained and there was no evidence of oppression, fraud, or malice. Although the defendants in *Beau* had caused the plaintiff's forcible removal and arrest, the court found that the mere use of force does not constitute evidence of oppression, fraud, or malice where only a reasonable and necessary amount of force was used in the detention.

Under a reading of the facts most generous to Peterson, defendant Zelie cannot be viewed as having been guilty of the oppression, fraud or malice necessary to justify a punitive damage award for the tort of false imprisonment. The facts contain no suggestion of fraud. The facts only mildly hint at malice, and while Zelie did confine Peterson, it was for only a brief period of time sufficient to demonstrate that in fact Peterson had not paid for the hockey game. There are no facts indicating the confinement was intended to cause injury to Peterson or was undertaken by Zelie with a willful and conscious disregard of the rights and safety of Peterson. Similarly, there is no evidence that Zelie subjected Peterson to a cruel and unjust hardship in conscious disregard of Peterson’s rights. Zelie thought Peterson was attempting to steal the hockey game, and in fact Peterson had not paid for the hockey game. We note that since these events occurred, the legislature has enacted a "shopkeeper immunity" statute that provides a shopkeeper with immunity not only from punitive damages but from liability at all when the store detains a customer whom the store has reasonable cause to believe was stealing for a reasonable period of time. Columbia Penal Code §13-1. This statute cannot be applied retroactively, but does suggest a societal indication that the store's detaining, investigating, and ultimately releasing Peterson under the circumstances cannot be said to be despicable. Accordingly, Peterson did

not present clear and convincing evidence of oppression, fraud or malice sufficient to justify a punitive damages award.

Defendant Zelie also argues the trial judge should have granted its motion that judgment for the defendant should be ordered because plaintiff's pleadings and evidence established that plaintiff had released defendant from any liability arising out of plaintiff's detention. Plaintiff Peterson, in response, claims that the release was obtained by duress and it is therefore voidable.

A signed promise by a plaintiff to refrain from suit is entitled to a strong presumption of enforceability. Nevertheless, a plaintiff can avoid summary judgment by demonstrating that there are factual matters to be resolved concerning the existence of the release, the meaning of the release, or the enforceability of the release. For example, if a plaintiff can demonstrate that there are disputed facts concerning whether the release was obtained by overreaching, or was the result of economic duress, or the plaintiff lacked the capacity to enter into the release, the matter cannot be resolved by summary judgment. The parties must go to trial, not on the underlying matter of the lawsuit, but on the issue concerning whether the release is valid and enforceable.

Affirmed in part, reversed in part.

Rafton v. Dorman's Donut House, Inc.

Columbia Court of Appeal (1985)

Plaintiff Nancy Rafton (“Rafton”) appeals from an order of the trial court granting defendant Dorman’s Donut House, Inc.’s (“Dorman’s”) motion for summary judgment. Plaintiff Rafton contends that the trial court erred in entering summary judgment against her because a genuine issue of material fact existed concerning her charge that she was falsely detained and imprisoned. For the reasons that follow, we affirm the trial court's decision.

Plaintiff Rafton’s complaint alleged that she was employed as a clerk in defendant's donut shop in Meyers, Columbia, for approximately three years; that defendant Dorman’s, through its agents and employees, Mac Betts, William Conn, and Joseph Jackson, accused her of selling donuts without registering sales and thereby pocketing defendant Dorman’s monies; and that she was falsely detained and imprisoned against her will in a room located on Dorman’s premises, with force, and without probable and reasonable cause, by defendant Dorman's employees.

Defendant Dorman’s denied the material allegations of Rafton’s complaint and filed an affirmative defense that alleged it was a merchant; that any questioning of Rafton by its employees, Betts, Conn, and Jackson, was performed only after the employees had reasonable grounds to believe that Rafton had committed retail theft while working for defendant Dorman; that any alleged detention for questioning was limited solely to an inquiry as to whether Rafton had failed to account for certain retail sales; and that such inquiry took place in a reasonable manner and for a reasonable length of time. Defendant Dorman’s subsequently moved for summary judgment, arguing that the Plaintiff Rafton's false imprisonment complaint that she was held against her will by her employers in a certain room of a Dorman's Donut House was contradicted by her testimony in a discovery deposition. The transcript of the deposition indicated that Plaintiff Rafton testified that she had voluntarily complied with Betts, Conn, and Jackson’s request to speak privately with her regarding the matter of shortages in her

cash register on April 9, 1981, and that when she no longer wished to continue her conversation with her employers, she got up and went home, electing never to return to her job. Rafton's response to Dorman's motion for summary judgment did not contradict the statements that she had made in her discovery deposition.

The trial court entered summary judgment for defendant Dorman's. Plaintiff Rafton appeals from that order.

Plaintiff Rafton asserts that the trial court erred in granting defendant Dorman's motion for summary judgment as there exists a genuine issue of material fact. She posits that she felt compelled to remain in the baking room, where she had gone after Betts and Conn requested they speak privately with her, so that she could protect her reputation by protesting her innocence to the two men, and that she left the room once she began to shake and feel ill. Additionally, she attributes her "serious emotional upset" to her feelings of intimidation that she contends were caused by: William Conn and Joseph Jackson each sitting directly next to her during questioning, yellow pad and pencil in hand; Mac Betts' repeated statement that his briefcase contained proof of her guilt; and his raised voice.

The common law tort of false imprisonment is defined as an unlawful restraint of an individual's personal liberty or freedom of locomotion. Imprisonment has been defined as any unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or to go where he does not wish to go. In order for a false imprisonment to be present, there must be actual or legal intent to restrain. Unlawful restraint may be effected by words alone, by acts alone, or both; actual force is unnecessary to an action in false imprisonment. The Restatement of Torts specifies ways in which an actor may bring about the confinement required as an element of false imprisonment, including (1) actual or apparent physical barriers; (2) overpowering physical force, or by submission to physical force; (3) threats of physical force; (4) other duress; and (5) asserted legal authority. Restatement (Second) of Torts §§38-41 (1965). It is essential, however, that the confinement be against the plaintiff's will and, if a

person voluntarily consents to the confinement, there can be no false imprisonment. Moral pressure, as where the plaintiff remains with the defendant to clear himself of suspicion of theft, is not enough.

In the case at bar, we are confronted with Plaintiff Rafton's testimony, given under oath, that she voluntarily accompanied Mac Betts and William Conn to the baking room; that she stayed in the room in order to protect her reputation; that she was never threatened with the loss of her job; that she was never in fear of her safety; and that at no time was she prevented from exiting the baking room. Her affidavit, in which she averred that she left the baking room after she began to shake and when she felt that she was becoming ill, does not place into issue material facts which she had previously removed from contention. In her discovery deposition, given under oath, she stated that she "got up and left" when Mac Betts asked her how long the cash register "shorting" had been going on.

In the tort of false imprisonment, it is not enough for Plaintiff Rafton to have felt "compelled" to remain in the baking room in order to protect her reputation, for the evidence must establish a restraint against her will, as where she yields to force, to the threat of force, or the assertion of authority. In the present case, our search of the record reveals no evidence that Plaintiff Rafton yielded to constraint of a threat, express or implied, or to physical force of any kind. Also, absent evidence that Plaintiff Rafton accompanied Betts and Conn against her will, we cannot say that she was imprisoned or unlawfully detained by defendant Dorman's employees.

For the reasons stated above, we conclude that the trial court properly granted defendant Dorman's motion for summary judgment, as there exists no question of material fact in the present case.

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Answer 1 to Performance Test A

Memorandum

To: Mary Hamline
From: Applicant
Date: July 29, 2008
Re: Chris Pearson v. Savings Galore

Below is the requested information regarding our client, Chris Pearson's ("Pearson") possible civil claim against Savings Galore supermarket ("the store").

I. **Elements of False Imprisonment**

Under the Restatement of Torts section 35, an actor is subject to liability for false imprisonment if the actor (1) intends to confine the plaintiff or a third person; (2) within fixed boundaries; (3) there is actual confinement; and (4) the person confined is aware of the confinement or is harmed by it. James v. Smitty's ("James"). Similarly, the common law tort of false imprisonment is defined as an unlawful restraint of an individual's personal liberty or freedom of locomotion. Rafton v. Dorman's Donuts ("Rafton").

A. Intent to Confine

First, Pearson must establish that the detective intended to confine him. In the interview, Pearson indicated that as he exited the store, the detective approached him and yelled, "Hold it right there!" The detective then indicated that she was going to "have to take [Pearson] into [the store]." After Pearson's friend fled, the detective told Pearson to come with her into the store. She then picked up the bags and herded Pearson into the store and into the office. She left Pearson in the [room] with the door closed. These facts indicate that the detective intended to confine Pearson.

B. Confinement to Fixed Boundaries

Second, Pearson must establish that the confinement was to a bounded area. As noted, the detective placed Pearson in a room, in the back of the store, with no windows. She left Pearson in the room and closed the door. While Pearson did not check to see whether the door was locked, he believed he heard the detective lock the door. Further, he was frightened and could hear the detective talking to the other security guards right outside the door. Because he was in a closed room, with no

windows, and the store's agents stood directly outside the door, Pearson had no reasonable means of leaving the room. Thus, he was confined to a bounded area.

C. Actual Confinement

To imprison the plaintiff, "there must be an unlawful exercise or show of force by which a person is compelled to remain where he does not wish to remain or go where he does not wish to go." Rafton. However, actual force is unnecessary and the restraint my be by words alone. Rafton. Similarly, under the Restatement (Second) of Torts, a plaintiff can be confined by actual or apparent physical barriers, overpowering physical force, threats of physical force, other duress, or asserted legal authority. Rafton.

Here, Pearson was compelled to follow [the] detective into the room and to remain in the room against his will. Although the detective did not force him into the room, she picked up the grocery bags and herded him into the store. She was a large and strong woman, and Pearson has indicated that he felt he could not have left at that point because the detective likely would have tackled him if he tried. Further, the detective asserted that she had legal authority to detain Pearson as an associate of a known shoplifter. For example, she stated that Pearson was in "big trouble" and ordered him to come with her. Thus, Pearson was compelled against his will to follow the detective into the room.

Once in the room, Pearson was not able to leave. The room had no windows and only one door. The store might argue that there was no actual confinement because the door was not locked. Although, Pearson is not certain whether the door was locked, he believed that he heard them lock the door. Nonetheless, whether the door was locked is not controlling because imprisonment does not require actual force preventing release. Instead, words or threats of force can be enough to establish actual confinement.

Similarly, the store might argue that there was no confinement because Pearson did not believe that the store's agents were going to physically harm him. However, as noted in Rafton, words alone can be sufficient to effectuate an unlawful restraint. So long as the confinement was against the plaintiff's will and a result of threatening words or conduct, there is imprisonment.

Here, although Pearson did not believe the store's agents were going to rough him up, he believed they were going to try to intimidate him somehow and hold him for a long period of time. While in the room, either the detective or other agents accompanied Pearson or they stood directly outside of the door, physically preventing his exit. Further, the agents directly stated that they did not have to let Pearson go, implying that

they had legal authority to detain him.

It should be noted that where the plaintiff voluntarily consents to the confinement, there can be no confinement. Moral pressure, such as remaining to clear one's own name, is not sufficient to establish actual confinement. For example, in Rafton, the plaintiff voluntarily accompanied the defendants' agents into a room. She stayed in the room to protect her reputation, was never threatened, and never feared for her safety. Further, she was able to actually leave the room when she decided that she wanted to leave. Under those circumstances the court found that the plaintiff was not restrained against her will merely because she felt compelled to stay to protect her reputation.

On the other hand, here, Pearson did not consent to the confinement. Although the detective did not physically force Pearson into the room, she picked up the grocery bags and herded him into the store. The detective was a large strong woman, and Pearson has indicated that walking away did not seem like an option because the detective likely would have tackled him. He felt as if he had no other options and was compelled to follow Pearson into the store. Once he was in the store, the door remained closed and the store's agents continued to indicate that he was not free to leave by implying that he could only leave if he told them his roommate's name and address.

Thus, given that the store's agents confined Pearson by actual or apparent physical barriers (the closed door, lack of windows, and their physical presence) and asserted a claim of legal authority, Pearson will likely be able to establish that he was actually confined against his will.

D. Awareness of or Harm by Confinement

Finally, here Pearson was both aware of and harmed by the confinement. He was aware of the confinement because the detective closed the door, Pearson believed she locked the door, and the agents stood directly outside of the door, preventing his departure. Further, as noted below in the damages section, the confinement harmed Pearson because he suffered mental distress and financial harm as a result of the confinement.

E. Likelihood of Pearson's Success on a Claim of False Imprisonment

Because the store's agents intended to confine Pearson to a bounded area resulting in his actual confinement and his awareness of and harm by the confinement, Pearson will likely to be able to succeed on the merits of a false imprisonment claim.

II. **Compensable Injuries**

A claim of false imprisonment does not require proof of a physical injury. As the court noted in James v. Smitty's (James), while negligent infliction of emotional distress requires a physical manifestation of injuries, a claim for false imprisonment does not required such physical injury. It is sufficient for a plaintiff to suffer "transitory physical phenomena" such as nightmares and sleep disturbances. There, the court awarded claimant, a child incidentally confined because of his parent's confinement, compensation for loss of time, for physical discomfort or inconvenience, and for resulting physical illness or injury to health. The court noted that the injury resulting from false imprisonment is largely mental suffering, including humiliation.

Thus, here, if Pearson establishes his claim for false imprisonment, he will be able to recover damages for his mental suffering. Pearson's doctor, Dr. Romeo, has indicated that Pearson suffers from significantly lower than normal energy and motivation levels, a sleep disorder, loss of concentration, tearfulness, and loss of general interest in previously pleasurable activities. Dr. Romeo [is] reasonably confident the injuries are a manifestation of posttraumatic stress disorder caused by the incident at Savings Galore. He is willing to sign an affidavit stating such facts and conclusions and may be willing to testify.

Further, Pearson will be able to recover for any physical and economic suffering, including compensation for loss of time, physical discomfort or inconvenience, and for the groceries lost and retained by the store as a result of the improper detention.

<u>Punitive Damages</u>

Under Columbia law, a plaintiff may recover damages for false imprisonment if the plaintiff establishes, by clear and convincing evidence, that the defendant is guilty of oppression, fraud, or malice. Peterson v. Zelie ("Peterson"). Where the defendant uses reasonable and necessary force to detain the plaintiff, the fact of force is not sufficient to establish oppression, fraud or malice.

For example, in Peterson the court found that the defendant was not liable for punitive damages because they did not act with fraud, malice, or oppression. There, the defendant detained the plaintiff for only a brief period of time sufficient to show that the plaintiff had not paid for the item in question. There was not evidence that the confinement was intended to cause injury to the plaintiff or was undertaken with a willful and conscious disregard of the rights and safety of the plaintiff. Further, there was not evidence of cruel and unusual hardship in conscious disregard of the plaintiff's rights.

Malice

Malice is conduct intended to cause injury to the plaintiff or despicable conduct carried on by the defendant with a willful and conscious disregard for the right or safety of others. Peterson. Here, there does not appear to be conduct rising to the level of willful or conscious disregard for Pearson's rights. The store's agents may have reasonably believed that they had a right to detain Pearson and there is no evidence of an improper motive. The detention was for only one hour and therefore not for an unreasonable period of time. There is no indication that the agents were aware of Pearson's nervousness or tendency to suffer anxiety, and there is no indication that they attempted to exploit this tendency in holding Pearson. As a result, there was no malice subjecting the store to punitive damages.

Oppression

Oppression is despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. In this case, there is no indication that Pearson suffered cruel and unjust hardship. The detention was only for one hour and, as noted above, the agents did not exploit a known weakness in Pearson or subject him to physical or severe mental abuse.

Fraud

Fraud is an intentional misrepresentation of concealment of a material fact known to the defendant with the intention of the party of the defendant to deprive a person of property or legal rights or otherwise causing injury. There is no indication that the store's agents misrepresented or withheld a material fact in detaining Pearson. They may have believed they had a lawful right to detain Pearson. They may have believed they had a lawful right to detain Pearson. If they knew they did not have a lawful right to detain Pearson, then their misrepresenting this fact or their failure to disclose this fact might rise to the level of fraud. However, further evidence is needed.

Thus, because the store's agents did not act with fraud, malice or oppression, Pearson is unlikely to succeed if he claims punitive damages.

III. **The Store's Defenses**

The Store will likely argue that they are entitled to the Shopkeeper's privilege in detaining Pearson and that Pearson waived his right to bring a false imprisonment claim against the store by signing the release form.

A. Shopkeeper's Privilege

Columbia Penal Code Section 13-1 provides a defense to a claim of false imprisonment. Subsection C provides that a merchant or a merchant's agent or employee may detain an individual reasonably suspected of shoplifting on the store's premises in a reasonable manner for a reasonable time for questioning. Further, under Subsection D, where the merchant or merchant's agent has reasonable cause to suspect an individual of shoplifting, they have a valid defense to a claim of false arrest, false or unlawful imprisonment, or wrongful detention.

Reasonable Suspicion: The Companion of a Shoplifter

In James, the court discussed the reasonableness of detaining an individual not suspected of shoplifting. There, the defendant detained the person suspected of shoplifting's four year old son. The court held that it was not reasonable for the defendant to detain the son for more than the time necessary to make sure the son would be under proper supervision. Further, in dicta, the court noted that the defendant lacked reasonable cause to detain the individual accompanying the suspected shoplifter because the defendant's agents testified that they did not consider the companion to have been involved in any illegal activity. Thus, it would not have been reasonable for the defendant to detain the companion.

Here, the detective did not suspect that Pearson shoplifted. When she originally stopped Pearson and his roommate, she acknowledged that she did not suspect Pearson of shoplifting. Pearson stated that he did not take the cashews, and the detective stated, "That's right, you didn't." As in James, where the defendant lacked reasonable suspicion to believe the shoplifter's companion was involved in the shoplifting, here, the detective lacked reasonable suspicion to believe that Pearson had shoplifted, and, in fact, admitted that she did not believe that Pearson had shoplifted. Because the store lacked a reasonable suspicion, under the dicta in James, the store cannot invoke the shopkeeper's privilege to justify Pearson's detention.

Reasonable Manner

The store's detective "herded" Pearson into the back office. While the agents did not threaten Pearson with physical force, they did impliedly threaten him with the threat of criminal or civil liability by asserting that they did not have to let him go and that he was not free to leave. However, as noted above, they may have reasonably believed that they were entitled to detain Pearson. Thus, because there was no overt physical force or threats of physical force, a court is likely to find that the manner of detention was reasonable.

Reasonable Time

The store's agents detained Pearson for approximately one hour. This does not appear to be an unreasonable time. However, Pearson can argue that it was an unreasonable time because the detective knew that he did not commit the crime. Nonetheless, as noted above, even if the detective knew he did not commit the crime, the agents may have had a reasonable basis for believing they were entitled to detain Pearson. If the agents had such a reasonable basis, then detaining him for one hour does not appear unreasonable.

Likelihood of Success

Although a court will likely find that the manner and time of detention were reasonable, as noted above, the store cannot invoke the shopkeeper's privilege as a defense to their detention of James because the agents lacked a reasonable suspicion to believe that Pearson shoplifted.

B. Waiver by Release of Liability

"In general, a release surrenders the legal rights or obligations between the parties to an agreement." Gaspard v. American Telco ("Gaspard"). If valid, a release completely bars a later action based on matters covered in the release. A signed release creates a strong presumption of enforceability. Gaspard. Nonetheless, a victim can void a signed release if they establish that the terms of the release are ambiguous or the signing of the release was a result of duress.

Here, Pearson clearly signed the release. Thus, the release is entitled to the presumption of enforceability. However, Pearson may be able to void the release if he establishes that the release was ambiguous or a result of duress.

Ambiguity

In Gaspard, the court held that because the release expressly mentioned the claim that the plaintiff asserted (claims arising from termination of employment), the release was not ambiguous. Similarly, here the release expressly mentioned claims arising from false imprisonment. Thus, under the reasoning of Gaspard, Pearson cannot argue that the release is ambiguous because the release expressly covers his potential claim.

Duress

To establish a claim of duress, Pearson must show that (1) the promise was made in response to a threat; (2) the threat was severe enough to reasonably convince the will of the promisor to make the promise; and (3) the threat was improper rather than just hard bargaining. Gaspard.

The Sufficiency of the Threat

First, Pearson must show that he signed the agreement because of a threat. While there is no clear test for determining what is a sufficient threat to invoke the rule, section 176 of the Restatement (Second) of Contracts indicates that a threat is improper if the threat itself constitutes a crime or a tort, the threat is of criminal prosecution, or the threat is of civil process and is made in bad faith.

Here, it is not entirely clear what the store threatened. The detective told Pearson that if he gave the store his roommate's name and address, the store would let him go. Further, the store directly indicated that they did not have to let Pearson go and told Pearson that if he signed a release, they would let him go.

While the store did not directly threaten criminal prosecution or a civil suit, Pearson could have reasonably believed that, in stating that they had a right to detain him, the store was indicating that they could file criminal charges or bring a civil claim against Pearson. In addition, the continued detention of Pearson might qualify as a tort or a crime in and of itself. As noted above, the store's threats and intimidation led Pearson to reasonably believe that he was not free to leave. This is an element of the false imprisonment claim.

In Gaspard, the plaintiff claimed only economic duress and not a physical threat inducing her to sign the release. Here, on the other hand, Pearson was told that he would not be able to leave if he did not sign the release. This, coupled with the intimidation and Pearson's belief that the door was locked, is a physical threat because it restricted Pearson's movement, making him believe that he had to stay where he was.

Reasonable Inducement to Act

Here, the threat reasonably induced Pearson to sign the waiver because he believed he was not free to leave. Further, Pearson did not believe anyone would come to his assistance. Under the circumstances, a reasonable person would believe they did not have a right to leave and might be held indefinitely. Thus, the threat reasonably induced Pearson to sign the release.

An Improper Threat

Finally, the threat rose above hard bargaining to impropriety. The agents indicated that they had a lawful right to detain Pearson and gave no indication that they would release him. Pearson could have been detained indefinitely, which is a significant violation of his freedom. Thus, the threat rose above hard bargaining.

Conclusion:
Pearson will not be able to rebut the defense of a liability waiver by establishing that the waiver was ambiguous. He may be able to establish that the signing of the release was a result of duress. If he establishes this, then he can void the release and sue under a claim of false imprisonment.

Answer 2 to Performance Test A

Memorandum

To: Mary Hamline
Re: Chris Pearson v. Savings Galore

As requested, here is an evaluation of Mr. Pearson's civil claim for false imprisonment against Savings Galore. The memorandum includes: (I) the elements necessary to succeed on a false imprisonment claim, (2) a factual analysis of the likelihood of Mr. Pearson prevailing on a false imprisonment claim, (3) an analysis of the injuries incurred by Mr. Pearson that may be compensable, (4) the likelihood of punitive damage awards given Mr. Pearson's injuries, and (5) the defenses that Savings Galore may raise and the likelihood o their success.

I. Elements that must be proven for Pearson to succeed on a false imprisonment claim

False imprisonment is defined as the unlawful restraint of an individual's personal liberty or freedom of locomotion (Rafton v. Dorman's Donut House). Under the Restatement (Second) of Torts, an actor is subject to liability for false imprisonment if the actor: (1) acts intending to confine another person within boundaries fixed by actor, (2) the act directly or indirectly results in such a confinement of the other person, and (3) the other person is conscious of confinement or harmed by it.

A. The actor acts intending to confine another person within boundaries fixed by actor.
The actor must actually intend to restrain the victim/plaintiff. The intent may be actual or legal intent. The actual unlawful restraint may be effected via words, acts, or both. Actual force is not necessary for liability in a false imprisonment claim (Rafton).

B. The act directly or indirectly results in such a confinement of the other person.
The act must result in confinement of the victim. Confinement can be brought about in many ways, including (1) actual/apparent physical barriers, (2) overpowering physical force or submission to physical force, (3) threats of physical force, (4) other duress, or (5) asserted legal authority (Restatement Second of Torts). The confinement must actually be, against the plaintiffs will--voluntary consent to a confinement is not against the plaintiff’s will. Furthermore, moral pressure to accede to a confinement is not enough (Rafton).

C. The other person is conscious of confinement or harmed by it.
The victim/plaintiff must know of the confinement or be harmed by it.

II. **Application of the facts of Pearson's situation to the elements and assessment of the likelihood that Pearson would prevail on a claim.**

Mr. Pearson's situation would have to meet all three elements of the false imprisonment tort in order to succeed.

A. Did Savings Galore act intending to confine Mr. Pearson within boundaries fixed by Savings Galore?

Savings Galore (SG) would have to act intending to confine Pearson within fixed boundaries. There are several instances where SG's house detective and security officer's actions could rise to the level of intending to confine Pearson within fixed boundaries.

I. Grabbing Pearson's arm.

The SG detective yelled "Hold it right there!" and grabbed Pearson's arm. Grabbing a person's arm is likely an attempt to prevent them from leaving. Accompanied with her words, it is clear that the detective's actions were meant to prevent Pearson from leaving the area. SG is unlikely to be able to argue against this. However, this confinement only resulted in Pearson's confinement in that spot in the parking lot, and was over once she removed her hold on his arm.

II. Threats to Pearson

Restraint may be affected via words or threats; actual force is unnecessary. Here, the house detective of Savings Galore told Pearson, among other things, "I'm going to have to take you in" and "You come with me right now. You ...are in big trouble." Here, the implied threat that Pearson would be in legal trouble should be enough to constitute action intending to confine. Even though Pearson protested that he had done nothing wrong, the detective replied that she "didn't care," and repeated that he was to go with her. This threat of legal action is likely enough action to lead a reasonable person to believe he had no other choice.

Pearson may also argue the threat of force, since he said that "she would probably have tackled me," if he tried to run. Though this argument is less plausible considering that the detective made no such move, he may argue that her appearance and large[ness], combined with her earlier hold on his arm and the threats that he was in trouble and should come with her, would constitute a threat of force.

The detective also took hold of his groceries that Pearson's roommate had dropped and "herded" Pearson into the room. Although courts have not addressed the issue of whether taking a person's rightful belongings consists of the necessary action for false imprisonment, it is likely that taking the groceries would suffice. The groceries belonged to Pearson and had been paid for; they were his rightful possessions. The detective deprived Pearson of the groceries and implied that she was taking them with her. Pearson could argue that he should not be forced to give up his rightful possessions and was forced to follow her in order to recover them; this could constitute a wrongful threat sufficient for an action to confine.

III. Placing Mr. Pearson into a windowless room

The detective took Pearson to a windowless office in the back of the store, summoned two large security officers, and closed the door, leaving Pearson inside. Pearson also states that he believed they locked the door, although he is unsure. Courts have not addressed issues of belief of confinement via locks, but looking at the totality of the circumstances - the three people standing outside, the windowless room, and the admonition to Pearson that he was in trouble, confinement in the room should be sufficient to constitute an action intending to confine.

B. Did Savings Galore's actions directly or indirectly result in the confinement of Mr. Pearson?

SG would argue that Pearson's confinement was not the direct result of its employees' actions. They would argue that Pearson came voluntarily, of his own free [will], and that he was free to leave at any time. They would also argue that he came with them due to moral pressure, or an attempt to protect his reputation.

However, Pearson would argue that the confinement was due to either threat of physical force or asserted legal authority. The threat of force argument would be that there were three people, all significantly larger than him, standing outside the door or with him in the room at all times. This would be enough to prevent a reasonable person from leaving, due to the threat of being tackled or overpowered. The threat of asserted legal authority was via the detective's statement that P had to come with her, and that he was in "big trouble," which implied trouble with the law. This threat of legal authority should be considered enough to result in P's confinement.

SG may also argue that Pearson was free to leave at any time. If they did not in fact lock the door or intend to hold him, then P's waiting would simply be of his own volition. They would argue that P did not simply try to walk out of there. This argument is unlikely to succeed, again given the circumstances – there were security guards standing

around, and they repeatedly told him that he could leave only after giving up the name and address of his roommate, or additionally after signing the release form. They were aware that P considered himself confined, as he repeatedly requested to be allowed to leave, and did not disabuse him of that notion. Additionally, P feared that if he did try to leave, he would be assaulted by the guards. This is probably a reasonable fear considering the disparities in their sizes and their hostile attitudes towards P. Thus, this argument is unlikely to succeed.

SG may also argue that P stayed due to moral pressure and to clear his reputation. According to Rafton, moral pressure is not enough to constitute confinement. In Rafton, the plaintiff testified that she voluntarily accompanied the defendants into a room and stayed there in order to protect her reputation. Additionally, the plaintiff eventually left the room on her own. Rafton can be distinguished here, as Pearson's interview reveals that his accompaniment was not voluntary - he felt like he had no other choice, as leaving "didn't seem like an option." He makes no mention of staying behind to protect his reputation - he thought he had no other choice, and wished to leave during the confinement. He believed that he was not allowed to leave until they had given him the release to sign. His belief is likely reasonable given the circumstances - 3 people in the room with him, constantly telling him that they would only let him go after he gave them his friend's name and address, and stating that "if you sign [the release], we'll let you go."

Therefore, it is likely that SG's actions will be found to have directly resulted in P's confinement.

C. Was Mr. Pearson conscious of his confinement or harmed by his confinement?
Pearson's testimony is clear that he was conscious of his confinement and also harmed by it. Pearson stated that he "was pretty scared," was having trouble breathing, and his heart was pounding. He repeatedly told SG employees that "You have no right to do this to me," and that he wished to be let go immediately, showing that he understood he was being confined and wished to be let go. (The harm resulting from his confinement is addressed below.) He, at the very least, clearly understood that he was confined. This factor is likely met.

For these reasons, Pearson should be able to make out a prima facie case of false imprisonment.

III. **Identify the injuries incurred by Pearson that would be compensable given these facts**

A claim of false imprisonment does not require proof of physical damages - a plaintiff will be entitled to compensation for loss of time, physical discomfort, inconvenience, resulting physical illness or injury (James v. Smitty's). In Smitty's, a child defendant's injuries consisting of nightmares and sleep disturbances for two months were considered sufficient damages to justify compensation under a FI claim.

A. Sleeplessness and nightmares

Here, P's injuries were very similar to the child in Smitty's. P stated that he cannot sleep, that he has nightmares, and that he has consulted a psychiatrist several times despite not having any health insurance. These damages would probably be recoverable.

B. Posttraumatic stress disorder

Additionally, Dr. Romeo stated that the symptoms P suffers from, including low energy/motivation, sleep disorder, loss of concentration, tearfulness, and loss of general interest in previously pleasurable activities, are consistent with posttraumatic stress disorder. Dr. Romeo stated that such symptoms may persist for as long as a year and P does seem to be suffering, and that posttraumatic stress is often created by a stressful or traumatic event. It is likely that the event in question was P's confinement in the store. Dr. Romeo would be willing to sign an affidavit and testify if necessary. Therefore, it is likely that P will be able to recover for his posttraumatic stress.

P also stated that he "could have" had a panic attack or heart failure, and that he was "really scared." These injuries are sufficiently uncertain that he would probably not be able to recover for them.

C. Monetary damages

As stated above, P consulted a psychiatrist for his problems despite not having health insurance. His consultation with the psychiatrist arose directly due to his imprisonment and thus, he would probably be able to recover for the cost of seeing the psychiatrist.

Additionally, P was not allowed to take his food or groceries that had already been purchased for a couple of hundred dollars. The guards kept the food (and P stated that he "lost the money from all the food. Who knows what they did with it"?) P would probably be able to recover the cost of those groceries.

IV. The likelihood of punitive damages given Pearson's situation

Under Peterson v. Zelie, punitive damages are recoverable for false imprisonment when the plaintiff proves by clear and convincing evidence that D is guilty of oppression, fraud, or malice. Under Beau v. Ketchum, the mere use of force is not evidence of oppression, fraud, malice, if the force is only reasonable and necessary for detention.

Here, in order to recover punitive damages, P will have to show that SG acted with fraud, oppression, or malice.

A. Fraud

Fraud is defined as intentional misrepresentation, deceit, or concealment of material facts known to D with the intention of depriving person of legal rights or otherwise causing injury.

Here, there is unlikely to be a showing of fraud. SG's employees did not act to deceive P or misrepresent/conceal a material fact. Though P may have an argument that they knew he was free to leave and did not have any right to keep him there, the fact that they repeatedly told him that he would be free to leave after he did give up his roommate or signed the release could constitute fraud. This is a rather attenuated argument as they never explicitly said that they had the right to hold him, nor did they lie in refusing to let him go after he had signed the release. It is unlikely that P would be able to show fraud.

B. Oppression

Oppression is defined as despicable conduct that subjects P to cruel and unjust hardship in disregard of that person's rights.

Here, P would argue that holding him while knowing he had done nothing wrong is despicable conduct. Although Zelie stated that exercise of a shopkeeper's privilege in detaining a suspect with reasonable cause was not despicable, here it was clear that the SG employees knew P had done nothing wrong. The detective stated that she "didn't care" that P hadn't done anything. The guards repeatedly stated that he would be let go if he gave up his friend show[ing] that they knew P was not at fault and they thus did not have the right to hold him.

P would argue that his confinement for over an hour in a windowless back office, with several security officers surrounding him, was a cruel and unjust hardship. However, although false imprisonment does disregard a person's rights, it may be difficult to argue that confinement of only an hour consists in "cruel and unjust" hardship. P may also

argue that the harassment and coercion he faced during that hour, combined with the confinement, should be enough to constitute oppression. However, this would be a difficult argument. A court is unlikely to find any oppression was present.

C. Malice

Malice is defined as conduct intended by D to cause injury to P, or despicable conduct carried on by D with willful/conscious disregard of rights/safety of others.

P may have the most luck with this prong of the argument. The conduct of the security cops showed that they intended to falsely imprison him (which would qualify as an injury). The despicable conduct analysis would be similar to above, but here the despicable conduct must be accompanied by willful and conscious disregard of P's rights. As analyzed above, the guards clearly knew they did not have the right to hold P and were simply threatening him in order to get information about his roommate - they consciously ignored his right to leave (despite his constant pleading) and continued questioning him. This unfair pressure/coercion may rise to the level of despicable conduct with conscious disregard of P's rights.

In the end, P may be able to obtain punitive damages by showing that SG acted with malice via despicable conduct carried on with willful and conscious disregard of his rights, although this would be a difficult argument.

V. **Possible defenses that Savings Galore may raise, and an assessment of the likelihood that store would prevail on each defense**.

Savings Galore may raise three possible defenses against a claim of false imprisonment. The defenses are the release he signed, voluntariness, and shopkeeper's privilege.

A. Release

Under Gaspard v. American Telco, a release is a complete bar to recovery and comes with a strong presumption of enforceability. If P signed a release, the burden would be shifted to P to attack the release or establish a fact issue in avoidance of it. Releases can be attacked via ambiguity and duress.

Since P did sign the release, he would have to attack it via one of these methods.

1. Ambiguity

A release may be attacked for being ambiguous. In Gaspard, the court held that a release that stated the signor was releasing D from all claims arising from employment

with D was an unambiguous release.

Here, P is unlikely to succeed with this argument. The release clearly and ambiguously states that P released SG from all causes of action, including claims of false imprisonment, on account of his detainment. Although P could argue that he did not read the release, he did sign it and therefore has no defense of ambiguity.

2. Duress

Alternatively, P could attack the validity of the release via duress. Duress traditionally required some sort of harm; modern courts have interpreted it to require an overbearing threat that leaves the victim with no reasonable alternative. (Gaspard). This can be shown by demonstrating three elements: 1. a promise made in response to threat (where the promisee created or issued the threat), 2. that the threat was severe enough to reasonably convince the will of the promisor to make promise, and that there were no sufficient alternatives to making the promise, and 3. the threat was improper, not just hard bargaining.

i. Was the promise made in response to a threat where the promisee created the threat

Here, P would argue that the "threat" was continued imprisonment. SG clearly told him that they would let him go if he signed the release, which he did, so the element of the promise made in response to a threat is met. The threat of imprisonment was also created by SG, since they were the ones who held him in the first place.

ii. Was the threat severe enough to reasonably convince the will of the promisor to make promise to make promise, and were there any sufficient alternatives?

P would argue that the threat was severe enough to make him sign the release. He would argue that he had been there over an hour, had been constantly questioned and harassed, and did not know when he would be let go. P was also extremely anxious and earlier had had trouble breathing. P could argue that the prospect of continued imprisonment was severe enough to convince him to sign the release, and, as he stated, he "would have signed it no matter what it said."

Additionally, no one besides his roommate (who was not going to come to his aid) knew he was there, so he had no alternative since no one else would come looking for him. His only options were to sign the release or wait for SG to release him. It should not be

considered an "alternative" to have to rely on the person creating or making the threat and demanding the promise to provide a better option. Therefore, this prong was likely met.

iii Was the threat improper and not just hard bargaining?

Here, the question is whether the threat (of continued imprisonment) was improper or just "hard bargaining." According to the Restatement (2d) of Contracts, a threat is improper if it threatens a crime or tort. Additionally, a threat is improper if the resulting exchange is not on fair terms, and either the threatened act would harm the recipient and would not significantly benefit the threatening party, or what is threatened is a use of power for illegitimate ends.

Here, the threat was the threat of continued false imprisonment, which is an improper tort. While SG might argue that they never actually threatened to hold him further if he did not sign, they did state that they would let P go if he did sign the release. P's options were therefore to continue his imprisonment and hope that they would release him later, or just sign the release. This is not truly a "choice" made by anyone with free will. Given the totality of the circumstances, including his previous confinement for over an hour, P would likely be able to show that this threat was improper.

Additionally, P could argue that the exchange was not on fair terms. Here, his part of the bargain was to sign a release that gave up his legal right to sue for a wrongful tort. SG's side of the bargain was simply to give up someone who had done nothing wrong and they clearly could not gain any information from. SG had no benefit (or right) to continue keeping P confined, since he was refusing to give any information about his roommate. Therefore, giving up this nonexistent right/benefit in exchange for a waiver of a legal right is an unbalanced bargain. Furthermore, this is a use of SG’s power for illegitimate ends, as they held him in their custody and threatened to continue the false imprisonment if he did not sign.

In the end, P will probably be able to show that the release is invalid because it was a result of duress (a threat by D that left P with no reasonable alternatives).

B. Voluntariness

SG may also raise a defense of P's voluntary acquiescence to the confinement. Although this is not a defense per se and rather goes to one of the elements of the claim, it may still be a valid argument. SG would argue that P accompanied the guard of his own free will, remained in the room despite it not being locked and being free to leave, or stayed there out of a sense of moral pressure (Rafton).

As addressed above, these arguments are unlikely to succeed given the circumstances

of the confinement (threats of legal action, confinement in a small room, 3 guards standing around, harassment, etc.) Please see the above analysis distinguishing Rafton from the instant case.

C. Shopkeeper's Privilege

Lastly, SG may assert the "shopkeeper's privilege" in S.13-1 of the Columbia Penal Code. 13-1 provides that merchant (and its agents/employees) may, with reasonable cause, detain persons suspected of shoplifting in a reasonable manner and for a reasonable time, for questioning or summoning a law enforcement officer. A shoplifter is defined as someone who knowingly obtains the goods of another with the intent to deprive the other of the goods, by removing goods from the establishment without paying, or by concealment. The Code further provides that reasonable cause is a defense to civil action against a merchant (agent/employee) for false imprisonment.

It is difficult for SG to argue that it had reasonable cause to detain P. The detective's statement, upon being told that P had not done anything, was that she "didn't care." The actions of the guards in pressuring P to give up his friend, and their repeated claims that P would be free to go as long as he gave up his friend (who they said was "not much of a friend" since he had abandoned P), all go to show that the guards did not reasonably believe that P was the one who had shoplifted. Rather, they were detaining him because his friend was unavailable.

SG may argue that P knew that his friend had shoplifted, and thus P assisted in the shoplifting. However, James v. Smitty's is directly on point here. In Smitty's, a friend of the Defendant, who was vaguely aware that an item had been placed in the shopping cart and was not paid for, but had not seen the item being hidden, was detained. The court found that the friend was wrongfully detained, since the defendant "had no basis to believe [friend] had shoplifted or assisted…in any way." Furthermore, the court held that "A merchant does not have immunity to detain a companion of a suspected shoplifter unless the store has reasonable cause to believe that the companion was involved in the illegal activity."

Here, P was not involved in taking the cashews or consuming them, nor in leaving without paying. He was also not involved in taking or concealing the garden gloves. Although SG may argue that P did believe that his roommate stole things from time to time, in this case the detective clearly did not have reasonable cause to believe that P was involved in the shoplifting, as she stated that she "didn't care" that he had done nothing wrong and continuously pressured him to give up his roommate [or] rather pressure him to admit to being involved in the shoplifting. Therefore, this defense is unlikely to succeed.

THURSDAY AFTERNOON
JULY 31, 2008

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

PEOPLE v. DUNCAN

FILE

PEOPLE v. DUNCAN

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Warren County Prosecutor
Alicia Ouelette, District Attorney
Averil Park, Columbia

MEMORANDUM

To: Applicant

From: Laurie Shanks, Deputy District Attorney

Date: July 31, 2008

Re: **People v. Duncan**

We have indicted Raymond Duncan for the murder of Jennifer Clark. Mr. Duncan confessed to police detectives during an interview at the Averil Park police station. The interview was tape-recorded. We have, of course, turned the recording and transcript of the interview over to defense counsel. Defense counsel has filed a Notice of Motion to Suppress Evidence, seeking to suppress evidence of all statements made during the interview. We will oppose that motion. The defendant has ten days after filing his notice of motion to suppress to file the actual motion and accompanying Memorandum of Points and Authorities. I, however, want you to start work on our reply immediately. Please prepare a draft of a persuasive Memorandum of Points and Authorities that argues the motion should be denied.

Arguments on motions to suppress require a detailed showing of how the facts in the case relate to specific factors identified by the courts in suppression cases. Therefore, your memorandum should relate specific facts to those specific factors and conclude how your analysis would establish that the evidence should not be suppressed. Where appropriate, explain how the defendant's version of the facts is not credible. Finally, take care to anticipate arguments defense counsel is likely to make and explain why they are not persuasive. Your memorandum should dispense with a statement of facts. I will draft the statement of facts later.

EXCERPTS OF INTERVIEW OF RAYMOND DUNCAN
BY DETECTIVES TIMOTHY JAMES AND GREGORY MANDEL

Detective Timothy James ("James"): Mr. Duncan, it is now 12:25 p.m. on January 2, 2008, and you are here in the Averil Park police station with me, Detective Timothy James, and Detective Gregory Mandel. Is that correct?

Raymond Duncan ("Duncan"): Yes.

James: This interview is being tape-recorded. Is that okay with you?

Duncan: Sure.

James: How old are you, Mr. Duncan?

Duncan: 24.

James: Did you know Jennifer Clark?

Duncan: Yes. I met Jennifer in high school, but I didn't see her after she graduated. Last year, Jennifer and I reconnected through mutual friends.

James: Were you good friends?

Duncan: Sure.

James: How good a friend were you? I mean, did you have a key to her apartment?

Duncan: No. I mean we saw each other occasionally. She allowed me to borrow her car three or four times. I don't have a key to either her apartment or her car.

James: When did you last have contact with Jennifer?

Duncan: It was probably between 10:00 p.m. and 11:00 p.m. on Wednesday, December 20. Jennifer picked me up and left me at her apartment. Jennifer said her rent was due and she had to go somewhere and do something.

James: Were you still at her apartment when she returned?

Duncan: She returned about six hours later, around 4:00 a.m. on December 21.

James: What did the two of you do then?

Duncan: We watched television in the living room. I stayed until maybe 9:00 a.m., when she asked if I wanted to go home because someone was coming over.

James: Who was coming over?

Duncan: She didn't say who it was.

James: Did she drive you home?

Duncan: No. I borrowed her car and left. Jennifer told me to call her in a couple of hours.

James: Did she walk you to the door?

Duncan: Yes.

James: Did she lock the door behind you?

Duncan: She always locked the door. It's not the best neighborhood.

James: Did you see her after that?

Duncan: No.

James: What was Jennifer wearing when you left?

Duncan: She was wearing a short-sleeve, white T-shirt, and light-colored shorts.

James: Did you try calling her like she asked you to?

Duncan: Sure. I drove home in Jennifer's car and took a shower. I called Jennifer's cell and home telephones at least twice between 10:30 a.m. and 12:15 p.m., but there was no answer. Around 1:00 p.m. or 2:00 p.m., I drove to a friend's house and tried to reach Jennifer. Later I went to Pat Kinnikin's house and again tried to reach Jennifer but was unsuccessful. So, Pat and I went to a restaurant later that evening.

James: Did you try to contact her again?

Duncan: Between 6:00 p.m. and 7:00 p.m. we left the restaurant to return Jennifer's car, and Pat followed in his car. We drove to Jennifer's apartment and I parked her car. I hid the key inside the car like the other times I borrowed it.

James: You didn't knock on her door?

Duncan: No. She hadn't been answering the telephone. She did that sometimes. I assumed she wanted to be left alone.

James: When did you find out Jennifer was dead?

Duncan: The next day. I saw it on the news.

James: Mr. Duncan, I'm going to ask you some direct questions and I want you to give me direct answers. And, you need to realize what I'm looking for. I need to establish that what other people told me is credible and I'm also looking to see how truthful you are with me in our conversations here, okay?

Duncan: Sure.

James: Why didn't you contact the police after you learned she was dead?

Duncan: Look, I don't have a clean record. Besides, my fingerprints were probably everywhere around her apartment and car and I figured the police would contact me. And see, that's what happened. You came to my apartment, left a message. I called you back and agreed to come down to this interview. I don't have anything to hide, but let's be real, I have a record.

James: Did you stab Jennifer?

Duncan: No.

James: Did you mess with any windows in her apartment?

Duncan: No.

James: Were you on the patio or did you use the sliding glass door during your last visit? Would your fingerprints be out on the patio?

Duncan: I didn't use the patio the last time I was there.

James: Are you sure?

Duncan: Uh, I think I'd know, unless I--unless-- unless I just peeked out there. But I wasn't out there for a second or two if I was.

James: That's interesting. I talked to the people who live in the apartment complex, and so you're sure?

Duncan: Well, I could have stepped out on the patio. I may have even stuck my head out and looked. I might have, you know. But, I left out of the front door, and she locked the door behind me, and I went to the car.

James: That's a little more in line with what we're hearing, that you were on that patio. Two people were pretty darn sure you left from the patio.

Duncan: Not true. I left through the front door.

James: Who killed Jennifer?

Duncan: I don't know. I don't have a clue.

Detective Gregory Mandel ("Mandel"): I have to tell you, Mr. Duncan, I still am stuck on why you didn't call the police when you found out what happened.

James: Let's cut to the chase. We've talked to a lot of people and you need to be honest because we need to put this thing to an end. If you'd like to tell us that?

Duncan: What do you want to know?

James: I want to know what happened with Jennifer.

Duncan: I swear I don't know what happened with Jennifer.

James: Raymond, Raymond. We're past that, dude. We're way past that. You know what I mean? Would you like to tell me what happened? I know this is bugging you, man.

Duncan: I don't know what happened.

James: You know what happened to her. We already know what happened.

Duncan: Okay, what happened then?

James: Ray. There's no doubt in my mind that you did this to her. You know what I'm talking about. Don't put yourself in a position anymore where you have to lie. Okay? We just need to put a closure to this thing. You know what I mean. If there's a reason, there's a reason. But you need to let us know what that reason was.

Duncan: I have no reason for it, because I didn't do it.

James: Ray, Ray.

Duncan: Yes.

James: Take a deep breath. Okay. Tell me what happened.

Mandel: You made mention of the....

James: Hold on a second....

Duncan: Do you mind if I have a glass of water?

James: Sure.

Duncan: Thanks.

James: Ray, you've got to help us here. Tell us what happened. I have to say, what you've told us so far just doesn't fit with the evidence. Not just the witnesses, either.

Mandel: Come on, Ray. Jennifer's family needs to know. You've got to realize this is tearing them apart.

James: We've got physical evidence and witness statements. Now's the time to tell your side of the story.

Duncan: I've told you my side of the story. I wasn't there. Jennifer was my friend. I had no reason to kill her, and I didn't kill her.

Mandel: I have to say, Ray, all our information points to you. Your story doesn't quite add up and you need to clear the air because I understand it was probably not planned.

Duncan: I can't explain what happened because I don't know.

James: Well, I'll tell you how you can explain it, Ray, because when she died you were there. And I can establish that based on your own statements about the times you were there, coupled with scientific facts establishing the time and cause of death.

Duncan: I'm telling the truth. I wasn't there. I didn't do it.

James: There's no doubt in my mind, Ray, you did it, and I can prove it. The problem here is that you, for no reason, other than maybe fear, are painting yourself into a corner. You're putting yourself in a position where you're having to justify the time of death.

Duncan: Not true.

James: Here's what I think, Ray. You were angry with Jennifer because she slept with another guy that night.

Duncan: I don't know about what she did with other guys.

James: We have no doubt what happened. Ray, she was killed by somebody in that apartment that knew her. That apartment told us a lot of stuff, Ray. You go to church, Ray?

Duncan: Yes. Sometimes.

James: You know then, you've got to be forthright with this thing.

Duncan: I have been.

James: You didn't approve of Jennifer's lifestyle, did you?

Duncan: I don't judge people.

James: Let's go back to the time line.

* * * * *

James: But you did go out on the patio, didn't you?

Duncan: Okay. I unlocked the living room's sliding glass door and went to the patio. But I went back inside and locked the door.

James: See, Ray, this is what I figure. The killer must have been inside the apartment for a while because you had been there, alone, for nine hours on Wednesday evening until Jennifer returned at 4:00 a.m. on Thursday. Jennifer slept on the couch while you watched television until 9:00 a.m. You went out to the patio to look for her car, returned inside and locked the patio door. You said Jennifer locked the front door when you left. Jennifer was killed when she was asleep on the sofa, so how did the killer get inside the

apartment with all the doors locked?

Duncan: That's your problem. Maybe someone could have come over after I left with her car.

James: There's no way anyone came over. Look, Ray, this doesn't appear to be a first-degree murder, but it wasn't a random crime. Looks more like a heat of passion kind of thing. And, I have to tell you, everything points to you, Ray, and you know, again, I'm still sitting right here, trying to appeal to you and your sense of fairness.

Duncan: I didn't do it.

James: I'm going to tip my hand on one thing. Okay? I can put you on that patio. I can put you exiting that way. All right? I need you to give me a justification for going out that way instead of going out the front door. Otherwise, your story doesn't hold water.

Mandel: You need to know, Ray, Jennifer's neighbor was always sitting there watching people come and go. Why did you go out the patio and over that fence on the back porch? Why did you leave that way?

Duncan: Didn't I explain to you that I had entered that way, too?

James: Well, Ray, no you didn't. Explain it to us; put the cards on the table for us, man.

Duncan: I jumped over the balcony and I tapped on the window, and I jumped back over because nobody answered. And that was that morning after I had gone to the car. I went back for something. She didn't answer the door. I didn't have the house key. All I had was the car key. And, I knocked and she didn't answer, and I jumped over the balcony, and then knocked on the glass door, and nobody answered so I jumped back over and I left. I didn't go back into the apartment.

Mandel: Well, the neighbors said something else, so I guess we're still not on the same page. You need some more water?

Duncan: Please.

Mandel: Okay, let me get it for you.... Here, now, let's just sit back and relax for a minute and give this some thought.

Duncan: Can I get a cigarette?

Mandel: We can't smoke in the building, but, hey, let's get some coffee and go sit on the rooftop courtyard for that cigarette. Let me go and check it out.

James: Mandel is a good guy, but more direct than I am. We need to solve this thing.

Duncan: I'll tell you, when I offered to come in for questioning, I felt it wouldn't be too bad, but oh boy!

James: Well, it's a far cry from how it was in the 60's and 70's, where they used to have a bunch of guys yelling at you, threatening and deprivation. Things have changed over the years. You know, we're just doing our job and we won't start yelling at you.

Mandel: I'm back; here's the coffee. You know, I've been thinking about your story about jumping over the balcony and tapping on the window. It doesn't make sense, because Jennifer would have been dead already, and the sliding glass door would have been unlocked. A reasonable person would have tried the door when there was no answer. Did you walk into the apartment when Jennifer was already dead?

Duncan: No. You know what's so bad about this? It's that you guys are saying I did it, and it doesn't matter what I say. Did the neighbors see anyone else at the apartment?

Mandel: We showed your picture at the apartment complex and people have already picked you out. But look, I might be able to understand. Maybe you had to defend yourself if Jennifer's methamphetamine use made her paranoid. You know, that crank can make you crazy. What happened? She tweaked and went nuts?

James: And, I have to say, your story that you jumped over the balcony, knocked on the window, and left wasn't entirely true.

Duncan: I just have the strong feeling that.... If you guys want it to be me, it's going to be me. I don't know what happened.

Mandel: You might not have meant it to happen; it just might be something ticked you off, something got you upset. But, it happened. I'm aware of that, and the only thing I can say is, man, it's going to torment you, and it's going to bug you, and it's going to cause you untold anguish like it's doing to her family right now. I know it's been bugging you. I could tell when I saw your face when you opened that front door earlier today.

Duncan: I did not do it. Can I have some fresh air, please?

Mandel: Sure. It is now 3:30 p.m. and we are stopping the tape recorder.

* * * * *

Mandel: Okay, it is now 3:50 p.m. We've taken a 20-minute break and in the room are myself, Detective Mandel, Detective James, and Ray Duncan.

James: Need some water?

Duncan: No, I just want to get this over with.

James: I think it's almost over. I want to compliment you on how polite you have been in this interview. If you just opened up, the hard part would be over. We know what happened. Did Jennifer do something to get you upset? Give me something.

Duncan: I didn't do it.

* * * * *

James: Look, Ray, we've been at this for hours. We know you did it. We know it. I told you that scene spoke volumes. And it wasn't the scene of a cold-blooded killer. It wasn't that kind of a crazed scene.

Mandel: We're way beyond you not having anything to do with her death. We can place you at the crime scene at the time that she was killed. We have witness statements placing you there. On top of that, you finally have admitted to jumping over that balcony on that patio.

Duncan: I was at the apartment but she wasn't dead and I didn't stab her. I didn't leave through the sliding glass door. I just jumped over the balcony and tapped the glass.

James: There were only two possibilities: either you killed her or you went back into the apartment and saw her dead.

Duncan: Yes. Okay, but I don't know what happened. I entered her apartment through the sliding glass door and saw her lying on the couch. Jennifer was covered by a blanket, she was lying on her stomach and facing the cushions, her right hand was by her face, and there was a bunch of blood. I didn't see any wounds but the blood was just like soaked into the couch. I didn't touch anything. I left through the patio, closed the sliding glass door, and drove Jennifer's car back to my place.

Mandel: When was this?

Duncan: Between 8:30 a.m. and 9:00 a.m. on Thursday, December 21.

Mandel: Did you really spend Wednesday night at her apartment?

Duncan: I spent the night on Wednesday, and left around 4:00 a.m. on Thursday. I walked out through the front door. I took Jennifer's car, drove to my place, and then went to a friend's house. I returned to Jennifer's apartment between 8:30 a.m. and 9:00 a.m. Jennifer didn't answer and the front door was locked, so I entered through the sliding glass door. I left through the sliding glass door and jumped over the patio

balcony. I used Jennifer's car to leave.

Mandel: Did you tell anyone what you saw?

Duncan: No.

James: Why did you call Jennifer's house later that day, even though you knew she was dead?

Duncan: So the police wouldn't suspect me.

Mandel: Why would we suspect you?

Duncan: I was the only one that was there around that time, and I knew that, like I told you before, that I had touched everything.

Mandel: Let's take a break. It's currently 5:15 p.m. and we are turning off the tape recorder.

* * * * *

James: Okay, we are back from our break. It is 5:35 p.m. and Detective Mandel, Raymond Duncan, and I, Detective James, are back in the interview room. Okay, let's finish this up. You killed your friend. Why?

Duncan: Look, I've got a question.

Mandel: Go ahead, ask.

Duncan: I halfway know the answer already. Are you guys going to go ahead and process me, or what are you going to do with me? I appreciate the fact that you guys have been patient with me. What are you guys going to do? I mean, are you guys going to process me, or what? I don't want to go to jail. I didn't stab her. But if you guys are going to process me and say that I did, why don't you just go ahead and do it?

James: What would you like us to book you for?

Duncan: I don't know. 'Cause you guys say I did this murder.

James: Well, I'll tell you what we've done. I think what we've established at this point, Ray, is that you saw your friend in her apartment, stabbed, okay, because you at least established that.

Mandel: You need to get this off your chest. Did you use crank with Jennifer on Wednesday night?

Duncan: We had been smoking crank. Listen, guys, I'm getting scared now.

James: Do you still want to talk to us? To tell us about the crank?

Duncan: Sure, I'll talk. I used a substantial amount of crank with Jennifer that night.

James: What were you thinking, Ray, when you were using the crank?

Duncan: I don't know, man. All of the drugs – I don't know.

James: Was it the crank, Ray? Is that what made you do it?

Duncan: Look, okay, Jennifer was arguing with me when it happened.

James: Were you trying to have sex with her, Ray? Were you trying to rape her?

Duncan: No.

James: But you stabbed her, didn't you Ray?

Duncan: Okay, okay. I don't remember stabbing her, but we argued.

James: Tell us what you remember, Ray.

Duncan: We were near the couch and I stood up. I remember us arguing. I remember standing up, and I remember seeing a knife with blood and then leaving. I left through the sliding glass door to throw off the police. I drove away in Jennifer's car and threw away the knife in a trash can.

James: Where'd you get the knife?

Duncan: I probably got the knife from the kitchen counter.

James: Why 30 times, man? She had to be screaming.

Duncan: No, no. All she did was ask what I was going to do, but she didn't scream.

James: Why 30 times?

Duncan: It was more than once, but not 30 times.

James: I think it's time we read you your rights, Ray. Now, Ray, you have the right to remain silent. Anything you say can and will be used against you in court. You have the right to the presence of a lawyer. If you can't afford a lawyer, one will be provided at no cost. Do you understand these rights, Ray?

Mandel: Ray, you are under arrest for the murder of Jennifer Clark. We may as well turn off the tape recorder. It's 6:03 p.m.

END OF TRANSCRIPT

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia	)	
	)	
	)	Criminal Division
v.	)	
	)	2008-2341
	)	
Raymond Duncan	)	
_____	)	

NOTICE OF MOTION TO SUPPRESS EVIDENCE

PLEASE TAKE NOTICE that upon the annexed affidavit of Raymond Duncan, defendant, and upon all the previous papers and proceedings in this matter, the undersigned will move this Court at the Courthouse located at 1435 Elm Street, Averil Park, Columbia, on August 7, 2008, at 9:00 a.m. or as soon thereafter as counsel can be heard, for an order:

1. Suppressing evidence of all statements made by defendant to the police during an interview conducted on January 2, 2008, as obtained in violation of *Miranda v. Arizona*; and

2. For such other and further relief as to the Court may deem just and proper.

Dated: July 30, 2008

Mary Lynch

Mary Lynch
Attorney for Defendant

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia	)	
	)	
	)	Criminal Division
v.	)	
	)	2008-2341
	)	
Raymond Duncan	)	
_____	)	

DEFENDANT'S AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

I, Raymond Duncan, being duly sworn, state:

1. I am the defendant in the above-entitled action.

2. At approximately 12:30 p.m. on January 2, 2008, I was arrested and taken into custody at the Averil Park Police Station by Detectives Timothy James and Gregory Mandel ("James" and "Mandel," respectively).

3. Detectives James and Mandel never attempted to question me at my home.

4. Detectives James and Mandel never told me I could have refused to go to the police station.

5. Once I arrived at the police station, Detective James or Mandel never told me I could leave.

6. I was placed in a small interrogation room that unlocked only from the outside.

7. I spent five hours being questioned by the two detectives.

8. Detective James accompanied me on two cigarette breaks and never left me …alone.

9. Detectives James and Mandel repeatedly accused me of killing Jennifer Clark.

10. Detectives James and Mandel communicated their subjective belief that I was the killer and made it objectively reasonable for me to believe I was not going to leave the police station.

11. During the course of this interrogation one or both of the detectives informed

me repeatedly that it was to my advantage to cooperate with them.

12. During the course of the interrogation I was told of several items of evidence, including eyewitnesses and forensic evidence, which allegedly constituted evidence against me, and was told by my interrogators that it was useless for me to deny my guilt in the face of such evidence.

13. Finally, after a total of approximately six hours of interrogation I was placed in handcuffs, left alone in the locked interrogation room for approximately one hour and then transported to the city jail.

14. It was after more than five hours of interrogation that I was advised that anything I said might be used in evidence against me, that I was not required to make a statement, that I had a right to the assistance of counsel, or that if I could not afford counsel, one would be appointed for me without charge.

Raymond Duncan

Raymond Duncan

Subscribed and sworn to before me on July 30, 2008.

Guido Zanani

Notary Public

TRANSCRIPT OF INTERVIEW OF DETECTIVE TIMOTHY JAMES

BY LAURIE SHANKS

Laurie Shanks ("Shanks"): Thank you for coming in, Detective James. As I said on the phone, Ray Duncan's attorney has requested a hearing seeking to exclude the statements her client made to you during your interrogation. We need to prepare for hearing. You're obviously likely to be called, so I wanted to go through your version of the interview. I have reviewed the transcript, but I have a few questions.

Timothy James ("James"): Fine.

Shanks: I'll be tape-recording this so I can refer to it for that preparation. First, how did Duncan come to be at the police station?

James: Well, the fact is he came down on his own.

Shanks: Did he just show up at the station?

James: No. We had been out to his apartment a couple of times and he wasn't there. We called a couple of times and left messages. And, apparently knowing we were looking for him, he called me and left a message saying when he would be home. Detective Mandel and I went out to his apartment and he invited us in. About the time we told him we were investigating Jennifer's death, we got a call from a crime scene and had to leave. He told us he would wait.

Shanks: When was this?

James: About 11:00 a.m., January 2. The call turned out to be nothing, so we went back to the apartment. We got there about 11:30, maybe 11:45.

Shanks: Then what happened?

James: Again, we told him we were investigating Jennifer's death and that he was one of several people we wanted to talk to because her cell phone indicated she had talked to him the day she was murdered. We asked if we could talk to him at his place, but he suggested that it would be better for him if we met him at the police station.

Shanks: Did he indicate why he'd rather be at the police station?

James: Not really. I just assumed he might be concerned about the neighbors, or maybe he didn't want the police there if someone stopped by.

Shanks: So what did you do?

James: He said he didn't have a car and asked if we would give him a lift, so we drove

him down to the station.

Shanks: What kind of car were you in?

James: An unmarked sedan.

Shanks: Where did he sit on the ride to the station?

James: The front seat.

Shanks: Was he handcuffed?

James: No.

Shanks: What were you guys wearing?

James: No uniforms. We were both in business suits.

Shanks: Did either of you ever display your guns?

James: No.

Shanks: During the drive to the police station, what did you talk about?

James: Small talk mostly, but I did advise him that he was going to a voluntary interview and he was free to leave at any time.

Shanks: When did you arrive at the station?

James: About noon. I got a phone call just as we arrived at the station, so we had him sit there in the reception area for about half an hour.

Shanks: When you interviewed Duncan, was he a suspect in Jennifer's death?

James: He was a subject, like everyone we had talked to.

Shanks: Did you say suspect or subject?

James: He was a subject. He was not suspected of doing anything wrong. We wanted to determine if he had any helpful information about the case.

Shanks: Why did you and Detective Mandel not advise Duncan of his *Miranda* rights at the beginning of the interview?

James: Like I said, he was not a suspect, he had not been linked to the murder, there were no independent witnesses, and there was no evidence he had been at the scene. The evidence was developed from Duncan himself during the interview.

Shanks: Did it become apparent to you during the interview that he was being caught in inconsistencies in what he was telling you happened on the day Jennifer was killed?

James: As you can see from the transcript, it became evident that there were several inconsistent statements he was making during the interview.

Shanks: At any time did he ask to leave?

James: After he was inside the interview room, he could have told us he was going to leave and walked out of the police department without talking to anyone. The complete interview lasted about five hours, but he never asked to leave.

Shanks: Was the interview room locked?

James: No, the room doesn't lock. We interview all kinds of people in there. There's no real need to lock the room. If a person was in custody, he'd either be in handcuffs, or there are these rings bolted in the floor and we would chain him to the rings.

Shanks: Tell me about the breaks you took.

James: He asked for water and it was provided for him. We took two cigarette breaks during the interview. The first break occurred when Duncan asked for a cigarette and some fresh air. There is no smoking in the police department building, so we decided to take a break outside and we went up on the roof, which is the building's designated smoking area for employees. It's got a gazebo.

Shanks: Did Duncan have any cigarettes?

James: No. We got one from another officer.

Shanks: Did you stay with him during the break?

James: Yes.

Shanks: Why did you stay with him?

James: No real reason other than the fact that I was just out there. I had given him the cigarette and, you know, I knew he didn't know the way to the smoking area. Also, there are some security concerns. You don't want the general public wandering around the station. Doesn't happen often, but you can imagine what would happen if someone under arrest got violent and someone just happened to walk by and got injured.

Shanks: What did you talk about during the break?

James: Nothing much. He asked if he was under arrest and I repeatedly told him that he was not under arrest and that he was free to leave.

Shanks: Did Duncan ever ask to leave?

James: He never asked to leave and he never tried to leave.

Shanks: Was he handcuffed while on the break?

James: He was not handcuffed or restrained in any way on the trip to or from the roof.

Shanks: You took a second cigarette break later. Was he handcuffed then?

James: No.

Shanks: Did you go with him to the roof?

James: Yes.

Shanks: How long was that break?

James: Like the first, maybe 20 minutes – the length of the time it took to walk and get the cigarette and allow him to smoke the cigarette. We didn't rush the breaks.

Shanks: And, at any time during the breaks, did he tell you that he wanted to leave?

James: No.

Shanks: Did he ask if he could leave?

James: He never made that request.

Shanks: What did you say when he finished his cigarette? I mean, did you say, "Are you ready to go back now?" Or do you recall what you would say in that regard?

James: Well, right before we actually walked out of the gazebo we would ask, "Are you ready to go back and talk some more?"

Shanks: And what did he answer you?

James: I don't recall the specific answer, but I know that the response was affirmative.

Shanks: Now, you interviewed other people as part of your investigation. Were they questioned in the same manner as Duncan? Did you confront other individuals with the accusation that you knew they killed the victim?

James: I interviewed three others before I talked to Duncan. I asked each of them whether they killed Jennifer and if they had anything to do with her murder. These three were also subjects rather than suspects.

Shanks: Did any of these other three interviews last five hours?

James: No, but one might have been for three hours. In fact, I think it was Brandy Gentry. I conducted an interview at the police department that lasted several hours. She made obscene remarks during the interview, and I became more aggressive and accused her of killing Jennifer. She was interviewed in the same room, and she got up, said the interview was over, and left the police station.

Shanks: Was Duncan ever left alone at any point in the interview?

James: No.

Shanks: Could someone have entered the police station and walked to the second floor interview room without interference by any officers?

James: Sure, a person could walk into the station and take the elevator to the second floor, and go to the interview room without being stopped. But, witnesses or suspects are usually accompanied by an officer to protect the integrity of the department's internal security.

Shanks: After Duncan was placed in the interview room, if he had decided to leave, could he have said, “Excuse me, gentlemen, I think I'm going to leave now?”

James: Yes.

Shanks: You know that technique you used with Duncan where you and Detective Mandel told him repeatedly that you knew he committed the crime, you had the evidence to prove it, and you just want to know why, and when he denied doing it you repeated the accusations? Did you use that technique with Gentry or any other person?

James: Yes. I specifically asked Gentry if she committed the crime and accused her of lying, but I never told her there was no doubt in my mind that she killed Jennifer.

Shanks: So, to be clear, was Duncan physically restrained in any way prior to his arrest?

James: He was arrested at 6:03 p.m., when the interview concluded, and he was handcuffed and chained to the bolt in the floor. Up to that point he was not restrained.

Shanks: Thank you, Detective. I think that will do for now.

THURSDAY AFTERNOON
JULY 31, 2008

California
Bar
Examination

Performance Test B

LIBRARY

PEOPLE v. DUNCAN

LIBRARY

State of Oregon v. Mathiason

United States Supreme Court (1977)

Carl Mathiason was convicted of first-degree burglary after a bench trial in which his confession was critical to the State's case. At trial he moved to suppress the confession as the fruit of questioning by the police was not preceded by the warnings required in *Miranda v. Arizona* (U.S. S.Ct., 1966). The trial court refused to exclude the confession because it found that Mathiason was not in custody at the time of the confession.

The Oregon Supreme Court reversed the conviction. It found that although Mathiason had not been arrested or otherwise formally detained, the interrogation occurred in a coercive environment of the sort to which *Miranda* was intended to apply. We think that the Oregon court has read *Miranda* too broadly, and we therefore reverse its judgment.

The facts are straightforward. An officer of the Oregon State Police investigated a theft at a residence near Pendleton. The officer asked the lady of the house which had been burglarized if she suspected anyone. She replied that Mathiason was the only one she could think of. Mathiason was a parolee and a “close associate” of her son. The officer tried to contact Mathiason on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at Mathiason's apartment with a note asking him to call because he’d like to discuss something with him. The next afternoon Mathiason did call. The officer asked where it would be convenient to meet. Mathiason had no preference, so the officer asked if Mathiason could meet him at the State Police patrol office in about an hour and a half, about 5:00 p.m. The patrol office was about two blocks from Mathiason's apartment. The building housed several state agencies.

The officer met Mathiason in the hallway, shook hands and took him into an office. Mathiason was told he was not under arrest. The door was closed. The two sat facing each other across a desk. The police radio in another room could be heard. The officer told Mathiason he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised him

that the police believed Mathiason was involved in the burglary and (falsely stated that) Mathiason's fingerprints were found at the scene. Mathiason sat for a few minutes and then said he had taken the property. This occurred within five minutes after Mathiason had come to the office. The officer then advised Mathiason of his *Miranda* rights and took a taped confession.

At the end of the taped conversation the officer told Mathiason he was not arresting him at this time; he was released to go about his job and return to his family. The officer said he was referring the case to the district attorney for him to determine whether criminal charges would be brought. It was 5:30 p.m. when Mathiason left the office.

The Oregon Supreme Court reasoned from these facts that the interrogation took place in a "coercive environment." The parties were in the offices of the State Police; they were alone behind closed doors; the officer informed Mathiason he was a suspect in a theft and the authorities had evidence incriminating him in the crime; and Mathiason was a parolee under supervision. We are of the opinion that this evidence is overcome by the evidence that Mathiason came to the office in response to a request and was told he was not under arrest.

Our decision in *Miranda* sets forth rules of police procedure applicable to custodial interrogation. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Subsequently we have found the *Miranda* principle applicable to questioning that takes place in a prison setting during a suspect's term of imprisonment on a separate offense, *Mathis v. United States* (U.S. S.Ct., 1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases. *Orozco v. Texas* (U.S. S.Ct., 1969).

In the present case, however, there is no indication that the questioning took place in a context where Mathiason's freedom to depart was restricted in any way. He came

voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2-hour interview, Mathiason did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody or otherwise deprived of his freedom of action in any significant way.

Such a noncustodial situation does not become one where *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning occurred in a coercive environment. Any interview of one suspected of a crime by police will have coercive aspects to it, simply by virtue of the fact that the policeman is part of a law enforcement system that may ultimately cause the suspect to be charged with a crime. But the police are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody. It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Oregon Supreme Court to be another circumstance contributing to the coercive environment that makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether Mathiason was in custody for purposes of the *Miranda* rule.

The judgment of the Oregon Supreme Court is reversed.

United States v. Cray

United States Court of Appeals, 15th Circuit (2004)

The government appeals from an order of the district court suppressing a written statement that Dr. Michael Cray, a chiropractor, signed at the conclusion of an interview with FBI agents. The district court determined that the statement should be suppressed because it was the product of custodial interrogation that was conducted without informing Cray of his rights under *Miranda v. Arizona* (U.S. S.Ct., 1966). We respectfully disagree, and we reverse.

FBI agents Timothy Bisswurm and Sean Boylan went to Cray's home the morning of February 16, 2001, to interview him regarding a health care fraud investigation. Prior to their arrival, the agents called Cray at 4:30 a.m. to ensure that Cray was home, stating they had the wrong number. At 6:30 a.m., the agents approached the home. When Cray did not answer the door, Agent Boylan called Cray by telephone and told him that he needed to come to the front door. When Cray appeared, Boylan identified himself and Bisswurm as FBI agents and told Cray they would like to speak with him for a few minutes. Boylan further informed Cray that he did not have to speak with the agents.

Cray admitted the agents into his home, and the three men proceeded to the living room to discuss the investigation. Over the course of the ensuing interview, which lasted nearly seven hours, Cray was informed several times that his participation was voluntary, and that he was free to ask the agents to leave his home. About three hours into the interview, Cray told the agents that he was late for work. The agents instructed Cray to call in sick, and directed him not to inform his office about the investigation. Cray complied.

Although the telephone rang several times as the interview progressed, the agents instructed Cray not to answer, and Cray did not do so. When Cray moved about his home on two occasions to go to the bathroom and his bedroom, Boylan accompanied him to check the rooms for telephones. During the interview, Cray was told that if he did

not cooperate, the agents would interview his 75-year-old father and others. The agents further told Cray that they would “light up his world,” and also suggested that if he did not cooperate, then they could use the power of the FBI to pressure insurance companies to withhold payments to his business.

Cray did not resist the agents' questioning during the interview, and he never asked them to leave. At the conclusion of the meeting, Cray signed a written statement (after making one correction and initialing each page) acknowledging that “no one has threatened, coerced, or promised me anything.” The written statement contained admissions that Cray had knowingly caused insurance companies to reimburse at least one hundred false claims, and knowingly paid illegal fees to persons who referred new patients to Cray's chiropractic clinic. There was no threat of arrest during the encounter, and the agents never displayed weapons. Cray was not arrested until weeks later.

Cray was charged in a twenty-seven count indictment with various crimes relating to an alleged health care billing fraud scheme. He brought a motion to suppress his signed statement.

The ultimate question in determining whether a person is in “custody” for purposes of *Miranda* is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. The only relevant inquiry in considering that question is how a reasonable person in Cray's position would have understood his situation. In making that evaluation, we consider the totality of the circumstances that confronted the defendant at the time of questioning.

Courts have identified at least eight factors for consideration in making the custody determination: (1) whether the suspect was informed during the interview that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest, and whether the person’s conduct indicated an awareness of such freedom; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect voluntarily acquiesced to official questioning

or initiated contact with authorities; (4) whether strong-arm tactics were used, *e.g.*, the police manifested a belief that the person was culpable and they had evidence to prove it, the police were aggressive, confrontational or threatening; (5) whether there was a police-dominated atmosphere, *e.g.*, where the interview took place or how many police officers participated; (6) whether the suspect was placed under arrest at the termination of the questioning; (7) whether the express purpose of the interview was to question the person as a witness or a suspect; and (8) how long the interrogation lasted. *United States v. Jones* (15th Cir. 1995).

The most obvious and effective means of demonstrating that a suspect has not been taken into custody is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will. The FBI agents who interviewed Cray testified they informed Cray at least eight times that his participation in the interview was voluntary, and that he was free to ask the agents to leave his home.

We believe that this abundant advice of freedom to terminate the encounter should not be treated merely as one equal factor in a multi-factor balancing test designed to discern whether a reasonable person would have understood himself to be in custody. That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. So powerful, indeed, that no governing precedent of the Supreme Court, or this court, or any case from another court of appeals that can be located, holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

The weighty inference that Cray was not in custody after receiving such advice is strengthened further by the context in which the interview occurred – the living room of Cray's home. When a person is questioned on his own turf, the surroundings are not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation. Indeed, an interrogation in familiar surroundings such as one's home softens the hard aspects of police interrogation and moderates a suspect's sense

of being held in custody. The custodial surroundings are important to consider. The principal psychological factor of concern is isolating the suspect in unfamiliar surroundings for no purpose other than to subjugate the individual to the will of his examiner.

Although these nonexhaustive factors and their attendant balancing test are often cited in our decisions concerning *Miranda*, there is no requirement that they be followed ritualistically in every *Miranda* case. When the factors are invoked, it is important to recall that they are not by any means exclusive, and that "custody" cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly. Exploring the nuances of such vague factors as voluntary acquiescence, strong-arm tactics, and a police-dominated atmosphere in order to place them on one side or the other of a balancing scale may tend one to lose sight of the forest for the trees. The ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest.

The district court relied heavily on its finding that the FBI agents instructed Cray not to alert others by telephone of the FBI's presence during the interview, and escorted Cray to his bedroom and bathroom to check for telephones before Cray entered the rooms. There are two difficulties with this emphasis on telephones. The first is precedent. In *United States v. Sutera* (15th Cir. 1999), officers conducted a three and one-half hour search of Sutera's apartment, and then interviewed him for one hour. They prevented him from using his phone during the search, and then questioned him in isolation in his apartment. We rejected Sutera's contention that prohibition on use of the telephone was one of several factors that demonstrated custody.

The second difficulty presumably explains the precedent: That a suspect is discouraged from using a telephone in his home during an interview often is not probative of whether he is free to terminate the interview altogether. In this case, the FBI agents testified that they requested (or, as the district court found, "directed") Cray not to use the telephone to disclose the presence of FBI agents, because such disclosure would interfere with

Cray's ability to cooperate with an ongoing investigation. If his cooperation with the FBI were known by alleged coconspirators, then he could not assist the government (and potentially himself) through undercover telephone calls or recorded meetings with other suspects. This likely is a common request (or direction) from investigators who are soliciting cooperation.

We also conclude that Cray's lack of voluntary acquiescence in questioning does not tend to show that he was in custody. The district court thought the mere absence of resistance by Cray, such as his making no attempt to terminate the interview and allowing the interview to proceed to its closing, did not rise to the level of active cooperation that our court has found to constitute voluntary acquiescence as used in our third factor. We conclude that the initiation of questioning by FBI agents in this case is not significant evidence of restraint on Cray's freedom of movement. Against a backdrop of repeated advice that he was free to terminate the interview, Cray's decision not to terminate the interview and to allow the interview to proceed to its closing suggests an exercise of free will, rather than restraint to a degree associated with formal arrest.

Judgment reversed.

People v. Adams

Columbia Supreme Court (1996)

Defendant Joseph Adams appeals from a judgment entered after a jury convicted him of involuntary manslaughter. Defendant claims his statements to police were involuntary and obtained in violation of the *Miranda* rule. *Miranda v. Arizona* (U.S. S.Ct., 1966). We agree and conclude that their admission at trial compels reversal.

Officer Cindy Torres testified that she and her partner Officer Mike Sterner learned from Jessie Badillo that defendant was "involved" in a shooting death by a group of “gang bangers” at Washington School on January 27. They went to defendant's residence and asked him and his mother if he would talk to them at the police station about the homicide. They offered to bring him back home. Defendant and his mother agreed that he would go. Defendant's mother also consented to a search of her house for evidence of the homicide and gang involvement.

The officers brought defendant to an interview room at the police station. Although he was not physically restrained, Officer Torres did not recall whether defendant ever left the room. The interview lasted two hours, and, when it was over, the officers drove defendant back home. Officer Torres told defendant he was not in custody. However, she then said they would bring him home when they were finished, explaining that "[i]t really depends on how long you want to take and how quickly you tell us the truth." Torres later testified that what she meant was if defendant told the truth in one hour or two hours, the interview would take that long. She further explained, "There's a possibility that he would never tell us the truth; then we would give him a ride home without him telling us the truth." However, Torres admitted she did not tell this to defendant.

Officer Torres next informed defendant they knew what had happened at Washington School, who had been present, and who had done what. Officer Sterner said they just wanted to know how he got involved. Defendant denied being involved. He said that,

after school, he declined an invitation to join a group of people and instead walked home with Richard Badillo. The officers rejected this story, and accused him of fabricating an alibi with Badillo. They told him not to "play games" and confronted him repeatedly with incriminating evidence of his involvement with "gang bangers." They falsely suggested they had his fingerprints from one of the cars.

Defendant continued to deny involvement. The officers became exasperated and annoyed and assailed him for hiding behind lies and not taking responsibility for his conduct. They warned that his lies would not protect him and that while the truth might exculpate him, his lies plus the evidence they had would probably lead to murder charges and his being labeled a liar. Defendant nevertheless refused to admit involvement. The officers pressed on. They said other officers were with his mother, and she would not corroborate his story. They said his story might be an effort to conceal complicity in the murder. They asked him to think about family events (his sister's marriage) and personal opportunities (going to college) that he would miss if sent to prison. They said he owed the victim the real story and invoked his mother's guidance to tell the truth.

After a while, the officers decided to leave defendant alone for a while. Before leaving, they advised him to clear his conscience and not to waste any more of his or their time. When the interview resumed, defendant stuck to his story. The officers again said he was lying and continued to pressure him to tell the truth. They warned that "[l]ying isn't gonna get you anything, nothing good. It'll sink you, but it ain't gonna save you." Torres advised him that "[i]f you tell us a lie and we know it's a lie, then that story is what's gonna get tacked onto you, and I can't protect you from that. Nobody can protect you from that."

After further pressuring, defendant partially abandoned his story. Asked if he intended to kill anyone while driving around, defendant said "No." Sterner expressed disbelief, asserted that was the purpose. "That was stated clear and upfront." Defendant denied he intended to get involved if there was fighting and said he thought the group was out

looking for girls. Sterner said others had given this story, but he did not believe it. Defendant then said he just wanted to cruise around with the group but soon realized they were out to "gang bang." He denied seeing a gun but admitted hearing someone mention that somebody else had a gun and that it was "no good."

Defendant then said that after the group left a restaurant, he left them to go with a girl he had seen. Sterner responded, "You know how this is gonna work. You're gonna tell us some girl's name. We're not gonna let you leave here until we go talk to the girl, and she's not gonna be able to confirm the story, Joe." He then pressed defendant to tell him about the incident at Washington School. At that point, defendant dropped all resistance and explained what happened that day.

In *Miranda v. Arizona* (U.S. S.Ct., 1966), the United States Supreme Court held that a person questioned by the police after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Statements obtained in violation of this rule cannot be used to establish guilt.

It is settled that the *Miranda* advisements are required only when a person is subjected to custodial interrogation. Custodial means any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Interrogation refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.

It is beyond reasonable dispute that defendant's interview was reasonably likely to elicit incriminating responses and thus was interrogation within the meaning of the *Miranda* rule. The People do not claim otherwise. The primary issue is whether defendant was taken into custody or otherwise deprived of his freedom of action in any significant way.

To make this determination, a trial court must first establish the circumstances

surrounding the interrogation. It must then measure these circumstances against an objective, legal standard: Would a reasonable person in the suspect's position during the interrogation experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest?

Courts have identified a variety of relevant circumstances to consider in deciding whether an interrogation was in a custodial environment. *United States v. Jones* (15th Cir. 1995). No one factor is dispositive. Rather, we look at the interplay and combined effect of all the circumstances to determine whether on balance they created a coercive atmosphere such that a reasonable person would have experienced a restraint tantamount to an arrest.

Here, defendant agreed to an interview at the station, and Officer Torres initially said defendant was not in custody. However, we find it significant that Torres then explained that the interview would end and they would bring him home after he told them the truth. Given the officers' repeated rejection of defendant's story, a reasonable person eventually would have realized that telling the "truth" meant admitting the officers' information was correct and explaining how and why one was involved and that until this "truth" came out, he or she could not leave. The officers later expressly reinforced this implication by explicitly telling defendant he would not be allowed to leave if they had to go interview an alleged alibi witness.

Next, we note that Officers Torres and Sterner did not tell defendant he was free to terminate the interview and leave if he wished. Furthermore, defendant's conduct here does not indicate he was aware of his personal rights during the interrogation. Indeed, it does not appear that defendant ever left the interview room, and Torres could not recall whether defendant ever did. Nor does it appear defendant had a means of getting home on his own if he had tried to leave before the officers were finished with him.

We observe that the officers did not interview defendant only as a potential witness. The officers unmistakably informed defendant he was a potential suspect and repeatedly

told him they had evidence to prove his involvement. The People candidly concede that defendant was made aware "that the police officers fully suspected the worst possible scenario regarding his involvement in the crime."

Concerning the manner of interrogation, this court has consistently held that accusatory questioning is more likely to communicate to a reasonable person in the position of the suspect that he is not free to leave than would general and neutral investigative questions. Thus, on the issue of custody, courts consider highly significant whether the questioning was brief, polite, and courteous, or lengthy, aggressive, confrontational, threatening, and intimidating.

The "tag team" interrogation lasted two hours and was intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating. Although the officers' tactics and techniques do not appear unusual or unreasonable, we associate them with the full-blown interrogation of an arrestee, and except for a *Miranda* advisement, we cannot conceive how defendant's interrogation might have differed had he been under arrest.

Given the totality of circumstances, we conclude that at least by the time defendant partially abandoned his story, if not before, the environment during the interrogation had become coercive, and a reasonable person would have understood he or she was required to remain for questioning indefinitely at the sole discretion of the officers and was not free to leave until he or she satisfied the officers' demand for the truth.

Thus, a reasonable person would have felt deprived of liberty in a significant way and that the restraint was tantamount to being under arrest. Here the interview was a typical custodial interrogation, during which the suspect feels completely at the mercy of the police and frequently is prolonged, and in which the suspect is aware that questioning will continue until he provides his interrogators the answers they seek.

The judgment is reversed.

Answer 1 to Performance Test B

Memorandum of Points and Authorities Opposing Defendant's Motion to Suppress Evidence

Defendant Raymond Duncan has moved to suppress all statements he made to the police during an interview conducted on January 2, 2008, as obtained in violation of Miranda v. Arizona. The people oppose this motion and respectfully submit, for those reasons listed below, that defendant's motion should be denied.

A**. Defendant's motion to suppress should be denied because he did not confess during a "custodial interrogation," as he was fully informed that he was not under arrest and could terminate the interview at his discretion**.

Under Miranda v. Arizona, police are required to give suspects a litany of warnings before engaging in custodial interrogation. The United States Supreme Court has defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Mathiason. In other words, according to the Supreme Court, "Miranda warnings are required to be given only where there has been such a restriction on a person's freedom as to render him in custody." Id (emphasis added).

The Columbia Supreme Court has followed the Supreme Court's lead, and it requires the Miranda warnings to be given only if "a reasonable person in the suspect's position during the interrogation [would] experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest." Adams. In determining whether an interrogation took place under custodial circumstances, the Columbia Supreme Court has adopted the balancing test used by the 15th Circuit in Jones. Under this test, the factors to be considered in determining whether a custodial interrogation occurred are: 1) whether the suspect was informed during the interview that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest, and whether the person's conduct indicated an awareness of such freedom; 2) whether the suspect possessed unrestrained freedom of movement during questioning; 3) whether the suspect voluntarily acquiesced to official questioning or initiated contact with authorities; 4) whether strong-arm tactics were used; 5) whether there was a police-dominated atmosphere; 6) whether the suspect was placed under arrest at the termination of the question; 7) whether the express purpose of the interview was to question the person as a witness or a suspect; and, 8) how long the interrogation lasted. Jones.

In this case, the vast majority of the factors to be examined weigh in favor of denying defendant's motion to suppress. Though the defendant's questioning might have been an uncomfortable experience, it never rose to the level of custodial interrogation required by this state, the 15th Circuit, or the Supreme Court.

1. **The defendant was repeatedly informed during the interview that his questioning was voluntary, and that he was not under arrest.**

This first factor, weighing whether the suspect knew he could terminate the interrogation, has been described by one court as "powerful evidence that a reasonable person would have understood that he was free to terminate the interview." Cray. In fact, neither the Supreme Court, nor any other court of appeals, has ever held "that a person was in custody after being clearly advised of his freedom to leave or terminate questioning."

Here, the defendant was clearly informed that the questioning was voluntary and that he could leave or terminate questioning. First, The defendant voluntarily agreed to come down to the interview, in fact proclaiming "I don't have anything to hide," He was told by Defective James that he was going to a voluntary interview and that he was free to leave at any time. And, as the interview progressed, it was again indicated to the defendant that he was in control of the interrogation - when the defendant asked for a break, he was given one without hesitation. Even towards the end of the interview, and even after the defendant had contradicted himself several times, he was once again asked "Do you still want to talk to us?" Only after he agreed did the interview continue.

At no point during the interview was the defendant restrained from leaving. The defendant has alleged that he was kept in a locked room, but according to Detective James, the room in which the interview took place does not lock. The defendant was not in handcuffs nor was he chained, and Detective James has noted that while he and the defendant were on the police roof smoking, he "repeatedly told him that he was not under arrest and that he was free to leave." The 15th Circuit has noted that the "most obvious and effective means of demonstrating that a suspect has not been taken into custody is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will." Detective James did just that, and so the defendant was fully aware that the questioning was voluntary, that he could ask the officers to leave, and that he was not considered under arrest.

The defendant has claimed that the detectives never told him he could leave. He claims they never told him he could have refused to accompany them to the station, and that while on his cigarette breaks Detective James never left him alone.

But the defendant's recollection is directly contradicted by both his own statements on tape - during which he specifically stated "I called you back and agreed to come down to this interview" - and by the accompanying circumstances. Whenever the defendant asked for a break, he was granted one. When he asked to get fresh air, he was allowed to. He never once asked to leave, and was not physically restrained in any way.

Further, the defendant has rendered himself not credible based on inconsistencies with his affidavit. In his affidavit, the defendant declares that at 12:30 p.m. on January 2, he "was arrested and taken into custody." However, the fact that he was taken into the station in the front seat of an unmarked sedan, was not placed in handcuffs until after 6:00 pm, was allowed to leave the building to smoke, all contradict that contention. Even stronger evidence of this false allegation is his statement on tape that, "I called you back and agreed to come down to this interview." Given such direct contradictions between the defendant's statements on tape, and his declarations in his affidavit, the Court should discount as untrustworthy all the defendant's contentions. What is more, the defendant has every incentive to lie concerning the circumstances of his confession, as suppression of the evidence will likely be the only realistic way for him to defeat liability at trial.

In denying that he was free to leave, the defendant compares his circumstances to that of Adams, where the police told the defendant that the length of his interrogation "really depends on how long you want to take and how quickly you tell us the truth." Given this statement, Adams had every reason to believe that he would be detained as long as was necessary for him to confess. But here, on the other hand, there was never any suggestion that the length of the interview would be the defendant's willingness to confess.

While "any interview of one suspected of a crime by police will have coercive aspects to it, simply by virtue of the fact that the policeman is part of a law enforcement system…..police are not required to administer Miranda warnings to everyone whom they question." Mathiason. Here, the defendant's interrogation was no more coercive than what is inherent in any interview where the police are seeking to solve a crime and interview an individual they believe involved. Therefore, this most important factor weighs in favor of not suppressing the defendant's confession.

2. **The defendant had unrestrained freedom of movement during questioning, and he used this freedom on several occasions**.

Under the second factor, courts examine whether the defendant had complete freedom to move around during the questioning. However, the simple fact that the questioning

took place in a police station does not render a defendant in custody. Mathiason.

Here, detectives had in fact given the defendant a choice of where he wanted the interview to occur. The police offered to question him in his home, where he would have a great deal of freedom of movement and could be free from any of the pressures that might be attached to a police station. See Cray. He chose not to accept their offer. And, during the interview at the station, the defendant was granted every request he made - whether for water, a cigarette, or some more fresh air. During these breaks the defendant was allowed to leave the room, and in fact, went outside onto the station's rooftop gazebo. There was never any show of force made to the defendant - the detectives were wearing business suits, he was never handcuffed, and there was never any display of guns. In fact, as Detective James has stated, the defendant was repeatedly told that he was free to leave.

The defendant has argued that because Officer James accompanied him during his breaks, he was not free to leave. However, in Cray, the court rejected precisely this argument. There, the suspect was followed into his bedroom and to the bathroom to ensure that he was not using the phone. However, even such invasive actions by police was not considered sufficient to render his interview custodial.

The defendant has further argued that he was never told that he was free to leave, and that he of course did not possess unrestrained freedom of movement given all the circumstances. However, this argument is contradicted by the fact that Brandy Gentry, another subject interviewed in connection with this crime, was interviewed under quite similar circumstances - she even got aggressive towards the detectives - and was allowed to walk out the exact same room in which the defendant was interviewed.

The defendant also relies on the Columbia Supreme Court's decision in Adams as evidence that he did not possess unrestrained freedom of movement. He compares his interview to the interrogation in Adams, and argues that he was similarly restrained. However, in Adams, the suspect was repeatedly told that he would not be released until he agreed with the accusations the detectives were levying at him. What is more, the defendant in Adams never once left the examination room, supporting his contention that he really was not free to leave. This situation was different - though the detectives refused to believe the defendant's story, they never once told him that his release would be conditional on his accepting responsibility for the crime. And, though the door to the interview room was closed during the interview, the defendant left it on more than one occasion.

This defendant had every opportunity to move about during question[ing], and his own

decision not to take advantage of such freedom by leaving the station is no reason to suppress his properly obtained confession. This factor thus supports the confession's admissibility.

3. **The defendant and police engaged in a voluntary and informal soliloquy to determine the time and manner of the interview**.

In this case, officers initiated contact with the defendant, but did so in such a way that a reasonable person would not have felt that he had to speak with them. All the evidence suggests that the detectives left several messages for the defendant and went to his apartment a couple times, and that the defendant eventually called and left a message saying when he would be home. Though the officers made the first move to speak with the defendant, this informal back and forth presents strong evidence that there was never any coercion in how they approached him.

In fact, the facts of this case are remarkably similar to how contact was initiated in Mathiason. There, police officers initially left a card with the defendant and asked him to call. Here, the officers left word for the defendant, but the defendant called on his own volition – without the officers asking him to. There was no coercion found based on such actions then, and police here did nothing to materially distinguish that case.

What is more, when the officers got to the defendant's house in this case, there was a back and forth where the interview would take place, and all questioning ultimately took place where the defendant specifically asked it to. It was for the defendant's benefit that questioning took place at the police station.

Therefore, even though officers technically spoke to the defendant before he reached out to them, contact was initiated by both sides, and this factor should be of limited use to the Court in determining whether a custodial interrogation took place.

4. **Strong-arm tactics were not used during the defendant's interview.**

In Cray, the 15th Circuit gave two examples of improper strong-arm tactics that might be used by police. First, the court offered that "police manifested a belief that the person was culpable and they had evidence to prove it." Next, "the police were aggressive, confrontational or threatening."

Here, the police may have manifested a belief that the defendant was culpable, but they only did so once the defendant's statements themselves gave them that reasonable belief. As Detective James has said, the police did not consider the defendant a suspect

when they initially sought him for questioning. Rather, it was only once he contradicted himself that their questioning truly manifested a belief that the defendant was culpable. In fact, reviewing the transcript of the defendant's interview, it is clear that the police became more accusatory only once the defendant contradicted himself for the first time - by stating "didn't I explain to you that I had entered that way, too?" about how he had left the apartment - a clear contradiction to what he had said earlier.

The defendant has also alleged that police told him of several items of evidence that constituted evidence against him, and has insinuated that such statements were false. However, the defendant's contentions are irrelevant. As the Supreme Court declared in Mathiason, "[w]hatever relevance this fact may have to other issues in the case, [a false statement by a police officer to a suspect] has nothing to do with whether Mathiason was in custody for purposes of the Miranda rule."

Further, the police were not aggressive, confrontational, or threatening in this case. They were accusatory, to be sure, but the courts have not suggested that mere accusations of guilt, without being coupled by more aggressive or threatening behavior, are sufficient to rise to the level of custodial interrogation. Rather, in Adams, it was repeated accusations of lying, made in an aggressive fashion, coupled with direct threats that he would miss important family events, that led to the defendant's confession. There, true duress and coercion was imposed on the defendant, and he was made to feel as though he had no way out but to confess.

The defendant relies on these facts in Adams to analogize his case. However, in this case, unlike Adams, the detectives asked "direct" questions but were not rude. They expressly told the defendant that they would not yell at him. Moreover, the defendant's own statements suggest that he was not intimidated by the police. At one point he even joked with Detective James: "I'll tell you, when I offered to come in for questioning, I felt it wouldn't be too bad, but oh boy!" Then, towards the end of the interrogation, he even thanked the police for being so patient with him.

Each of these specific instances belies the defendant's argument that police only obtained his confession through the use of strong-arm tactics. This factor further supports the contention that the defendant did not confess during a custodial interrogation.

5. **Any police-dominated atmosphere at the station existed only due to the defendant's choice of the interview's location.**

The Cray court also offered two examples of when an interview might take place in a police-dominated atmosphere: where the interview took place, and how many police officers participated.
Here, the defendant notes that the interview took place in a police station. However, as described above, the interview took place in the police station only because the defendant chose not to use his house for the interview. The police made every attempt contrary to defendant's contentions, to interview him at his house, and the defendant should not now be entitled to claim a police-dominated atmosphere when it was his choice of atmosphere in the first place.

Further, only two officers participated in this case. There is nothing to suggest that officers were rotated in and out of the interview in order to throw the defendant off, or to confuse or intimidate him.

Therefore, this factor is neutral at best in determining whether the defendant's confession was given in a custodial atmosphere.

6. **Though the defendant was placed into custody at the termination of the interview, this factor offers him only minor support for his claims.**

The defendant was placed under arrest at the termination of the questioning. However, this was not a situation in which the defendant was initially a suspect and would have been placed under arrest regardless of what he had told the police. Rather, the defendant was not a suspect in this crime until after he contradicted himself on material elements of his story. Therefore, this factor provides only minimal support for the defendant's contention that his confession occurred in a custodial environment.

7. **The express purpose of the interview was to question the defendant as a witness, not as a suspect**.

Detective James made it quite clear to the defendant that the purpose of the interview was to question him as a witness. The objective circumstances surrounding how the parties began questioning - the informal back and forth as to where the interview would take place - would have been a strong indication to anyone in that circumstance that he was only a witness in the killing. This fact is further confirmed by the circumstances in which the defendant arrived at the police station – in the front seat of an unmarked sedan, with detectives wearing business suits, without any physical restraint of any kind.

Further, Detective James has unequivocally stated that he repeatedly told the defendant that he was free to leave, and that he was not under arrest. In fact, the defendant, in his affidavit does not contest the fact that the purpose of the interview was to question him as a witness. Nowhere in the defendant's affidavit does he dispute the suggestion that he arrived at the police station as a witness to a crime like any other.

8. The interrogation did not last an unreasonable length of time.

The defendant points to Adams and claims the case provides him strong support for his contention that the long duration of the interview – over five hours – supports his contention that this was a custodial interrogation. And, it is true that the confession suppressed in Adams was obtained after only two hours of interrogation. However, the Adams court, after noting that the interrogation lasted two hours, only once made mention of that fact again, and then in the context of noting the threatening, confrontational, and intimidating atmosphere of the interrogation. It simply was not a fact that the court found especially compelling in determining the confession was taken within a custodial interrogation.

Further, in Cray, the court found that an interview of seven hours was not enough to render a noncustodial interrogation custodial. There simply is no set time limit after which any interrogation is inherently custodial. The defendant was interviewed for five hours, but it was during the middle of the day, between lunch and dinner, and not in such a way so as to prevent him from working or engaging in other activity he had already scheduled.

What is more, the defendant himself did not seem to think the interview was unfairly long. Though he insinuates in his affidavit that the police unfairly kept him in captivity for almost six hours for the express purpose of obtaining his confession, this fact is belied by his own statements on tape. Towards the end of the interview – minutes before it ended – the defendant told the detectives “I appreciate the fact that you guys have been patient with me.” Such a statement is entirely inconsistent with any suggestion that the interview’s length was a major factor in obtaining the confession.

Therefore, though this interview was longer than that in Adams, the difference in length is irrelevant when compared with the vast distinction between the custodial nature of the two interviews.

B. Conclusion

The totality of the circumstances balancing test used by Columbia in determining whether an individual confessed during a custodial interrogation plainly shows that Mr. Duncan did not need to be read his Miranda rights at any point before he confessed. Though balancing is not a strict counting exercise, the factors, viewed as a whole, consistently support the People's contention that the defendant was never restrained as though he were under formal arrest. As in Cray "[a]gainst a backdrop of repeated advice that he was free to terminate the interview," [Mr. Duncan]'s decision not to terminate the interview and to allow the interview to proceed to its closing suggests an exercise of free will, rather than restraint to a degree associated with formal arrest.

Therefore, we respectfully ask this Court to deny defendant's motion to suppress evidence, and to allow his full confession to be admitted into evidence.

Answer 2 to Performance Test B

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA IN AND FOR THE COUNTY OF WARREN

People of the State of Columbia v. Raymond Duncan

Criminal Division 2008-2341

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION TO SUPPRESS

Raymond Duncan ("Defendant") has been charged with the murder of Jennifer Clark ("victim"). While being questioned by police detectives, Defendant admitted to the killing. He now seeks to suppress his confession as being taken in violation of his right to a Miranda warning. Because Defendant was not subject to a custodial interrogation under the Cray factors, he was not entitled to a Miranda warning. Thus, his confession is admissible.

Applicable Law

The U.S. Supreme Court held in Miranda v. Arizona that police must first warn a person being questioned of his rights in certain circumstances. Oregon v. Mathiason; United States v. Cray; People v. Adams. As noted in Adams, the police must give a Miranda warning only to a person subjected to a custodial interrogation. At issue in the case of Defendant's confession is whether the situation was custodial. "Custodial" includes any situation in which a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Id. To make this determination, a court must determine whether a reasonable person in the suspect's position during the interrogation would experience a restraint on his or her freedom of movement to the degree normally associated with a formal arrest. Id.

In making this evaluation, courts will consider the totality of the circumstances that confronted the defendant at the time of questioning. Cray; Adams. However, courts have identified eight factors in making the custody determination: 1)whether the suspect was informed during the interview that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest, and whether that person's conduct indicated an awareness of such freedom; 2) whether the suspect possessed unrestrained freedom of movement during questioning; 3) whether the suspect voluntarily acquiesced to official questioning or initiated contact with authorities;

4) whether strong-arm tactics were used; 5) whether there was a police dominated atmosphere; 6) whether the suspect was placed under arrest at the termination of the questioning; 7) whether the express purpose of the interview was to question the person as a witness or a suspect; and 8) how long the interrogation lasted. United States v. Jones.

While no one factor is dispositive, Adams, courts have found evidence that repeated communications that the person is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. No Supreme Court, Fifteenth Circuit or other appellate precedent holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

Analysis

Applying the United States v. Jones factors, as stated in Cray, establishes that Defendant was not subject to a custodial interrogation when he confessed his murder of the victim.

Suspect Was Informed During the Interview that the Questioning Was Voluntary; Conduct Indicating Awareness of Such Freedom.

As the court of Cray noted, the "most obvious and effective means of demonstrating that a suspect has not been taken into custody is for the police to inform[him] that an arrest is not being made and that the suspect may terminate the interview at will." This exactly describes the facts of this case. While Defendant states that the officers arrested him before the questioning began, he was never placed under arrest according to Detective James. He voluntarily accompanied the detectives to the station, as will be discussed later.

Significantly, Defendant was repeatedly informed over the course of his encounter with the police that he was free to leave any time. He was informed of this on his way to the station house, and repeatedly again on his breaks with Detective James.

While Defendant claims that it became objectively reasonable for him to believe he was not going to leave the police station, this was not the case. Though he stated that he thought he had to tell the officers what they wanted to hear in order for him to be able to leave, the officers never indicated anything like that to the Defendant. In Adams, the interview of a high school boy became custodial because the police conditioned taking him home on his telling the “truth.” The court found that a reasonable person eventually would have realized that telling the truth meant admitting the officers’ information was

correct. However, as, demonstrated by the taped recording of the interview with Defendant, the officers in this case never made such statements. They only encouraged Defendant to confess as an appeal to his sense of fairness, and because otherwise living with the murder would "bug" him.

In addition to the statements of the officers being much different from those in Adams, it must further be considered that the police in that case were questioning a high school age boy who had no way to get home except through the police. In this case, although Defendant got a ride from the police, he is a 24 year old man who would certainly find other ways to get home from the police station. (In any event, he requested the ride to the police station.) They never gave him any indication that he couldn't leave unless he told them what they wanted to hear. Though Defendant stated as much during the interview, the test for a custodial interrogation is whether a reasonable person would feel as though they had been restrained as if formally arrested.

Furthermore, the defendant in Adams was told he would not be allowed to leave if the officers had to leave to interview an alibi witness. The officers in this case made no such statements about the Defendant not being able to leave. In addition, the defendant in Adams was never allowed to leave the room, which was not the case here.

Suspect Possessed Unrestrained Freedom of Movement During Questioning

Defendant was not restrained during his interview with the police. According to Detective James, he was never handcuffed or physically restrained in any other way. While Defendant claims that he was in a locked room, in fact the room he was in was not capable of being locked. He could have left at any time, and, in fact, did leave the room he was in. He twice went on cigarette breaks with Detective James on the roof of the police station. Being able to take cigarette breaks and walk through the police station unrestrained would not indicate to a reasonable person that they were in custody and unable to leave.

While Defendant was always accompanied by an officer while he moved about the police station, this would not necessarily indicate custody to a reasonable person. The defendant in Cray was always accompanied by an officer when he moved about his own home during questioning, and the court there found that there was no custodial interrogation.

Suspect Voluntarily Acquiesced to Official Questioning

Though Defendant claims that he was arrested, and thus did not voluntarily acquiesce to questioning, this is not the case. In fact, the detectives tried several times to contact him but were unable to. Defendant was finally the one who got in touch with the detectives. When the detectives came to his home to talk to him, they were called away and left the Defendant by himself. If the officers were going to arrest him, a reasonable person would not think that they would leave him alone while taking care of other business.

In addition, the method by which the Defendant arrived at the station house should have indicated to him that he was not under arrest. He rode with the officers in an unmarked car, while they weren't wearing uniforms. Most significantly, he did not sit in the back seat. He sat in front. A person under arrest does not usually sit in the front seat of a police car. Furthermore, James informed him on the way to the station house that he was voluntarily coming in for questioning, and was free to leave at any time.

This situation is extremely similar to that in Mathiason. In that case, officers tried to contact the defendant with no success, left a card at his apartment with a note to call them. The defendant did. In that case, the defendant also accompanied the officers to the station house, where he gave a confession. This was not considered to be a custodial interrogation. Though the interview in that case was extremely short, the Mathiason Court did not give that fact much weight. It focused its attention on how his freedom to depart was restricted in any way. Therefore, the length of this interview should not take away from the fact that the Defendant volunteered to answer police questioning, indicating it was not a custodial interrogation.

Strong-Arm Tactics

According to the Jones factors, strong-arm tactics could include that the police manifested a belief that the person was culpable and they had evidence to prove it, as well as aggressive, confrontational and threatening behavior on the part of the police.

In this case, the police did indicate to the Defendant that they thought he had committed the crime. However, they were not being aggressive or threatening about it. Rather, they told the Defendant he should get the murder off his chest so it wouldn't "bug" him. They tried to appeal to his sense of compassion for the victim's family, as well as his sense of religious obligation. The Defendant even specifically discussed police tactics with Detective James, who assured the Defendant that police questioning was very different than in the past, and they would not yell at the Defendant.

This conduct is markedly different from the tactics used in the Adams case, where the police were found to have created a custodial interrogation in part by their use of strong-arm tactics. The tag-team environment contributed to the finding. While there may have been two officers in this case, in Adams, the officers were “intense, persistent, aggressive, confrontational, accusatory, and, at times, threatening and intimidating.” As noted above, this description [does] not comport with the officers’ actions in this case. Furthermore, and as previously noted, the defendant in Adams was in high school, and would be more likely to be pressured by threatening and aggressive questioning.

A better comparison to this case is with the defendant in Cray, in which two government agents were dealing with an adult man. In Cray, the FBI agents interviewed that defendant for seven hours and threatened to "light up his world," and put financial pressure on him if he did not cooperate. This was not found to create a custodial interrogation. The police behavior in this case fell far short of the conduct of the police in both of those cases, and is thus noncustodial.

As to fabricated evidence, the Supreme Court in Mathiason rejected this as a factor creating a custodial interrogation. In that case, the suspect was confronted with fabricated evidence. While the interrogation was much shorter than the Defendant's in this case, the court explicitly stated that "whatever relevance this fact may have to other issues in the case, it has nothing to do with whether Mathiason was in custody for purposes of the Miranda rule." Therefore, this should not be considered as supporting Defendant’s belief that he was in custody.

Notably, the officers in this case subjected others to similar questioning, and those persons knew that they could leave. In fact, those other persons did leave police custody. This indicates that the police tactics would not indicate to a reasonable person that their freedom of movement was restricted to the extent of someone who was under formal arrest.

Police-Dominated Atmosphere

According to the Jones factors, this could include such factors as where the interview took place or how many police officers participated. In this case, although Defendant claims the police did not try to question him at his home, this was not the case. They tried several times to contact him at his home, and when they finally met up with Defendant they gave him the option of staying at home for questioning.

The claim that the police never attempted to interview him at his home is belied by the many times the police tried to contact him there, as well as their offer to question him at his home on the day of confession. While the questioning did take place at the police

station rather than at the Defendant's home, this was only the case because Defendant requested it. Finally, as the Supreme Court noted in Mathiason, the police are "not required to give Miranda warnings… simply because the questioning takes place in the station house." Just because the Defendant was questioned at the police station does not mean he was under arrest. A reasonable person who requested to be interviewed at the police station would not take that as an indication that they were in custody.

Suspect Placed Under Arrest at Termination of Questioning

The Defendant was placed under arrest at the termination of questioning. However, it was only after he confessed to the murder. This does not indicate anything about the nature of the rest of the interrogation.

Express Purpose of Interview

The Defendant was not a suspect at the time of his interview. They just wanted to see if he had any helpful information about the case. In fact, Defendant knew this when he accompanied the officers to the police station. They informed him that they just wanted to talk to him because he had spoken with the victim on the day she died. This is a rational reason that the police would want to interview someone, and would not indicate to a reasonable person that the police were taking them into custody just based on that fact. This is more in line with the police interviewing the Defendant as a potential witness than as a suspect. They never indicated to the Defendant that they thought he might have committed the murder until well into the interview.

Length of Interview

The length of the interview goes to whether a reasonable person would believe they were in custody. Defendant in this case was interviewed by the police for a little over five hours. However, this is not dispositive of the issue. The defendant in Cray was questioned for seven hours, but was found to have not been subject to a custodial interrogation. And while he was in his own home, he was not allowed to contact anyone and he was always in the presence of the FBI agents. Here, Defendant was being interviewed by police for less time. Significantly, the questioning, though long, was not continuous. The Defendant was allowed to take cigarette breaks, and received water when he asked for it. The detectives gave Defendant the space he needed by telling [him] things like "take a deep breath," and "sit and relax and give it some thought." The interview was not of an intense and continuous nature as in Adams, and thus would not indicate to a reasonable person that they were unable to leave.

Conclusion

As the Cray court noted, there is no requirement that these factors be followed ritualistically in every Miranda case. The issue of custody cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly. Cray. The ultimate inquiry must always be whether the Defendant was restrained as though he were under formal arrest. In this case, the court must be careful not to "lose sight of the forest for the trees," as the Cray court cautioned. Though the other factors also suggest there was no custody, great weight must be given to the fact that Defendant was informed on several occasions that he was free to terminate the questioning and leave at any point. The court must find that the Defendant was not subject to a custodial interrogation.

California Bar Examination

Performance Tests and Selected Answers

February 2009

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 -1639 • (415) 538 - 2300
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 -1500

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2009 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the February 2009 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of the authors.

Contents

FEBRUARY 2009

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

PANNINE v. DRESLIN, et al.

FILE

PANNINE v. DRESLIN, et al.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia 11113

MEMORANDUM

To: Applicant

From: Gerry Morris

Date: February 24, 2009

Re: **Pannine v. Dreslin, et al.**

We represent Ralph Pannine in a federal court diversity contract action against Rene Dreslin ("Dreslin"), a French citizen, living in London, England, and two foreign corporations, one of Gibraltar and the other of Luxembourg, each controlled by Dreslin. All three defendants have been properly served and have made appearances in the action. We allege that the defendants breached the contract by (1) refusing to pay Pannine after he performed the work he committed to do; and by (2) transferring the asset that was the subject of the contract. We conducted extensive discovery that establishes the absence of meaningful business records and that Dreslin and the two corporations took steps to hide their only asset, four U.S. patents that cover a valuable technology called Perception Processing ("PP"). The actions of the defendants demonstrate that they are likely to sell or otherwise transfer their United States patents to avoid their being subject to post-judgment execution.

We need to convince the court to grant the plaintiff a preliminary injunction to prevent the defendants from selling or transferring the PP patents. If the defendants sell or transfer the patents to someone beyond the jurisdiction of the court, we will lose any chance of satisfying our client's probable judgment. Following our firm's guidelines, which are attached, please draft a persuasive memorandum of points and authorities in support of our client Pannine's motion for a preliminary injunction. Be sure to argue that the record supports a conclusion that each of the elements necessary for a preliminary injunction is clearly present.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia 11113

MEMORANDUM

TO: Attorneys

RE: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to attorneys, all persuasive briefs or memoranda, such as memoranda of points and authorities to be filed in court, shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated briefly, cogently, and accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position.

Following the Statement of Facts, the Argument should begin. This firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER**: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. **PROPER**: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts support our position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Finally, there should be a short conclusion stating why our client should prevail.

Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v. CASE NO. 08-61674-Civ-Cohn

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

Plaintiff Ralph Pannine asks the Court to exercise its inherent equitable powers and issue a preliminary injunction to prevent the sale or other transfer of Defendants Rene Dreslin, B.E.V. Holding, S.A., and Carlos Magnus Limited's (collectively "Defendants") assets, four United States patents that cover the Perception Processing ("PP") technology, in order to ensure that the patents are available to satisfy the Plaintiff's probable judgment for damages.

Plaintiff has reason to believe Defendants will sell or otherwise transfer the patents for the PP technology beyond the jurisdiction of this Court unless the Court grants the relief requested.

The facts that give rise to the Plaintiff's concerns about the disposition of Defendants' assets are set out in the attached Declaration of William Brown. The facts establish that the assets (the patents covering the PP technology) are extremely valuable and the only assets known to the Plaintiff that are owned and controlled by the Defendants.

In this breach of contract action, this Court has the authority to grant the requested equitable relief pursuant to Columbia Business Code § 77.1 et seq.

Dated: February 24, 2009

Respectfully submitted,
Morris, McIntosh, Coleman & Quick, PA

Gerry Morris

by: Gerry Morris, Esq.
Attorneys for Plaintiff

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v.

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

CASE NO. 08-61674-Civ-Cohn

DECLARATION OF GERRY MORRIS IN SUPPORT OF PLAINTIFF'S REQUEST FOR EQUITABLE RELIEF

1. I, Gerry Morris, am an attorney for Plaintiff Ralph Pannine ("Plaintiff"), and I make this declaration on my personal knowledge in support of Plaintiff's Motion for a Preliminary Injunction. All of the facts recited herein are supported by the exhibits filed separately as an appendix to this declaration. 2. Defendant Rene Dreslin ("Dreslin") is an individual, and the controlling shareholder, and managing director of Defendants Carlos Magnus Limited, a Gibraltar corporation ("Carlos Magnus"), and B.E.V. Holding, S.A. ("B.E.V. Holding"), a Luxembourg corporation.

3. On November 9, 2004, Plaintiff entered into a written agreement ("Agreement") with the Defendants to provide consulting services in connection with Defendants' desire to sell, license, or otherwise transfer a unique technology known as

Perception Processing ("PP"). The Agreement is one of the exhibits in the appendix. At the time of contracting, the four (4) U.S. patents covering the PP technology were owned by Carlos Magnus. 4. The Agreement provides that Plaintiff would identify and negotiate with potential buyers, licensees, and transferees of the PP technology with the object of effecting a sale, licensing arrangement or other transfer of the technology and that either Defendant Carlos Magnus and/or Defendant Dreslin would, in the aggregate, pay Plaintiff one percent of the total gross proceeds of any deal concluded with Plaintiff's participation, up to US $13.5 billion in gross proceeds. 5. The agreement also provides that Plaintiff is entitled to payment upon the occurrence of any of the following events: (a) the sale of the patents covering the PP technology; (b) the sale of any shares in Carlos Magnus; or (c) the licensing of PP. 6. As conceded by the Defendant Dreslin in his deposition testimony, Plaintiff fully performed his side of the Agreement by identifying and negotiating with potential buyers, licensees and transferees of the PP technology, to the point of obtaining commitments to acquire the PP technology, all within the price range set forth in the Agreement. 7. In his deposition testimony, Defendant Dreslin affirmatively acknowledged that the PP technology is worth many millions, perhaps billions, of dollars on the technology market. 8. Between 2004 and 2007, Defendants, without informing Plaintiff, transferred ownership or other interests, including the right to use the PP technology, to various entities without adequate consideration and with the object of delaying or otherwise impeding the rights of creditors. In all cases, the transferor did not receive any consideration, nor did the transferee pay any consideration for the transfer. Discovery to date has revealed the following: (a) In July 2004, GABFI, Ltd., a Luxembourg corporation, which was owned and controlled by Defendant Dreslin and which, at the time, owned all of the rights to the four US patents covering the PP technology, transferred all of its interest in PP to Carlos Magnus.

(b) In October 2005, Dreslin caused all of the stock in Carlos Magnus to be transferred to B.E.V. Holding.

(c) In October 2008, while this action was pending (this action was filed in August 2008), B.E.V. Holding granted an exclusive license of the PP technology to Tech Development, S.A., yet another Luxembourg corporation owned by Defendant Dreslin.

This licensing agreement recited that it "comes into effect retroactively on January 1, 2008," a date prior to the initiation of this action.

(d) Although the patents themselves remain in the hands of B.E.V. Holding, the effect of the exclusive license granted to Tech Development, S.A. is to transfer the entire economic value of the patents to Tech Development, S.A. because no other person or entity can deal with the PP technology in any way that will produce revenues.

9. Defendants have admitted in various discovery requests by Plaintiff that Defendants have failed to maintain, and are therefore unable to produce, any meaningful business and financial records, even such elemental documents as stock ledgers, lists of stockholders, financial statements, and records relating to the PP technology.

10. It is undisputed that in the past 10 years, Defendants have invested in excess of US $15 million in the development and perfection of the PP technology.

11. The only known or reported asset of Defendants and the transferee entities referred to above is the PP technology represented by four US patents.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of February, 2009 in East Plantation, Columbia.

Gerry Morris

Gerry Morris

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v.

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

CASE NO. 08-61674-Civ-Cohn

PLAINTIFF'S NOTICE OF INTENT TO RAISE ISSUES CONCERNING FOREIGN LAW IN CONJUNCTION WITH MOTION FOR PRELIMINARY INJUNCTION

Under Rule 44.1 Columbia Rules of Civil Procedure, in conjunction with his contemporaneous filing of his Motion for Preliminary Injunction, Plaintiff Ralph Pannine ("Plaintiff") gives notice that he intends to raise issues concerning the law of Gibraltar and Luxembourg regarding the legal requirements of companies established and operated under the laws of each country to maintain books, records, accounts, audits and other business records as well as the general business laws of each country. Such laws are relevant to establish Defendants' transfers of economic rights in the four U.S. patents were fraudulent and that, unless enjoined, Defendants are likely to put the patents and their value out of the Court's reach, making it impossible for Plaintiff eventually to satisfy any judgment.

Plaintiff intends to offer expert testimony, documents and other relevant material or sources to the Court to determine the foreign law at issue.

Dated: February 24, 2009

Respectfully submitted,

Morris, McIntosh, Coleman & Quick, PA

Gerry Morris

by: Gerry Morris, Esq.

Attorneys for Plaintiff

COLUMBIA STATE UNIVERSITY
COLLEGE OF LAW

W.L. JIMETS
MARTIN PRESS PROFESSOR OF INTERNATIONAL LAW

February 17, 2009

Gerry Morris, Esq.
Morris, McIntosh, Coleman & Quick, PA
Columbia Trust Tower – Suite 1100
East Plantation, Columbia 11113

Dear Mr. Morris:

I have reviewed the standard books and treatises in international company law printed in English and available in the United States. I also reviewed the published statutes and regulations dealing with the company law of Gibraltar and Luxembourg (the latter in the original French) and will testify that they support the conclusions provided below.

As to Gibraltar, a British Commonwealth nation, an outside auditor must certify annually that the provisions of the Gibraltar corporation law are being observed. An annual meeting must be held to approve the accounts although the annual meeting does not have to be held in Gibraltar. An annual tax return must be filed with details about the share capital and names of registered directors and shareholders. The annual return also must show the amount called up on each share as well as the total amount of indebtedness with regard to mortgages and other contracts that evidence an obligation in excess of US $25,000. Under Gibraltar law, all companies, with the exception of private United Kingdom companies, must file annual accounts with the Registrar of Companies, the Gibraltar Commissioner of Income Tax, or with any relevant Government department or agency. Insurance companies can send their accounts in confidence to the Financial Secretary.

Gibraltar has adopted the 7th European Union company directive requiring annual publication of a corporation's audited consolidated financial statements in a newspaper of general circulation. Gibraltar also has adopted the 4th European Union company directive applying generally accepted accounting principles to both public and private companies.

In Luxembourg, all companies must maintain regular books of account regarding the operations of the company or branches in accordance with the *Code de Commerce.* All companies must engage, at a minimum, a statutory auditor*.* Under the *Code de Commerce*, the books that must be prepared and made available include: (1) a journal for the entry of the day-to-day transactions; (2) a record for the annual registration of the inventory of assets and liabilities (balance sheet and supporting details, profit and loss account). Intellectual property, including patents, is to be included as an asset.

A Luxembourg company must maintain all books necessary to track incoming and outgoing invoices to permit an evaluation or "control" of the statements relative to the Value Added Tax (VAT). These statements are required to be filed periodically with the government and accompany the quarterly payment of the VAT.

Under Section 209 of the Companies Act of 10 August 1915, as amended in 1929, a Luxembourg holding company is required to provide extensive information in its annual accounts, including a full listing of all assets, including unpaid subscribed capital, formation expenses, fixed assets, current assets, prepaid expenses, and all liabilities, including share equity, provisions for contingencies and expenses, all debts and all deferred income. In addition, holding companies are required to provide, *inter alia,* the details of all commitments and guarantees, and any loans to directors.

Luxembourg Social Security regulations also require that all companies maintain a number of records, including a register for each staff member with information regarding identity, family status, address and date of employment. The Luxembourg Tax Department requires that all companies file an annual tax return, even if the company has not realized a profit. The tax returns must be supported by a copy of the company's trial balance and by a detailed balance sheet and profit and loss account, or income statement, and details of fixed assets and depreciation of such assets, and of all items that are placed on or removed from reserve. In addition, Luxembourg law requires all companies to provide tax authorities with annexes showing all remunerations paid by the company and certain data relative to the beneficiaries.

Finally, both Gibraltar and Luxembourg require all companies to report, on an annual basis, any transaction that would affect the value of any of its assets, including intellectual property. While both countries, as well-known “tax havens,” maintain confidentiality of most if not all of the corporate documents mentioned above, they each require that the companies and their directors retain copies of the filed documents.

I have included an abbreviated résumé for your use in qualifying me as an expert in the event I am called to testify. If you have additional questions, please contact me.

Sincerely,

W. L. Jimets

W.L. Jimets

W.L. JIMETS

EDUCATION

YALE UNIVERSITY, LL.M. (International Law) (1994)
Editor, Yale Journal of International Law; Sterling Honors fellowship

COLUMBIA UNIVERSITY SCHOOL OF LAW, J.D. (1987)
Harlan Fiske Stone Scholar (Honors)

UNIVERSITY OF WASHINGTON**,** B.A. *cum laude* (Political Science) (1982)
Academic Achievement Scholarship

INTERNATIONAL AND LAW PRACTICE

INTERNATIONAL HUMAN RIGHTS LAW GROUP (1992-1993)

Attorney, Bucharest, Romania
Developed and trained a network of attorneys to address human rights and election law violations in Romania.

SIMMER EUROPE (1989-1992)

Corporate Counsel, Amsterdam, The Netherlands
Served as European corporate counsel for international company, handling legal and business issues including: European Union antitrust law, food and drug law, corporate reorganization, intellectual property and labor law. Supervised outside legal counsel in Germany, The Netherlands, Belgium, France, and the United Kingdom.

AVERY AND HILL (1984-1989)

Attorney, Hampton Office
Intensive corporate, real estate, banking and transactional work.
Representative clients: PepsiCo; Fuji Bank; City of Tacoma (bonds); and numerous other corporate and banking clients.

L'UNION JUIVE INTERNATIONALE POUR LA PAIX (1982-1983)

Head Secretariat, Paris, France

LEGAL EDUCATOR

COLUMBIA STATE UNIVERSITY COLLEGE OF LAW (1994-present)

Professor of Law (tenured)

Courses taught: European Union Law; Comparative Law; International Trade and Investment; International Business Transactions; Sales (U.C.C.); International Law; International Practice Clinic; International Human Rights.

UNIVERSITY OF FRANKLIN SCHOOL OF LAW (1994-1997)

Assistant and Associate Professor (untenured)

Courses taught: International Business Transactions: Legal Aspects of Foreign Investment; Advanced International Human Rights; Appellate Advocacy.

YALE UNIVERSITY LAW SCHOOL (1993-1994)

Teaching Fellow

Team-taught International Human Rights

LANGUAGES

Fluent in English, French, Spanish and Romanian

PUBLICATIONS (last three years)

BOOKS and CHAPTERS

THE GREENBOOK: MANUAL OF INTERNATIONAL. AND FOREIGN LEGAL CITATION (Jimets & Goldman, eds., Hein Publishers, publication expected fall, 2010)

ENCYCLOPEDIA OF FOREIGN BUSINESS RECORDS (Elvier Publishing, 2009)

LAW REVIEWS AND OTHER PUBLICATIONS

Introduccion: *Los Pilares Fundamentales Para El Reconociniento de los Derechos Ilumanos y la Democracia: la Reconciliation, el Estado de Derecho y la Paz Nacional e Internacional*, ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 731 (2006) [English Translation: Introduction: *The Fundamental Pillars for the Recognition of Human Rights and Democracy: The Reconciliation, and the State of Right and the National and International Peace*]

Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection, ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 645 (2007)

The Demise of the Nation-State: Towards a New Meaning of the State Under International Law, BERKELEY JOURNAL OF INT'L LAW 193 (2008)

BAR ADMISSIONS

Columbia, California and the European Union (International Law Practice)

FEBRUARY 2009

California Bar Examination

Performance Test A

LIBRARY

PANNINE v. DRESLIN, et al.

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA RULES OF CIVIL PROCEDURE

§44.1 Proof of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Columbia Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Comment: Because Columbia and the federal rules expressly permit the court to make a determination of foreign law without being bound by the rules of evidence, the trial court has very broad discretion. For example, the court may consider direct testimony or a declaration from a lawyer who is a member of the bar of the foreign jurisdiction, a law professor familiar with the law of the other jurisdiction, and a declaration of an expert in the other jurisdiction's law (including testimony or a declaration from a non-lawyer). An individual is qualified to testify on the law of a particular jurisdiction if the education or occupation of the witness indicates he has acquired a practical working knowledge of the foreign law. Of course, the ability to understand the language of the foreign country is helpful in qualifying a witness, but the inability to understand the language may not be fatal.

SELECTED PROVISIONS OF THE COLUMBIA BUSINESS CODE

§77 Fraudulent Transfer Act

§77.1 Definitions

As used in §§77.1 – 77.12:

* * *

(2) "Asset" means property of a debtor, but the term does not include:
(a) Property to the extent it is encumbered by a valid lien;
(b) Property to the extent it is generally exempt under nonbankruptcy law; or
(c) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:
(a) If the debtor is an individual:

1. A relative of the debtor or of a general partner of the debtor;
2. A partnership in which the debtor is a general partner;
3. A corporation of which the debtor is a director, officer, or person in

control;

(b) If the debtor is a corporation:

1. A director of the debtor;
2. An officer of the debtor;
3. A person in control of the debtor.

(8) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(9) "Property" means anything that may be the subject of ownership.

(10) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

* * *

§77.5 Transfers fraudulent as to present and future creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was undisclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

§77.6 Transfers fraudulent as to present creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

§77.7 When transfer made or obligation incurred

For the purposes of §§77.1 – 77.12:

(1) A transfer is made:

*** * ***

(b) With respect to an asset that is not real property or that is a fixture, when

the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under §§77.1 – 77.12 that is superior to the interest of the transferee.

§77.8 Remedies of creditors

(1) In an action for relief against a transfer or obligation under §§77.1 – 77.12, a creditor may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;

(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

3. Any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Abraham v. Yoram
Columbia Supreme Court (2007)

Abraham and Yoram are business partners and shareholders in a foreign corporation known as "Nitro Plastic Technologies, Ltd." The corporation maintained a bank account at the Bank of London, on which both Abraham and Yoram were authorized signers. Yoram filed a verified complaint against Abraham alleging that Abraham withdrew $760,000 from the corporate account without Yoram's authorization by forging Yoram's signature on the withdrawal authorization form. Yoram further alleged that Abraham deposited the money in newly-opened bank accounts at NationsBank, N.A. and Washington Mutual Bank. The trial court entered an *ex parte* injunction prohibiting the two banks from allowing withdrawal of those monies.

Abraham appealed the injunction, arguing that the complaint failed to state a cause of action for injunctive relief in that it did not set forth a showing of irreparable harm, a clear legal right, an inadequate remedy at law, or that an injunction would serve the public interest. The Court of Appeals reversed holding that the trial court erred in enjoining Abraham from removing assets because Yoram had an adequate remedy at law in the form of money damages.

The court below reached the correct result based on an abundance of authority. The holding harmonizes with legal precepts that had their beginnings in the fourteenth century. However, at the beginning of a new century, we must reexamine these principles to be certain a trial judge can fashion a remedy that does justice in this and similar cases.

Yoram's complaint alleged that Abraham, "by the artful use of a copy and facsimile machine," caused the "wrongful withdrawal of $760,000" from a business account. The complaint also alleged that there was a "substantial likelihood that Abraham will abscond with whatever monies are not restrained" and "that there is a great likelihood that the Defendant will be a candidate for flight to a foreign jurisdiction." Here and

below, Yoram emphasized that without an injunction, he will be left with an empty "piece of paper entitled ‘judgment’."

Yoram's complaint contained two counts, conversion and unjust enrichment, both actions at law. In a motion for preliminary injunction, Yoram sought to freeze Abraham’s bank accounts. (See Columbia Business Code, §77.5 Fraudulent Transfer Act, for the “badges of fraud” Yoram is required to prove to establish his right to such relief.) Many Columbia cases have held that a court may not grant the equitable relief of an injunction incident to an action at law, such as conversion, because “an action for equitable relief, such as an injunction, cannot be maintained unless it falls within some acknowledged basis of equity jurisprudence.” *Messina v. Cole* (Col. S. Ct., 1931).

Many Columbia cases explain that a party seeking an injunction must demonstrate: 1) irreparable harm; 2) a clear legal right; 3) an inadequate remedy at law; and 4) consideration of the public interest. We have held that the loss of money from a corporate bank account does not constitute irreparable harm because the loss can be compensated for by money damages. The test of the inadequacy of a remedy at law is whether a judgment can be obtained, not whether, once obtained, it will be collectible.

The decisions that form the basis of this rule predate the 1967 Columbia merger of the law and equity courts.[1] With the merger of the law and equity courts, the historical reasons for equity's deference to common law courts and remedies disappeared. The pre-merger Columbia cases reflect the need to preserve the structural distinction between law and equity in the court system. Post-merger cases are hamstrung by the language of the older, binding authority and are therefore prevented from looking behind the irreparable injury rule to consider its logic and justice.

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[1] In 1967, Columbia adopted rules of civil procedure which gave the trial courts jurisdiction to hear cases in which counts at law and counts in equity were pleaded in the same complaint as alternative grounds for relief. Prior to that time Columbia's courts of law were separate from its courts of equity.

To modern lawyers, the choice between legal and equitable remedies is historical and almost wholly dysfunctional. Prior to the merger of the courts, lawyers had to be skilled at drawing the distinction between legal and equitable remedies. The penalty for bringing a case in the wrong court was dismissal or transfer to the correct side of the docket.

Under modern pleading rules, equitable and legal causes of action may travel in the same complaint. Legal scholars have made a compelling argument that a preliminary injunction should be available to a plaintiff in an action at law who demonstrates that a defendant will dissipate or hide assets unless restrained by the court. Until now, to obtain a preliminary injunction, a plaintiff had to prove that: (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has no adequate remedy at law; (3) he has a clear right to the relief requested and a substantial likelihood of success on the merits; and (4) a preliminary injunction will serve the public interest.

As to the irreparable harm/inadequate remedy aspects of the showing necessary for a preliminary injunction, we conclude that when the plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate assets to frustrate the potential money judgment, the plaintiff's harm should be considered irreparable. The most compelling reason in favor of entering a preliminary injunction is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.

This approach is contrary to our earlier decisions, but, if the plaintiff can prove that the defendant is about to dissipate assets to render herself judgment-proof, it is difficult to see how the potential money judgment will be an adequate remedy for the plaintiff. Decisions such as those rendered earlier by this Court are incorrect to the extent they hold that a money judgment is an adequate remedy regardless of whether the defendant is engaged in conduct designed to render the judgment unenforceable.

If the inadequate remedy portion of the preliminary injunction equation is eliminated, the other prerequisites to such relief would create a workable legal framework for ruling on the issuance of a preliminary injunction that balances the interests of a defendant with those of the plaintiff and the public. To decide whether a preliminary injunction should issue, a trial court must balance the hardships between the plaintiff and the defendant. There are two ways to mitigate the hardship on the defendant. One is to require the plaintiff to post a monetary surety to protect the defendant in the event defendant prevails. The other is that the court can fashion a flexible preliminary injunction that gives the defendant some access to funds. During the pendency of a preliminary injunction, a defendant may seek modification to obtain funds for specified uses.

Finally, a preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest in five ways: 1) the injunction protects the integrity of the judicial process; 2) the injunction reduces any incentive the defendant would have to delay the litigation; 3) a preliminary injunction reduces the likelihood that other creditors of the defendant will rush to file claims against her or even force her into involuntary bankruptcy; 4) a preliminary injunction is less likely to affect the rights of innocent third parties who may be in possession of a defendant's property than prejudgment attachment or garnishment; and 5) because of the geographical limitations of attachment, an injunction, which operates *in personam* on a defendant, eliminates the need for duplicative actions in multiple states.

Columbia has tied itself to a rule of law firmly rooted in history, but for which the original justification has evaporated. A reconsideration of the rule compels the conclusion that, assuming the other prerequisites are met, a preliminary injunction may issue where the plaintiff has proven a demonstrable risk that the defendant will transfer, hide, or dissipate her assets, even if the plaintiff's claim is based on an action at law.

The decision of the Court of Appeals is reversed with the thanks of the Court for certifying a question of great public importance. The preliminary injunction issued by the trial court is reinstated.

The Columbia Trust Company v. Foster and Wentz

United States District Court for the Northern District of Columbia (2008)

The Columbia Trust Company, a Columbia corporation, filed suit in the district court against defendant Foster, a citizen of Ohio, alleging breach of contract. At the time of service of process upon Foster, he was the owner of certain real estate in Doral County, Columbia. One week after service, a deed was filed in Doral County conveying title to the property to Wentz.

While the lawsuit was pending and early in the discovery process, Columbia Trust joined Wentz and sought, in the alternative, prejudgment equitable relief: a preliminary injunction against Wentz forbidding further transfer of the property; a writ of attachment against the property itself; and an order setting aside the conveyance as fraudulent. In support of its request for equitable relief, Columbia Trust submitted the declaration of its attorney that included the following claims of fact: Foster was the owner of the property at the time the suit was filed; the telephone listed for the property was and had been for at least 10 years in the name of Foster; the property was valued at more than $1 million; and the transfer of the property to Wentz was without consideration.

Based on this information, the Court ordered immediate depositions of Foster and Wentz on the question of the transfer of the property. Depositions were taken and additional declarations were filed. On the basis of the pleadings, declarations and depositions, the Court has made findings of fact as follows.

Foster and Wentz have been very close friends for more than 35 years. Each was familiar with the business affairs of the other, and Wentz knew of Foster's indebtedness to Columbia Trust. Foster was served in the law action on January 20, 2007. That evening, Foster advised Wentz of the service of process and they fully discussed the matter. Within the next three days, as fast as they could take care of it, the two of them consulted a close friend, a certified public accountant, and then an attorney who prepared a deed conveying the property to Wentz. This deed was recorded one week after Foster was served. Wentz does not remember seeing the deed or receiving it, or

the circumstances regarding its execution. Wentz admits that he gave Foster no money for the deed and that there were no discussions as to money or other consideration. There were no other papers, such as a contract of sale or closing statement, relating to the transaction. Wentz frankly admitted that the purpose of the deed was to avoid the possibility of the property being sold under any judgment in favor of the Columbia Trust Company against Foster. Wentz further testified that he executed a will in which he devised the property to Foster, to the exclusion of his own relatives. Wentz asserted, however, that he held the property in trust for Foster as the beneficiary.

Foster continues to pay the utility bills for the property. The property was leased for seasonal periods and produced income. The income tax returns of Foster, including one filed after the transfer, disclose that he filed such returns as the owner of the property, and reported the income received as his own income, taking deductions for interest, taxes, depreciation and other allowable items. Foster had sole charge of the property, received and deposited the income from it in his bank account, and disbursed funds from his account for the payment of expenses in connection with the property. Foster maintained complete insurance on the property, paid the premiums thereon, and continued to carry this insurance, even after the conveyance of the property to Wentz, and in all of such policies Foster was named as insured. Foster has no other property in Columbia which could be levied upon to satisfy a judgment in favor of Columbia Trust. Foster has continued in full use and possession of the premises in the manner and to the extent as that which existed prior to the conveyance.

Discussion

This diversity case will be decided by applying the law of Columbia. *Hanna v. Plume*, 380 U.S. 460 (1965). The recent decision of the Columbia Supreme Court in *Abraham v. Yoram* (Col. S. Ct., 2007), dramatically altered how trial courts should address requests for equitable relief in the context of an action at law such as Columbia Trust's breach of contract claim. By dispensing with the "adequate remedy at law" bar to addressing equitable remedies in a

contract case, the Supreme Court granted trial courts the power to fashion rational orders that meet the needs of the litigants.

Columbia Trust's request for equitable relief must be measured, therefore, against the standard set out in *Abraham*. To obtain a temporary injunction, Columbia Trust must prove that: (1) it will suffer irreparable harm unless the status quo is maintained; (2) it has a clear legal right to the relief requested and a substantial likelihood of success on the merits; and (3) a temporary injunction will serve the public interest.

The first element of the standard – irreparable harm – requires Columbia Trust to establish that Foster's conveyance of the property to Wentz was fraudulent. Section 77 of the Columbia Business Code is the state's codification of the Uniform Fraudulent Transfer Act and §77.5 sets out actions by a party that will result in a fraudulent conveyance, the so-called "badges of fraud." The Fraudulent Transfer Act expands available remedies. It does not in and of itself confer a cause of action. However, the Act does inform the analysis of whether there will be irreparable harm.

The Court notes that every one of the indicia of fraud set out in the statute are present in the instant case, with the exception of secrecy or concealment, since the conveyance was recorded. Indeed, on the facts we have outlined above, this is a classic case of fraudulent conveyance. It also is noted that the property that is the subject of this equitable action is Foster's only asset of value in Columbia.

As to the second element, the pleadings make it clear that Columbia Trust has presented a *prima facie* case that it is likely to succeed on the merits of the underlying breach of contract claims alleged in the complaint. The well-pleaded facts plus references to the depositions thus far completed make it clear that the parties contracted and that Foster assumed an obligation to compensate Columbia Trust. Although Foster has asserted affirmative defenses, the Court finds Columbia Trust has met its burden, according to Columbia law, at this stage of the proceedings.

Finally, a temporary injunction certainly will serve the public interest. As the Court noted in *Abraham*, "a preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest" in several ways. Here, an injunction will protect the integrity of the judicial process by preventing Foster and Wentz from conveying the property to innocent third parties who would become unnecessarily embroiled in this dispute; an injunction will reduce any incentive defendants would have to delay the litigation; and an injunction will reduce the likelihood that other creditors of Foster will rush to file claims against him or even force him into involuntary bankruptcy.

Therefore, Foster and Wentz are temporarily enjoined from further conveying the property in question and are mandated to preserve the value of the property. The Court will determine at the conclusion of the litigation the necessity of setting aside the conveyance and making the property available to satisfy any judgment in favor of Columbia Trust.

SO ORDERED.

Answer 1 to Performance Test A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE
V.
RENE DRESLIN, BEV HOLDING, SA, AND CARLOS MAGNUS, LIMITED

MEMORANDUM OF POINTS AND AUTHOIRITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

STATEMENT OF FACTS

On November 9, 2004, Plaintiff entered into a written agreement ("Agreement") with the Defendants to provide consulting services for identifying and negotiating with potential buyers, licensees and transferees of defendants' patents in Perception Processing ("PP") in return for one percent of the total gross proceeds of any deal procured by plaintiffs, or any sale or licenses in the patents of PP or sale of shares in Defendant's corporation, Carlos Magnus, Limited. Plaintiff fully performed their side of the agreement by identifying and negotiating with potential buyers, licensees, and transferees of defendant's patents in PP. Also, after the agreement was in place, defendants have transferred ownership or other interests of the PP patents to various entities without consideration, and have transferred all of the shares of Carlos Magnus, Limited to BEV Holding, without notifying plaintiff, or providing compensation in accordance with the agreement in any form.

This action was filed in August 2008, and the parties have conducted discovery in preparation of the trial date. Plaintiffs have discovered that, in October 2008, while the action was pending, defendant BEV Holding granted an exclusive license of PP technology to Tech Development, SA, another corporation owned by defendant Dreslin.

This agreement recited that it "comes into effect retroactively on January 1, 2008," which is a date prior to the initiation of this action. This agreement transfers the entire economic value of the patents to Tech Development because no other person or entity can deal with the PP technology represented by four U.S. patents. This transfer was done after the defendants were served with notices of the action, and have all made appearances in the action.

Furthermore, during discovery, defendants have refused to produce any meaningful business or financial records, such as stock ledgers, lists of shareholders, financial statements, and other records relating to PP technology for [the] reason that they failed to maintain such records. This is despite the fact that the Defendants have spent 10 years and in excess of U.S. $5million in the development of PP technology.

ARGUMENT

A preliminary injunction will be used when a plaintiff can prove that: (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has a clear right to the relief requested and a substantial likelihood of success on the merits, and (3) a preliminary injunction will serve the public interest. Columbia Trust Co. The following discussion and the facts on the record support a conclusion that each of the elements necessary for a preliminary injunction is clearly present.

I. PLAINTIFF WILL SUFFER IRREPARABLE HARM BECAUSE DEFENDANTS' ONLY ASSETS ARE THE PP PATENTS WHICH WERE FRAUDULENTLY TRANSFERRED TO FRUSTRATE A POTENTIAL JUDGMENT AGAINST THEM.

The Columbia Supreme Court has held that irreparable harm is shown when plaintiff can show that the defendant is about to dissipate assets to frustrate a potential money judgment. The court states that the most compelling reason in favor of entering a preliminary injunction is the need to prevent the judicial process from being rendered

futile by defendant's action or refusal to act. Abraham, Plaintiff must establish that defendant's conveyance of property was fraudulent. Columbia Trust Co.

Section 77 of the Columbia Business Code is the state's codification of the Uniform Fraudulent Transfer Act, and section 77.5 sets out actions by a party that will result in a fraudulent conveyance. Columbia Trust Co. Under that section, a transfer made is fraudulent if the debtor made the transfer: (a) with the actual intent to hinder, delay, or defraud any creditor of the debtor; or (b) without receiving a reasonably equivalent value in exchange for the transfer and the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were reasonably small in relation to the business or transaction; or intended to incur or believed or reasonably should have believed that they would incur debts beyond their ability to pay as they became due.

A. DEFENDANT TRANSFERRED THE PATENTS WITH ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD PLAINTIFF BECAUSE THE TRANSFER MEETS ALL OF THE FACTORS UNDER SECTION 77.5

In detriment actual intent to hinder, delay or defraud, section 77.5 lists factors for the courts to consider: (a) the transfer of obligation was to an insider, (b) the debtor retained possession or control of the property transferred after the transfer, (c) the transfer or obligation was undisclosed or concealed, (d) before the transfer was made the debtor had been sued or threatened with suit, (e) the transfer was of substantially all the debtor's assets, and (f) the debtor absconded. The debtor is a person, which includes individual, and corporations and other commercial entities, who is liable on a claim, which is a right to payment whether or not the right is reduced to a judgment. Here, the debtors are Defendants, and the claim is the pending breach of contract suit.

1. The transfer or obligation was to an insider.

Under section 77, an "insider" includes, if the debtor is an individual, a corporation of which the debtor is a director, officer, or person in control; and if the debtor is a corporation, a director, an officer, or a person in control of the corporation.

In our case, in October 2005, Defendant Dreslin, who, controlling shareholder and managing director of Carlos Magnus, caused all of the stock in Carlos Magnus to be transferred to BEV Holding. BEV Holding then transferred an exclusive license of PP Patents to Tech Development, a corporation owned by Defendant Dreslin. Thus, because the transfer involved an exclusive license to the patents, where no other person or entity can deal with the technology, and was a corporation owed by Dreslin, this transfer was from Dreslin, back to Dreslin, who is considered an insider.

2. The debtor retained possession or control of the property transferred after the transfer.

Defendant Dreslin, who is a debtor because of plaintiff's claim against him in the present suit, retained control of the patents because he transferred all of the patent interests to Carlos Magnus, Limited, who then transferred all of their interest to BEV Holding, who then transferred an exclusive license of the patents back to Dreslin by way of granting the license to Tech Development. Because Dreslin retains exclusive use and value of the patents, this factor is met.

3. The transfer was undisclosed or concealed.

All of the transferred that occurred between 2005 and 2008 were made by defendants without informing plaintiff. Defendant Dreslin and Carlos Magnus had an obligation to notify plaintiff upon any sale in the patents, sale in shares of Carlos Magnus, or any licensing of the patents after November 9, 2004, when the defendants entered into a

written agreement with plaintiff. Because defendants did not notify plaintiff of the transfers made between 2004 and 2007, they are considered undisclosed.

Also, the transfer made by BEV Holding to Dreslin, the agreement recited that "it comes into effect retroactively on January 1, 2008." This is a date prior to when this action was commenced. This shows that Dreslin acted in bad faith in order to conceal and cover up the extent of their assets which can be reached by judgment of plaintiff's claim.

In addition, the defendants have admitted in various discovery requests by plaintiff that they have failed to maintain and [are] unable to produce significant business and financial records, including stock ledgers, lists of stockholders, financial statements, and records relating to the patents. A reasonably prudent corporation or individual, with interest in valuable patent technology, would keep records of such elemental documents in relation to the technology. In fact, the defendants have acknowledged that the PP technology is worth many millions, perhaps billions, of dollars on the technology market.

Under Columbia Rule of Civil Procedure section 44.1, the court may consider any relevant material of source including testimony, whether or not admissible under the Columbia Rules of Evidence, in determining foreign law. This gives the court broad discretion, and the court may consider direct testimony from a lawyer who is a member of the foreign jurisdiction, or a law professor familiar with the law of the jurisdiction, or a declaration of an expert in the other jurisdiction's law.

Plaintiffs have presented a declaration from Gerry Morris, [referencing] a current professor of law teaching European Union Law, International Business Transactions, and International Law. He is familiar with the laws of Gibraltar and Luxembourg, and is fluent in their respective languages.

Gibraltar law requires that all corporations must file an annual tax return with the share capital and names of registered shareholders. Corporations must publish annual

audited financial statements. Luxembourg law requires all companies maintain regular books of account regarding the operations of the company, and must engage at minimum a statutory auditor. Books [that] must be prepared and made available include a journal of day-to-day transactions, annual records of assets and liabilities, including any patents.

Not having any records on file is a clear violation of both Gibraltar and Luxembourg laws. This further shows that defendants acted in bad faith in order to conceal their transfers and assets.

4. Before the transfer was made the debtor had been sued or threatened with suit.

As above, the transfer by Dreslin of the patents from Carlos Magnus to BEV Holding, then back to Dreslin by way of Tech Development were all made between 2005 and 2008, and made after entering into the agreement with plaintiff, and after plaintiff performed their side of the bargain. The transfer made from BEV to Tech Development was made after the suit was filed. Thus, Dreslin knew that he had to pay plaintiff after he performed or would be threatened with breach of the agreement. And after the suit was filed, BEV Holding transferred the rights to the patents back to Dreslin. Thus, this factor is met.

5. The transfer was of substantially all the debtor's assets.

According to plaintiff's discovery up to this point, the only known or reported asset of Defendants is the PP technology represented by four U.S. patents. Thus, Dreslin's transfer of his interests back and forth [and] back to him was actually all of his assets.

Because five of the factors are met, this shows that the defendants made the transfers fraudulently, and thus plaintiff meets the element of irreparable injury.

B. DEFENDANT'S TRANSFER WAS FRAUDULENT BECAUSE DEFENDANT TRANSFERRED THE PATENTS WITHOUT RECEIVING REASONABLY EQUIVALENT VALUE IN EXCHANGE AND SHOULD HAVE KNOWN THAT THEY WOULD INCUR JUDGMENTS BEYOND THEIR ABILITY TO PAY.

Even if the factors are not sufficiently met, plaintiff can show that defendants' remaining assets after transfer were unreasonably small in relation to the debts they would incur. As mentioned above, plaintiffs were entitled to compensation under the agreement with defendants, as they performed, or due to the conduct of defendants. Plaintiff was entitled to compensation after identifying and negotiating with potential buyers, licensees, and transferees, as well as whenever defendants sold or licensed the patents or sold shares in Carlos Magnus. Defendants did cause their interests in the patents to be transferred without any evidence of compensation. Also, even if there was some form of compensation in exchange for the patents, the defendants acknowledged that the technology is worth many millions, even billions, of dollars. There is no evidence that Defendants hold any assets other than the patents themselves; thus, there is no evidence of equivalent value. Because the only assets reported or known of the defendants are the patents themselves, transferring their interest in the patients via outright sale or selling all of the shares in Carlos Magnus, who held the rights to the patents, amounted to leaving essentially no assets to compensate plaintiff or any other creditor as debts become due.

Because both options can be satisfied, plaintiff can show irreparable injury in regards to the transfer of defendants' patents.

II. PLAINTIFF HAS A CLEAR RIGHT TO RELIEF REQUESTED AND A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE HE HAS PRESENTED A PRIMA FACIE CASE OF BREACH OF CONTRACT.

The Court in Columbia Trust Co. held that plaintiff must show in their pleadings that the facts plus references to the depositions thus far completed make it clear that the parties contracted and that defendants assumed an obligation to compensate plaintiff.

In our case, Plaintiff's pleading includes facts that there was a written agreement, and plaintiff has fully performed their part of the agreement. Plaintiff fully performed their side of the agreement by identifying and negotiating with potential buyers, licensees, and transferees of defendants' patents in PP. Also, after the agreement was in place, defendants have transferred ownership or other interests of the PP patents to various entities without consideration, and have transferred all of the shares of Carlos Magnus Limited to BEV Holding, without notifying plaintiff, or providing compensation in accordance with the agreement in any form. The agreement provided that the defendants shall compensate plaintiff when the plaintiff has identified and negotiated with potential buyers, licensees, and transferees of defendants' patents, and defendants will provide further compensation whenever there is a transfer of ownership or other interests in their patents or in Carlos Magnus Limited.

Defendants have conceded in their depositions that plaintiff fully performed his side of the agreement in accordance with the terms set forth in Agreement. Discovery has revealed that defendants, in fact, have transferred their patents and interest in Carlos Magnus to BEV Holding in October 2005, after the agreement was in place.

Thus, because there was a valid written contract, full performance, and conduct that gave rise to compensation due to plaintiff, there are sufficient facts in the pleadings and depositions thus far completed to show a prima facie case of breach of contract.

III. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST BECAUSE IT PREVENTS DEFENDANT FROM RENDERING HIMSELF JUDGMENT PROOF.

The court in Abraham noted that a preliminary injunction preventing a defendant from rendering himself judgment proof serves the public interest in several ways.

A) The injunction protects the integrity of the judicial process.

Injunction will protect the integrity of the judicial process by preventing defendants from conveying the property, which is their only known asset, to innocent third parties who would become unnecessarily embroiled in this dispute. As shown, the defendants have made several transfers, including a transfer after the suit was filed, and are likely to transfer the interests of the patents again. Currently, the patent interests are being held by BEV Holding and Tech, which is owned by Dreslin. These are parties in the current suit. This injunction would prevent additional transfers, and prevent other innocent third parties from being joined because of their interest in acquiring the valuable technology.

B) A preliminary injunction reduces any incentive the defendant would have to delay the litigation.

This injunction would decrease the chance that defendants would delay the litigation, because the only valuable assets they have are in the patents. If the patents are rendered nontransferable, they would have no choice [other] than to complete the litigation in order to receive any value from the patents.

C) A preliminary injunction reduces the likelihood that other creditors of the defendant will rush to file claims against him or force him into involuntary bankruptcy.

If the patents are enjoined from transfers, other creditors of defendants would not have to rush to file claims before the defendants can render the value of the patents unattachable by creditors.

D) Because of the geographical limitations or attachment, an injunction, which operates in personam on a defendant, eliminates the need for duplicative actions in multiple states.

The defendants are in other countries, and because the attachment would serve to enjoin the defendants from transferring the patents in other countries, this would prevent innocent third parties and the plaintiff from suing defendants over and over in different jurisdictions.

IV. PRELIMINARY INJUNCTION SHOULD BE ISSUED BECAUSE PLAINTIFF'S AND PUBLIC'S INTERESTS OUTWEIGH DEFENDANTS' INTEREST.

To decide whether the preliminary injunction should issue, a court must balance the hardships between the plaintiff and the public, and those of the defendants. There are two ways to mitigate the hardship on the defendants. As shown above, plaintiff will suffer irreparable harm, and the public's interests are served. Even if the defendants claim significant harm on their part, a court can mitigate the hardship on the defendants. A court can require the plaintiff to post a monetary surety to protect the defendants in the event defendants prevail. Also, the court can fashion a flexible preliminary injunction that gives the defendants some access to funds, where the defendants can seek modification of the injunction to obtain funds for specified uses.

V. CONCLUSION

Because all of the elements necessary for a preliminary injunction are clearly present, and the balance of hardships weigh in plaintiff's and public's favor, the court should grant plaintiff's motion for preliminary injunction.

Answer 2 to Performance Test A

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

The Agreement at Issue

On November 9, 2004, Plaintiff entered into a written agreement (the "Agreement") with Defendants to provide consulting services in connection with Defendants' desire to sell, license, or otherwise transfer a unique technology known as Perception Processing ("PP"). See Declaration of Gerry Morris. At the time of contracting, the four (4) U.S. patents covering the PP technology were owned by Carlos Magnus, Limited, a Gibraltar corporation ("Carlos Magnus"). Id.

The Agreement provides that Plaintiff would identify and negotiate with potential buyers, licensees, and transferees of the PP technology, with the object of effecting a sale, licensing arrangement or other transfer of the technology and that either Defendant Carlos Magnus and/or Defendant Rene Dreslin ("Dreslin") would pay Plaintiff one percent of the total gross proceeds of any deal concluded with Plaintiff's participation, up to U.S. $13.5 billion in gross proceeds. Id.

The Agreement also provides that Plaintiff is entitled to payment upon the occurrence of any of the following events:

(a) the sale of the patents covering the PP technology;

(b) the sale of any shares in Carlos Magnus; or

(c) the licensing of PP.

Id.

Undisputed Deposition Testimony

In his deposition testimony, Defendant Dreslin conceded that Plaintiff fully performed his side of the Agreement by identifying and negotiating with potential buyers, licensees and transferees of the PP technology. Id. Defendant Dreslin admitted that Plaintiff fully performed, to the point of obtaining commitments to acquire the PP technology, all within the price range set forth in the Agreement. Id.

Defendant Dreslin also affirmatively acknowledged that the PP technology is worth many millions, if not billions, of dollars on the technology market. Id.

Fraudulent Transfer of PP Technology

Between 2004 and 2007, Defendants, without informing Plaintiff, transferred ownership or other interests, including the right to use the PP technology, to various entities without adequate consideration and with the obvious object of delaying or otherwise impeding Plaintiff and other creditors' rights. Id. Tellingly, in all cases, the transferor did not receive any consideration nor did the transferee pay any consideration for the transfer. Id. Specifically, the following transactions occurred and are not disputed:

(a) In July 2004, GABFI, Ltd., a Luxembourg corporation which was owned and controlled by Defendant Dreslin, owned all of the rights to the four U.S. patents covering the PP technology. GABFI transferred all of its interest in PP to Defendant Carlos Magnus.

(b) In October 2005, Defendant Dreslin caused all of the stock in Defendant Carlos Magnus to be transferred to Defendant B.E.V. Holding.

(c) In October 2008, while this action was pending (this action was filed in August 2008), Defendant B.E.V. Holding granted an exclusive license of the PP technology to Tech Development, S.A., yet another Luxembourg corporation owned by

Defendant Dreslin. Ironically, the licensing agreement recited that it "comes into effect retroactively on January 1, 2008," a date prior to the initiation of this action. The effect of the exclusive license granted to Tech Development is to transfer the entire economic value of the patents to Tech Development, since no other person or entity will be able to deal with the PP technology in any way that will produce revenues given the exclusive nature of the agreement. Id.

Defendants' Failure to Maintain/Produce any Business Records

Plaintiff has made various discovery requests to Defendant, requesting Defendants' business and financial records. Id. Defendants have produced nothing, and have admitted that they have failed to maintain, and are therefore unable to produce, any meaningful business and financial records, including such elemental documents as stock ledgers, lists of stockholders, financial statements, and records relating to the PP technology. Id.

Although Defendants have invested in excess of U.S. $15 million in the development and perfection of the PP technology, their and their transferee entities' only known or reported asset is the PP technology, represented by the four U.S. patents.

II. ARGUMENT

To obtain preliminary injunction, a plaintiff must prove (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has a clear right to the relief requested and a substantial likelihood of success on the merits; and (3) a preliminary injunction will serve the public interest. *See* Abraham v. Yoram, Columbia Supreme Court (2007). Previously a plaintiff was also required to prove that he had no adequate remedy at law; however, that requirement was wholly dispensed by the Supreme Court's recent holding in Abraham.

As set forth fully below:

A. Plaintiff will Suffer Irreparable Harm Unless the Status Quo is Maintained Because Plaintiff Can Demonstrate That Defendants Fraudulently Transferred the PP Technology With the Intent to Defraud Plaintiff and Defendants' Actions Consist of all the "Badges of Fraud."

In order to establish irreparable harm, the Plaintiff must establish that a conveyance was fraudulent. *Columbia Trust*. Further, when a plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate assets to frustrate the potential money judgment, the plaintiff's harm should be considered irreparable. *Abraham.*

Fraudulent Conveyance

Section 77.5 of the Columbia Business Code sets out the actions by a party that will result in a fraudulent conveyance, otherwise commonly referred to as the "badges of fraud." Also, see Columbian Trust v. Foster and Wentz, USDC, DC (2008). Under this section, a transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer (a) with actual intent to hinder, delay or defraud any creditor of the debtor; or (b) without receiving a reasonably equivalent value in exchange for the transfer, the debtor was engaged (or about to engage) in a business.

In determining the intent required under this provision, the court should consider the following, commonly referred to as the "badges of fraud":

(a) whether the transfer of obligation was to an insider;

(b) whether the debtor retained possession or control of the property transferred after the transfer;

(c) whether the transfer or obligation was undisclosed or concealed;

(d) whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) whether the transfer was of substantially all the debtor's assets; and

(f) whether the debtor absconded.

A "transfer" is defined as "every mode, direct or indirect, absolute or conditional …of disposing of or parting with an asset or an interest in an asset…." See 77.1. With respect to an asset that is not real property, a transfer occurs when a transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under the provisions of the Fraudulent Transfer Act that is superior to the interest of the transferee. See 77.7.

Plaintiff has established that the transfer of the PP technology to Defendant Carlos Magnus, which then transferred its stock to Defendant B.E.V., which then granted an exclusive license to Tech Development, was fraudulent.

Inside Transaction

First, it is quite likely that all of the transfers were to insiders. GABFI, a Luxembourg corporation and the original owner of the U.S. patents, was owned and controlled by Defendant Dreslin. Dreslin, the managing director and controlling shareholder of Carlos Magnus, caused all of the stock of Carlos Magnus to be transferred to Defendant BEV Holding, a Luxembourg corporation, which granted the exclusivity to Tech Development, a Luxembourg corporation.

GABFI, BEV Holdings and Tech Development are all Luxembourg corporations. As such, they are required to maintain regular books and records.

Carlos Magnus is a Gibraltar corporation, and must also file specific documents, as well as include the share capital and names of registered directors and shareholders. See Letter from Professor W. L. Jimets. The Court is entitled to consider this fact based

upon Professor Jimet's letter and Plaintiffs Notice of Intent to Raise Issues Concerning Foreign Law, per CRCP 44.1. Mr. Jimet's résumé (attached to his letter) demonstrates his extensive qualifications and knowledge of the foreign law at issue.

Defendants' undisputed refusal to keep these records and provide any of them (to the extent that they exist) can only logically be construed as an admission that these entities are essentially all one in the same and their transactions are inside transactions.

Retaining Control of the Property

Defendants are liable on Plaintiff's claim for breach of contract. Defendant BEV has retained control of the patents; however, the transfer to Tech Development transferred the entire economic value of the patents to Tech Development. It has been impossible to obtain information regarding the ownership and control of Tech Development given the failure to maintain business records; however, based upon the previous transfers amongst defendants, it is presumed that Tech Development is controlled by Defendants and therefore Defendants have retained control of the property after the exclusivity license.

Undisclosed/Concealed

The series of transactions were not disclosed as they were required to be in accordance with both Luxembourg and Gibraltar laws. The laws of both countries require the companies to report, on an annual basis, any transaction that would affect the value of any of its assets, including intellectual property. Such corporate documents must also be retained by the directors of the company. See Letter from W.L. Jimets. Certainly, GABFI's transfer of its interest in PP to Defendant Carlos, a transaction worth several million dollars (if not billions) is required to be reported. Similarly, the stock transfer by Carlos Magnus to BEV is required to be reported, as well as BEV's license agreement with Tech Development. All of these transactions had a substantial effect on the value

of each corporation's assets, and were required to be disclosed, but were instead concealed, further portraying Defendants' fraudulent intent.

There is further concealment given that the licensing agreement was "retroactive" as of January 1, 2008, the date of the initiation of this action.

Transfer Made After Suit Filed

The most critical transfer made was the transfer that occurred when BEV granted the exclusive license of the PP technology to Tech Development. This constituted a transfer because it indirectly disposed of the asset of the patent by rendering it worthless given Tech Development's exclusivity. Tech Development is not a party to this action, and Defendants, as creditors, will not be able to perfect on the Agreement because it's possible that Tech Development is a BFP. The transfer was made in October of 2008, but stated that it would be retroactive to January 1, 2008, prior to the date of the initiation of this action. This portrays a clear intent to circumvent the rules regarding fraudulent conveyance.

Transfer was all of Defendants' Assets

As discussed at length above, per Gibraltar and Luxemburg law, Defendants are required to report their assets. The only reported asset of Defendants and the transferee entities is the PP technology, represented by the four U.S. patents. Therefore, the transfer was substantially all of the debtor Defendants' assets.

Whether the Debtor Has Absconded

While there is not evidence at this point that Defendants have absconded, they are all foreign defendants, and although they have been properly served, it would not be difficult for them to abscond, in the event they have not done so already.

Similar facts in Columbia Trust, where the court noted that "every one of the indicia of fraud set out in the statute are present in the instant case, with the exception of secrecy or concealment, since the conveyance was recorded," this is a case of classic fraud. The property that is the subject of this equitable action is Defendants' only known asset. Based upon the foregoing, Plaintiff has clearly established that a conveyance was fraudulent, thus satisfying the irreparable harm element to obtain a preliminary injunction. Further, Plaintiff is suing for money damages and has demonstrated, via Defendants' conduct set forth above, that Defendants are about to dissipate assets to frustrate the potential judgment, thereby making Plaintiff's harm irreparable.

Fraudulent Conveyance Under 77.6

Additionally, Section 77.6 of the Columbia Business Code provides that a transfer made is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or became insolvent as a result of the transfer. Under each of the transactions at issue that occurred in connection with Defendants' fraudulent conveyance, no consideration was ever paid. Plaintiff is a creditor of Defendants, and Defendants made the transfer to Tech Development after suit commenced. These facts alone establish a fraudulent conveyance, in addition to the fraudulent conveyance factors set forth above.

Dissipation of Assets

When a plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate assets to frustrate the potential money judgment, the plaintiff's harm should be considered irreparable. *Abraham*. As set forth in detail in the factors above, Defendants have no qualms about dissipating their assets. Despite the value of the PP technology, Defendants have transferred, via directly or directly, the assets not once, not twice, not three, but four times, the last transfer rendering the PP

technology such that no other person or entity can deal with the PP technology in any way that will produce revenues. Plaintiff engaged in the last transfer after the commencement of the instant litigation, which evidences that it did so in order to frustrate a potential money judgment in favor of Plaintiff. Given the foregoing, Plaintiff's harm should be considered irreparable.

B. Plaintiff Has a Clear Legal Right to the Relief Requested and a Substantial Likelihood of Success on the Merits Because He has Established a Prima Facie Case for Breach of Contract Based on Defendants' Own Admission That Plaintiff Fully Performed and the Fact That Defendants Transferred the Asset That Was the Subject of the Agreement.

As to the second element, the pleadings make it clear that Plaintiff has presented a prima facie case that he is likely to succeed on the merits of the underlying breach of contract claims alleged in the complaint. Plaintiff has alleged that Defendants breached the Agreement by (1) refusing to pay Plaintiff after he performed the work he committed to do; and (2) transferring the asset that was the subject of the Agreement.

Failing to Pay

As admitted by Defendants, Plaintiff fully performed his side of the Agreement by identifying and negotiating with potential buyers, licensees and transferees of the PP technology. According to Defendant Dreslin's own deposition testimony, Plaintiff's full performance allowed Defendants to obtain commitments to acquire the PP technology, all within the price range set forth in the Agreement. Thus, the well-plead facts and uncontroverted testimony establish that Defendants breach[ed] the Agreement by refusing to pay Plaintiff after he fully performed.

Transferring the Asset That is the Subject of the Agreement

As set forth in detail above, Defendants transferred the asset that was the subject of the Agreement -- the PP technology. Although Defendants did not transfer the patents themselves to a non-party defendant, their exclusive license to Tech Development rendered it impossible for any other person or entity to deal with the PP technology in any way that will produce revenues. This act constituted a transfer under the business code because BEV essentially disposed of the asset with the exclusive licensing agreement. This transfer makes it impossible for Plaintiff to further perform per the Agreement, and constitutes a breach by Defendants.

Despite any affirmative defenses that Defendants have asserted, the Court should find that Plaintiff has met his burden, according to Columbia law, at this state of the proceedings.

C. The Court's Granting of a Temporary Injunction Will Serve the Public Interest by Protecting the Integrity of the Judicial Process, Reducing Delay, Protecting Defendants, Protecting Third Parties, and Eliminating the Need for Duplicate Actions.

A preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest in several ways. See Abraham; also see Columbia Trust. Specifically, (1) the injunction protects the integrity of the judicial process; (2) the injunction reduces any incentive the defendant would have to delay the litigation; (3) a preliminary injunction reduces the likelihood that other creditors of the defendant will rush to file claims against it or force it into involuntary bankruptcy; (4) a preliminary injunction is less likely to affect the rights of innocent third parties who may be in possession of a defendant's property than prejudgment attachment or garnishment; and (5) because of the geographical limitations of attachment, and injunction, which operates in personam on a defendant, eliminates the need for duplicative actions in multiple states. *See Abraham and Columbia Trust.*

Identical to Columbia Trust, here an injunction will protect the integrity of the judicial process by preventing Defendants from conveying the patents to innocent third parties who would become unnecessarily embroiled in this dispute. A third-party—Tech Development—has already unnecessarily become embroiled in the dispute given the exclusivity agreement. If the patents are conveyed to innocent third parties who could likely be BFP's, they will also become entrenched in this already complicated dispute.

The injunction will reduce any incentive Defendants have to delay the litigation, as the patents are their only known asset and they have spent in excess of $15 million in developing and perfecting them. If they are prohibited from transferring them, they will have an incentive to participate diligently in the litigation and resolve the dispute in order to move forward.

Knowing that the patents are safe and secure given the injunction order, other creditors of Defendants will not be so inclined to rush to file claims against Defendants. Such creditors know that there is value in the PP technology, and provided the patents are safe, the creditors can wait until the appropriate time to seek payment.

It is unknown at this time whether Tech Development is an insider and deserves any type of protection, but to the extent that it does, entering a preliminary injunction order halting the transfer of the patents protects Tech Development pending resolution of these matters in a better way than ordering attachment of the patents or possibly a constructive trust over the licensing agreement.

Last, it is undisputed that Defendants are all foreign residents. Although the patents are U.S. patents, they currently belong to foreign corporations, and an attachment action would require the need for duplicative actions in foreign countries, an extensive and costly process.

Therefore, all of the public interests as delineated by the Columbia Supreme Court will be served if the Court grants Plaintiff's request for a preliminary injunction.

III. CONCLUSION

The record amply supports that each of the elements necessary for a preliminary injunction is clearly present. Plaintiff has demonstrated, given the undisputed and relevant facts, that he will suffer irreparable harm unless the status quo is maintained because Defendants have engaged in fraudulent transfers and are about to dissipate with the patents unless restrained by the court. Plaintiff has demonstrated that he has a clear right to the relief requested and a substantial likelihood of success on the merits. Lastly, Plaintiff has explained how a preliminary injunction will substantially serve the public interest. Therefore, Plaintiff respectfully requests that the Court grant his request for a Preliminary Injunction.

February 2009

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

PHOENIX TOWERS v. PORTER

FILE

PHOENIX TOWERS v. PORTER
INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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.
5. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
6. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

To: Applicant

From: George Randall

Date: February 26, 2009

Re: **Phoenix Towers v. Porter**

Our clients, Richard and Cathy Porter, who recently had a baby, are long-time tenants at the Phoenix Towers. Phoenix Towers has a rule that limits occupancy of one-bedroom units to two people. Last week, they received a thirty-day notice of termination of tenancy, and the landlord said they would be served with an unlawful detainer action if they did not move out. The question is whether the eviction constitutes unlawful discrimination based on familial status.

I conducted an interview with the Porters last week after they received the thirty-day notice from the Phoenix Towers. The Porters have an appointment with me tomorrow to discuss their options. It is clear that the landlord will not agree to a settlement in this matter.

As I see it now, there are several options we might pursue. We could defend the imminent unlawful detainer action. We could file a lawsuit in state court. We might also file an administrative complaint. It is unclear to me whether it would be better for the Porters to stay in the premises or move out while pursuing any or all of these options. I, however, need more analysis of the consequences of each option. Therefore, in order to help me prepare for this meeting, I would like you to draft a counseling memo in accordance with the guidelines set forth in our office policy, which is attached.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

To: Attorneys

From: Jean Marcus

Re: **Requirements for Counseling Memos**

Members of the firm often conduct a counseling session with a client who is confronted with several significant and difficult choices. In such a situation, the attorney should prepare a counseling memo to the supervising attorney for use in the counseling session.

All counseling memos will use the following format:

- State your understanding of the client's goal or goals.
- Identify all options available to the client.
- For each option, identify the possible consequences or results, whether legal, economic, or personal. Be sure to explain the possible consequences or results, why they are possible, and how likely they are to occur. This will require a discussion of the interrelationship of the law and facts.

- Where a possible option, consequence, or result is unclear, identify what additional information we need, why we need it, and how it can be obtained

TRANSCRIPT OF FEBRUARY 19, 2009 INTERVIEW WITH

RICHARD AND CATHY PORTER

George Randall (Randall): Why don't you have a seat over here? I want to make sure the microphone is able to pick up all of our voices.

Cathy Porter (Cathy): Okay. Thanks so much for seeing us over the lunch hour. We are concerned about this notice and want to get your help right away.

Randall: No problem. I just want to reiterate that you've agreed that I can record this interview so that I can concentrate better on what you're saying.

Richard Porter (Richard): That's fine.

Randall: So, you said something about a notice?

Cathy: Yes, it's from our landlord. We live in a one-bedroom unit at the Phoenix Towers. We moved in about ten years ago. We originally signed a one-year lease. After the expiration of the lease, I guess it converted to a month-to-month lease. Here's the original lease.

Randall: I see that Phoenix Towers limits occupancy to two persons in a one-bedroom unit.

Richard: That's right, and since we've just had a baby, we're now in violation of the lease.

Randall: Does Phoenix Towers have any two-bedroom units?

Cathy: Yes, there are two-bedroom units in the complex, but none are available now, and anyway we're not in a position financially to pay the higher rent, which may be as much as $500 more a month. I'm taking six months off to stay home with the baby, and we'll only have one income during most of that time. This is very upsetting. As I said, we've lived here for ten years. We know a lot of our neighbors, and we feel part of the community. And it is an easy commute to work for Richard. The housing market is so tight right now. It's pretty hard to find affordable housing in this part of town and our one-bedroom unit is very spacious. We've probably spent 20 hours between the two of us over the last week looking at ads, calling real estate agents, and looking at vacant apartments just in case we have to move. Nothing is available at our current rent rate in this neighborhood.

Randall: Do you think you've exhausted all other possibilities?

Cathy: Yes, we've discussed it, and can't think of any other options for a place to live that we can afford.

Randall: How would you like things to work out?

Richard: We really need to stay in our apartment for now. But, that's why we're here. We don't know whether there's any way we can fight this, and whether we want to fight even if there is. It just seems so unfair.

Randall: I'm guessing that you're feeling pretty overwhelmed right now. Being new parents is hard enough, but it's so much harder if you're anxious about your living situation at the same time.

Cathy: You've got it. Neither of us has been sleeping very well and I feel on edge all the time wondering what's going to happen.

Richard: I broke out in hives after our last meeting with the manager. He came to see us as soon as we came home from the hospital with the baby. He told us that we are in violation of the lease. I told him that I couldn't believe they would make us move. He said that the owner was adamant about enforcing the occupancy limit in all cases.

Randall: Here's what I'd recommend. I believe you may have a claim for housing discrimination based on this occupancy standard, but before proceeding, I need to do some research, ask you a few more questions, get your authorization to hire a housing expert to do a preliminary investigation, and set an appointment with you next week to discuss your options. How's that sound?

Richard: That sounds okay, but how much is all this going to cost? We can't afford to spend very much on this.

Randall: Some of the options may involve what are called "attorney's fee provisions" that will require the landlord to pay our fees if you win. In other words, we wouldn't be paid unless you win. I will advise you more fully about costs of various options when we meet again.

Richard: That would be great. And then we can give serious thought to whether this is worth it to us. You said you had more questions?

Randall: I'm wondering, do you recall anything about how you found out about the Phoenix Towers before you moved in? Was it a newspaper ad? Did someone tell you about it?

Cathy: I think we heard about it from friends. The manager seemed nice when we called to ask about vacancies.

Randall: Anything else you remember?

Cathy: Not really.

Randall: Do you remember seeing any children when you visited the apartments?

Cathy: I don't recall specifically. There are definitely a few children who live there, but I have no idea whether they live in one- or two-bedroom units.

Randall: Has anyone ever said anything about children living at Phoenix Towers?

Cathy: No, but I would say that the vast majority of people who live there are singles or couples. There aren't very many amenities that would attract families – no play areas, no equipment. Come to think of it, I don't even see that many children at the pool.

Randall: So, do you have the feeling that the Towers is considered an adults-only complex?

Cathy: You know, I have no idea.

Richard: I don't either.

Randall: Any idea how large the complex is?

Cathy: I think it's around 200 apartments. There are four multi-story towers. There's an adjoining parking lot, and there's a swimming pool in a courtyard between the towers. It's a very nicely maintained complex, and we love living there.

Randall: Well, this has been very helpful. I will get a housing expert on this right away and we'll see you next week, okay?

Richard: Thanks so much. We'll see you then.

END OF INTERVIEW

LEASE AGREEMENT

THIS LEASE AGREEMENT (hereinafter referred to as the "Agreement") is made and entered into this 15th day of January, 1999, by and between Phoenix Towers (hereinafter referred to as "Landlord") and Richard and Cathy Porter (hereinafter referred to as "Tenant"). This lease covers the premises known as 475 Phoenix Drive, Unit A-75, Rushmore, Columbia (the "Premises").

1. TERM. This Agreement shall commence on January 15, 1999. The termination date shall be on (date) January 14, 2000 at 11:59 PM. Upon termination date, this Agreement will continue on a month-to-month basis on the same terms. Any term may be modified upon proper notice by the Landlord.

2. RENT. Tenant shall pay to Landlord Eight hundred fifty DOLLARS ($ 850) per month as Rent for the Term of the Agreement. Due date for Rent payment shall be the 1st day of each calendar month and shall be considered advance payment for that month. If not remitted on the 1st, Rent shall be considered overdue and delinquent on the 2nd day of each calendar month.

3. DAMAGE DEPOSIT. Upon the due execution of this Agreement, Tenant shall deposit with Landlord the sum of Seventeen hundred DOLLARS ($ 1700), receipt of which is hereby acknowledged by Landlord, as security for any damage caused to the Premises during the term hereof. Such deposit shall be returned to Tenant, without interest, and less any setoff for damages to the Premises upon the termination of this Agreement.

4. USE OF PREMISES. The Premises shall be used and occupied by Tenants, exclusively, as a private single family dwelling, and no part of the Premises shall be used at any time during the term of this Agreement by Tenant for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single family dwelling. Tenants agree that the occupancy of this:

Xone-bedroom unit shall be limited to two permanent occupants at all times.

□ two-bedroom unit shall be limited to four permanent occupants at all times.

* * *

12. ATTORNEYS' FEES. Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee.

* * *

Rachel Simone _____ Richard Porter _____

Phoenix Towers, Landlord
Printed Name: Rachel Simone

Tenant
Printed Name: Richard Porter

Cathy Porter _____

Tenant
Printed Name: Cathy Porter

THIRTY-DAY NOTICE OF TERMINATION OF TENANCY

TO: [name(s) of the tenant(s)] ____Richard and Cathy Porter_____

AND TO ALL PERSONS IN POSSESSION OF THE PREMISES COMMONLY KNOWN AS [address of the property] _____475 Phoenix Drive, Unit A-75_____,

_____Rushmore, Columbia_____:

NOTICE IS HEREBY GIVEN that within thirty (30) days after service of this Notice on you, you are hereby required to quit the above-described premises and deliver up the possession of same to the Lessor or Lessor's agent if specified below.

FURTHER NOTICE IS HEREBY GIVEN that said lessor hereby elects to terminate your month-to-month tenancy of the above-described premises and that if, within thirty (30) days after service of this Notice upon you, you have not quit the above-described premises, the undersigned will institute legal proceedings for Unlawful Detainer against you to recover damages and possession of the premises from you.

DATED: February 18, 2009

___Rachel Simone_____

Phoenix Towers, Landlord

Printed Name: Rachel Simone

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

MEMORANDUM

To: File

From: George Randall

Date: February 23, 2009

Re: **Summary of Columbia Department of Fair Housing (DFH) Administrative Complaint Process**

1. Intake -- Complainants are first interviewed to collect facts about possible discrimination.

2. Filing -- If the complaint is accepted for investigation, formal complaint is drafted, signed and served on the Respondent by DFH. The Respondent is required to answer the complaint and is given the opportunity to voluntarily resolve it. A no-fault resolution can be negotiated at any time during the complaint process.

3. Investigation -- DFH investigates every case and has the authority to take depositions, issue subpoenas and interrogatories and seek Temporary Restraining Orders when appropriate. If the investigative findings do not show a violation of the law, DFH will close the case.

4. Conciliation -- Formal conciliation conferences are scheduled when the investigative findings show a violation of the law. If formal conciliation fails, litigation may be recommended.

5. Litigation -- After issuing an accusation, DFH legal staff litigates the case before the Fair Housing Commission (FHC).

6. Remedies -- The FHC may order remedies for out-of-pocket losses, injunctive relief, access to the housing previously denied, additional damages for emotional distress, and civil penalties up to $10,000 for the first violation. Attorney's fees are also awardable by the FHC.

7. FHC rarely grants preliminary injunctive relief, and this was confirmed by my friend who works as a staff attorney at DFH. FHC determinations typically take at least one year to be issued from the time the complaint is filed.

8. There is no requirement to exhaust administrative remedies under state law. Statutes of limitations for court actions are tolled while administrative proceedings are pending.

9. If, as an alternative, the case is initially filed in civil court, DFH will not accept an administrative complaint based on the same allegations of discrimination.

Ralph Frankel, Ph.D.
2525 Lookout Street
Rushmore, Columbia 99999
Tel. (555)888-2525

To: George Randall, Esq.
From: Ralph Frankel, Ph.D.
Date: February 23, 2009
RE: Phoenix Towers

This report is prepared pursuant to my retention agreement to serve as your housing expert.

Summary of demographic data:

Census data for the year 2000 establishes that in the Standard Metropolitan Statistical Area in which the Phoenix Towers is located, 50% of renter households have children.

On-site observation

I spent two mornings and two afternoons watching ingress and egress from the parking structure at Phoenix Towers. I observed approximately 125 different cars coming and going from the premises. I observed very few people who appeared to be walking to school or work. None of the pedestrians were children. Of the 125 cars, I observed only two cars with children. One adult and one child rode in each of those cars. I managed to interview both adults and was told by each that there are only five families with children at Phoenix Towers. Three of them are in two-bedroom units, and two are in one-bedroom units.

Public records research

Property tax records indicate that there are 200 units at the Towers, 180 one-bedroom units, and 20 two-bedroom units.

A review of court records showed that there have been five unlawful detainer actions filed by the owners in the past two years. In reviewing the defenses raised by tenants in these actions, none raised discrimination as an affirmative defense. One of the unlawful detainers by the owners was against a two-person family in a one-bedroom unit who had an elderly parent move in. There were no lawsuits on record filed against the landlords.

Columbia's Department of Fair Housing reveals no complaints filed against the owners.

A review of print ads in the local newspaper reveals that up until the early 1980's the Phoenix Towers advertised itself as an "adults-only" complex.

Conclusion

Assuming for purposes of this analysis that there are at most five families with children residing at Phoenix Towers, there is an extremely low probability that this proportion of families with children would have occurred by chance. That is, the proportion of families with children should be much higher, given the much higher incidence of families with children in the nearby neighborhoods. Since the proportion of renter households with children is 50%, the census data would predict that at least 100 families with children would reside at Phoenix Towers.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

MEMORANDUM

To: Porter File

From: George Randall

Date: February 23, 2009

Re: Estimate of Fees

My current rate is $200 per hour. Unlawful detainer defense for this matter will range from 5-20 hours ($1,000- $4,000), billed on an hourly basis.

Estimate of fees for affirmative discrimination case: $40,000

Estimate of fees for DFH administrative hearing: $5,000

I have confirmed that attorney's fees can be awarded to prevailing plaintiffs in successful, affirmative discrimination cases brought under the FHA. If it turns out that there is a good discrimination claim, the firm would be willing to represent the Porters without charge and take our chances on an award of statutory attorney's fees.

FEBRUARY 2009

California
Bar
Examination

Performance Test B

LIBRARY

PHOENIX TOWERS v. PORTER

LIBRARY

Rowan v. Las Brisas Apartments
Columbia Supreme Court (1994)

This case interprets the 1988 amendments to the Columbia Fair Housing Act (FHA) that, *inter alia*, added a provision protecting familial status. Defendant appeals from the judgment below finding that it violated the FHA and awarded damages and injunctive relief. Defendant argues that the court erred in failing to require Plaintiff to prove an intention to discriminate and in imposing a "compelling business purpose" standard on Defendant's conduct. We hold that a showing of actual discriminatory intent is not necessary for plaintiffs to prevail in a case of housing discrimination based on familial status. We also hold that discrimination based on familial status can be proved by a showing of disparate impact, the only rebuttal to which is whether defendant can show that its action is the least restrictive means to achieve a compelling business purpose.

Defendant Las Brisas Apartments ("Las Brisas") is a condominium complex in Hunter Beach, Columbia. The complex consists of 76 identical two-bedroom, one-bathroom units of approximately 950 square feet each. Defendant enforces a numerical occupancy restriction of two persons per unit.

Plaintiffs, Colin and Valerie Rowan ("The Rowans"), were living at Las Brisas when Valerie Rowan became pregnant. The resident manager told the Rowans they would have to move following the birth of their child because of the occupancy restriction. After the Rowans' son was born, the resident manager told the Rowans that they would be evicted if they did not vacate their apartment voluntarily. The Rowans moved soon afterward.

The Rowans filed this lawsuit for monetary, declaratory and injunctive relief. They alleged violations of the Columbia FHA.

The FHA was adopted in 1968. The FHA initially prohibited discrimination on the basis of race, color, religion, or national origin. The legislature extended protection to familial status in the Fair Housing Amendments Act of 1988. The FHA now makes it unlawful:

> "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

Discrimination is defined to include a refusal to rent after the making of a bona fide offer, or to refuse to negotiate for the rental of, or otherwise deny, a dwelling to any person because of familial status.

Familial status is defined as one or more persons under the age of 18 domiciled with one or more parents or other legal custodians. The protection also applies to pregnant women or persons in the process of securing legal custody of any individual who has not attained the age of 18.

Other courts have split on whether intent to discriminate must be proven. Recently, a Court of Appeal, in *Earle v. Mountain Side Mobile Estates*, squarely addressed whether a numerical occupancy restriction violates the FHA's family status provisions under a pure disparate impact theory, without proof of intent. In *Earle*, an unmarried couple and their three children were evicted from the Mountain Side Mobile Home Park for violating the park's three-person-per-trailer occupancy restriction. The court determined that national census data could be used to establish a showing of disparate impact against families with children, and the park's numerical occupancy restriction had a discriminatory effect in violation of the Act. We agree with and adopt the reasoning in *Earle* that plaintiff need not show defendant's intent to discriminate based on familial status.

Although in this case defendant's occupancy restriction is facially neutral because it treats adults and children similarly, and children in fact do reside at Las Brisas, the restriction has a disparate impact on intact families with children, i.e., two parents and child. By refusing to rent to families composed of three or more persons, defendant excludes a large percent of families with children from renting apartments at Las Brisas.

Plaintiffs supported their showing with U.S. Census family statistics. Thus, the policy has a disparate impact on the Rowans.

Here, Defendant Las Brisas' offered business justification is to prevent damage and destruction to the apartments from excessive wear and tear. Defendant argues that Las Brisas maintains an occupancy restriction policy to keep the property in good repair and to reduce ongoing maintenance and eventual resale costs.

Defendant has not cited authority to show that such economic judgments constitute a compelling necessity, nor has defendant produced evidence to demonstrate that the occupancy restriction is closely tailored to serve Las Brisas' goals. Defendant simply relies on defendant's own subjective judgment which, notwithstanding defendant's experience in the real estate industry, falls short of the necessary showing.

Even if defendant's damage prevention rationale were supported by independent evidence, it does not show the occupancy restriction is the least restrictive means to achieve defendant's purpose. Defendant does not deal with a number of less restrictive alternatives suggested by the Rowans that would appear to accomplish the same goals, such as detailed maintenance requirements, more frequent inspections, higher security deposits, or more careful tenant screening.

AFFIRMED.

Carter v. Brea

Columbia Supreme Court (1995**)**

Defendant Brea appeals from judgment following a jury trial finding that Defendant committed unfair housing practices by discriminating against persons with minor children in violation of state fair housing statutes. Defendant claims that (1) the jury's findings on disparate-treatment discrimination were unsupported because the evidence did not show any intent to discriminate, (2) the court erred in permitting the jury to award damages for emotional distress in the absence of expert medical testimony, and (3) the court awarded excessive attorney's fees to Plaintiff.

On May 1, 1981, Ernest Brea ("Brea") purchased Limehurst Apartments ("the Limehurst"). The complex consists of thirty-three one-bedroom apartments. When Brea purchased the Limehurst, the lease term on occupancy stated that residents "shall *not* be permitted to have *children under the age of 18* years."

In April 1989, the occupancy provision was revised to state:

> "Lessees who have entered into a lease agreement after July 1, 1988 shall *not* be permitted to have *more than two occupants* per lease premises . . . Lessees prior to July 1, 1988 who have more than two occupants shall be grandfathered, but the number of occupants cannot expand beyond what existed as of July 1, 1988." (Emphasis added.)

Currently, only one unit at the Limehurst houses a family with a minor child. This family moved into the Limehurst prior to 1982. No persons with minor children moved into the Limehurst after Brea purchased it, even after the occupancy provision was changed from adults-only to a two-occupant maximum.

Scott and Luanne Carter ("the Carters") moved into a unit in the Limehurst in August 1992. Brea sent them a letter on August 15, 1992 stating: "We remind you that the

Limehurst is an adult complex and if you should have children in the future you will be required to vacate the Limehurst prior to the arrival of said child."

Luanne Carter became pregnant in December 1993. The Carters' son was born September 18, 1994. When they returned home from the hospital, they found a letter from Brea informing them that they must vacate the premises "upon arrival of your third occupant." Following the letter, the Carters received telephone calls, visits, and additional letters from Brea telling them to vacate the Limehurst. On November 25, 1994, they received a 30-day notice of termination of tenancy. On December 28, 1994, the Carters were served with a summons and complaint for unlawful detainer brought by Brea.

The Carters sought legal representation. They brought the instant action seeking injunctive relief and damages. They alleged violations of Columbia's Fair Housing Act (FHA). The trial court granted a preliminary injunction enjoining the prosecution of the unlawful detainer action upon a showing of likelihood of the Carters' ultimate success on their discrimination claims, a balancing of the equities, and irreparable injury if the relief was not granted.

Prior to and during the pendency of this action, while continuing to live at the Limehurst, Luanne Carter felt humiliated by Brea's demands to vacate the premises. Consequently, she did not leave her home often. She was unable to sleep and had chest pains.

Plaintiff's theory of discrimination was that the occupancy standard was (1) adopted for the purpose of discriminating against persons with minor children by either limiting or eliminating them from occupancy in the Limehurst, and (2) although facially neutral, has an unlawful discriminatory impact because it excluded families with minor children in significant numbers. In order to prevail on an intentional discrimination theory under FHA, Plaintiffs must establish by a preponderance of the evidence that a causal connection existed between the familial status of plaintiffs and their being asked to

vacate by defendant. Plaintiffs' familial status need not have been the sole or even the dominant cause of the action. Discrimination is established if familial status was any part of the motivation for Defendant's conduct. Defendant maintained that the occupancy limit was necessary due to a limited water supply.

At trial, both parties presented expert testimony on the capacity of the water supply at the Limehurst. Defendant's expert testified that the water supply at the Limehurst was adequate to serve a maximum of sixty-six people. Plaintiffs' expert offered contrary testimony. The jury found that Defendant Brea had violated federal and state fair housing statutes and awarded $1,500 for the emotional distress and humiliation suffered as a result of Defendant's actions, and $3,000 in punitive damages. In subsequent orders, the court permanently enjoined Defendant from adopting or enforcing a two-person-per-unit occupancy limit at the Limehurst, and awarded the Carters $51,072 in attorney's fees, and $2,194.39 for costs. Defendant appealed.

FHA makes it unlawful for the owner of any housing accommodation to discriminate against any person because of, *inter alia*, the person's familial status. Familial status means "one or more individuals under 18 years of age who reside with, *inter alia*, a parent."

The Carters alleged violations of FHA under two theories of discrimination law: (1) intent to discriminate -- Defendant Brea intentionally discriminated against members of a statutorily protected category because of their membership in that group, and (2) disparate impact – Defendant's facially neutral policy has a disproportionate effect on a statutorily protected category. The jury found Defendant liable for housing discrimination under both theories. We do not address Defendant's challenges to the finding of disparate impact because we uphold the decision on the theory of intentional discrimination.

Defendant first claims that the jury could not have found disparate treatment or intent to discriminate in the absence of any direct evidence of discrimination against persons

with minor children. Intentional discrimination may be shown by circumstantial or direct evidence. Thus, the short answer to Defendant's challenge is that direct evidence is not necessary to prove an intentional discrimination claim. Indeed, direct evidence of unlawful discrimination is often difficult to obtain.

Evidence of a discriminatory practice prior to civil rights legislation, coupled with a post-legislation pattern of maintaining the status quo, may be sufficient to establish the intent to continue the discrimination through a neutral policy. In this case, there was evidence that Defendant clearly excluded minor children from the Limehurst prior to 1989. That year, apparently in response to changes in Columbia law prohibiting discrimination against familial status, Defendant changed the occupancy provision in their leases from adults-only to a two-person maximum. Although the new occupancy provision appears neutral on its face, Defendant has maintained the status quo at the Limehurst -- no minor children have moved into the Limehurst since Defendant purchased it. This evidence is sufficient to imply that the two-person occupancy limit was adopted for the purpose of eliminating or limiting persons with minor children from the Limehurst. Based on Defendant's actions against the Carters and Defendant's pattern and practice of excluding minor children from the Limehurst, we conclude that the jury properly found an intent to discriminate against persons intending to occupy a dwelling with one or more minor children.

At trial, Defendant presented evidence that his occupancy limit is based on legitimate water capacity considerations. He presented evidence on the limits of the Limehurst's water supply. The special verdict indicated that the jury did not believe the Defendant's rationale, finding that the limitations of the water system were a mere pretext for discriminating against persons with minor children.

Defendant argues that the trial court erred in permitting the jury to award damages for emotional distress. The law clearly provides for recovery of emotional distress damages, and the award here was supported by Carter's testimony.

Defendant also argues that the court awarded excessive attorney's fees. It is well settled that attorney's fees are awardable to victims of discrimination who prevail in affirmative discrimination actions. On the other hand, fees are not awardable to defendants who successfully defend against affirmative discrimination claims.

The initial estimate of a reasonable attorney's fee in state civil rights actions is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Once the court has determined the basic, "lodestar" amount, the court may adjust the fee up or down based on other factors. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the trial court did not adopt each contention raised.

AFFIRMED.

Lavelle v. Hodges
Columbia Supreme Court (1977)

Plaintiff Nancy Lavelle ("Lavelle") brought this action to set aside a deed conveyance, alleging that defendant Everett R. Hodges ("Hodges") fraudulently induced her to convey title to him. The question that we consider is whether the present suit is precluded by the prior adjudication of the fraud issue in an unlawful detainer action between the parties.

An unlawful detainer action is a summary proceeding to determine the right to possession of real property and to provide for peaceable eviction. Typically, it arises when a tenant has violated a lease or unlawfully held over beyond the term of the lease. Following termination of the tenancy through service of a three-day or 30-day notice, an unlawful detainer may be commenced. The tenant has five days to answer the complaint, and the matter proceeds to trial on a very accelerated schedule, usually within a month. No, or very limited, discovery is allowed.

It is of foremost importance to note that unlawful detainer actions are limited in scope. Ordinarily, only claims bearing directly upon the right of immediate possession are cognizable. Affirmative defenses, legal or equitable, are permissible only insofar as they would, if successful, preclude removal of the tenant from the premises. If a tenant, for example, proves that the landlord had an improper motive in serving the notice of termination and bringing the unlawful detainer action, such as the tenant's exercise of a right under the law, the tenant will retain possession. It should be noted, however, that cross-complaints are not permitted in unlawful detainers. Thus, if a tenant has affirmative claims or claims for damages, she must seek them in a separately filed action.

The trial court here found that Lavelle, who originally owned the subject property, had for several years maintained a confidential and intimate relationship with Hodges. Lavelle encountered financial difficulty, so she agreed that Hodges would temporarily take title until she recovered financially. Thereafter, the parties quarreled, and Lavelle

demanded reconveyance and Hodges refused. The record indicates the property at that time had a fair market value in excess of $40,000.

Lavelle immediately filed the present suit, framed as an action for injunctive relief and for imposition of a constructive trust. Meanwhile, Hodges served Lavelle with a three-day notice to quit the premises and upon expiration of the notice immediately initiated unlawful detainer proceedings. In the unlawful detainer action Lavelle asserted as an affirmative defense the same allegations of fraud that form the basis for the present equity action that was then pending. As is typical in unlawful detainer actions, Lavelle's answer was due five days after service of the summons, discovery was limited, trial was set within 21 days of the filing of Lavelle's answer, and the matter was tried before the court in a trial lasting one hour. Judgment in the unlawful detainer suit was given for Hodges and Lavelle was evicted. That judgment is now final.

Hodges unsuccessfully urged the unlawful detainer judgment as a bar to the present action. His motion to strike the complaint was denied, and the cause proceeded to trial on the merits. After a four-day trial, the court, on the basis of detailed findings of fact, concluded that Lavelle's conveyance had been fraudulently induced by Hodges and ordered the property returned to Lavelle.

Both Lavelle and Hodges appealed, raising not only the res judicata issue that we consider herein, but various other unrelated issues. The Court of Appeal, without considering these other issues, reversed the trial court judgment solely on the ground that Lavelle's fraud claim had been conclusively adjudicated in the prior unlawful detainer proceeding, and that judgment for Hodges in that action cut off Lavelle's right to pursue an independent claim for equitable relief. We conclude that the unlawful detainer judgment was not res judicata under the circumstances, and consequently reverse.

A judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title or to adjudicate other legal and equitable claims between the parties. Recently, in *Wood v. Herson*, the Court of Appeal held that a suit for specific performance of a contract to convey was foreclosed by a prior unlawful detainer judgment that had decided all issues of fact material to the second action. Noting that the Woods' affirmative defense of fraud in the unlawful detainer action was virtually identical to the fraud allegations upon which their suit for specific performance was based, the court concluded that even though title normally is not a permissible issue in an unlawful detainer action, the essential issues had been fully and fairly disposed of in the earlier proceeding. The court cited in support of its ruling such varied factors as the unusual length of the "summary" unlawful detainer hearing (seven days), the scope of discovery by the parties ("extensive" and "complete"), the quality of the evidence ("detailed"), and the general character of the action ("clearly not the customary unlawful detainer proceeding"). A lengthy and comprehensive superior court record replete with precise findings of fact persuaded the *Wood* court that application of collateral estoppel to curtail further litigation would involve no miscarriage of justice, as “the Woods have had their day in court.”

We agree that "full and fair" litigation of an affirmative defense -- even one not ordinarily cognizable in unlawful detainer, if it is raised without objection, and if a fair opportunity to litigate is provided, will result in a judgment conclusive upon issues material to that defense. In a summary proceeding such circumstances are uncommon. *Wood*, however, appears to be an appropriate example. There, the parties apparently chose to waive speedy resolution of the issue of possession in favor of an extensive adjudication of their conflicting claims by a superior court invested with jurisdiction to deal with any issues the disputants agreed to try. The more usual situation is accurately characterized by this case wherein matters affecting the validity of a conveyance of title are neither properly raised in the unlawful detainer proceeding, a summary proceeding for possession, nor are they concluded by the unlawful detainer judgment.

The doctrine of res judicata, whether applied as a total bar to further litigation or as collateral estoppel, rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.

The record herein fails to disclose that Lavelle had the fair adversary hearing contemplated by the law. The municipal court, in Hodges' unlawful detainer action, was empowered to consider whatever equitable defenses Lavelle might have raised insofar as they pertained directly to the right of possession. The court had no jurisdiction, however, to adjudicate title to property worth considerably more than its $5,000 jurisdictional limit, nor could its judgment on the issue of possession foreclose relitigation of matters material to a determination of title except to the extent that the summary proceeding afforded Lavelle a full and fair opportunity to litigate such matters. The burden of proving that the requirements for application of res judicata have been met is upon the party seeking to assert it as a bar or estoppel. In the matter before us Hodges has failed to sustain that burden.

We are of the further opinion that a defendant in an unlawful detainer is not required to litigate, in a summary action within the statutory time constraints, a complex fraud claim. In the absence of a record establishing that the claim was asserted and that the legal and factual issues therein were fully litigated, we conclude that the question of fraudulent acquisition of title was not foreclosed by the adverse judgment in the earlier summary proceeding.

We do not envision that our holding will impose any unwarranted burden on the plaintiff in an unlawful detainer action. In return for speedy determination of his right to possession, plaintiff sacrifices the comprehensive finality that characterizes judgments in non-summary actions. Moreover, he has adequate protection against multiple litigation, for ordinarily he can prevent the introduction of extrinsic issues by making appropriate objections to the defendant's pleadings or proof.

Lavelle appealed the trial court's denial of her attorney's fee motion. The deed of conveyance contained a clause providing that Lavelle would pay Hodges' attorney's fees in the event that he incurred fees in enforcing the deed of conveyance. Columbia Civil Code section 1717 provides that:

> "in any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to one of the parties, . . . then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees. . . ."

The court erred in denying Lavelle's motion for attorney's fees.

REVERSED.

Answer 1 to Performance Test B

To: George Randall

From: Applicant

Date: February 26, 2009

Re: Phoenix Towers v. Porter - - Counseling Memorandum

Richard and Cathy Porter recently had a baby and were subsequently and immediately served with a thirty-day notice of termination of tenancy from their landlord. They currently reside at the Phoenix Towers ("The Towers"), and, as residents of the Towers for ten years, desire to remain at the Towers. At issue is whether the landlord's threatened eviction of Richard and Cathy constitutes unlawful discrimination under the Columbia Fair Housing Act ("FHA") based on familial status. This memorandum will serve as a memo for your use during the counseling session with the Porters tomorrow.

I. Richard and Cathy Porter's goals

The Porters have enjoyed living at The Towers for ten years, have established a significant community there, and Cathy very recently gave birth to their first child and just brought the baby home last week. Therefore, the Porters' primary goal is to remain in their apartment at The Towers. Additionally, Cathy is taking time off from work to take care of their new baby, and as a result they are living on one income, Richard's. Thus, the Porters' secondary goal is to spend as little money as possible in their attempt to remain at The Towers. While this goal is secondary, if the costs of remaining in the apartment become prohibitively expensive, the Porters will reconsider their decision to remain.

II. Options available to Richard and Cathy Porter

There are three primary options available to the Porters: (1) defend the unlawful detainer action that the landlord is likely to bring at the end of their thirty-day notice of termination, (2) file a lawsuit in state court alleging a violation of the FHA, and (3) file an administrative complaint with the Columbia Department of Fair Housing ("DFH").

III. Analysis of options available to Richard and Cathy Porter

A. Defend unlawful detainer action

An unlawful detainer is defined by the Court in Lavelle v. Hodges as "a summary proceeding to determine the right to possession of real property and to provide for a peaceable eviction." It is initiated by a landlord after the termination of a tenancy, which occurs after the expiration of either a three or thirty-day notice given be the landlord. Lavelle.

Possible consequences or results

An unlawful detainer action is the fastest way a court can determine whether the termination of a tenancy (and the resulting eviction) is lawful. It is a very quick proceeding. After the landlord files a complaint at the close of the thirty-day termination notice period, the tenant has five days to answer, and the matter will usually proceed to trial within a month. Levelle. For example, in Lavelle, the plaintiff served a summons of an unlawful detainer action against the plaintiff, the plaintiff answered five days later, the trial was held 21 days later, and the trial only an hour.

Because of the very rapid nature of these proceedings, the Porters would have their rights determined within approximately two months from the time the landlord served the notice on them. If the court rules in their favor, they would be secure in their tenancy in about two months. If the court does not rule in their favor, they would have

to vacate the premises, but would not have to do so until the close of the unlawful detainer proceedings. The likelihood of quick resolution in an unlawful detainer action is great. This option will not drag on. Even if the Porters lose, they will meet their goal of not having to move immediately, but also, it they lose, they would have to move after the close of the two months.

Another result of the rapid nature of the proceedings is that this option is not as expensive as one other. Your work on the case will range form 5-20 hours, resulting in a $1,000 to $4,000 fee at the rate of $200 per hour. There is a chance, however, that the Porters would also be forced to pay for the landlord's attorney's fees and costs in this action. According to Lavelle, which relied on Columbia Civil Code Section 1717, in an action on a contract where the contract provides for attorney's fees and costs, the party that prevails on the contract is entitled to reasonable attorney's fees and costs from the other party. The lease in question here contains a provision for attorney's fees and costs. The provision specifically states that if the landlord employs an attorney to enforce the lease, that tenant will pay all expenses incurred, including attorney's fees. Thus, if the landlord prevails in the unlawful detainer action, the Porters would have to pay the landlord's attorney's fees. However, if the Porters prevail, CCC section 1717 also provides (as quoted in Lavelle) that the prevailing party on the contract is entitled to attorney's fees and costs whether or not that person is the party that is specified to receive the fees in the contract. Therefore, if the Porters win, this is a very economical situation for them because they will not have to put too much money up front since your fees are not very high for this action, and they would have their fees and costs reimbursed. However, if they lose, they would have to pay their own attorney's fees and costs in addition to the landlord's attorney's fees and costs.

Another issue with unlawful detainers is the limited relief afforded to the Porters. Because cross-complaints are not permitted in unlawful detainer actions, see Lavelle, the tenant cannot seek damages. The only relief that the Porters could get from this action is the ability to remain in their apartment. This is the Porter's highest goal, so this option may meet their needs. However, your interview with the Porters also revealed

that the Porters have not been sleeping well and are on edge and that Richard broke out in hives after the last meeting with the manager. It is possible (as will be discussed below) that the Porters have a viable claim for damages based on emotional distress, and it would not be possible to raise such a claim in an unlawful detainer action.

The biggest question is what the chances are of prevailing in a defense of the unlawful detainer action. While the Porters cannot cross-claim for damages, they are free to raise any defense that would, "if successful, preclude removal of the tenant from the premises." Lavelle. In this case, the Porters are in violation of the terms of lease because they have three occupants in their apartment, and the lease specifically states that they can only have two occupants. However, the Porters can raise an affirmative defense of discrimination under the FHA because, as shown by Carter v Brea, if successful, a remedy under the FHA is continued occupation of the unit because the landlord may be enjoined from enforcing an unlawful occupancy limit.

Thus, if the Porters can prevail on an FHA claim (which will be discussed below), they can successfully defend the unlawful detainer action. However, there is one caveat to that conclusion. It will be more difficult for the Porters to prevail on their FHA claim in defending the unlawful detainer for two reasons. First, the trial will be very quick. The trial in Lavelle lasted only one hour. In such a short time, it may be difficult to convince the judge that the Porters have established a defense under the FHA, particularly when our defense will likely require expert opinion. Adding to this difficulty is the fact that, according to Lavelle, discovery is limited in unlawful detainer actions. Therefore, we would likely not be able to get all the information that would be helpful to have in defending the case.

If we were to fail on the FHA claim, according to Lavelle, the landlord would not be able to use our failure in the unlawful detainer as a defense against a subsequent case by applying the doctrine or res judicata if, as made clear in Lavelle, the trial is short. However, Lavelle also described a scenario in which res judicata could apply: if the defense was raised and litigated in the prior proceeding in a less summary fashion. If

we were to go this route, it might make sense to ensure that the trail was short just so that we could preserve the ability to raise the FHA claim in a subsequent state action, should the Porters choose.

In sum, the likely consequence of the Porters choosing this action is quick adjudication of their rights. However, it is a costly route if they lose because they would have to pay the landlord's fees. But, if they win, it is a cost saving option because the landlord would have to pay their fees. Additionally, the Porters would definitely be able to stay in their apartment for the next two months, which might give them at least a little bit of peace in this hectic time. It is more likely than not that the Porters will prevail on their FHA claim (as seen below), though their chances are slightly diminished here due to the hurried nature of the proceeding and the lack of discovery available.

2. Additional information needed

In order to determine how important it might be to be able to get damages for emotional distress, we need to get more information about the distress that the Porters have suffered. Have they experienced any other physical manifestations of stress beyond the lack of sleep, general anxiety, and Richard's hives? Has the baby manifested any symptoms of stress due to the stress in the household? Have they gone to see any doctors for their conditions? We can get this information by further interviewing Richard and Cathy and asking them to bring any relevant doctors' bills or any receipts for medications they have purchased to deal with their symptoms.

We also do not know how much the landlord will spend in attorney's fees. We [can] call the landlord or send him a letter, asking if he has retained counsel. If he has, we can ask around to see what their standard billing rate is and perhaps locate records of other unlawful detainers they have prosecuted to get an idea of how much time they will spend on the case.

B. File a lawsuit in state court alleging violation of the FHA

The Porters' second option is to file a lawsuit in state court alleging violation of the FHA.

1. Possible consequences or results

The first consequence of such an action could be the staying of the unlawful detainer proceeding. In Carter, a couple sued under the FHA after their landlord initiated an unlawful detainer action, threatening to evict them for violating an occupancy provision in a lease after the birth of their son. The court below granted a preliminary injunction that enjoined the unlawful detainer during the pendency of the FHA litigation because the couple was able to show that they had a likelihood of success on their FHA claim, the harm to them outweighed the harm to the landlord, and the couple would be irreparably injured if the relief was not granted. If the Porters could also show these three elements, the unlawful detainer would be stayed throughout the pendency of the FHA suit.

Such a result would meet the Porters' goal of remaining in the apartment better than defending an unlawful detainer. There still remains a risk that the Porters would ultimately lose the FHA case, but if they can at least prevail on the preliminary injunction, they would be able to remain in their apartment during the entire action, which would likely take much longer than three months.

There is also a very high likelihood that the Porters would be able to get a preliminary injunction. Skipping over the likelihood of success for now, but still relying on the elements from Carter, the injury to them far outweighs any injury to the landlord. The landlord would receive rent if the Porters remain, which is what he would receive if he rented it to another party that met the occupancy requirement. Additionally, if the Porters stayed, the landlord would not be deprived of any rent he would have lost while the apartment was vacant during a time when the landlord was looking for another tenant. On the other hand, the Porters will be forced to look for alternative housing at a

time when they have a newborn baby. Additionally, their options for other apartments, according to Richard, look like they might be as much as $500 more per month. The harm to the Porters would also be irreparable because the time of peace with a newborn cannot be replaced. Being thrown into a state of anxiety during such a unique time would cause irreparable harm that could not be fixed with money. Thus, if the Porters can show a likelihood of success on the FHA claim, they are likely to get a preliminary injunction, allowing them to stay in their apartment during the pendency of the litigation.

The main question, then, is the likelihood of succeeding on the FHA claim. The plaintiffs in Carter alleged a violation of the FHA using two different theories, which were affirmed by the court: (1) intent to discriminate and (2) disparate impact. The Carter court noted that, in order to prevail on an intent to discriminate theory, a plaintiff must establish, under a preponderance of the evidence standard, that "a causal connection existed between the familial status of plaintiff and their being asked to vacate by defendant." The court explained that the familial status did not need to be the sole cause of the decision to evict, but it had to play some part.

In Carter, the plaintiff proved intent to discriminate by using only circumstantial evidence. That evidence showed that the landlord specifically excluded minor children from its housing prior to the adoption of the FHA law, but that once the law changed the defendant maintained the status quo in the housing even though the leases were changed to conform to the FHA on their face. The leases changed from requiring adults only to requiring a two-person maximum. However, even with the change no minor children moved in. The court found that the evidence was sufficient to show a "pattern and practice" of excluding children from housing, and that showed an intent to discriminate, in violation of the FHA.

In this case, our housing expert has turned up advertisements in which The Towers was advertised as an "adults-only" complex until the early 1980s. Additionally, our housing expert has determined that is it likely that there are only five families with children in five

units of the 200-unit complex. So, it is possible that although some children have made it into the complex, the circumstantial evidence shows at least an attempt to maintain the status quo. Without more specific information about what the lease said prior to the FHA and what the tenancy trends have been after the FHA, however, it will be difficult to prevail with an intentional discrimination claim. We simply cannot show, as the plaintiffs did in Carter, that no families have moved in since the FHA and that the lease was explicitly restrictive prior to the FHA and was changed only in response.

However, the plaintiffs in Rowan v. Las Brisas prevailed using the disparate impact theory. The Court in Rowan made it clear that a plaintiff does not have to show actual intent to discriminate to prevail on an FHA claim. Rather, the plaintiff can show disparate impact. The Rowan plaintiffs also claimed discrimination by a landlord on the basis of familial status, and showed disparate impact by showing that the occupancy provision in their lease served to exclude a large percentage of families with children in the area. The plaintiffs used data from the U.S. Census to make this showing. In this case, the Porters can also claim discrimination on the basis of familial status because, as defined in Rowan, they are being discriminated on the basis of their status as a unit of "one or more persons under the age of 18 domiciled with one or more parents." They qualify because they are two people living with one baby, who is their child. The Towers appears to only rent out five of the 200 units to families. According to the research of our housing expert, the proportion of renting families with children is 50%. Therefore, if The Towers rented indiscriminately, The Towers would also be renting at 50% to families, for a total of 100 units instead of five. This is likely a strong enough showing to prevail on the FHA claim. Additionally, it is even more likely that the Porters would be able to get a preliminary injunction because this data definitely shows a likelihood that they will succeed on the merits of their claim.

The Rowan court also noted that a defendant can defend against the showing of disparate impact by proving that its action is "the least restrictive means to achieve a compelling business purpose." The Rowan plaintiffs suggested several less restrictive alternatives to their defendant's rationale which was that the occupancy requirement

prevented wear and tear and kept the resale value high. The Rowan plaintiffs suggested that detailed maintenance requirements, frequent inspections, higher security deposits, and tenant screening could reach the same goal. We do not yet know what the landlord will claim is the motive for the occupancy requirement as Las Brisas. If it is the same as that in Rowan, we will easily be able to show that there are less restrictive means of achieving the same purpose by proposing the same alternatives as in Rowan. If the landlord, however, has a different rationale, we will need to develop ideas of less restrictive means of the landlord achieving this purpose. The plausibility of those means will affect the likelihood of success on this claim.

Legal success would also translate into personal success for the Porters. They would be able to stay in The Towers indefinitely, and because the landlord would not be able to enforce the occupancy claim against others, per Carter, there would likely be more families moving into The Towers, perhaps providing an even better living situation for the Porters. Additionally, if the Porters can achieve a preliminary injunction, which appears likely, they can be assured of not having to move for the near future and can have peace that they will not be disturbed during this time with their newborn.

The economic consequences of the suit are also limited, which would meet another of the Porters' goals. Because attorney's fees are awarded to prevailing plaintiffs under the FHA, and because we will likely succeed on the claims, if our firm agrees to accept Porters' case on contingency, the Porters will not have to pay anything, and we will receive our $40,000 in attorney's fees from the landlord if we win. Additionally, there is not a risk of the Porters having to pay for the landlord's attorney's fees or costs if we lose because defendant's attorney's fees are not awarded even if they prevail, per Carter.

Additionally, in a suit under the FHA, the Carter court makes clear that the Porters would also be able to recover for damages for emotional distress if they can prove such damages, which they likely can because of Richard's hives and the humiliation they experienced by being served the moment they got home from the hospital with the

baby, just as the plaintiffs in Carter were, and for which they were awarded $1,500. The jury in Carter also awarded $3,000 in punitive damages, which the Porters may also be entitled to should they show that their landlord's actions were more than negligent. Thus, there are more damage options available to the Porters with this option, and, given their financial situation, they could be eager to go for an option with such a big financial upside.

2. Additionally information needed

We need more information to show that the harm to the Porters would be great and irreparable if the permanent injunction is not granted. We need to determine what the average rent is for a one-bedroom apartment and how much higher that is than the rent they're paying now. Our housing expert could likely find that for us. We should also ask the Porters if the baby has any special needs that would be disrupted by a move. Is their pediatrician or hospital close to The Towers? Is the baby receiving any special treatments currently? Is Cathy receiving any treatments currently?

We also need more information to determine whether The Towers discriminated on the basis of family before the FHA. We can ask our housing expert to look into more newspapers to see if the advertisements changed immediately after the implementation of the FHA. We should also request production of documents during the course of litigation to get leases that were signed prior to the implementation of the FHA and those immediately after.

We also need more information to show that the status quo has been maintained through a pattern and practice of discrimination. Through discovery, we should request a tenancy list for the two or three years prior to the FHA and then to date to see the number of apartments that have been rented to families. We should also interview the people who were evicted by the landlord to determine whether the practice of keeping children out played any role in the eviction. The information from the housing expert makes this unlikely, but we should still pursue this path just to be sure. We should also

interview all of the families with children to determine when they started renting, if they had children when they began renting, and what their relationship with the manager and landlord has been like.

We need to determine what the landlord's rationale of the occupancy restriction. We can attempt to find that out now through a strongly worded letter and see what his response is to determine the viability of his defense. If he does not respond to such a letter, during litigation, we can ask an interrogatory to this effect.

We need more information about the possible claim for damages due to emotional distress. See above for ideas of what to gather and how.

W\e need more information to support a punitive damages claim. We should further interview the Porters and ask if they can give us copies of any communications they've received from the landlord or the manager to see if there is evidence of malice or intentional infliction of distress on the Porters. We should also ask them to make a log with the dates and content of any conversations they have from this point on with the manager or the landlord. We should also ask them for more detail of their initial meeting with the manager, to determine whether he said anything particularly upsetting to them.

C. Filing and administrative complaint

The Porters could file an administrative complaint with the DFH.

1. Possible consequences or results

Unfortunately, the process of filing an administrative complaint is lengthy, and the Porters would likely not be able to stay in their apartment during the pendency of the administrative action. That is because the Fair Housing Commission, which oversees the case as a judge, rarely grants preliminary injunctions and their determinations

usually take a year. Thus, this option would not meet the Porters' primary goal of being able to stay in their apartment. If they were to take this option and not defend the unlawful detainer, they would likely be evicted within a month after the 30-day notice expires. While the DFH can seek a temporary restraining order, that order would buy the Porters little time.

The actual process, however, would give the Porters a greater likelihood of success than defending the unlawful detainer. That is because it is a much more in-depth investigation than the unlawful detainer. The Porters will be interviewed and, after they file a complaint, the DFH would investigate. It has the authority to take depositions, issue subpoenas and interrogatories. Thus, the possibility for discovery is much greater than in the unlawful detainer action though more limited than the state FHA action because the DFH would be conducting it rather than a retained attorney with greater resources.

If the DFH finds that there is a violation, which it likely would, as explained above with regard to the FHC, then the DFH legal staff would litigate the case before the FHC. If the FHC finds for the Porters, they would also be entitled to a broad range of remedies: out-of-pocket costs, injunctive relief, they would be able to go back to their housing, get damages for emotion[al] distress. Additionally, civil penalties of $10,000 will be imposed on the landlord, though it is not clear whether those would go to the Porters or to DFH. Thus, financially it is a good option for the Porters. Also, because attorney's fees are awarded by the FHC, the Porters would be reimbursed for the $5,000 in fees that we would charge for your services.

Finally, I should note that this option is only available to the Porters if a civil suit is not filed. Thus, they can take this option if they lose on the unlawful detainer action, but they cannot take this option if they choose to file a state suit. However, if they choose this option and lose, they can still go back and file the state claim because the statute of limitations will be tolled. It is not clear, however, what the legal effect of the decision of the FHC would be.

2. Additional information needed

We need to know whether the $10,000 civil penalties would go to the Porters or to DFH. We can look on the DFH web site for information or call a DHF representative; perhaps [contact] your friend who works as a staff attorney there, and ask her.

We need more information on emotional damages, and we can take the same path as described previously.

We need to know if there is a res judicata effect of the administrative action to see if it would in fact be possible to succeed on a state claim filed after losing before the FHC. Further legal research should be undertaken on this point.

Answer 2 to Performance Test B

COUNSELING MEMORANDUM

To: George Randall

From: Applicant

Re: Phoenix Towers v. Porter

I. ISSUE AND CLIENT GOALS:

Our clients Richard and Cathy Porter ("Porters") received a Thirty-Day Notice of Termination of Tenancy ("Notice") demanding that they terminate their occupancy at the Phoenix Towers, where they have leased a one-bedroom unit for the past ten years. The Notice advises that Porters that if they do not vacate the apartment, Phoenix will institute legal proceedings for Unlawful Detainer against the Porters to recover damages and possession of the apartment. The Porters received the Notice after Cathy gave birth to their first child, due to the Porters' failure to comply with the numerical occupancy provision contained in their Lease Agreement, which provides that a "one-bedroom unit shall be limited to two permanent occupants at all times."

Our clients' most immediate goal is to retain possession of the apartment, as they have been unable to find a suitable or affordable living alternative despite extensive diligence. In addition, our clients desire a speedy resolution of this issue, which has taken an emotional and physical toll on their well being, particularly given that they are new parents. However, our clients have limited resources to pursue or defend litigation and are unable to front significant costs for litigation. Although the Porters view Phoenix Tower's numerical occupancy as unfair and would likely support relief that applies broadly to all tenants of Phoenix Towers, their principal motivation is to resolve this issue and keep their apartment, rather than to pursue this litigation to maximize "impact" to tenants more broadly.

I have researched the pros and cons of pursuing various options to achieve these goals for our clients, and have outlined and analyzed each below.

II. ANALYSIS OF AVAILABLE OPTIONS:

A. Defense of Unlawful Detainer Action:

One course of action to consider is to simply defend the imminent unlawful detainer action to be filed against our clients, without filing any affirmative litigation or administrative complaint. Phoenix's claims in an unlawful detainer action would be fairly straightforward, and would arise from the plain language of the Lease Agreement, which on its face prohibits the Porters from occupying a one-bedroom apartment with a family of three members. The Porters would be entitled to assert violations of the Fair Housing Act's ("FHA") prohibition on discrimination on the basis of familial status as an affirmative defense in any unlawful detainer action, since that defense, "if successful, [would] preclude removal of the tenant from the premises*." Lavelle v. Hodges*, Columbia Supreme Court (1977) p.9. However, the Porters could not file a cross-complaint against Phoenix for discrimination under the FHA in that proceeding, and the court's determination of the Porters' affirmative defense would be limited to assessing the right of the Porters to remain in the apartment, and would not attempt to address or resolve the more complex analysis that would be required in connection with the Porters' affirmative discrimination claims. *Id*.

1. Advantages:

Mere defense of the unlawful detainer action presents certain advantages to our clients, although I ultimately conclude that these advantages are outweighed by the disadvantages of pursuing this course. One chief advantage of this option is that unlawful detainer actions present an extremely efficient and speedy mechanism for resolution of this issue. The entire time required to adjudicate an unlawful detainer case is typically less than one month from the date the Notice is served, and only extremely limited discovery is available. As our clients are seeking a quick (albeit favorable) resolution of this issue, a successful defense of the unlawful detainer action would give our clients finality within a short time frame on their living situation.

Likewise, and in part because of the truncated nature of the proceedings, defense of the unlawful detainer option would present the cheapest option for our clients, with attorneys fees of approximately $1,000-$4,000. More significantly, because this is the only option that would arise under the parties' Lease Agreement (as opposed to the affirmative litigation and administrative options set forth below, which arise under the FHA), defense of the unlawful detainer action would be the only means by which our clients could recover their attorneys' fees under the contract. Although the Lease Agreement as drafted contains a one-sided fee clause (which purports to provide fees only to Phoenix in the event that it is required to enforce any of the covenants in the Lease Agreement), under Columbia Civil Code Section 1717, our clients would be entitled to collect reasonable attorneys' fees if it prevails in defending against Phoenix's breach of contract claims, but only in an action arising under the Lease Agreement (although, as discussed below, the FHA does permit the prevailing party to recover attorneys' fees).

2. Disadvantages:

Despite these advantages, there are numerous disadvantages of relying solely on a defense of the unlawful detainer action without simultaneously filing affirmative proceedings.

First, the unavailability of meaningful discovery would weigh against our client and could easily result in their affirmative defense being rejected. As discussed above, it will not be difficult for Phoenix to show that our clients are violating the facially neutral terms of the Lease Agreement, as it is not disputed that they and their baby exceed the numerical occupancy limitations set forth in the lease. Whereas no discovery is required to make a prima facie showing of breach, our clients would benefit from additional discovery that could establish either the discriminatory impact of the policy or that Phoenix specifically intended to discriminate against the Porters based on their family status (a more complete discussion of discovery that would be helpful is set forth below). Our clients could fare poorly were this complex issue to be determined without

the benefit of discovery, and by a court that is not suited or experienced at resolving complex questions of discrimination.

Moreover, there is at least some risk that an adverse determination of our client's affirmative defense would have a preclusive effect on any simultaneous or future litigation against Phoenix asserting discrimination under the FHA. This risk is slight in view of the Columbia Supreme Court's decision in *Lavelle*, which held that due to the limited nature of the proceedings in an unlawful detainer action, "a judgment in unlawful detainer effect usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to …resolve other legal and equitable claims between the parties." Although an affirmative claim of discrimination based on FHA encompasses different remedies than a simple affirmative defense based on violation of the FHA, which would focus on the mere right of possession, there is sufficient overlap in the issues to be decided (whether this issue is presented defensively or affirmatively) that a court could certainly deem our client precluded from relitigating this issue as an affirmative claim. Indeed, the Columbia Supreme Court's opinion in *Lavelle* explicitly acknowledged that in certain idiosyncratic instances involving a more "extensive adjudication" of disputed issues in an unlawful detainer action than is typical, the judgment is entitled to preclusive effect where, under the circumstances, the parties had a "full and fair opportunity" to litigate the issue. Thus, the *Lavelle* court left a sufficient opening to reach a different result in a different case, and this possibility is increased by the fact that the *Lavelle* decision is almost forty years old and may no longer reflect the view of the current Court. It would be devastating for our clients were they precluded from litigating their affirmative claims due to a finding that an adverse judgment in the unlawful detainer action has res judicata effect, and this is not a risk that we should take absent compelling need to do so.

Additionally, the speed of decision in an unlawful detainer action, while advantageous in the event of a successful outcome, would be equally devastating to our clients in the event they lose. This could result in our clients being evicted until such time as they are able to litigate their affirmative claims in court or before the FHA, which could take more

than one year, depending on the course of action we choose. Thus, as discussed below, I recommend that we file affirmative litigation asserting violation of the FHA, and that we seek an immediate preliminary injunction to enjoin the unlawful detainer proceeding pending the adjudication of that case.

Finally, our clients would only be entitled to limited relief in the event that they prevail in an unlawful detainer action, as they would not be entitled to recover punitive damages for emotional distress. Although they could recover attorneys' fees under the contract (as applied under Columbia Civil Code Section 1717) if they prevail, they also can recover attorneys' fees under the FHA. Conversely, there is a risk that they could be required to pay Phoenix's attorneys' fees if they lose in an unlawful detainer proceeding, whereas they would not be required to do so in litigation under the FHA.

For these reasons, and as discussed below, I recommend that we seek to enjoin the unlawful detainer action in connection with filing affirmative litigation in court.

B. Filing Affirmative Litigation:

Our clients also could file affirmative litigation in federal court asserting unlawful discrimination based on familial status under the FHA. Under binding authority in Columbia, our clients have an extremely strong case on the merits of this claim. The FHA was amended in 1988 to protect familial status, defined as "one or more persons under the age of 18 domiciled with one or more parents or other legal custodians." Under the FHA, it is unlawful to discriminate (which includes a refusal to rent or any action to deny a dwelling) because of familial status. *See, e.g., Rowan v. Las Brisas Apartments, Columbia Supreme Court (1994) p. 2*.

Significantly, the Columbia Supreme Court has held in two leading cases that a party alleging discrimination based on familial status under the FHA need not demonstrate actual discriminatory intent in order to prevail on claims arising from a neutral occupancy limitation. *Rowan; Carter v. Brea*, Columbia Supreme Court (1995).

Instead, a party can demonstrate either: (1) that a facially neutral limitation on occupancy has discriminatory impact on persons with minor children; or (2) intentional discrimination. *Id*. Our clients have a strong likelihood of prevailing under either theory. The Columbia Supreme Court has held that national census data demonstrating a discriminatory impact on families with children is sufficient to establish discrimination based on familial status. *Rowan*. Our housing expert, Ralph Frankel, has analyzed census data, which reveals that less than three percent of the occupants of Phoenix Towers (and less than two percent of occupants of one-bedroom apartments) have children, even though census data confirms that 50% of renting households in the relevant metropolitan area have children. These statistics, on their face, establish a strong and compelling showing of disparate impact under Phoenix's occupancy limitation provisions. Moreover, with the benefit of additional discovery, our clients also would be likely to establish a case of intentional discrimination, which requires only that they demonstrate that their familial status was "any part of the motivation" for the Notice. Certainly, the fact that the Porters were contacted by the manager and informed of the lease violation immediately after they came home from the hospital with their new baby suggests that their familial status was a significant part of the decision to proceed to evict them. Moreover, the fact that Phoenix's historical advertisements through the 1980s expressly proclaimed that it was an "adults-only" complex (which would be clear evidence of intentional discrimination under current FHA laws), and that Phoenix has continued to maintain its limited occupancy rules since that time, also can form sufficient evidence to establish discriminatory intent. *See, e.g., Carter* (finding discriminatory intent where neutral occupancy provision was implemented in response to changes in FHA law and followed an express policy of prohibiting children). With limited additional discovery, including copies of communications and internal documents by FHA concerning its occupancy limitation policy and its decision to serve the Notice on the Porters, and depositions of other current and prospective tenants, we almost certainly could bolster the case for intentional discrimination.

Given that a defendant can only rebut a showing of disparate impact or intentional discrimination by showing that the policy is the least restrictive means to combat a

compelling business purpose, it is almost certain that Phoenix could not overcome an initial showing of discrimination. Indeed, the Columbia Supreme Court has rejected claims that such restrictions were needed to minimize "wear and tear" or conserve water resources, and it is difficult to imagine that Phoenix could come up with a greater rationale for its policy. *Rowan; Carter*.

1. **Advantages:** There are numerous advantages to filing affirmative claims in court for the Porters asserting violations of the FHA.

First, such litigation would afford the Porters a full opportunity to obtain discovery on their claims, which could include evidence necessary to bolster the case for intentional discrimination and historical statistics that could bolster the showing of disparate impact.

In addition, the Porters would be entitled to a jury trial, and a jury is likely to be extremely sympathetic to the Porters given their status as new parents.

Significantly, this route also would permit us to file for a preliminary injunction seeking to enjoin the unlawful detainer action. The Porters can make a strong showing for a PI, as the census data establishes a showing that they are likely to succeed on the merits, as the balance of hardships clearly favors the Porters (who have a new baby and who have nowhere else to live) over the Phoenix, a commercial landlord, and as the public has an interest in avoiding violation of the FHA, and because the Porters will face irreparable harm if they are evicted with a young child and [have] nowhere else to live. *Compare Carter*. A preliminary injunction proceeding also would enable the Carters to stay in their apartment while their cases is litigated, and would afford them the temporary relief that they are seeking.

Finally, although affirmative litigation (especially with a PI) is the most expensive option to our clients, this also would permit the broadest range of recovery, as determined by a jury likely to be sympathetic. Specifically, the Porters would be entitled to recover punitive damages and emotional damages in addition to obtaining compensatory

damages and injunctive relief, as well as recovery of reasonable attorneys' fees. *See Carter*. Given the strength of the Porters' claims, our firm can afford to take on the risk that we will prevail in this action, particularly as Phoenix appears to have sufficient resources to satisfy a judgment.

2. **Disadvantages:** One disadvantage to filing an affirmative case at this stage is that it is more expensive than other options, but this is mitigated by the strength of the case, greater relief available, and ability to recover attorneys' fees.

In addition, if our client ultimately was not successful in court, it would be precluded from filing an administrative complaint (whereas the converse is not true) but, as discussed below, I do not think the administrative route ultimately is an attractive one for our client.

C. **Filing Administrative Complaint with DFH:**

Finally, our client could consider filing an administrative complaint with the DFH, which could lead the DFH to issue an accusation against Phoenix and to pursue litigation on behalf of the Porters before the Fair Housing Commission. Given the strength of the Porter's FHA claims (discussed above), it is likely that the DFH would conclude that their dispute is worth litigating. Ultimately, the discovery available to the DFH appears to be comparable to that available to our clients in direct litigation.

1. **Advantages:** Filing an administrative complaint would have a few advantages for the Porters.

First, because the DFH and Fair Housing Commission (FHC) are specialized administrative bodies, they are likely to be sympathetic to the Porters' claims and to possess the necessary expertise to conduct a thoughtful and effective litigation.

In addition, because the DFH's staff would take the lead in litigating these claims before the FHC, this would reduce the costs of litigation for our client.

Moreover, the FHC is empowered to award civil penalties to $10,000 (which would not be available in other proceedings), in addition to damages, injunctive relief, emotional damages and attorney's fees.

Finally, if our client proceeded first with an administrative complaint and lost, it could still pursue an action in court, whereas the converse is not true.

2. **Disadvantages:** Ultimately, however, I feel that the advantages of proceeding administratively are not as strong as proceeding directly to court.

Most significantly, although the FHC is empowered to grant temporary injunctive relief, your investigation suggests that it rarely does so, and that the Porters could expect the determination by the FHC to take as much as one year from the time the complaint is issued (which itself follows a lengthy period of investigation, mediation, etc.) This time table is wholly unacceptable to our clients, who require an expedited determination of their claims and rights to stay in their apartment.

In addition, I am uncomfortable forfeiting control over the progress of any litigation to the DFH staff, and would prefer that we maintain our position as lead counsel in any action on behalf of the Porters.

Finally, an administrative proceeding would not permit our clients access to a jury, who is likely to be sympathetic to their claims, and they also could not recover punitive damages in an administrative action, which potentially could be significant.

III. Conclusion and Recommendation

Thus, for each of the reasons set forth above, I propose that we file affirmative litigation asserting violations of the FHA on behalf of the Porters and seek an immediate preliminary injunction to enjoin the unlawful detainer action pending the outcome of that proceeding.

California Bar Examination

Performance Tests And Selected Answers

July 2009

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
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PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2009 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the July 2009 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of the authors.

Contents

JULY 2009

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

FARLEY v. DUNN

FILE

FARLEY v. DUNN

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Sundquist & Davis
Attorneys at Law
12 Manning Blvd.
Columbia City, Columbia

MEMORANDUM

To: Applicant

From: Wendy Davis

Date: July 28, 2009

Re: **Farley v. Dunn**

Our firm represents Dunn Insurance Company ("Dunn"), which is headquartered in Columbia. Dunn insures a wide variety of activities, including commercial trucking. Dunn has been sued by Farley Trucking, Inc. ("Farley"). Farley is a large, interstate trucking company also located here in Columbia. Farley, an apparently sophisticated company, aided by its insurance broker, seeks to elevate the status of a one-page letter into a three-year contract for millions of dollars of commercial general liability insurance coverage, and, in the process, unilaterally rewrite important terms of the insurance contract that was subsequently signed by the parties.

We are now prepared to file a motion for summary judgment, seeking dismissal of the entire lawsuit. Following the guidelines set forth in the attached memorandum regarding persuasive briefs in support of motions for summary judgment, please draft a Statement of Uncontested Facts and a persuasive brief in support of our motion in which we argue that the one-page letter is not enforceable as a contract, varies the one-year term of the policy, and is not a sufficient basis for Farley's fraud allegation.

Sundquist & Davis
Attorneys at Law
12 Manning Blvd.
Columbia City, Columbia

MEMORANDUM

To: Attorneys

From: Executive Committee

Re: **Persuasive Briefs in Support of Motions for Summary Judgment**

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs in support of motions for summary judgment to be filed in state court shall conform to the following guidelines.

All of these documents shall start with a Statement of Uncontested Facts that itemizes the facts that are material to support our motion and explains why each of the material facts is undisputed. The attorney must sift through the facts in the file and draft a statement that persuasively shows that there is indeed no genuine issue of material fact. This requires a careful comparison of the opposing side's characterization of the facts in the file. The format and style shall be as follows:

Fact #1: The May 1, 2005 memorandum was signed by the President of the company.

Undisputed Because: The President of the company admitted this fact in paragraph 2 of her affidavit.

Fact #2: The meeting between James and Spellman occurred on March 1, 2006.

Undisputed Because: This fact is alleged in paragraph 10 of the plaintiff's complaint and is admitted in paragraph 14 of the defendant's answer.

Following the Statement of Uncontested Facts, the attorney must then argue, applying the law to the facts, and move on to show that, in light of the uncontested facts, our client

is entitled to judgment as a matter of law.

This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position the attorney is advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER:** DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. **PROPER:** A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs. Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Victoria Cooper, Esq.
State Bar No. 7579
Michaels & Farnsworth, LLP
515 Francesca Way
Marion, Columbia
(555)337-2021
Attorneys for Plaintiff

SUPERIOR COURT OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

Farley Trucking, Inc.,	Civil Action
Plaintiff,	No. 89765
v.	
	COMPLAINT
Dunn Insurance Company,	
Defendant	
_____/	

THE PARTIES

1. Plaintiff, Farley Trucking, Inc. ("Farley"), is a corporation organized and existing under the laws of Columbia, with its principal place of business in Columbia City, Columbia.

2. Upon information and belief, Defendant, Dunn Insurance Company ("Dunn"), is an insurance corporation incorporated under the laws of Columbia, with its principal place of business located in Columbia City, Columbia.

3. Upon information and belief, Dunn insures certain types of liabilities, including liabilities associated with the commercial trucking industry.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action.

5. Venue is proper in this Court.

BACKGROUND

6. Farley is a truckload motor carrier of general commodities in both interstate and intrastate commerce. Farley is among the five largest truckload carriers in the United States. It operates throughout the 48 contiguous states and also portions of Canada and provides through-trailer service in and out of Mexico. At 2006 year-end, Farley's fleet consisted of 7,475 tractors, over 19,770 trailers, and over 10,000 employees and independent contractors. The principal types of freight Farley transports include consumer products, retail store merchandise, food and paper products, beverages, industrial products, and building materials.

7. In the summer of 2006, Farley, through insurance brokers Bradford Insurance Brokers, Inc. (“Bradford”), negotiated with Dunn to purchase commercial general liability coverage.

8. In a letter dated July 11, 2006 (the “Agreement”), Dunn entered into a contract with Farley to provide coverage for a fixed premium rate of .0940 per 100 payroll miles for a period of three consecutive years beginning August 1, 2006 and ending August 1, 2009. (A true and correct copy of the Agreement is attached to this Complaint as “Exhibit A.”)

9. In accordance with the Agreement, effective August 1, 2006, Farley purchased from Dunn a commercial general liability policy (the “Policy”) that provided for $5,000,000 in policy limits per occurrence. (A true and correct copy of the relevant excerpts of the Policy is attached to this Complaint as “Exhibit B.”)

10. All premiums due and owing under the Policy have been paid.

11. In breach of the Agreement, on May 23, 2007, Dunn sent Farley a notice of non-renewal (the “Notice”) of the Policy effective August 1, 2007. (A true and correct copy of the Notice is attached to this Complaint as “Exhibit C.”)

12. As of May 23, 2007, there was no material change in Farley's operations.

13. As of May 23, 2007, no claim in excess of $500,000 has been filed.

14. As of May 23, 2007, Dunn has neither requested an increase in coverage nor

a decrease in the policy deductible.

15. After Farley received the Notice, representatives from Bradford met with representatives from Dunn. The Bradford representatives learned from this meeting that Dunn claimed that their notice of non-renewal was because the terms of Dunn's reinsurance agreements would not allow them to lay off the risk they assumed in the Policy.

16. Dunn knowingly misrepresented its intention to renew and willfully placed its own pecuniary interest before that of its policyholder in failing to renew the Policy at the fixed premium rate through August 1, 2009, as it contracted to do in the Agreement.

17. Due to Dunn's breach of the Agreement, Farley was forced to purchase insurance similar to that previously provided under the Policy for the period August 1, 2007 through August 1, 2009, at a cost to Farley significantly in excess of the fixed premium rate provided for in the Agreement.

BREACH OF CONTRACT

18. Farley repeats and realleges the allegations contained in paragraphs 1 through 17 as if fully set forth herein.

19. Dunn was obligated under the Agreement to renew the Policy at the fixed premium rate of .0940 per 100 payroll miles for a period of three consecutive years beginning August 1, 2006 and ending August 1, 2009.

20. Dunn sent Farley a notice of non-renewal of the Policy effective August 1, 2007 — two years before their obligation expired.

21. Thus, Dunn has breached the terms of the Agreement.

22. As a result of such breach, Farley has suffered, and will continue to suffer damages.

23. Farley, therefore, is entitled to an award of compensatory and consequential damages in an amount to be proven at trial.

FRAUDULENT INDUCEMENT

24. Farley repeats and realleges the allegations contained in paragraphs 1 through 23 as if fully set forth herein.

25. Farley has justifiably relied upon the Agreement entered into on July 11, 2006.

26. Dunn's actions as enumerated in paragraphs 1 through 25 constitute

fraudulent inducement.

27. As a result of Dunn's fraudulent inducement, Farley has suffered, and will continue to suffer damages.

WHEREFORE, Plaintiff prays for judgment as follows:

(a) For compensatory and consequential damages in an amount to be proven at trial;

(b) For attorneys' fees and expenses of litigation incurred in bringing this action, and

(c) For such other and further relief as this Court may deem just and proper.

Michaels & Farnsworth, LLP

Dated: January 9, 2009

Victoria Cooper

by: Victoria Cooper, Esq.

Attorneys for Plaintiff Foley Trucking, Inc.

Bradford Insurance Brokers, Inc.
456 Peal Street
Columbia City, Columbia

July 11, 2006

Scott Gordon, President
Dunn Insurance Company
717 Security Drive
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance

Dear Mr. Gordon:

I enjoyed meeting with you yesterday and wanted to follow up our conversation concerning the proposed Farley Trucking, Inc. insurance policy with a brief summary of our discussion. We are in agreement that you will provide a rate of .0940 per 100 miles for the period of August 1, 2006 through August 1, 2009 with a minimum deposit of $987,800 for the referenced account for the 12 month period August 1, 2006 through August 1, 2007.

This rate will not change unless:

1) There is a material change in operation;
2) There has been a claim in excess of $500,000;
3) Farley requests an increase in coverage or a decrease in deductible.

If there are any questions, please contact me. I look forward to working with you.

Sincerely,

Bradford Insurance Brokers, Inc.

Jennifer Barba

Jennifer Barba
Vice President

EXHIBIT A

Dunn Insurance Company
717 Security Drive
Columbia City, Columbia

POLICY OF INSURANCE

Policy No. GYC 3427

NAMED INSURED: Farley Trucking, Inc.

TERM: The policy term shall be one year, from August 1, 2006 to August 1, 2007.

PREMIUM: $987,800 per year, adjustable at a rate of .0940 per 100 payroll miles.

* * *

COVERAGE: Dunn will provide $5 million commercial general liability coverage per occurrence.

* * *

23. This policy constitutes the entire agreement between the insured and the insurer concerning this insurance.

24. Dunn may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least Ninety (90) days before the effective date of cancellation if we cancel for any reason other than bankruptcy or non-payment of premiums.

25. We may non-renew this policy by mailing to the first Named Insured written notice of the non-renewal at least 60 days before the expiration date of the policy.

Mark Jones

For Farley Trucking, Inc.
Date: July 20, 2006

Scott Gordon

For Dunn Insurance Company
Date: July 20, 2006

EXHIBIT B

Dunn Insurance Company
717 Security Drive
Columbia City, Columbia

May 23, 2007

Mark Jones
Farley Trucking, Inc.
987 Broadway
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance No. GYC 3427

Dear Mr. Jones:

This letter is to advise you that Dunn Insurance Company is not renewing the 2006-2007 Policy No. GYC 3427.

We are willing to consider renewal options for this account. However, any renewal option we may offer may contain changes in limits, premiums, terms and conditions. If you wish to proceed on this basis, please forward completed signed, dated renewal submission including all pertinent information.

I look forward to hearing from you or your insurance broker.

Sincerely,
Dunn Insurance Company

Scott Gordon

Scott Gordon
President

cc: Jennifer Barba, Bradford Insurance Brokers, Inc.

EXHIBIT C

Wendy Davis, Esq.
State Bar No. 5862
Sundquist & Davis
12 Manning Blvd.
Columbia City, Columbia
(555)337-1091
Attorneys for Defendant

SUPERIOR COURT OF COLUMBIA

COUNTY OF CHESTER

Farley Trucking, Inc.,
Plaintiff,

v.

Dunn Insurance Company,
Defendant
_____/

Civil Action
No. 89765

DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES

THE PARTIES

1. Defendant admits the allegations of paragraph 1.

2. Defendant admits the allegations of paragraph 2.

3. Defendant admits the allegations of paragraph 3.

JURISDICTION AND VENUE

4. Defendant denies that this Court has jurisdiction over this action as Plaintiff has failed to state a claim upon which any relief may be granted.

5. Defendant denies that this Court has venue over this action as Plaintiff has failed to state a claim upon which any relief may be granted.

BACKGROUND

6. Defendant admits the allegations of paragraph 6.

7. Defendant admits the allegations of paragraph 7.

8. Defendant admits that Exhibit A is a true and correct copy of the July 11, 2006 letter but denies the remaining allegations of paragraph 8.

9. Defendant admits that Exhibit B is a true and correct copy of portions of the policy purchased by Plaintiff from Defendant but denies the remaining allegations of paragraph 9.

10. Defendant admits the allegations of paragraph 10.

11. Defendant admits that Exhibit C is a true and correct copy of the non-renewal notice but denies the remaining allegations of paragraph 11.

12. Defendant admits the allegations of paragraph 12.

13. Defendant admits the allegations of paragraph 13.

14. Defendant admits the allegations of paragraph 14.

15. Defendant denies the allegations set forth in paragraph 15.

16. Defendant denies the allegations set forth in paragraph 16.

17. Defendant denies the allegations set forth in paragraph 17.

BREACH OF CONTRACT

18. Defendant repleads its response to the allegations contained in paragraphs 1-17 as though they were set forth herein verbatim.

19. Defendant denies the allegations of paragraphs 19 through 23.

FRAUDULENT INDUCEMENT

20. Defendant repleads its response to the allegations contained in paragraphs 1-17 as though they were set forth herein verbatim.

21. Defendant denies the allegations in paragraphs 25-27.

PRAYER FOR RELIEF

Defendant denies that Plaintiff is entitled to any of the relief it has sought, including but not limited to, the alleged compensatory and consequential damages, or any award of attorneys' fees.

DEFENDANT'S DEFENSES

The Complaint fails to state a claim upon which relief may be granted.

Plaintiff's rights and claims, if any, are barred by the statute of frauds.

WHEREFORE, Defendant requests that Plaintiff's request for relief be denied in its entirety.

Sundquist & Davis

February 8, 2009

Wendy Davis

by: Wendy Davis, Esq.
Counsel for Defendant
Dunn Insurance Company

Victoria Cooper, Esq.
State Bar No. 7579
Michaels & Farnsworth, LLP
515 Francesca Way
Marion, Columbia
(555)337-2021
Attorneys for Plaintiff

SUPERIOR COURT OF COLUMBIA

IN AND FOR THE COUNTY OF CHESTER

Farley Trucking, Inc.,

Plaintiff,

Civil Action

No. 89765

v.

Dunn Insurance Company,

Defendant

_____/

AFFIDAVIT OF MARK JONES

Mark Jones, being first duly sworn, states the following upon personal knowledge:

1. I am the Risk Manager of Plaintiff Farley Trucking, Inc. ("Farley"), a commercial trucking company.

2. Farley is a publicly-traded Columbia-based company involved in various lines of business, including the commercial trucking of goods throughout the United States.

3. I have been employed by Farley in this capacity during all relevant times and during those times purchased complex insurance programs from a multitude of insurance companies to cover different lines of business and risks with different layers of coverage.

4. As of January 1, 2006, Farley had annual operating revenues of over $1 billion.

5. In 2006, Farley employed a full-time Risk Manager who helped purchase a number of Farley's insurance policies. Farley also contracted with professional insurance brokers, Bradford Insurance Brokers, Inc. (“Bradford”), for assistance in obtaining such insurance.

6. Beginning in or about June 2006, Bradford entered into negotiations with Dunn to obtain a commercial general liability policy for Farley. These negotiations culminated in Dunn's agreement to provide such coverage for the period of August 1, 2006 to August 1, 2009 (Exhibit A to the Complaint).

7. Pursuant to the agreement to provide such coverage for three years, Dunn issued the Policy of Insurance covering the period August 1, 2006 to August 1, 2007 (Exhibit B to the Complaint).

8. In May, 2007, Farley specifically requested Dunn provide a new policy for the second year (August 1, 2007 to August 1, 2008) at the same rate, going so far as to have its broker fax a copy of the July 11, 2006 Agreement to Dunn.

9. On May 23, 2007, Dunn advised Farley that, pursuant to the non-renewal provision of the policy, it was not renewing the 2006-2007 policy.

10. Farley, through Bradford, engaged in negotiations with another insurer for a new policy for the August 2007-August 2008 period and ultimately bought a policy for that period with different terms of coverage and different exclusions from the 2006-2007 policy.

11. The 2007-2008 policy's premium rate was also higher than the premium rate for the 2006-2007 policy.

Mark Jones

Mark Jones

Subscribed and sworn to

before me this 9th day of January, 2009

R Grunberg

by: Notary Public

Wendy Davis, Esq.
State Bar No. 5862
Sundquist & Davis
12 Manning Blvd.
Columbia City, Columbia
(555)337-1091
Attorneys for Defendant

SUPERIOR COURT OF COLUMBIA
COUNTY OF CHESTER

Farley Trucking, Inc.,
Plaintiff,

Civil Action
No. 89765

v.

Dunn Insurance Company,
Defendant
_____/

AFFIDAVIT OF SCOTT GORDON

Scott Gordon, being first duly sworn, states the following upon personal knowledge:

1. I am President of Defendant Dunn Insurance Company ("Dunn").

2. Plaintiff Farley Trucking, Inc. ("Farley") purchased from Dunn a commercial general liability policy (the "Policy") that provided for $5,000,000 in policy limits per occurrence.

3. The term of the policy was from August 1, 2006 through August 1, 2007.

4. In the spring of 2007, Farley sought renewal of the Policy, or the issuance of a new one-year policy, at the 2006-2007 rate.

5. On May 23, 2007, Dunn sent Farley a notice of non-renewal of the Policy, effective August 1, 2007.

6. Dunn did not agree in word or substance to provide insurance coverage to Farley for 3 years pursuant to the July 11, 2006 letter, or otherwise.

7. Farley failed to object entirely to the non-renewal of the Policy until one and one-half years later when it first asserted its claim under the July 11, 2006 letter through this legal action.

*Scott Gordon*_____

Scott Gordon

Subscribed and sworn to
before me this 8th day of February, 2009

*Don Ramos*_____

Notary Public

JULY 2009

California Bar Examination

Performance Test A

LIBRARY

FARLEY v. DUNN

LIBRARY

COLUMBIA CIVIL CODE § 1350

§ 1350. Obligations which must be in writing.

To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:

* * * *

(4) Any contract for sale of lands, or any interest in, or concerning lands;

(5) Any agreement that is not to be performed within one year from the making thereof;

(6) Any promise to revive a debt barred by a statute of limitation; and

(7) Any commitment to lend money.

First Data POS, Inc. v. Willis Group

Columbia Supreme Court (2001)

In 1992, appellant First Data POS, Inc. (“First Data”) purchased COIN Banking Systems (“COIN”), a software development company, from appellees the Willis Group (“Willis”). The parties executed a Stock Purchase Agreement (the “Agreement”) in which First Data agreed to pay Willis $2.5 million in exchange for all of COIN's stock. The Agreement provided that Willis might receive additional payments, so long as COIN's post-acquisition business generated certain levels of revenue over the three-year period following the Agreement's execution (the earnout provision). The Agreement expressly stated that First Data was under no obligation to carry on the current business of COIN, or even to maintain COIN as a business entity, but rather that First Data was authorized “at any time without limitation and without notice to Willis to reorganize or merge COIN out of existence or cease the sale of any of the products or services of COIN.” Finally, the Agreement contained a standard merger clause, which stated that:

> [The] Agreement ... constitutes the entire agreement between the parties with respect to the subject matter contained herein and supercedes all prior agreements and understandings, both oral and written by and between the parties hereto with respect to the subject matter hereof.

Approximately three years after the Agreement's execution, Willis filed suit alleging that during the precontractual negotiations, First Data had misrepresented its intention to increase COIN's business after it acquired the company, and that those misrepresentations had induced Willis to enter into the Agreement and to sell COIN's stock for less than its then-current market value. Willis' complaint against First Data alleged fraudulent misrepresentation and breach of contract. The Court of Appeals reversed the trial court’s granting of summary judgment as to Willis' civil fraud and breach of contract counts.

Summary judgment is proper when the materials of record show that no genuine issue exists as to material facts and that the moving party is entitled to judgment as a matter of law. Col. R. Civ. P. 56(c). The threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial.

The proper construction of a contract may be a matter appropriate for resolution on summary judgment even though the parties contend the contract should be construed differently. A Court is first to look to the four corners of the instrument to determine the proper construction of the contract. Only if contract language remains ambiguous does a court then apply the appropriate rules of construction to interpret any unclear terms. If the language remains ambiguous after applying the rules of construction, only then may extrinsic evidence be considered to resolve the ambiguity.

The Agreement's terms state with absolute clarity that First Data was under no obligation to continue carrying on COIN's business and could, at any time and without notice to Willis, “reorganize or merge COIN out of existence or cease the sale of any of COIN's products or services.” Despite this express contractual provision, Willis' claim is based entirely upon parol evidence of contradictory representations that are purported to have been made before the Agreement's execution. It has long been the law of this state that the parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous agreement to alter, vary or change the unambiguous terms of a written contract. Therefore, the Court of Appeals erred by basing its ruling upon such contradictory parol evidence.

The Court of Appeals also erred by concluding that the Agreement's merger clause did not preclude Willis' claim that First Data's precontractual representations amounted to fraud or fraudulent misrepresentation. As explained above, the Agreement's

unambiguous merger clause states that it was the parties' intention that the Agreement supercede all precontractual agreements and representations, both oral and written, concerning First Data's acquisition of COIN's stock.

It is axiomatic that contracts must be construed to give effect to the parties' intentions, which must whenever possible be determined from a construction of the contract as a whole. Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning. In written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties, nor would the violation of any such alleged oral agreement amount to actionable fraud.

The rational basis for merger clauses is that where parties enter into a final contract all prior negotiations, understandings, and agreements on the same subject are merged into the final contract, and are accordingly extinguished.

It follows from these well established precepts of contract law and the precedent based thereon that any impressions held by Willis that were based upon First Data's purported precontractual representations that it would increase COIN's business after the acquisition were superceded by the merger clause contained in the parties' Agreement, which expressly put Willis on notice that the Agreement's terms superceded any and all prior representations not contained therein.

Thus, Willis' claim that they were deceived by First Data's precontractual misrepresentations has no basis. Under the express terms of the Agreement, Willis could not have reasonably placed their reliance upon any precontractual representation that was not also included in the Agreement's language, and thus Willis could not have been deceived by such precontractual representations. Without deception, of course,

there can be no fraud claim.

Accordingly, the Court of Appeals erred in ruling that the contractual merger clause did not preclude Willis' claim that First Data had committed fraud in making precontractual representations regarding the future business operations of COIN Banking Systems. As a matter of law, a valid merger clause executed by two or more parties in an arm's-length transaction precludes any subsequent claim of fraud based upon precontractual representations.

Judgment reversed.

Hieke v. George D. Warthen Bank

Columbia Court of Appeals (1999)

Alleging that appellee-defendants George D. Warthen Bank (the "Bank") had breached an agreement to loan them $80,000, appellant-plaintiffs Jane and Ray Hieke ("Hieke") brought suit to recover in fraud and contract. The Bank answered and counterclaimed, seeking to recover on notes which were allegedly in default. After discovery, the Bank moved for summary judgment on their own counterclaim as well as on Hieke's main claim. The trial court granted summary judgment in favor of the Bank and Hieke appeals.

Construing the evidence most favorably for Hieke, they borrowed $40,000 from the Bank pursuant to an *oral* extension of a $120,000 line of credit, but were subsequently denied the additional $80,000 when they sought to borrow it. However, such a commitment to lend Hieke money would have to be evidenced by a *writing* signed by the Bank. Columbia Civil Code §1350. The fact that the Bank did loan Hieke $40,000, as evidenced by a note, would not serve to take the alleged oral agreement outside the Statute of Frauds.

A contract falling within the Statute of Frauds must be complete within itself as to all terms of the undertaking, and oral evidence cannot be used to supply contractual elements that are missing. Further, for such a contract, oral evidence is not permitted to prove provisions that are inconsistent with the writing.

In order to remove the alleged oral contract from the Statute of Frauds the proper performance shown must be consistent with the presence of a contract and inconsistent with the lack of a contract. The act of lending Hieke $40,000 may be entirely consistent with an agreement to lend them an additional $80,000, but neither is it inconsistent with the lack of an agreement to lend them any additional sum whatsoever. The lending of $40,000 in no way tends to prove that the Bank agreed to the oral contract that Hieke

seeks to enforce. To hold that the mere act of lending *any* sum to a borrower will serve to render enforceable an alleged oral agreement to lend some *additional* sum would negate §1350 and have the anomalous effect of subjecting the lenders of this state to potentially fraudulent claims despite the protection ostensibly afforded them under the Statute of Frauds. It follows that the trial court correctly granted summary judgment in favor of the Bank as to Hieke's contract claim.

The trial court likewise correctly granted summary judgment in favor of the Bank as to Hieke's fraud claim. Although fraud can be predicated on a misrepresentation as to a future event where the defendant knows that the future event will not take place, fraud cannot be predicated on a promise which is unenforceable at the time it is made. The instant alleged oral contract was unenforceable at the time it was purportedly made because it was not in writing as required by §1350. Obviously, one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds.

With regard to the Bank's counterclaim, there is no dispute either as to the execution of the notes or as to Hieke's default thereon. In the original and supplementary evidence offered in support of the motion for summary judgment, the Bank showed the amounts of unpaid principal and interest that were owing on the notes. In opposition, Hieke offered nothing to demonstrate the existence of any *genuine* issue of *material* fact. It follows that summary judgment was properly granted in favor of the Bank.

Judgments affirmed.

Callaway v. DeMaio Swine Breeders, Inc.

Columbia Court of Appeals (1998)

Callaway Farms (“Callaway”) brought suit against DeMaio Swine Breeders, Inc. (“DeMaio”) for fraud and bad faith in selling diseased swine. The trial court granted summary judgment, dismissing Callaway's claims. For the following reasons, we affirm.

In 1992 and 1993, Callaway operated a large swine breeding herd with approximately 5000 sows in Wilkes County, Columbia. Callaway regularly introduced new breeding stock into its herd supplied by DeMaio. DeMaio is in the business of raising and selling swine breeding stock.

From 1989 through 1994, Callaway and DeMaio executed numerous written contracts documenting Callaway's purchase of breeding stock from DeMaio. Each contract contains a limitation of liability in the case of disease, stating:

> DEMAIO CANNOT AND DOES NOT GUARANTEE THE ABSENCE OF ANY PATHOGENS OR DISEASES IN THE BREEDING STOCK SOLD BY DEMAIO. PATHOGENS OR DISEASES MAY BE PRESENT AT TIME OF SALE OR MAY APPEAR LATER.

The contracts recommend that the buyer have the swine tested at the buyer's expense prior to delivery. In the case of diseased swine, the contracts provide that replacement of the swine is the buyer's sole remedy. On the front page, in bold red letters, the contracts provide:

> DEMAIO GIVES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SWINE OR THEIR PROGENY. DEMAIO GIVES NO WARRANTIES OF MERCHANTABILITY, HEALTH OR FITNESS FOR A PARTICULAR PURPOSE.

Each contract contains a merger clause, stating that “[t]his contract supersedes all prior written or oral agreements related to the swine sold hereunder, and this contract cannot be amended except in a writing which refers to this contract and which is signed by both parties.” Moreover, the contracts provide a blank for the purchaser to state any promises or representations made by the seller not otherwise specified in the contract. In each of the contracts, Eugene Callaway, Jr., an officer of Callaway, wrote “none” in the blank.

In early 1993, Callaway considered replacing DeMaio with Pig Improvement Company (PIC) as their supplier of breeding stock. Callaway decided against this move, however, when it learned from a PIC veterinarian that PIC's herds had tested positive for Porcine Reproductive and Respiratory Syndrome (PRRS), a swine disease caused by a virus. In sows, PRRS may cause abortions and birth of stillborn, underweight, or defective pigs. PRRS is highly contagious and widespread. Callaway explained to DeMaio's sales personnel that it wanted to avoid PRRS and that was the reason they had decided to stay with DeMaio over PIC. Clinton Day, a DeMaio salesman, replied: “Well, that is a pretty good reason to stay with us.”

Callaway's herds tested negative for PRRS on March 1, 1993. On March 11, 1993, Callaway received nineteen boars from DeMaio. The animals had no clinical signs of PRRS at the time of shipment or delivery. As was the conventional practice, a Callaway farm manager signed the invoices upon delivery.

On April 9, 1993, Callaway's herds developed the PRRS virus. No swine were introduced to the Callaway herds from any source other than DeMaio.

Callaway filed suit alleging fraud and seeking damages in excess of $2,000,000. DeMaio filed a motion for summary judgment that the trial court granted.

This court exercises a complete and independent review of the trial court's grant of

summary judgment, and applies the same legal standards used by the trial court. As such, we must view all evidence and make all reasonable inferences in favor of the nonmovant. This court should affirm the trial court's grant of summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Col. R. Civ. P. 56(c).

The Columbia common law tort of fraud has five elements: (1) a false representation by the defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to the plaintiff. In granting summary judgment, the trial court found that Callaway's reliance upon Mr. Day's statement was not justifiable in light of the contractual provisions disclaiming liability for diseases.

Callaway asserts that the trial court improperly granted summary judgment on the fraud claim, stressing that the question of justifiable reliance was one for the jury. In most cases, the question of justifiable reliance is a jury question, but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, as a matter of law, to establish that his reliance is justifiable.

DeMaio's contract with Callaway devotes over fifty lines of text to disclaimers as to pathogens and diseases and buyer's responsibilities as to testing and quarantine. The contract expressly states that "[o]rganisms which cause swine diseases (called pathogens) are present in every swine herd, including DeMaio's swine herds." The contract could not be any clearer in disclaiming DeMaio's responsibility for diseases in its swine herds.

In red letters, in a paragraph labeled "BUYER'S UNDERSTANDING," the buyer must attest that he "ha[s] discussed the purchase of DeMaio breeding stock with DeMaio, and ha[s] read this Contract, and, in particular, ... the 'Pathogen and Disease — Statement and Limited Replacement Policy', and 'Testing and Quarantine — Buyer's

Responsibility' on the back of this page." The contract also has a space for the buyer to fill in any additional representations made by DeMaio representatives.

The situation is complicated somewhat by the fact that the alleged misrepresentation by Mr. Day was made after the contracts were signed. On delivery, one of Callaway's farm managers signed a delivery invoice stating that:

> The Warranties and Remedies, if any, applicable to the swine delivered with this invoice are determined in the contract between you, the Buyer, and DeMaio Swine Breeders, Inc. Please refer to that contract for the warranties, exclusive remedies, and statements regarding the swine, including their fertility, diseases and soundness. Acceptance of the swine here delivered is a reconfirmation of that contract and its terms.

We agree with the trial court that, by signing this invoice, Callaway reaffirmed the sales contract and all of its provisions, including the merger clause. As such, Callaway could not justifiably rely on the intervening representation of Mr. Day as a matter of law.

AFFIRMED.

Dana v. Piedmont Motors

Columbia Supreme Court (1974)

A suit in tort by a buyer against a seller for an alleged fraudulent misrepresentation by the seller's agent resulted in a jury verdict and judgment for the buyer, and on appeal by the seller the Court of Appeals affirmed. We determine the judgment of the Court of Appeals should be affirmed.

In this case, the buyer, Ryan Dana (“Dana”), contended that he purchased a used automobile with the understanding that the vehicle had never been wrecked. The seller, Piedmont Motors, denied that this representation was made by its agent (salesman) to the buyer. The buyer, Dana, signed a sales agreement which contained the words, “No other agreement, promise or understanding of any kind pertaining to this purchase will be recognized.” In addition, the purchase agreement stated that the car is sold “as is.” Subsequent to the purchase, the buyer discovered that the automobile had been wrecked, tendered the car to the seller, gave notice of rescission of the contract and brought the present action in tort for fraud and deceit.

In our review of the case, we accept the jury's factual determination that the seller's agent knowingly misrepresented the car as never having been wrecked. The decisive issue we address is whether the language of the merger clause that “no other agreement, promise, or understanding of any kind pertaining to this purchase will be recognized,” was legally effective to prevent the buyer from claiming that he relied on the seller's misrepresentation. It has been recognized that §2-202 of the Uniform Commercial Code was intended to allow sellers to prevent buyers from making false claims of oral warranties in contract actions. Thus, in contract actions, the effect of merger and disclaimer clauses must be determined under the provisions of the Uniform Commercial Code.

However, under Columbia law, traditionally two actions have been available to a buyer in which to sue a seller for alleged misrepresentation in the sale. The buyer could affirm

the contract and sue in contract for breach or he could seek to rescind the contract and sue in tort for alleged fraud and deceit. Our threshold question in this tort case is to determine whether the adoption of the Uniform Commercial Code left available in Columbia a buyer's historic remedy in tort. The passage of the Uniform Commercial Code by the legislature evinced an intent to have that body of law control all commercial transactions. While the Code, however, is an attempt to make uniform the law among the various jurisdictions regarding commercial transactions, the draftsmen realized that it could not possibly anticipate all situations. Thus, §2-721 of the Code states:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

In addition, it provides that:

> Remedies for material misrepresentation or fraud include all remedies available under this Article for nonfraudulent breach. Neither rescission nor a claim for a rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

The commentary by the drafters of the Uniform Commercial Code on this section states: “Thus the remedies for fraud are extended by this section to coincide in scope with those for nonfraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible.” See Official Comment, Uniform Commercial Code, §2-721.

We conclude from this language that neither the draftsmen nor the legislature intended to erase the tort remedy for fraud and deceit with the adoption of the Uniform Commercial Code in Columbia.

Having decided that a remedy in tort still exists in Columbia for actual fraud, we turn next to the seller's contention that the disclaimer language used here prevented any reliance by the buyer on the alleged fraudulent misrepresentation, and consequently the buyer's action must necessarily fail. The seller contends that there is no fraud on which the buyer relied that prevented him from knowing the contents of the contract, and, therefore, the buyer is bound by the terms of the contract.

We believe the better view is that the question of reliance on the alleged fraudulent misrepresentation in tort cases cannot be determined by the provisions of the contract sought to be rescinded but must be determined as a question of fact by the jury. It is inconsistent to apply a disclaimer provision of a contract in a tort action brought to determine whether the entire contract is invalid because of alleged prior fraud which induced the execution of the contract. If the contract is invalid because of the antecedent fraud, then the disclaimer provision therein is ineffectual since, in legal contemplation, there is no contract between the parties. In this case, parol evidence of the alleged misrepresentation was admissible on the question of fraud and deceit. As the antecedent fraud was proven to the satisfaction of the jury, it vitiated the contract.

Judgment affirmed.

Answer 1 to Performance Test A

To: Wendy Davis

From: Applicant

RE: Statement of Uncontested Facts and brief in support of motion for summary judgment in Farley v. Dunn.

Pursuant to your instructions, here is the Statement of Uncontested Facts and the argument section of the brief in support of our motion for summary judgment against Farley. Please let me know if there are any problems. Thank you.

MOTION FOR SUMMARY JUDGMENT

Statement of Uncontested Facts

Fact #1: On July 11, 2006, Jennifer Barba of Bradford Insurance Brokers, Inc. ("Bradford") sent a letter ("the Letter") to Dunn Insurance Company ("Dunn") President Scott Gordon purporting to clarify an agreement made on behalf of Farley Trucking, Inc. ("Farley"), whereby Farley would receive insurance coverage from Dunn for a period of 3 years, from August 1, 2006 through August 1, 2009.

Undisputed Because: This fact is alleged in Exhibit A of Farley's complaint and admitted in paragraph 8 of Dunn's answer.

Fact #2: On July 20, 2006, Farley entered into a contract for commercial general liability insurance ("the Policy") with Dunn whereby Dunn would provide coverage for a fixed premium rate of .0940 per 100 payroll miles for the term of August 1, 2006 to August 1, 2007.

Undisputed Because: This fact is alleged in Exhibit B of Farley's complaint, Farley's Risk Manager Mark Jones admitted this fact in paragraph 7 of his affidavit, and Dunn admitted this fact in paragraph 9 of its answer.

Fact #3: The Policy contained a merger clause which stated "This policy constitutes the entire agreement between the insured and the insurer concerting this insurance."

Undisputed Because: This fact is alleged in Exhibit B of Farley's complaint and admitted as true in paragraph 9 of Dunn's answer.

Fact #4: The Policy allowed Dunn the option to non-renew the Policy by mailing to Farley written notice of non-renewal at least 60 days before the expiration date of the Policy.

Undisputed Because: This fact is alleged in Exhibit B of Farley's complaint and admitted as true in paragraph 9 of Dunn's answer.

Fact #5: In May, 2007, Farley sent a request to Dunn for Dunn to provide a new policy for August 1, 2007 through August 1, 2008, at the same rate as the existing policy.

Undisputed Because: The fact is alleged in Mark Jones' affidavit in paragraph 8 and admitted in Dunn's President Scott Gordon's affidavit in paragraph 4.

Fact #6: On May 23, 2007, more than 60 days before the expiration of the Policy, Dunn sent Farley a notice of non-renewal of the policy ("the Notice") effective August 1, 2007.

Undisputed Because: This fact is alleged in Exhibit C of Farley's complaint, and also in paragraph 9 of Mark Jones' affidavit, and admitted as true in paragraph 11 of Dunn's answer.

Fact #7: Dunn did not renew the Policy.

Undisputed Because: This fact is alleged in Exhibit C of Farley's complaint and admitted as true in paragraph 11 of Dunn's answer.

Argument

Summary judgment is warranted when there is no genuine issue of material fact. Col. R. Civ. P. 56(c). Dunn is entitled to summary judgment on the fraud and breach of contract actions brought by Farley for the following reasons.

I. The Letter Violates The Statute Of Frauds, And Thus Is Not A Binding Contract Between Dunn And Farley, Because It Was Not Signed By Dunn, The Party To Be Charged, And Partial Performance Is Not Inconsistent With A Lack Of A Contract.

In order for a contract to exist between two parties, there must be an offer, acceptance, and consideration. An offer requires an objective willingness to enter into a contract. Acceptance requires that the other party agree to accept the terms of that contract. Consideration requires that there be some bargained-for exchange between the parties for their offer and acceptance. In the event that only one party claims that a contract exists, the opposing party may invalidate the contract if it does not satisfy the Statute of Frauds. In Columbia, the Statute of Frauds is defined in Columbia Civil Code Section 1350: "To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:…(5) Any agreement that is not to be performed within one year from the making thereof."

The Letter clearly falls under this provision in the Columbia Civil Code. Farley claims the Letter is a binding services contract on Dunn with duration of three years. Because the services contract under the Letter could not possibly be performed within one year of its making, the contract would fall under Columbia's Statute of Frauds. Thus, in order for the services contract within the Letter to be valid, it must be in writing and assigned by the party to be charged, namely Dunn.

Although the Letter constitutes writing, it was not signed by a party to be charged. The Letter was addressed to Dunn, but was only signed by Jennifer Barba of Bradford. Under section 1350, if the writing was signed by a person authorized to act for the charged party, the writing will satisfy the Statute of Frauds. Here, Jennifer Barba is not authorized by Scott Gordon, or any member of Dunn, to enter into contracts on Dunn's behalf. Thus, Jennifer Barba's signature is not one which may bind Dunn to a valid contract. Therefore, the Letter does not satisfy Columbia's Statute of Frauds, and the Letter is not a valid contract between Dunn and Farley.

Additionally, under the court's ruling in Hieke, the issuance of part performance is

not enough to satisfy the Statute of Frauds for a modification to a contract if the original contract is complete on its terms. Furthermore, under Hieke, part performance will only satisfy the Statute of Frauds if it is consistent with the presence of a contract and inconsistent with a lack of a contract. Here, the Policy is both complete on its face and terms, and it is not inconsistent with a lack of a contract. Although Dunn providing insurance for one year is consistent with the presence of a contract for three years, Dunn providing insurance for one year is consistent with the presence of a contract for three years, Dunn providing insurance for one year is not inconsistent with the lack of a contract for three years. As such, Farley cannot use the doctrine of partial performance to satisfy Columbia's Statute of Frauds.

For the reasons stated above, the Letter did not constitute a contract between Dunn and Farley. As such, Dunn could not have breached the contract within the Letter. Therefore, Dunn is entitled to summary judgment on the issue of a breach of contract arising out of the durational term stated in the Letter.

II. Dunn Did Not Breach Its Policy With Farley By Issuing A Non-Renewal Notice And Subsequently Allowing The Policy To Self-Terminate Because The Letter Does Not Alter The One-Year Duration Of The Policy.

Farley claims that the Letter constitutes a variation in the Policy's terms intended by both Farley and Dunn. Under this variation, Dunn would be bound under a contract for three years, even though the Policy explicitly states that Dunn is only bound under the Policy from August 1, 2006 to August 1, 2007. Farley's argument will fail as a matter of law because the parol evidence rule prohibits use of the Letter to contradict the express terms of the Policy. As such, the original clear terms of the Policy control, and Dunn was only contractually bound to provide insurance to Farley for one year. Thus, Dunn is entitled to summary judgment because it did not commit breach when it allowed the Policy to self-terminate at the end of the year term.

A. The Policy's terms are clear and unambiguous on their face; thus, parol evidence may not be used to contradict its terms.

The Columbia Supreme Court held in First Data that when a court is enforcing the terms of a contract, the court will first look to the four corners of the contract. If the terms are ambiguous, the court will use the rules of contract construction. Under the Court's ruling in First Data, a court is only allowed to use extrinsic evidence if ambiguities in the language persist. Furthermore, the Court in First Data held that the parol evidence rule prohibits evidence of prior or contemporaneous agreements to alter, vary, or change unambiguous terms in a written contract. Thus, if the contract's terms are clear, parol evidence may not be used to contradict them.

Here, the terms of the Policy are clear and unambiguous from the face of the written contract. The Policy clearly states that the policy term shall be one year, from August 1, 2006 to August 1, 2007. See Exhibit B of Farley's complaint. There is no indication anywhere in the Policy itself that any other term duration was intended by the parties. Thus, under the Court's ruling in First Data, a court must interpret the Policy according to the four corners of the contract. Therefore, a court must read the Policy as one requiring a term of one year.

Furthermore, because the Policy is clear and unambiguous on its face, parol evidence may not be used to contradict its terms. See First Data. The letter constitutes parol evidence because it is evidence of a prior agreement that materially contradicts the terms of the Policy. As the Policy is clear on its face, the Court's interpretation of the parol evidence rule in First Data prohibits a court from admitting the Letter to alter the duration of the Policy's term.

B. The merger clause within the Policy shows the Policy to be a complete and accurate reflection of the parties' intent: thus, parol evidence may not be used to contradict its terms.

The Court in First Data also held that a merger clause in a contract that states that the contract is a complete and final reflection of the parties' intent prohibits a court from admitting parol evidence that would vary the terms of the written agreement. The Policy at issue here contained just such a merger clause, showing that Dunn and Farley

intended the Policy to be a complete and final reflection of the terms of their contract. This merger clause is in plain, unambiguous language leaving no alternative constructions. See Exhibit B of Farley's Complaint. Furthermore, the terms of the contract are similarly clear and unambiguous. See Id. Thus, under First Data, a court cannot admit parol evidence to contradict or vary the clear terms of the contract. For this reason, as well as those stated above, the Letter is not admissible to change the duration of the Policy from one year to three years. Because the term in only one year, Dunn did not breach its duty to Farley, and Dunn is entitled to summary judgment as a matter of law on the issue of breach.

III. Dunn Did Not Commit Fraud On Farley Because Farley's Reliance On The Terms Of The Letter Was Not, As A Matter Of Law, A Reasonable Reliance Necessary For A Fraud Action.

As the Court stated in First Data, "if there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim" the claim fails. Dunn is entitled to summary judgment as a matter of law on Farley's fraud claim because Farley failed to present a genuine issue with regards to an essential element of the cause of action.

A. Farley could not have justifiably relied on the Letter's terms when it is expressly contradicted by the Policy's terms; thus Farley cannot prove every element of Fraud and Dunn is entitled to summary judgment.

Under the court's ruling in Callaway, the five common law elements of fraud are 1) false representation, 2) scienter, 3) an intent to induce the plaintiff to some action or inaction, 4) a justifiable reliance on that intent, and 5) damage to the plaintiff. Callaway states that where a representation is controverted by the express terms of the contract, the plaintiff will be unable as a matter of law to show that the reliance is justifiable. Thus, if the representation that the plaintiff claims it relied upon is expressly contradicted by the terms of the contract entered into by the plaintiff, the plaintiff cannot

recover for fraud.

Here, the express terms of the Policy state that the duration of the policy was only for one year. The representation that Farley claims to have detrimentally relied upon is the Letter, which states that the duration of the policy was three years. Thus, under the clear holding of Callaway, Farley cannot have justifiably relied upon the contradictory terms in the Letter after agreeing to the terms of the Policy. Thus, under Callaway, Farley cannot, as a matter of law, possibly satisfy the fourth element of a fraud cause of action. As the Court stated in First Data, "if there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim" the claim fails. Therefore, under Callaway and First Data, Farley's cause of action for fraud fails as a matter of law, and Dunn is entitled to summary judgment.

B. Farley could not have justifiably relied on the Letter's promise of a three-year term when that promise is unenforceable under the Statute of Frauds; thus Farley cannot prove every element of fraud and Dunn is entitled to summary judgment.

In Hieke, the court stated that a plaintiff cannot claim fraud, as a matter of law, on a promise that is unenforceable when it is made. One such reason that a promise may not be unenforceable is if it does not satisfy the Statute of Frauds. As stated above, the Letter does not satisfy the Statute of Frauds, both because it is not signed by Dunn (or Dunn's authorized representative), the party to be charged, and because Farley cannot show existence of the contract through the doctrine of partial performance. Thus, under the rule of Hieke, Farley cannot claim fraud based on any representations made in the Letter. As such, Farley cannot prove justifiable reliance, and Dunn is entitled to summary judgment on the fraud action.

C. Farley could not have justifiably relied on the Letter's terms after Farley agreed to the merger clause in the Policy; thus Farley cannot prove every element of fraud and Dunn is entitled to summary judgment.

However, under the Court's ruling in Piedmont Motors, reliance on a fraudulent misrepresentation is determined by a jury and not by the provisions of a contract. That case is distinguishable from the present case, however, on numerous grounds. First

Piedmont Motors interpreted a contract for the sale of a good over $500, thereby interpreting the contract through the lens of the UCC. Here, the Policy is a services contract and is not subject to any UCC provisions. Second, Piedmont Motors concerned a disclaimer clause in a contract as opposed to the merger clause seen here. For this reason, First Data, a later case from the Columbia Supreme Court, is controlling.

In First Data, the Court held that a merger clause, like the one found in the Policy, trumps any claims by the plaintiff that he suffered a justifiable reliance on a fraudulent misrepresentation. The Court in First Data held that where there is a merger clause, there can be no reasonable reliance on any agreements that came before the contract with the merger clause. Without this reasonable reliance, there can be no deception. With no deception, there can be no fraud. See First Data. As the final line in First Data states, "as a matter of law, a valid merger clause executed by two or more parties in an arm's-length transaction precludes any subsequent claim of fraud based on precontractual representations."

The Policy contained a valid merger clause stating that the Policy was the entire agreement between Dunn and Farley concerning the insurance. Thus, the merger clause extinguishes any reliance that Farley may have had in any previous agreement that did not amount to a contract. Because Farley could not have justifiably relied upon any prior agreement, Farley cannot, as a matter of law, claim fraud based on that agreement. Thus, Dunn is entitled to summary judgment as a matter of law on the fraud cause of action.

Conclusion

The terms of the contract between Dunn and Farley are only those which are found in the Policy. The Letter, both as an unenforceable contract under the Statute of Frauds and as inadmissible parol evidence, cannot be used to contradict or vary the clear, unambiguous language of Policy. As such, the terms of the Policy control. The Policy states that the duration of the Policy was only one year, and that Dunn may give notice to Farley of an intent to non-renew 60 days before the expiration of the Policy. It is uncontested that Dunn issued that notice within the 60-day period. Furthermore, there is no genuine issue of material fact that Dunn breached any other duty under the Policy.

Thus, Dunn is entitled to summary judgment.

Finally, there is no genuine issue of material fact as to fraud.

Answer 2 to Performance Test A

Persuasive Brief in Support of a Motion for Summary Judgment

Statement of Uncontested Facts

Fact #1: Farley, through insurance brokers Bradford, negotiated with Dunn to purchase commercial general liability coverage.
Undisputed Because: This is stated in Farley's complaint in Paragraph 7 and Dunn admits to it in its answer in Paragraph 7.

Fact #2: Bradford sent a letter to Scott Gordon, President of Dunn, regarding their conversation concerning the proposed insurance policy, and Jennifer Barba, of Bradford, is the only one who signed it.
Undisputed Because: Exhibit A shows a true and correct copy of the letter according to Farley's complaint in Paragraph 8 and Dunn's answer in Paragraph 8.

Fact #3: The policy has a clause in Paragraph 23 that states that "this policy constitutes the entire agreement between the insured and the insurer concerning this insurance."
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #4: The policy has a statement that says "Dunn may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least Ninety (90) days before the effective date of cancellation if we cancel for any reason other than bankruptcy or non-payment of premiums."
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #5: The policy has a statement that says "We may non-renew this policy by mailing to the first Named Insured written notice of the non-renewal at least 60 days before the expiration date of the policy."

Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #6: The policy is signed by Mark Jones, the Risk Manager of Farley, and Scott Gordon, the president of Dunn.
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #7: The term of the policy reads that it shall be for one year, August 1, 2006 to August 1, 2007.
Undisputed Because: Exhibit B shows a true and correct copy of the letter according to Farley's complaint in Paragraph 9 and Dunn's answer in Paragraph 9.

Fact #8: Dunn issued a policy covering the period for August 1, 2006 to August 1, 2007.
Undisputed Because: Mark Jones' affidavit states this in Paragraph 7.

Fact #9: Dunn sent Farley a notice of non-renewal of the policy, effective August 1, 2007, on May 23, 2007, more than 60 days prior the expiration of the policy.
Undisputed Because: Exhibit C shows a true and correct copy of the letter according to Farley's complaint in Paragraph 11 and Dunn's answer in Paragraph 11.

Fact #10: Farley requested Dunn to continue its policy beyond August 1, 2007.
Undisputed Because: Mark Jones' affidavit states this in Paragraph 8 that Farley requested Dunn to provide a new policy beyond August 1, 2007, and Scott Gordon's affidavit in Paragraph 7 indicates that Farley has asserted that the policy was supposed to extend beyond August 1, 2007.

Argument for Summary Judgment

Dunn has been sued by Farley for both breach of contract and fraudulent inducement. In light of the uncontested facts set forth above, our client, Dunn, is entitled to judgment as a matter of law because (1) the one-page letter from Bradford Insurance to Dunn is not enforceable as a contract because it is not signed by Dunn, the party charged, and thereby, fails to satisfy Columbia Civil Code Section 1350, which requires any agreement that is not performed within a year to be in writing and signed by the party charged in order to be enforceable; (2) elevating the one-page letter to a contract would vary the one-year term of the policy in violation of the plain meaning of the contract because the letter indicates that the agreement persists for three years whereas the policy clearly states that the policy is only for one year and that Dunn may cancel and choose not to renew the policy after a year; and (3) there is not a sufficient basis for Farley's fraud allegation because (a) there is no enforceable agreement for three years; (b) based on the non-renewal provision in the policy, Farley could not justifiably rely on any claims that the contract persisted for three years and without justification reliance, there is no claim for fraud and (c) there is no action in tort because there was no fraud in the inducement.

Standard for summary judgment

As the Columbia Supreme Court has noted in *First Data*, pursuant to Col. R. Civ. P. 56(c), "summary judgment is proper when the materials of record show that no genuine issue exists as to material facts and that the moving party is entitled to judgment as a matter of law." Moreover, as the court in Callaway points out, the court "must view all evidence and make all reasonable inferences in favor of the nonmovant." Summary judgment, thus, requires two steps. The first step is to show there is no genuine issue of material facts. The second step is to show that the moving party is entitled to judgment as a matter of law even if all the evidence is viewed in favor of the nonmoving party.

No genuine issue of material facts

"The threshold inquiry [in Step 1] is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards." *First Data.*

In this case, a number of uncontested facts are stated above. These facts have been admitted by both parties in their complaints, answers and/or affidavits. They both admit that the letter from Bradford to Dunn on July 11, 2006 was "a true and correct copy" and that the policy between Farley and Dunn is accurate, including the provisions of this policy, is a "true and correct copy." Because both parties have admitted to this, there is no genuine issue of fact with regards to whether these documents are accurate.

Judgment as a matter of law

The court can find that Dunn is entitled to judgment as a matter of law on both breach of contract and fraud in the inducement based on all three issues analyzed below based on the uncontested facts stated above and the law in Columbia. Because of this and the fulfillment of the first step in summary judgment, Dunn is entitled to summary judgment for dismissal of this suit.

1. The one-page letter from Bradford Insurance to Dunn is not enforceable as a contract because it is not signed by Dunn, the party charged, and thereby, fails to satisfy Columbia Civil Code Section 1350, which requires any agreement that is not performed within a year to be in writing and signed by the party charged in order to be enforceable.

Columbia Civil Code Section 1350 states that "to make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith." One of the obligations stated is an agreement that is not to be performed

within one year from the making thereof.

Here, Farley has alleged that the one-page letter is enforceable as a three-year contract from August 1, 2006 and August 1, 2009. Clearly, such an agreement cannot be performed within a year and thus, it must satisfy Columbia Civil Code Section 1350(5). This means the letter must be in writing and be signed by the party charged. While the letter is a writing, it is undisputedly signed only by Bradford, not Dunn, who is the party charged on the agreement. Thus, the letter does not satisfy Section 1350(5) and cannot be enforceable as a contract.

Because the letter cannot be enforceable as a contract, Dunn cannot be held to a three-year contract. Since there is no three-year contract, Dunn could not have possibly breached its contract by ending the policy in a year.

2. Elevating the one-page letter to a contract would vary the one-year term of the policy in violation of the plain meaning of the contract because the letter indicates that the agreement persists for three years whereas the policy clearly states that the policy is only for one year and that Dunn may cancel and choose not to renew the policy after a year.

Farley is also arguing that the letter should be admitted to show that the policy was meant to be a three-year contract, not a one-year contract.

The Columbia Supreme Court has stated in *First Data* that the construction of a contract may be a matter appropriate for resolution on summary judgment even though the parties contend the contract should be construed differently. A court is first to look to the four corners of the instrument to determine the proper construction of the contract. Only if contract language remains ambiguous does a court then apply the appropriate rules of construction to interpret any unclear terms. "Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible and the contractual language used by the

parties must be afforded its literal meaning. In written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties, nor would the violation of any such alleged oral agreement amount to actionable fraud." *First Data.*

In *First Data,* the court found that the agreement between First Data and Willis stated with "absolute clarity" what the obligations or lack thereof were between them. "Because Willis' claim was based entirely upon parol evidence of contradictory representations that are purported to have been made before the Agreement's execution," the court found that this contradictory parol evidence was inadmissible. The Columbia Supreme Court clearly holds that "it has long been the law of this state that the parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous agreement to alter, vary or change the unambiguous terms of a written contract."

In this case, the policy clearly states that the term of the policy will be for one year. Looking at the four corners of this policy, it is evident that "the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation." Thus, pursuant to *First Data, "*no construction is required or even permissible and the contractual language used by the parties must be afforded its literal meaning." The literal meaning of the contract is that it persists only for one year.

Moreover, similar to the case in *First Data*, here the policy agreement had an undisputed merger clause that stated in Paragraph 23 that "this policy constitutes the entire agreement between the insured and the insurer concerning this insurance." Because there is a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement. The July 11th Letter is a prior representation that contradicts the written clause. It claims that the agreement was for three years instead of one. Farley is attempting to use this in direct contradiction to a valid written agreement but, according

to the law in *First Data*, this is inadmissible.

Because such contradictory evidence is inadmissible under Columbia law, the one-page letter cannot be admitted to vary the plain terms of the one-year term policy. The policy is thus construed by its plain meaning, which states that it is a one-year contract. Because the policy only persists for one year, Dunn did not breach the contract by notifying Farley that the policy would end at the end of its term of one year and not be renewed.

3. There is not a sufficient basis for Farley's fraud allegation because (a) there is no enforceable agreement for three years; (b) based on the non-renewal provision in the policy, Farley could not justifiably rely on any claims that the contract persisted for three years and without justification reliance, there is no claim for fraud and (c) there is no action in tort because there was no fraud in the inducement.

Farley has argued that Dunn has committed fraud by knowingly misrepresenting its intentions to renew the contract and has even fraudulently induced Farley to enter the contract. In *Dana*, the Columbia Supreme Court notes that an action for fraud can be based both in contract and in tort. Thus, it must be determined if there was fraud based in contract and in tort.

(a) Because there is no enforceable agreement for three years, there is no fraud based in contract.

According to *Callaway,* fraud has five elements: (1) false representation by the defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damages to the plaintiff. Here, Farley is suggesting there was a false misrepresentation by the defendant that the policy was supposed to persist for three years.

However, under *Hieke,* "a contract falling within the Statute of Frauds must be complete within itself as to all terms of the undertaking, and oral evidence cannot be used to

supply contractual elements that are missing. In order to remove the alleged oral contract from the Statute of Frauds the proper performance shown must be consistent with the presence of a contract and inconsistent with the lack of a contract." The court found in *Hieke* that while lending $40,000 was consistent with part of the contract, this "in no way tends to prove that the Bank agreed to the oral contract that Hieke seeks to enforce. To hold that the mere act of lending any sum to a borrower will serve to render enforceable an alleged oral agreement to lend some additional sum would negate Section 1350. "Fraud cannot be predicated on a promise which is unenforceable at the time it [was] made. The instant alleged oral contract was unenforceable at the time it was purportedly made because it was not in writing as required by Section 1350. Obviously, one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds." *Hieke.*

Similarly, in this case, Dunn performed part of the contract - it provided insurance for one year. However, Farley is insisting that it should have performed for three years. Dunn's alleged partial performance of a contract was consistent with the contract but, like in *Hieke,* it "in no way proves" that Dunn agreed to a three-year contract. Farley cannot allege that based on the conversation between Bradford and Dunn, there was a three-year contract because an oral agreement of this length would violate Section 1350 as noted above in section (1). Because there was no enforceable contract for three years, fraud cannot be predicated on this promise. Thus, as in *Hieke,* one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds.

<u>(b) Farley could not justifiably rely on any claims that the contract persisted for three years and without justification reliance, there is no claim for fraud in contract</u>.

As noted above, fraud can be found if there is justifiable reliance. In most cases, the question of justifiable reliance is a jury question but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, as a matter of law, to establish his reliance is justifiable. The Court in *Callaway* found that there could be no justifiable reliance in light of the contractual provisions disclaiming liability for

diseases. "The contract could not be any clearer in disclaiming DeMaio's responsibility for diseases in its swine herds."

Likewise, in light of Dunn's non-renewal provision and the clear language on the face on the policy that says the term of the policy is for one year, Farley cannot justifiably rely on any alleged suggestion that their agreement with Dunn would persist for three years.

There is no action in tort because there was no fraud in the inducement.

According to Dana, a purchaser may rescind the contract he has entered into and sue in tort for alleged fraud and deceit. In such a tort action, a disclaimer in a contract cannot be used against the party where fraud had induced a party to enter into a contract. In *Dana*, the purchaser sought to rescind the agreement because he alleges that he had been fraudulently induced to enter the agreement by a misrepresentation prior to the agreement.

Here, Farley was not induced to enter into a contract with Dunn based on fraud. Rather, Farley sought this policy through Bradford and, indeed, it originally intended to continue the policy for another three years. Farley wanted to continue the agreement, not rescind the agreement, as in *Dana*. However, because it was unable to continue the agreement, it sought a different policy and is now seeking damages. However, Farley's undisputed attempt to continue the agreement clearly indicates that there was no fraud in the inducement and, thus, there is no fraud based in tort.

Based on the above analysis, it is clear that there was no fraud in tort as a matter of Columbia law and that Dunn should be entitled to summary judgment as a matter of law on this matter.

Conclusion

Because of the analysis above based on governing Columbia law as applied to the undisputed facts of this case, Dunn is entitled to summary judgment as a matter of law on the claim that it has not breached its contract and on the claim that it has not fraudulently induced Farley to enter the contract or committed other misrepresentations.

JULY 2009

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

WILLIAMS v. GOLUB

FILE

WILLIAMS v. GOLUB

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. 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.
6. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
7. 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. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: Applicant

From: Lauren Evans

Date: July 30, 2009

Re: **Williams v. Golub**

We represent Adam Golub, a successful personal injury lawyer, who has been sued for defamation by Adrienne Williams. Ms. Williams was an associate in Mr. Golub's firm until she resigned to set up a solo law practice, taking one of the firm's clients with her. Mr. Golub was recently served with the complaint that alleges that a letter he sent to the client was defamatory.

As you will see when you read my notes from my interview with Mr. Golub, at least one of the assertions he made in the letter was untrue and is defamatory unless privileged. I need your help therefore in analyzing whether there are privileges that might apply.

An answer to the complaint is due next week. Please prepare an objective memorandum for me that analyzes whether any defenses to Ms. Williams' claim for defamation based on privilege are available.

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: File

From: Lauren Evans

Date: July 29, 2009

Re: **Interview with Client Adam Golub**

Adam Golub is the principal of a five attorney personal injury law firm. He has been sued for defamation by a former associate, Adrienne Williams, who left the firm "under unpleasant circumstances." He said that her work was substandard and that he spoke to her about it "numerous times" and that ultimately she resigned on January 13, 2008 rather than be fired. Williams followed up with a resignation letter in which she announced that a client on whose case she had worked, Harvey Campbell, had decided to retain her as his lawyer and that she had taken portions of the client's files. Golub called her and accused her of "poaching" his client and demanded that she return the files. She declined, and said that he would be getting a letter from Campbell (and maybe others) instructing him to transfer the case to her and to turn over the remainder of the file to her.

Golub says the case she took involved a client with paralysis resulting from the collapse of a roof. He said that liability among multiple defendants wasn't clear and that the cause of the collapse was contested as well as the permanency of the injury. He said he "couldn't imagine how a lawyer as inept as Williams could win the case, and at stake was a potential multimillion dollar verdict and the client's capacity to pay for medical treatment over the long term." Golub's firm took the case on a contingency fee of 33% of the recovery plus costs, and he has already invested hundreds of hours on

the investigation and more than $30,000 for expert witness fees. He composed and sent a letter to the client to “warn him about Williams” and to persuade him not to change lawyers.

After reading the letter I said to Golub, “You certainly used some strong language.” He responded, “Although it’s complicated, Campbell has a strong case. There was a lot of money involved for both Campbell and me. The more he gets, the more I get. Also, I just didn’t want a client of mine to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case.”

I asked if the letter worked. He said that no, it hadn’t. About a week after he sent the letter, he received a fax from Campbell, telling him that he had retained Williams as his lawyer and that Golub should transfer all files and evidence to Williams. I asked Golub if he’d assumed he was still Campbell’s attorney up until the time he got the fax. He said, “Yes. I sure wasn’t about to take Adrienne’s word for it.” Golub said over the course of the next month he had complied in transferring files, etc., and that he had formally withdrawn from the case. Even so, he continued to have disputes over the transfer of the firm's claim for its share of legal fees and costs. He said that the atmosphere between them “was quite poisonous and that was, no doubt, the reason she filed the defamation lawsuit.”

I asked him to tell me about Adrienne Williams. He said that she went to law school after working for a decade as an emergency medical technician and that he had hired her after she had worked at the Robin, Thomas, David and Sweet law firm for two years. She started at the previous firm right after passing the bar exam. Even though “she barely kept her grades high enough to graduate” he was impressed with her experience in the medical field and thought her knowledge of and comfort with medical terminology and procedures would be useful in the practice. He said that, although clients liked her, “she seemed to resist learning what I tried to teach her, and her level of disorganization created some real problems for the firm.”

I asked him if everything he wrote in the letter was true. He said, “I thought so at the time I wrote it. I have since found out that even though I said that she had never handled a case like Campbell’s and that she had never won a case, in fact, when she was with the Robin, Thomas, David and Sweet firm, she did work on another paralysis case in which she had gotten a million dollar verdict.”

Ryan, Evans & Blaire
605 Dana Way
Bodie, Columbia
www.ryanevansblaire.com

MEMORANDUM

To: File

From: Lauren Evans

Date: July 29, 2009

Re: **Telephone Conversation with Emily Sweet**

After talking to Mr. Golub I called Emily Sweet. Emily is a partner in the law firm of Robin, Thomas, David and Sweet. She was Adrienne Williams' boss for 3 years. She said that Williams worked as a law clerk for the firm during her last year of law school and then they hired her as an associate after Williams passed the bar.

I asked whether Williams' work was satisfactory and she said, "Adrienne was quite good for her level of experience. During her time at the firm she tried two personal injury cases to completion and won one and lost one." She said that her research and writing "were adequate, not excellent."

I asked about the case she had won. Emily said, "It was her second trial and she had clearly learned some hard lessons from losing the first. In this one, she got a large verdict, $1.2 million, for a client who had nerve damage with resulting paralysis. I was very proud of her, and the client was very pleased with her work."

I next asked why she had left the Robin, Thomas firm. The reply was "She went to work with Adam Golub because he lured her away with more money. He paid her more than I could afford. I was sad to see her go, but I didn't match his offer."

Conrad J. Gaskill
Panama, Whittier, Francisco & Alameda, LLP
5211 Bay Street
Santa Barbara, Columbia
(555)714-1937
Attorneys for Plaintiff

SUPERIOR COURT OF COLUMBIA
COUNTY OF HERKIMER

Adrienne Williams,
Plaintiff — Civ. # 27706

v. — **COMPLAINT**

Adam Golub,
Defendant
_____/

This is an action for defamation, in which plaintiff Adrienne Williams seeks general, special, and exemplary damages proximately resulting from false and malicious statements defendant Adam Golub made in a letter to a client of the plaintiff impugning her competence and integrity as a lawyer.

1. Plaintiff is a lawyer, admitted to practice in the State of Columbia, and engaged in the private practice of law.
2. Defendant is a lawyer, admitted to practice in the State of Columbia, and is the principal in the law firm of Adam Golub and Associates ("law firm").
3. From July 7, 2004 to January 13, 2008 plaintiff was employed as an associate attorney in defendant's law firm.

4. As part of her duties while employed at the law firm, plaintiff represented Harvey Campbell ("the client") in a suit based upon tort.
5. On January 13, 2008, plaintiff resigned from the law firm.
6. On January 18, 2008, defendant was terminated as counsel for Campbell and was instructed to transfer Campbell's case from the law firm to plaintiff for continuing representation.
7. On January 20, 2008, defendant sent a letter to the client containing false and unprivileged communications tending directly to injure plaintiff and damage her business and professional relationships by mischaracterizing her competence as a lawyer and specifically stating the falsehood that plaintiff had lost every case she had taken to trial.
8. Plaintiff is informed and believes, and based thereon alleges, that the conduct of defendant described above was done with malice.
9. Defendant's conduct was defamatory under the law of the State of Columbia. As a result of defendant's defamation, plaintiff has suffered loss of earnings, injury to her personal, business and professional reputation, harm to her business and professional relationships and severe emotional distress, in an amount to be established at trial.
10. Defendant's conduct was such as to entitle plaintiff to punitive damages in an amount to be established at trial.

Wherefore, plaintiff seeks damages as a result of defendant's defamatory actions in an amount to be established at trial.

Panama, Whittier, Francisco & Alameda

Dated: May 20, 2009

C J Gaskill

Conrad J. Gaskill, Esq.
Attorneys for Plaintiff Adrienne Williams

Adam Golub and Associates
Attorneys at Law
11 Brocklebank Building
Bodie, Columbia
(555)538-2320

January 20, 2008

Mr. Harvey Campbell
1873 West Shawna Lane
Shipley, Columbia

Dear Mr. Campbell:

Adrienne Williams has resigned from our law firm effective January 13, 2008 and set up a solo law practice run from her home. She informed me that you are considering withdrawing your case from our firm and hiring her to represent you in your ongoing lawsuit against those responsible for the roof collapse that injured you so severely. Because I do not think it is in your best interest to be represented by a lawyer with so little experience and such a weak record of success, I ask that you think long and hard before you make this change. If you do decide to transfer representation to her, I will, of course, honor your decision and turn over your file to Ms. Williams.

Ms. Williams has been an attorney for barely five years. In the three and a half years she was with my firm, she won only two cases. In each of those cases there was no defendant actively litigating against her allegations. In one, the doctor was in a mental institution and, in the other, she was suing a hospital for its emergency room practices, which they knew were deficient and were in the process of changing. They were anxious to settle once they had decided how to handle the changes. Both of those cases had been prepared for years by my office before Ms. Williams became involved. She has never before handled a case with an injury such as yours.

While with me, Ms. Williams lost four cases she took to trial. At her prior law firm, the first case she tried was a major case in which she represented a teacher who was dying of cancer that his urologist had failed to diagnose. The defendant's attorney told me that he had been present at a conference when the judge laughed at Ms. Williams for misrepresenting that her client was too sick to appear at a deposition when the defendant had surveillance photos showing him teaching a class and traveling to his vacation home in Montreal. The defendant's attorney also told me that Ms. Williams had not prepared her major witness. Her expert witness was unfamiliar with the medical records when questioned on cross-examination. Ms. Williams lost that case and every other one she took to trial.

It takes a lot of money to run a law office. I have heard that Ms. Williams hasn't enough money to hire a secretary. All of our attempts to reach her by telephone in the past two weeks have been unsuccessful because the answering machine says it is full. She will owe me tens of thousands of dollars in disbursements on the cases she hopes to take

from my office.

If the defendant's attorneys know that the plaintiff's attorney has a record of losing cases, has limited experience in trying cases, and is not able to finance the great expenses of a complicated trial such as yours, which involves expert witnesses and depositions, they are likely to resist any legitimate settlement and force the case to trial. Also, Ms. Williams, in her need for money to pay her overhead and finance other cases, may attempt to settle your case for far less than its full value. Your case is worth millions of dollars. It would be criminal to settle the case for anything less. If she does so, she will have put her interests ahead of yours.

I tell you these things because, as your lawyer, I have an ethical obligation to give you candid advice. In addition, as I will receive a portion of the fee in your case, it is in both our interests that you receive the best possible result. As I have told you, I represented another client who has essentially the same injury as yours. I tried her case and obtained a verdict of $3,500,000. The case was sent back for a new trial by the appellate court. The second time I obtained a verdict of $3,400,000. I tried the case in Ness County, a jurisdiction that is much more hostile to plaintiffs than Herkimer. You, therefore, have a very valuable case. I am more than willing to continue to represent you in it. However, if you decide to entrust it to her, please, for both your sake and mine, take the following precautions:

1. Direct Ms. Williams in writing not to enter into settlement negotiations on your case without speaking first to you, discussing her settlement strategy, and obtaining your approval of the amounts she will demand and will be willing to settle for.
2. Before you accept any offer of settlement, you discuss the case with some other experienced personal injury attorney for the sake of having a second opinion and hearing other options. Your case is the first paralysis case that Ms. Williams will be handling. She does not have experience in evaluating or trying cases such as this and has very little rapport with the defense bar and the builders' insurance companies.

Judge Regina Mack, the judge handling your case, is very intelligent and experienced. After Ms. Williams was assigned to her for trial on a recent case, Ms. Williams called the court and stated that her father had been taken to the hospital. Ms. Williams had told me and an associate in my firm that she was afraid of going before this judge. The trial was continued. She then spent the day in the office rather than going to the hospital to see her father in the hospital, if he actually was in the hospital.

Please call me if you have any questions or wish to discuss these matters before making your decision.

Very truly yours,
Adam Golub and Associates
Adam Golub
Adam Golub

The Law Office of Adrienne Williams
560 Winston Street
Reginald, Columbia
555-331-0500

BY PERSONAL DELIVERY **Email: awlawyer@alo.com**

January 18, 2008

Adam Golub, Esq.
Adam Golub & Associates
11 Brocklebank Building
Bodie, Columbia

Dear Adam:

This letter confirms our conversation in which I resigned as an associate with your firm, effective January 13, 2008. You know all of the ways that I was dissatisfied with the way I was treated by you and others at the firm, and I will not rehash them in this letter. My resignation gives me the opportunity to start my own firm, something I have always wanted to do.

Fortunately, I am working to ensure that the clients for whom I had primary responsibility are not harmed by my departure from your firm. They all have been quite happy with my work. That is particularly the case with Mr. Harvey Campbell, who has decided to come with me rather than stay with the Golub firm.

Mr. Campbell has authorized me to enter an appearance in his pending case in the name of my new law firm. I will obtain a substitution of attorney from Mr. Campbell and send it to you for signature. In addition, please arrange to have Mr. Campbell's files available for pickup by me on or before January 25, 2008. My hope is that we will be able to amicably resolve any lingering financial issues regarding this case along with the money you still owe me for past services.

Sincerely,

A. Williams

Adrienne Williams

COPIES OF ADAM GOLUB AND ASSOCIATES E-MAIL CORRESPONDENCE

From: duarte@golublaw.com

To: golub@golublaw.com

Sent 12/19/2007 4:15 PM

Subject: RE: RE: Why are you excluding me?

Dear Adam,

I can no longer work productively with Adrienne. I realize that you have been counting on me as the senior associate to train her and bring her along but she has screwed up so many things that I don't feel I am being successful. She is disorganized and doesn't seem to be prepared. I sent her to court for a status conference a few weeks ago and she ended up going to the wrong courtroom and didn't straighten it out in time to be there when the case was called. This kind of thing happens too often, in my view.

I would appreciate it if you would assign me one of the other associates. Sorry to bother you with this. Here is the e-mail I got from her yesterday and my response to it.

Tony

From: duarte@golublaw.com

To: williams@golublaw.com

Sent 12/19/2007 3:45 PM

Subject: RE: Why are you excluding me?

Dear Adrienne:

I am not sure that carrying on this conversation by e-mail is the best idea. You asked why I exclude you, but the truth is that you have excluded yourself. How many client meetings have had to start without you because you came late or not at all? I can answer the question but perhaps you should reflect on it. It makes a very poor impression when we tell a client to expect you but you aren't there. Regarding expert witnesses, given your medical expertise I think you could potentially be a big help in talking with them but in the ones I have been part of with you it has seemed as if you were either unprepared or extremely disorganized. For these reasons I have stopped

scheduling you to be part of many meetings. If I can get a commitment from you to change your behavior, I will rethink my position.

Regarding the written work, I very often find your writing unpersuasive, your research incomplete, your analysis fuzzy, and your grasp of the facts marginal at best. I have offered repeatedly to work with you to help you improve but instead of accepting my constructive criticism you always walk away in a huff so I have just given up.

You aspire to be a trial lawyer but in the time you have been in this firm you haven't shown any of us that you have the drive or the ambition to develop the skills you need in order to be successful.

Tony

From: williams@golublaw.com
To: duarte@golublaw.com
Sent 12/18/2007 2:20 PM
Subject: Why are you excluding me?
Anthony:

I am getting increasingly angry by your repeated exclusion of me from meetings with clients and witnesses. I don't see how I can continue to be an effective member of our litigation team unless I have the kind of first-hand knowledge that comes from these meetings. You rewrite briefs and pleadings that I have drafted without consultation or discussion with me. I thought we were supposed to collaborate but instead you insult my work and act with condescension in ways that undermine me. In the Thornton case summary judgment brief, you ignored what I wrote about the medical diagnosis and substituted your language for mine. As you well know, my knowledge of medicine is far superior to yours and I think the way you botched the descriptions of the client's injuries will harm her case. I know there is much I can learn from you, but you have to treat me with respect.

Adrienne

From the Desk of Harvey Campbell

By Fax Transmission to 555-538-2321

TO: Adam Golub, Esq.
Adam Golub and Associates
11 Brocklebank Building
Bodie, Columbia

FROM: Harvey Campbell
1873 Shawna Lane
Shipley, Columbia

DATE: January 27, 2008

NUMBER OF PAGES, INCLUDING COVER SHEET: One (1)

Dear Mr. Golub,

I have decided to switch attorneys, and I want to be represented by Adrienne Williams.

I appreciate the excellent work that has been done on my behalf by your law firm, and my decision to change law firms is based solely on my desire to stay with Ms. Williams. It does not reflect an adverse opinion toward you or your work.

Ms. Williams has informed me that she will shortly present you a Substitution of Attorney. Please transfer all my records and all of your files, documents, and work product to Ms. Williams.

Finally, now that Ms. Williams is my attorney, in the future please direct all communications to her.

Thank you for your past work and your cooperation in this matter.

Sincerely,

Harvey Campbell

Harvey Campbell

JULY 2009

California Bar Examination

Performance Test B

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WILLIAMS v. GOLUB

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SELECTED PROVISIONS OF THE COLUMBIA CIVIL CODE

§ 44 Defamation. Defamation is effected by (a) libel, or (b) slander.

§ 45 Libel. Libel is a false and unprivileged publication by writing that exposes a person to hatred, contempt, ridicule, or obloquy, or causes the person to be shunned or avoided, or has a tendency to cause injury to reputation or occupation.

§ 46 Slander. Slander is a false and unprivileged publication, orally uttered, that charges a person with crime or tends directly to cause injury to a person's profession, trade or business.

§ 47 Privilege. A privileged publication is made:

(a) In the proper discharge of an official duty;

(b) In any

(1) legislative proceeding,

(2) judicial proceeding, or

(3) other official proceeding authorized by law;

(c) In a communication, made without malice, to a person interested therein, by one

(1) who is also interested, or

(2) who is in a relationship to the interested person that affords a reasonable ground for supposing the motive for the communication to be innocent, or

(3) is requested by the interested person to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment.

§ 48 Malice. Malice is a state of mind arising from hatred or ill will toward the plaintiff; provided, however, that a communication made with a good faith belief in its truth at the time it is published shall not constitute malice.

SELECTED PROVISIONS OF
THE COLUMBIA MODEL RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP
RULE 1.4 COMMUNICATION

(A) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(B) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party.

* * * *

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of

representation.

* * * *

COUNSELOR

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client's situation.

Comment

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Auden v. Fox and Peters

Columbia Supreme Court (2002)

This appeal is a minor skirmish in a major litigation battle. The parent litigation is a case, *Pinkerton v. Duke Industries*, which after several years is still pending. While awaiting trial, Pinkerton's attorney Phillip Peters ("Peters") took the deposition of James Fox ("Fox"). At the deposition, Fox, in response to questions from Peters, said several unflattering things about Allan Auden ("Auden").[1] Two days after the deposition, Auden filed a defamation action against Peters and Fox. The Trial Court ruled in the defamation action that the statements were absolutely privileged and granted a motion to dismiss the complaint. Auden appeals.

The complaint alleges that Fox and Peters orally published defamatory matter about Auden at the deposition. The trial court held correctly that the plaintiff failed to state a cause of action for defamation because of the privilege recognized in connection with judicial proceedings.

Both sides recognize that the privilege of an attorney in judicial proceedings is absolute in that it cannot be defeated by a showing that the publication was made with malice. For the privilege to apply, however, the defamation published in a judicial proceeding must have "some relation" to the proceeding. (Restatement Torts, §585.)

Columbia Civil Code §47(b) provides that a privileged publication or broadcast is made in any (1) legislative proceeding, (2) judicial proceeding, or (3) other official proceeding authorized by law.

---

[1] We will discuss the statements made about Auden only to the extent that such discussion is absolutely necessary to our opinion. The entire record before us is replete with threats by everybody against everybody else to sue them on any theory which imaginative counsel can think of. There is no desire on the part of this court to act as an agent -- albeit immune -- who further publicizes a libel or slander and thereby adds grist to the parties' mills.

The purpose of §47(b) is to afford litigants freedom of access to the courts to secure and defend their rights without fear of being harassed by actions for defamation and to promote the unfettered administration of justice even though as an incidental result it may provide immunity to the evil-disposed and malignant slanderer. Thus, courts should not extend application of the absolute privilege unless the public policy upon which the privilege rests exists.

This statute protects attorneys as well as judges, jurors, witnesses and other court personnel from liability arising from publications made in the course of a judicial proceeding. The policy underlying the privilege is to afford our citizens utmost freedom of access to the courts. As a consequence, attorneys are given broad protection from the threat of litigation arising from the use of their best efforts on behalf of their clients. The privilege is absolute; it protects publications made with actual malice or with intent to do harm.

Although defamatory publications made in the course of a judicial proceeding are absolutely privileged, even if made with actual malice, the absolute privilege attaches only to a publication that has a reasonable relation to the action, is permitted by law, and if it is made to achieve the objects of the litigation. The absolute privilege in judicial proceedings is afforded only when the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law.

First, if the defamatory publication is made in furtherance of the litigation it is appropriate for the courts to define liberally the scope of the term “judicial proceeding” and the persons who should be regarded as litigants or other participants. If this requirement is met, the publication is absolutely privileged even though made outside the courtroom and no function of the court or its officers is invoked.

Second, although the defamatory matter need not be relevant, pertinent or material to any issue before the court, the publication must have some connection or logical relation to the judicial proceeding. Fox and Peters do not even have to claim that the allegedly defamatory deposition questions and answers were admissible, either directly or for the purpose of impeaching any witness or that they were calculated to lead to the discovery of admissible evidence. Doubts should be resolved in favor of relevancy and pertinency. For the privilege not to apply, the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety.

Third, since the deposition questions and answers concerned Auden's credibility, which would affect the outcome of the litigation, they were not pretextually calculated merely to defame and therefore they are made to achieve the objects of the litigation.

Fourth, the privilege stated in §47(b) is confined to statements made by an attorney while performing his function as such. This approach does not protect attorneys, witnesses and litigants who use the mere fact that they are talking in the course of judicial proceedings as a pretext to defame persons with respect to matters that have nothing to do with the question under consideration, yet it does shield counsel, clients and witnesses from having their motives questioned and being subjected to litigation if some connection between the utterance and the judicial inquiry can be established. Likewise, this approach does not shield attorneys, witnesses, or litigants who are no longer involved in the litigation, such as by way of dismissal as an attorney, witness, or litigant.

As long as Peters was actually retained as a lawyer in this litigation, he is protected by this privilege, and, so long as Fox was answering his questions, he, too, is protected.

AFFIRMED.

Kashian v. Harriman

Columbia Supreme Court (1966)

Edward Kashian ("Kashian"), a prominent businessman and civic leader in Paradise Valley, Columbia, brought this action for defamation against Richard Harriman ("Harriman"). The dispute arises from remarks published by Harriman regarding Kashian, who was at the time serving as Chair of the Board of Trustees of Paradise Valley Hospital (PVH), a nonprofit, tax-exempt corporation.

In 1964, PVH announced plans to build and operate a for-profit heart hospital. Local non-profit medical providers, St. Anne Elizabeth Medical Center ("St. Anne") and MediPrime, became concerned that PVH's hospital would compete unfavorably with them. St. Anne wrote a letter to the Columbia Attorney General expressing its concern that PVH's involvement in a for-profit hospital would conflict with its non-profit status and called for an investigation. Harriman, who was counsel for MediPrime, wrote a letter to the Attorney General joining in this request for an investigation.

In 1962, Harriman had been retained as special counsel in the bankruptcy of another provider whose assets PVH had purchased from the bankrupt estate. In his current letter to the Attorney General, Harriman wrote that, in the course of his duties as special counsel, "I conducted an investigation that led me to believe that PVH has engaged in unfair business practices since at least 1959 by pursuing a course on intentional conduct that interfered with the practices of private practitioners. Moreover, my investigation led me to believe that Mr. Kashian has unlawfully used his position as Chair of the PVH Board of Trustees to accrue substantial economic advantages for himself to the disadvantage of PVH." Harriman's letter indicated that he had sent copies to "Clients, and St. Anne."

On June 1, 1964, *The Paradise Valley Bee* published a news article reporting on

Harriman's letter, under the headline "Hospital Official Assailed." The article focused primarily on the accusations about Kashian, and quoted parts of the letter, including the excerpt cited above. Kashian was quoted in the article as saying the accusations were "completely false."

On June 19, 1964, Kashian filed a lawsuit against Harriman asserting that Harriman's letter was false and defamatory. He also alleged Harriman acted with malice.

Harriman filed a motion for summary judgment on all Kashian's claims. Harriman acknowledged sending his letter to the Attorney General with copies to his client and St. Anne, with which he was joining to request an investigation of PVH. He argued that his letter to the Attorney General was absolutely privileged under Columbia Civil Code §47(b), qualifiedly privileged under section 47(c), and not defamatory.

The trial court granted Harriman's motion. The court concluded Harriman's statements were privileged under section 47(b) of the Civil Code. The court declined to decide whether the privilege was a qualified one, in which case it could be defeated by a showing the statements were made with actual malice, because the evidence failed to show Harriman had acted with malice. It also ruled Harriman's delivery of the letter to third persons (his client and St. Anne) was privileged under Civil Code section 47(c). The trial court also declined to reach the question of whether the publication in *The Paradise Valley Bee* was defamatory because Kashian failed to make a sufficient prima facie showing that Harriman was the person responsible for sending the letter to the newspaper. Kashian appealed.

Columbia law recognizes two types of privileged communications: (1) communications that are absolutely privileged, for which there is no liability even if the defamatory communication is made with actual malice; and (2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being found

privileged.

Section 47(b) defines what is commonly known as the litigation privilege. The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) that have some connection or logical relation to the action; (3) made to achieve the objects of the litigation; and (4) by litigants or other participants authorized by law. The privilege is absolute. If it applies, it does not matter whether the communication was made with malice or the intent to harm. Put another way, application of the privilege does not depend on motives, morals, ethics or intent. The litigation privilege is not limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. The privilege extends beyond statements made in the proceedings and includes statements made to initiate official action. The absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing. The privilege is based on the importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity. *Wise v. Thrifty Payless, Inc.*, *supra* (husband's report to the Department of Motor Vehicles regarding wife's drug use and its possible impact on her ability to drive).

Section 47(c) codifies the common law privilege of common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty. This privilege applies to a narrow range of private interests and does not create a broad public interest privilege. The interest protected must be private or pecuniary. It must be a common interest in an outcome, which can exist in the absence of a formal relationship (for example, shareholders who bought corporate shares independently of one another). It can also be in a contractual, business, or similar relationship, such as between partners, corporate officers or members of incorporated associations, or between union members and union officers. The communication must have been in the course of the relationship.

This definition is not exclusive, however, and the cases have taken an eclectic approach toward interpreting the statute. The scope of the privilege is not capable of precise definition and its application depends upon an evaluation of the competing interests that defamation law and the privilege are designed to serve.

The common interest privilege as defined in §47(c) only arises in the absence of malice. Malice for purposes of the statute means a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person. Malice is not inferred from the communication itself, but from surrounding circumstances.

We now consider whether the privileges apply to Kashian's complaint. Kashian's claim for defamation is based on the letter Harriman wrote to the Attorney General and delivered to his client and involved in the complaint to the Attorney General. We assume the letter was defamatory and consider whether delivery of the letter was privileged.

Kashian argues Harriman's delivery of the letter to the Attorney General's office was subject only to the qualified common interest privilege because there was no official proceeding. We disagree. Section 47(b) provides for an absolute privilege with regard to statements made in "any . . . official proceeding authorized by law." A communication concerning possible wrongdoing made to an official government agency such as a local police department and designed to prompt action by that entity is as much a part of an official proceeding as a communication made after an official investigation has commenced. The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. A qualified privilege is inadequate under the circumstances. Since the privilege is absolute, it cannot be defeated by a showing of malice.

In *Dove Audio, Inc. v. Stark, Vernon & Ruxton*, Dove Audio produced a recording featuring the voices of several celebrities whose royalties were to be paid to their designated charities. When few royalty payments were actually made, one of the celebrities contacted the law firm of Stark, Vernon & Ruxton (SV&R) to request that it look into the matter and contact the appropriate government agency to conduct an investigation. SV&R wrote to the celebrities explaining the situation and soliciting their support for a complaint to the Attorney General's office. Dove Audio sued SV&R alleging the letter was defamatory and interfered with their economic relationships with other celebrities. The court granted SV&R's motion to dismiss the claims on the ground that the communication was absolutely privileged under Civil Code section 47(b). This court held that a petition to the Attorney General constitutes an official proceeding within the meaning of section 47(b) since the Attorney General has the statutory responsibility to protect the assets of charitable trusts and public benefits corporations. In addition, the court held that the privilege extends to communications with private parties who share with the defendant an interest in the investigation preliminary to the institution of the official proceeding.

We conclude, then, that Harriman's delivery of his letter to the Attorney General and the other entities requesting an investigation into PVH's business practices was absolutely privileged under section 47(b). Consequently, we need not reach the questions of the applicability of the qualified privilege as it applies to the delivery of the letter to the Attorney General.

On appeal, Kashian also argues that neither the litigation privilege nor the common interest privilege attaches to publication of the letter to *The Paradise Valley Bee* or to St. Anne. We address these contentions in turn.

As for the publication of the letter to *The Paradise Valley Bee*, we do not reach the question of privilege because we agree with the trial court that there is insufficient

evidence to suggest that Harriman was responsible for sending the letter to the newspaper.

We turn finally to Harriman's publication of the letter to St. Anne. In this case, St. Anne was a party to the request to the Attorney General for an investigation into PVH's tax-exempt status. It follows that their communications with one another in that connection were protected by the litigation privilege.

Kashian maintains, however, that the same privilege does not extend to their communications in regard to Harriman's request for an investigation into Kashian's alleged conflict of interest, a request in which St. Anne had not joined until after Harriman's letter. We need not decide whether the litigation privilege under section 47(b) reaches these communications because we conclude that St. Anne shared a common business or professional interest under §47(c) in investigation of both PVH's business practices and Kashian's potential conflict of interest.

Kashian argues that he presented evidence that, if believed, was sufficient to support a finding of actual malice, which would prevent the defense of a qualified privilege under section 47(c) from arising. On the premise that Harriman's statements about him in the letter are defamatory, Kashian contends a jury might reasonably infer Harriman acted with malice because he failed to conduct an adequate investigation before making the statements.

Malice, which is statutorily defined as state of mind arising from hatred or ill will, may be proved by showing the publisher of a defamatory statement lacked reasonable grounds to believe the statement was true, and therefore acted with a reckless disregard for the rights of the person defamed. However, negligence is not malice. It is not sufficient to show that the statements were inaccurate or even unreasonable; only willful falsity or recklessness suffice. Only reckless or wanton disregard for the truth will imply a willful disregard for or avoidance of accuracy sufficient to establish malice.

Kashian's bare assertion that many of the statements in Harriman's letter are false does not make it so, much less establish that Harriman made the statements maliciously. For example, Harriman urged the Attorney General to investigate certain of Kashian's business dealings using the following language: "Your investigators will need to obtain property profiles on certain properties, such as the proposed Heart Hospital and Women's Center, in order to trace the ownership and development of the properties by entities in which Mr. Kashian has been involved, either directly or indirectly."

In his declaration Kashian asserts that "even a cursory review of the facts would have put anyone on notice that many of these factual allegations are false. For example, it is a matter of public record that the property purchased by the Heart Hospital--which Harriman accused me of profiting from--was sold by River Park Properties approximately 10 years prior to the Heart Hospital's purchase." This evidence tends to show at most that Harriman's letter was inaccurate insofar as it suggested Kashian may have had a direct financial interest at a certain moment in PVH's purchase of land for a heart hospital. The evidence is insufficient to support an inference Harriman acted with a reckless or wanton disregard for the truth when he wrote the letter. Consequently, the trial court was correct in rejecting Kashian's claim under section 47(c) because there was no prima facie showing of malice.

AFFIRMED.

Scott Rogers v. Associated Aviation Underwriters

Supreme Court of Columbia (1953)

This defamation action was brought by Scott Rogers ("Rogers") against Associated Aviation Underwriters (AAU) and various insurance companies that were members of that association. His action was based upon a report made by AAU that he claimed injured his reputation and deprived him of his profession as a pilot. At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendants on the ground that the communication from AAU to Rogers' employer, Olympic Oil Company ("Olympic"), was privileged.

AAU is the name of an organization of the aviation insurance departments of the defendant insurance companies. It inspects risks and makes periodic inspections of the aviation facilities insured by the insurance companies.

Olympic employed Rogers as an aircraft pilot from February 1948 until he was discharged about November 22, 1948. He alleged that his discharge resulted from a report of an investigation of all of the aviation facilities and pilot personnel of Olympic by AAU. Two sections of the report are at issue here. First, the report states that, "None of the crew members currently employed by Olympic Oil Company has qualified for Airline Transport Rating (ATR). We advise that all Olympic Oil pilots obtain an ATR rating from one of the recognized competent schools. This training should be given to weed out the weaker pilots." Second, the report stated that, "In checking with a previous employer we were unable to substantiate that Rogers was anything other than an average pilot with questionable flying ability, and this employer lacked confidence in him as a pilot. In addition, we were informed he had a poor personality and there was much better pilot material available. In checking with another source, who has flown with Rogers and has known him personally for seven or eight years, we could not develop any information concerning Rogers' qualifications to operate aircraft in accordance with the high standards desired by the Olympic Oil Company."

Rogers claims that the report does not fall within the qualified common interest privilege. Under the common interest privilege, communication made in good faith in which the person reporting has an interest and in reference to which he has a duty is conditionally or qualifiedly privileged if made to a person having a corresponding interest or duty. By definition the privilege arises only in the absence of malice. Malice is not inferred from the communication itself, but from surrounding circumstances.

Rogers does not contend that AAU did not believe the communications to be true or that they were actuated by hatred or ill will. He does contend that the communications were made with such gross indifference to his rights as to amount to a willful or wanton act. The evidence showed that Rogers actually had an ATR at the time of the report. The evidence further showed that the derogatory statements concerning Rogers were based upon only two telephone calls to persons who had known or been associated with him. A jury might very well have found that there was no sufficient investigation to support the statements against the appellant. We do not think, however, that the evidence was sufficient to submit to the jury the issue of such gross indifference to the rights of Rogers as would amount to willful or wanton conduct from which malice might be inferred.

In *Courtney v. Gault,* the alleged defamatory statement made was without any investigation in reliance upon a report made by a detective agency. The court held that negligence cannot take the place of actual malice to destroy the immunity from damages given to a privileged publication.

The judge correctly directed a verdict on the ground that the alleged defamatory statements were privileged and that there was insufficient evidence to authorize the jury to find that they were malicious.

AFFIRMED.

Answer 1 to Performance Test B

MEMORANDUM

To: Lauren Evans

From: Applicant

Date: July 30, 2009

Re: Williams v. Golub

Our client Adam Golub has been sued for defamation by Adrienne Williams. In her complaint the plaintiff states that Mr. Golub's defamatory statement was related to her competence as a lawyer and "specifically stating the falsehood that plaintiff had lost every case she had taken to trial." You asked me to prepare an objective memorandum that analyzes whether any defenses to Ms. Williams' claim for defamation based on privilege are available. Columbia law recognizes two types of privileged communications: "1) communications that are absolutely privileged, for which there is no liability even if the defamatory communication is made with actual malice; and 2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being found privileged." Kashian. Below I have analyzed Mr. Golub can assert an absolute privilege or a qualified privilege.

Absolute Privilege

Section 47 of the Columbia Civil Code sets out the elements for establishing absolute or qualified privileges. A privileged publication is made in any 1) legislative proceeding, 2) judicial proceeding, or 3) other official proceeding authorized by law. Columbia Civil Code Section 47(b). Publications made in any one of the mentioned proceedings are given absolute privilege. Auden; Kashian. Thus, it protects publications made with actual malice or with intent to do harm. Auden. However, this absolute privilege is only afforded to a publication that has a reasonable reaction to the

action, is permitted by law, and if it is made to achieve the objects of the litigation. Auden. Thus the privilege is afforded only when the publication "1) was made in a judicial proceeding; 2) had some connection, or logical relation to the action; 3) was made to achieve the objects of the litigation; and 4) involved litigants or other participants authorized by law."

1) Was made in a judicial proceeding

The court in Auden held that as long as the defamatory publication is made in the furtherance of the litigation it is appropriate for the courts to define liberally the scope of the term judicial proceeding. Thus if the statement is made in the furtherance of the litigation the publication is absolutely privileged even though it was made out of the courtroom and no function of the court is involved. Auden.

The letter from Golub to Campbell was arguably made in the furtherance of the litigation. Golub was sending the letter to Campbell in order for Campbell to know the risks involved in selecting Williams over Golub. Pursuant to your interview**,** Golub stated that he did not want a client of his to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case. Moreover, the letter was necessary to determine whether Campbell was going to continue with Golub's representation or Williams'. Although Williams had suggested that Campbell wanted Williams to continue to represent her and not Golub, Golub had yet to hear anything directly from Campbell. As he stated, he was not going to take Williams' word for it. He also needed to know if there was going to be a switch in order to transfer the files to Williams. Thus, the communication can be in the furtherance of litigation because Golub was letting Campbell know his rights and the risks he faced in changing attorneys and because Golub needed to know if Campbell still wanted Golub to represent him.

On the other hand, Williams may argue that the letter was not in furtherance of litigation because Golub's real intention was not to help Campbell but rather help

himself. As Golub mentioned to you the more Campbell got the more he got. Moreover, ever since the split there has been a constant struggle between Golub and Campbell regarding the amount that Golub should get paid, further suggesting that Golub's interest was only personal. Golub in his letter to Campbell even mentioned that he is writing the letter because he will receive a portion of the fee.

Although Golub might [have] had a monetary interest in sending the letter the court will still probably consider the letter to be in the furtherance of the litigation. Just because Golub has a financial interest does not suggest that he did not sincerely care about Campbell's position. The fact that Golub would make more money if Campbell made more money is in the best interest of both parties, not only Golub's. Moreover, on more than one occasion Golub mentioned that if Campbell wanted to change attorneys he would "honor" the decision and turn over the files. Finally, in the end of the letter, Golub asked Campbell to take precautions before settling the case. Although this can also serve Golub's interest, because he will get a piece of the final settlement, in the end it best serves Campbell's and is in the furtherance of the litigation.

Thus, because the letter is in furtherance of the litigation, the court would liberally construe the judicial proceeding term and most probably find that the letter was within the requirements of a judicial proceeding.

2) Had some connection, or logical relation to the action

The court in Auden stated that the defamatory matter need not be relevant, pertinent, or material to any issue before the court; however, the publication must have some connection or logical relation to the judicial proceedings. For the privilege not to apply, "the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety." Auden.

The letter does have some relevance to the proceedings. As mentioned above, it outlines and tells Campbell about the risk in switching lawyers and the effects it might

have on the action. Golub mentioned Williams' lack of experience in relation to the risks that Campbell was taking by switching lawyers. Moreover, Golub mentioned the costs that the attorney representing Campbell would have to incur in order to bring Campbell's case to a successful resolution. For example, he mentioned that in a complicated trial like Williams', there are a lot of expenses related to expert witnesses and depositions and if his attorney could not afford those expenses it might result in a disfavorable settlement. Thus, the letter had some connection or logical relation to the judicial proceedings because it mentioned the consequences of switching attorneys and the risks involved.

Williams might make the same arguments as above regarding Golub's intention in sending the letter. However, Williams will have difficulty showing that the matter is so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety. Williams might argue that although the need for Campbell's attorney to have sufficient funds is related to the case, the statements regarding Williams' competence are not related to the subject matter of the controversy because they do not relate to the substantive aspects of Campbell's case. Moreover, Williams can point to the statements made regarding lying to the judge as wholly inappropriate. However, because the attorney's experience in relation [to] cases tried and won even can affect the client's substantive rights, the statements regarding her experience are related to the subject matter. Moreover, the statement regarding her lying to the judge goes to Williams' ability to prepare and organize for a case. Thus, the statements are related to the matter.

Thus, because the statements have some connection or logical relation to the judicial proceedings this element should be met.

3) Was made to achieve the object of the litigation.

In Auden the court found that defamatory statements made in depositions were made to achieve the object of the litigation because they would affect the outcome of the litigation and were not pretextually calculated merely to defame.

Likewise, here [in] Golub's letter defamatory statements were made to achieve the object of the litigation because they would affect the outcome of the litigation. As Golub mentioned numerous times in the letter having an experienced attorney, with a good reputation, and funds necessary for the cost, would affect the outcome of the litigation because it would directly impact whether the case settled or whether it went to trial. As Golub mentioned, if the defense attorney knows that the plaintiff's attorney is inexperienced and lacks the funds to finance the expenses they are likely to resist any legitimate settlement and force the case to trial.

However, Williams would argue that the letter was pretextually calculated to merely defame Williams because at the time Golub wrote the letter Campbell had already decided to switch to Williams and Williams had informed Golub of this decision. However, not having heard from Campbell personally, Golub could not rely only on Williams' statements. Moreover, the letter was not pretextually calculated merely to defame because on numerous occasions Golub mentioned that he would honor Campbell's decision if Campbell decided to fire Golub and hire Williams.

Thus, a court would most likely find that the statements were made to achieve the object of the litigation because it dealt with the outcome of the litigation and were not pretextually calculated merely to defame.

4) Involved litigants or other participants authorized by law.

The privilege is confined to statements made by an attorney while performing his function as such. Auden. Thus, the privilege does not shield attorneys "who are no

longer involved in the litigation, such as by way of dismissal as an attorney." Auden. As a result, Golub would have to show that he was still retained as a lawyer in the litigation when he made the statements.

Arguably, Golub was still retained as a lawyer in the litigation at the time he made the statements because Campbell had not notified him yet of the switch. Golub's letter to Campbell is dated January 20, 2008, whereas Campbell's fax to Golub notifying him of the switch is dated January 27, 2008. Thus, Golub was still Campbell's attorney at the time of the letter because Campbell had not notified him of the switch. Williams may argue that Golub was not the attorney at the date because Williams had notified Golub of Campbell's intent to switch attorneys. However, just because Williams mentioned Campbell's intent to switch does not really prove that Campbell himself wanted to switch. Moreover, Campbell could have changed his mind and not told Williams at that date. Additionally, on the date the letter was sent, Golub still had Campbell's files and [in] her resignation letter Williams mentions that she will pick up the files on or before January 25, 2008. Finally, even Williams knew that he had to obtain a substitution of attorney from Campbell.

Thus, because Campbell had not yet submitted a substitution of attorney form, Golub was still retained as a lawyer in the litigation.

Golub would most likely be able to meet all four requirements for absolute privilege set out in Auden. Thus, under Columbia Civil Code Section 47(b) the statements would be absolutely privileged.

Qualified Privilege

Section 47(c) of the Columbia Civil Code states that a privileged publication is made "in a communication, made without malice, to a person interested therein, by one 1) who is interested, or 2) who is in a relationship to the interested person that affords a reasonable ground for supposing the motive for the communication to be innocent, or 3)

is requested by the interested person to give the information." If a court were to find that the statement was made with actual malice it would prevent the defense under Section 47(c). Thus, the first issue to be decided is whether the statement was made with malice. The second issue is whether Golub and Campbell had a relationship that is recognized by Section 47(c).

Malice

"Malice is a state of mind arising from hatred or ill will toward the plaintiff; provided, however, that a communication made with good faith belief in its truth at the time it is published shall not constitute malice." Columbia Civil Code Section 48. Moreover, malice is analyzed by not only looking at the statement itself but also the surrounding circumstances. Kashian. The court in Kashian further defined malice as publication of the statement when the "defendant lacked reasonable grounds to believe the statement was true, and therefore acted with reckless disregard for the rights of the person defamed." In turn, courts have refused to hold that [a] defamatory statement made because of the lack of investigation is enough to constitute malice. Scott, citing Courtney. Instead, courts have deemed the lack of investigation as negligence. Thus, "only reckless or wanton disregard for the truth will imply a willful disregard for an avoidance of accuracy sufficient to establish malice." Kashian.

First, Golub's statement was arguably not with malice because at the time he made the statement he had a good faith belief in its truth at the time it was published. As Golub mentioned to you at the time he made the statement he thought that Williams had never handled a case like Campbell's and she had never won a case. Arguably Golub had a good faith belief in this assertion because in the three and a half years that Williams worked for Golub she never won a complicated case. Moreover, the type of cases that Williams had worked on while at Golub were not similar to Campbell's case. Moreover, although Williams worked at another law firm before coming to work for Golub, she had only worked there for two years and it was right after law school. A reasonable person could believe that an attorney out of law school would not have

worked on a case as complicated as Campbell's case was. Thus, Golub could have had a good faith belief that Williams never worked on a similar case while at the other law firm. Additionally, he could have a good faith belief that she never had a trial at the other law firm because [of] the low likelihood that firm would give a new attorney a trial.

However, Williams can argue that Golub, in fact, knew of her prior experience at the other law firm because in the letter to Campbell he mentions Williams' experience prior to joining Golub. In the letter Golub mentions the facts of Williams' first case at the prior law firm and that Golub had spoken to defense counsel that was involved in Williams' first case. Moreover, the facts of the first case concerned a teacher who was dying of cancer that his urologist had failed to diagnose. Although not very similar to Campbell's case, Williams can argue that Golub should have been on notice that she had handled trials at her previous firm and even complex cases. Because there are facts to suggest that Golub knew of Williams' previous experience it might be difficult to prove that the statement was made with a good faith belief in its truth when published.

Although, Golub might not be able to show a good faith belief in the truth he can still argue that his statement was not made with malice because he had reasonable grounds to believe that his statements regarding Williams' lack of experience and victories. Golub again pointed to the fact that Williams never won a complicated case while working for him. In fact the only cases Williams won were the ones where the defendants did not really fight back. Moreover, Golub can point to the e-mail from the senior attorney regarding Williams' performance. The e-mails show that Williams was often late and often not adequately prepared. Additionally, Golub can point to the statements made by the defense counsel in Williams' first case regarding Williams' lack of being prepared. Finally, Golub can also point to the fact that Emily Sweet, an attorney at the previous firm, stated that Williams' research and writing were adequate, not excellent. Thus, taking into consideration all of the surrounding issues, Golub can argue that he had reasonable grounds to believe everything that was stated in the letter. Moreover, because he had reasonable grounds to believe everything he did not willfully disregard an avoidance of the truth.

Williams might argue that Golub lacked reasonable grounds to believe the statements were true because Golub did not investigate the statements and that the facts suggest that he willfully disregarded avoidance of the truth. As mentioned above, the fact that Golub did not investigate the truth of the statements does not indicate a malicious intent but rather only negligence. However, Williams can argue that Golub willfully disregarded the truth. First, Williams would argue that Golub knew that Williams was experienced and that she did not lose all her cases because Golub lured her away from the previous firm by paying her double. Williams will argue that Golub would only pay double what Williams was getting paid at the other firm if he believed that Williams was competent. Additionally, Golub would only agree to pay Williams double if he knew the exact cases that Williams had worked on at her previous firm. Moreover, Williams will argue that Golub did not know that she did not have enough money to hire a secretary but rather based on the fact that he "heard" she did not have enough money to hire a secretary. Williams will argue that the fact that her mailbox was full does not mean that she did not have enough money to hire an attorney but rather maybe she was not checking her mailbox. However, because the main defamatory statement at issue [was] the fact that she lost all her cases and that she never had a case similar was based on a lack of investigation, Williams will probably not be able to prove malice.

Adequate Relationship

In addition to proving that the statement was not made with malice, Golub would also have to prove that he and Campbell had a sufficient relationship for purposes of section 48. The court in Kashian noted that section 47(c) of the Columbia Civil Code "codifies the common law privilege of common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty." The two parties must have a common interest in an outcome, which can exist in the absence of a formal relationship and the communication must have been in the course of the relationship. Kashian. Additionally, it can be a contractual, business, or similar relationship. However, this definition is not exclusive and "the cases have taken an eclectic approach toward interpreting the statute." Kashian. Thus, its application

depends upon an "evaluation of the competing interests that defamation law and the privilege are designed to serve." Kashian.

Here Golub had [a] relationship with Campbell [that] would satisfy section 48. First, Golub and Campbell had a business relationship as attorney and client. However, not only did they have a business relationship, but they also shared a common interest, which was getting the most money possible for Campbell. Moreover, as set out in the Columbia Model Rules of Professional Conduct, an attorney has a duty to communicate with his client. Rule 1.4. In relation to this communication the attorney "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4. Additionally, "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, which may be relevant to the client's situation." Rule 2.1. Thus, Golub's letter that related to Campbell's chances of success if he switched attorneys was within the course of the relationship because the information was necessary in order for Campbell to make an informed decision. Additionally, the communication was within the scope because it considered economic and social factors that were relevant to Campbell's situation. Williams might argue that this relationship had ended because Campbell had decided to switch attorneys. However, for reasons mentioned above, the relationship had not ended. Thus, because Golub and Williams not only had a business relationship, but also a common interest and because the communication was made in the course of that relationship, the relationship requirement of 47(c) will be met.

Moreover, Golub can argue that the competing interests that defamation law and the privilege are designed to serve also support the finding of an adequate relationship. As the court mentioned in Auden the absolute privilege in judicial proceedings is afforded to give citizens utmost freedom of access to the courts. Thus, attorneys are given "broad protection from the threat of litigation arising from the use of their best efforts on behalf of their clients." Thus, public policy favors the free and uninterrupted communication between an attorney and the client. This is also supported by the Rule

of Professional Conduct mentioned above. Thus, because we want to give attorneys great latitude in communications with clients, a court would probably recognize the relationship between Golub and Williams as one that satisfied the requirements of section 47(c).

Conclusion

Golub would probably be able to prove the requirements of absolute privilege as the statements were made in a judicial proceeding. Golub might also be able to prove qualified privilege. However, based on the facts a showing that the statement was not with malice might be a close call.

Answer 2 to Performance Test B

MEMORANDUM

To: Lauren Evans

From: Applicant

Date: July 30, 2009

Re: Williams v. Golub, defenses

As per your instructions, I have prepared a memorandum discussing the possible defenses for Mr. Golub for use against Ms. Williams' defamation claim against him. Based on my review of the legal materials, it appears that Mr. Golub may have two options in terms of his privilege defense, either an absolute privilege under Columbia Civil Code ("CCC") 47(b)(2) or a qualified privilege under the various sections of section 47(c). This memorandum first discusses the defamation claim itself and then the two privilege defenses, in turn.

[A] Defamation

Under section 44 of the CCC, "[d]efamation is effected by (a) libel, or (b) slander." Section 46 further provides that "[s]lander is a false and unprivileged publication, orally uttered, that charges a person with a crime or tends directly to cause injury to a person's profession, trade or business." Here, Mr. Golub wrote a letter to Mr. Campbell regarding Ms. Williams' experience and competence as a lawyer that most likely meets this definition of defamation effected by slander.

Ms. Williams, a former associate of Mr. Golub, left Mr. Golub's firm, as evidenced by a confirmatory memorandum dated January 18, 2009. Also in that memorandum, Ms.

Williams referenced the bad terms on which she was leaving and noted that she would be taking with her Mr. Campbell, a client whose paralysis case represented a very lucrative prospect for Mr. Golub's firm. In a letter dated January 20, 2008, Mr. Golub sent a letter to Mr. Campbell in order to dissuade him from transferring his representation from Mr. Golub to Ms. Williams. In that letter, Mr. Golub stated a number of things regarding Ms. Williams' legal practice that were later proved to be untrue. First, he stated that Ms. Williams "has never before handled a case with an injury such as yours." Second, after describing a case that Ms. Williams lost while at her former firm, Mr. Golub noted that "Ms. Williams lost that case and every other case she took to trial. " Both of these statements proved to be untrue according to an attorney from Ms. Williams' former firm, who noted not only that Ms. Williams had actually prevailed on the only other case that she took to trial while at that firm, and that that second case actually involved a matter very similar to the Mr. Campbell's case. Mr. Campbell subsequently sent Mr. Golub a letter effectively switching counsel on January 27, 2008.

While the statements are most likely defamatory in that they were false and concern Ms. Williams' profession as a lawyer, under Kashian, there are two types of privileges recognized in Columbia: (1) absolutely privileged communications, for which there is no liability, even if the defamatory communication is made with actual malice; and (2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being privileged.

[B] Absolute Litigation Privilege

One type of absolute privilege available in Columbia is the litigation privilege defined in section 47(b). As articulated in Kashian, this privilege applies to any communication: (1) made in judicial or quasi-judicial proceedings, that (2) has some connection or logical relation to the action, (3) made to achieve the objective of the litigation, and (4) by litigants or other participants authorized by law. According to Auden, the purpose of the privilege is, in part, to protect attorneys from the threat of litigation arising from the use of their best efforts on behalf of their clients. Where this privilege applies, it does not

matter whether the communication was made with malice or the intent to harm, which means that motives, morals, ethics, and intent are not relevant in determining whether this privilege applies. Mr. Golub may be able to argue that this privilege applies to the statements that he made regarding Ms. Williams for the reasons articulated below.

[1] *Judicial Proceeding*

First, Mr. Golub will have to establish that the statement was made in a judicial or quasi-judicial proceeding. Under Auden, the court noted that if the defamatory publication is made in furtherance of the litigation, it is appropriate for the courts to define liberally the scope of the term "judicial proceeding" as well as the persons who are deemed participants, and that it is not necessary that the statement be made in a courtroom or involve a function of the court. Based on this precedent, Mr. Golub may be able to argue that the communication was made in furtherance of the litigation because it concerned the representation of the client, a matter central to the furtherance of the litigation. In addition, Mr. Golub should be able to argue that a letter to a client regarding the representation thereof can be covered by the privilege because the privilege has been extended to letters to attorneys general even in the absence of a pending case, Kashian, and irrelevant statements in depositions, Auden, which suggests the breadth of the privilege. Therefore, Mr. Golub may be able to argue that the letter was in furtherance of the litigation by analogy.

[2] *Some Connection or Logical Relation to the Action*

In addition, under Auden, the defamatory matter must have some connection to the judicial proceeding, although the defamatory matter itself does not need to be relevant, pertinent or material to any issue before the court. Under this precedent, Mr. Golub may be able to argue that the letter, which related to the representation of Mr. Campbell, which is clearly related to the representation, met this standard even though it did not concern the merits of the case itself. This is particularly true given that the court in Auden noted that "[d]oubts should be resolved in favor of relevancy and

pertinency. For the privilege not to apply, the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety." Therefore, considering the low bar to show that the matter is related to the proceeding, Mr. Golub should not have a problem meeting this element.

[3] *Made to Achieve the Objects of the Litigation*

The statements must also be made to achieve the objects of the litigation. This element may be more difficult for Mr. Golub to prove, although the bar is again not very high. For example, in Auden, the fact that the statements related to a party's credibility was sufficient for the court to find that the statements were made to achieve the litigation's objects. Here, Mr. Golub may be able to argue that the competency of Mr. Campbell's counsel is a matter that could affect the outcome of the litigation. This argument may be difficult to make, however, because it requires Mr. Golub to argue that to achieve the objects of the litigation, Mr. Campbell needed to retain Mr. Golub as his counsel. If it is possible to make a more muted version of this argument, however, Mr. Golub may also succeed on this element as well.

[4] *Confined to Statements Made by An Attorney While Performing His Function As Such*

Finally, in order for this privilege to apply, the statement must have been made by the attorney while serving as an attorney. Therefore, the attorney cannot merely make a statement as part of a judicial proceeding in order to defame others for reasons wholly unrelated to the representation. Mr. Golub should not find this difficult to prove. First, his letter itself referred to the fact that it was made in his function as an attorney. Furthermore, the letter concerned the representation in the litigation itself. Finally, while Mr. Golub had already received a letter from Ms. Williams that Mr. Campbell was no longer his client, Mr. Golub was still effectively serving as Mr. Campbell's representation because Mr. Golub had not received a letter from Mr. Campbell terminating him, which means that he was in effect still Mr. Campbell's lawyer, as discussed below. Therefore,

provided this connection is established between the litigation and the defamatory matter, the court cannot consider Mr. Golub's motives behind making the statement.

In sum, Mr. Golub may be able to prove that he had an absolute privilege to make these defamatory statements under the absolute litigation privilege. If this privilege applies, Mr. Golub will not be required to prove that he did not act with malice. However, even if Mr. Golub cannot establish that the litigation privilege applies, he may still be able to make a claim for a qualified privilege under CCC section 47(c).

[C] Qualified Interest Privilege

The delivery of the letter to Mr. Campbell including the defamatory statements may be qualified under CCC 47(c). According to Kashian, section 47(c) codifies the common law privilege or common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty. This privilege is more limited than the privilege above in that (1) this privilege protects only private or pecuniary interests, such as a common interest in outcome, or a contractual relationship; (2) the communication must occur during the course of that relationship; and (3) even where the interest is one in which the privilege applies, the privilege only arises in the absence of malice.

[1] *Protected Interests*

Based on Kashian, there are two grounds under which there may have been a protected interest that gave rise to a privilege on these facts: a common interest in outcome, or a contractual relationship.

[a] Common Interest in the Outcome

The interests here are likely those envisioned to be protected under CCC 47(c). First, it is likely that Mr. Campbell and Mr. Golub had a common interest in the outcome of Mr.

Campbell's suit. In his letter to Mr. Campbell, Mr. Golub stated, "I will receive a portion of the fee in your case, and it is in both our interests that you receive the best possible result." This is supported by a number of other facts, such as the statement from Mr. Golub that he had taken the case on a contingency fee of 33% recovery plus costs, and that he had already invested hundreds of hours on the investigation and more than $30,000 for expert fees. In addition, Mr. Golub noted that "[t]here was a lot of money involved for both Campbell and me. The more he gets, the more I get."

[b] Contractual Relationship

Furthermore, as Mr. Campbell's lawyer, Mr. Golub had a contractual relationship with Mr. Golub as his lawyer. As part of this relationship, Mr. Golub had an interest in telling him about the best possible course of action. In Mr. Golub's letter, he stated that he was telling Mr. Campbell about the risks of pursuing his claim with Ms. Williams "because, as your lawyer, I have an ethical obligation to give you candid advice." This statement is further supported by Rules 1.4 and 2.1 of the Columbia Model Rules of Professional Conduct. Rule 1.4 states that "(a) a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and (b) a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Similarly, Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." In the comment to this section, the rules provide that a lawyer's duty to offer advice applies in certain cases even when such advice is not solicited by the client. In relevant part, the comments state "when a lawyer knows that a client proposes a course of action that is likely to result in adverse legal consequences to the client, a duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation…a lawyer may initiate advice to a client when doing so." Furthermore, the comment notes that the lawyer "should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."

Here, there are certainly facts that we can use to support that Mr. Golub did in fact render the advice in order to advise him in the role of Mr. Campbell's lawyer. First, Mr. Golub made several statements that indicate that the purpose of the letter was to help his client make an informed decision. For example, he stated: "I just didn't want a client of mine to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case." In addition, in the letter itself, Mr. Golub states that the advice was given with the purpose of advising Mr. Campbell, noting that decision was for the client to make, and that he was merely providing the client with advice in order to better make this decision. Second, the information in the letter is information that a reasonable client would consider when deciding whether to pursue a case with a particular attorney. For example, he noted her track record of cases both for himself and at her prior firm, Ms. Williams' financial situation and its potential ramifications on Mr. Campbell's case, her less than exemplary behavior before the judge presiding over Mr. Campbell's case, as well as the possible ramifications of having a relatively inexperienced attorney on the chances of settlement. Finally, third, and most importantly, in the letter, Mr. Golub gave Mr. Campbell some important advice in the case that he chose to pursue the case with Ms. Williams, which indicates that he really did have the lawyer-client relationship in mind when he wrote the letter, rather than merely a purpose to defame. Furthermore, Mr. Golub noted that the files were available for Mr. C if he were to decide to make that decision. Of course, the tone of the letter is rather harsh, but Mr. Golub should be able to argue that the content of the letter was based on a privileged relationship with Mr. Golub.

Therefore, there are likely two grounds on which Mr. Golub can claim that there was a privileged interest in the statements made.

[2] *In The Course of the Relationship*

In addition, in order to qualify under the 47(c) privilege, the statement must also have been made in the course of the relationship. It could be argued that as of when Ms. Williams sent her letter to Mr. Golub on January 18, 2008, notifying Mr. Golub that she

was taking Mr. Campbell with her to her new firm, that Mr. Campbell was no longer a client of Mr. Golub. In that letter, Ms. Williams stated "Mr. Campbell has authorized me to enter an appearance in his pending case in the name of my new firm" and asked that his files be transferred to her firm. However, Mr. Golub will have to argue that this letter did not serve to sever the attorney-client relationship between Mr. Golub and Mr. Campbell because it was from Ms. Williams and not Mr. Campbell himself, an argument that will likely prevail. Therefore, the letter in question likely was sent in the course of the relationship.

[3] *Lack of Malice*

With the 47(c) privilege, however, Mr. Golub will have to establish that he did not act with malice. As noted in Kashian, it is not enough to show merely that the statement is false. Furthermore, as articulated in Rogers, mere negligence is not enough. In Rogers, defamatory statements were made about an employee involving his qualifications, experience, and personality. Rogers, the employee, attempted to argue that the statements were malicious on the grounds that they were made with such gross indifference to his rights as to amount to a willful or wanton act. Nonetheless, the court found that, even though the statements were made after only two investigatory phone calls, that there was insufficient evidence of malice. Furthermore, citing Courtney, the court noted that even without an investigation, negligence cannot take the place of actual malice to destroy the immunity from damages given to a privileged communication. Therefore, even though Mr. Golub did not make any apparent investigations on the facts, this fact alone is not enough for Ms. Williams to show that he acted with malice.

Instead, it must be shown that the publisher acted with reckless or wanton disregard for the truth. In the context of this privilege, according to Kashian, malice means a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. It is based upon the surrounding circumstances. The court in Kashian articulated that malice can be proved by showing that the publisher of a defamatory

statement lacked reasonable grounds to believe the statement was true, and, therefore, acted with a reckless disregard for the rights of the person defamed. In addition, section 48 of the CCC notes that "a communication made with a good faith belief in its truth at the time it is published shall not constitute malice."

As noted above, here, Mr. Golub's statements that Ms. Williams had never won a case were false. First, there are a number of circumstances that objectively indicated to Mr. Golub that Ms. Williams did not have the experience or skill to win a major lawsuit, thereby indicating that the statement was made without malice. For example, Mr. Golub noted that, in terms of Ms. Williams' background, "she barely kept her grade high enough to graduate," and that "she seemed to resist learning what [he] tried to teach her, and her level of disorganization created some real problems for the firm." Furthermore, another associate at the firm noted that Ms. Williams was difficult to work with, disorganized, and failed to attend or be prepared for meetings with clients. That associate also noted that Ms. Williams [sic]. Second, Mr. Golub had a good faith belief that the statement was true. In fact, when asked whether he thought that the material in his letter was true, Mr. Golub noted that "I thought so at the time I wrote it."

Of course, it may be difficult for Mr. Golub to overcome the fact that there had been a tense relationship between himself and Ms. Williams before she left the firm, which may give rise to an inference that he made the statement with the intent to vex, annoy, or injure. Furthermore, he will have to overcome the fact that the tone of the letter is harsh and Mr. Golub may have included more information about Ms. Williams than necessary to prove his point. However, if Mr. Golub is able to emphasize the facts as he knew them when the statement was made, as well as his own good faith belief as to the truth of the statement itself, he may also be able to prove that he acted without malice sufficient to prove a defense of privilege under 47(c) as well.

Finally, as articulated in Kashian, evidence of a lack of malice can be shown by a suggestion that the recipient investigate the matters published themselves. Therefore, the statements made by Mr. Golub that the decision was for Mr. Campbell to make

further support that the statement was not made with malice on this basis as well. Although this argument may be tenuous because Mr. Golub did not specifically indicate that Mr. Campbell do his own investigation, and, therefore, may be something that should be left out if Mr. Golub tries to pursue this privilege at trial.

[D] Conclusion

Therefore, in light of the foregoing, Mr. Golub has two potential claims based on both an absolute and qualified privilege to the defamation claim brought by Ms. Williams.