THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 - 2303
149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 -1500

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2010 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the February 2010 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 2010

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

FILE

OCHOA v. CMH

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 CASTRO AND RUZ
713 Pasado
Vista, Columbia

MEMORANDUM

To: Applicant
From: Kristina Castro
Date: February 23, 2010
Re: ***Ochoa v. CMH*** **Early Neutral Evaluation Proceedings**

I was asked by the court to serve as the evaluator in the pending action of *Ochoa v. CMH*, a wrongful death case. Early Neutral Evaluation (ENE) is one of our court's alternative dispute resolution procedures in which the parties and their counsel receive a nonbinding evaluation by an experienced lawyer.

It turns out that the dispositive issue is the enforceability of a waiver of liability the plaintiff's deceased husband signed. If the waiver is unenforceable, the case could approach the $10 million plaintiff seeks. If not, the defendant may not even pay 1% of that. Mr. Ochoa, the plaintiff's deceased husband, was a successful businessman from Mexico, but he was neither fluent in, nor could he read, English.

At the conclusion of the ENE session, both parties agreed that, pursuant to ENE Rule 5-2(c), I should provide them with a written opinion on the enforceability of the waiver. I have concluded that the waiver is enforceable in view of its validity and scope, whether or not Mr. Ochoa read or understood the waiver.

Please prepare my opinion for the parties consistent with ENE Rule 5-2(c). To be effective the ENE opinion must persuade the parties that it reflects the probable outcome if the case were to proceed through discovery and to trial. An opinion that says "on the one hand this and the other hand that" and that does not reach a conclusion will not lead the parties to appraise their chances realistically and negotiate sensibly.

5. EARLY NEUTRAL EVALUATION RULES

5-1. Description.

In Early Neutral Evaluation (ENE) the parties and their counsel make compact presentations of their claims and defenses, including key evidence, and receive a nonbinding evaluation by an experienced neutral lawyer with subject matter expertise.

5-2. The ENE Session.

(a) At least ten days before the ENE session, each party shall file an ENE Statement that describes briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence.

(b) At the ENE session, the evaluator shall:

(1) permit each party, orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

(2) help the parties identify areas of agreement and, where feasible, enter stipulations;

(3) assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain carefully the reasoning that supports these assessments.

(c) If requested by one or more of the parties, within 10 days after the session, the evaluator shall provide a written opinion that:

(1) includes a statement of facts that carefully selects only the facts pertinent to the legal and factual issues evaluated in the opinion;

(2) states the legal and factual issues presented to the evaluator;

(3) assesses the relative strengths and weaknesses of the parties' contentions and evidence, and explains carefully the reasoning that supports the evaluator's assessments; and

(4) draws a conclusion as to the likely outcome in the pending litigation on each legal and factual issue presented to the evaluator and requested to be addressed in the opinion.

(d) The ENE session shall be informal. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses.

5-3. Confidentiality. The court, the evaluator, all counsel and parties, and any other persons attending the ENE session shall treat as "confidential information" the contents of the written ENE Statements, anything that happened or was said, any position taken, any view of the merits of the case formed by any participant in connection with any ENE session, and any opinion or assessment of the evaluator.

Richard Penniman, Esq.
BOISELLE & PENNIMAN
1980 Armando Avenue
Wilson, Columbia
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF COLUMBIA
COUNTY OF GALENA

Louise Oddo Ochoa,	)	
Plaintiff,	)	
vs.	)	**Case No. 03031955 KRB**
Columbia Mountain Heli-ski, LLC,	)	**PLAINTIFF'S EARLY NEUTRAL**
Defendant	)	**EVALUATION STATEMENT**
_____	)	

SUMMARY STATEMENT OF CASE

This action is for damages ($10,000,000) arising from the negligence of the defendant that resulted in the death of Alfredo Ochoa. The Plaintiff is the widow of Alfredo Ochoa. Mr. Ochoa was killed along with eight other people by an avalanche after the defendant helicopter skiing company Columbia Mountain Heli-ski, LLC (CMH) decided to take clients onto an avalanche path known as Bay Street in the Sierra Sonora, Columbia. The events leading up to the avalanche and its aftermath are described in the Coroner's Report.

LEGAL AND FACTUAL ISSUES

This is an action for negligence, arising from an accident which occurred while highly trained professionals were responsible for the lives of their clients. The accident occurred because CMH failed in that responsibility. The issue is: Was that failure the result of an unreasonable error of judgment or lack of skill?

CMH's Answer alleges that this action is precluded because Mr. Ochoa signed a liability and claim waiver before he participated in defendant's heli-ski operation. Contrary to CMH's allegations, the waiver is not valid or enforceable on several grounds:

(1) The validity and scope of the waiver are legally deficient.

(2) Waivers are void as to hazardous activities.

(3) Mr. Ochoa's signature was not effective because he could not and did not understand the document. Defendant was aware that Mr. Ochoa could not read English when he signed the waiver.

At the evaluation session, we will present the Plaintiff, Louise Oddo Ochoa, Mr. Ochoa's surviving wife.

Dated: February 1, 2010 Respectfully submitted,

BOISELLE & PENNIMAN

by: Richard Penniman

Richard Penniman, Esq.
Attorneys for Plaintiff

David Chemichen, Esq.
CHEMICHEN, STRAND & LUTZ
11819 Kiowa Street
Angeles, Columbia
Attorneys for Defendant

IN THE SUPERIOR COURT OF COLUMBIA
COUNTY OF GALENA

Louise Oddo Ochoa, Plaintiff,	)	
vs.	)	**Case No. 03031955 KRB**
Columbia Mountain Heli-ski, LLC,	)	**DEFENDANT'S EARLY**
Defendant	)	**NEUTRAL EVALUATION**
_____	)	**STATEMENT**

SUMMARY STATEMENT OF CASE

The Coroner's Report referred to in plaintiff's Early Neutral Evaluation (ENE) is an acceptable summary of the incident for the ENE proceeding.

ISSUES OF FACT AND LAW

This case will be resolved on the basis of the attached Release of Liability, Waiver of Claims, and Assumption of Risks signed by Mr. Ochoa. It is settled law in Columbia that waivers in sports and recreational activities do not violate Civil Code section 1668. The waiver is clear and unambiguous.

DISCOVERY, SETTLEMENT, AND ENE PROCEEDING

Before considering the difficult, time-consuming, and contentious issues in this case, the ENE should focus exclusively on whether the waiver precludes further proceedings.

Dated: February 3, 2010 Respectfully submitted,
CHEMICHEN, STRAND & LUTZ
by: David Chemichen
David Chemichen, Esq.
Attorneys for Defendant

COLUMBIA MOUNTAIN HELI-SKI, LLC (CMH)

RELEASE OF LIABILITY, WAIVER OF CLAIMS, AND ASSUMPTION OF RISKS. PLEASE READ CAREFULLY. BY SIGNING THIS DOCUMENT, YOU WILL WAIVE YOUR LEGAL RIGHTS, INCLUDING THE RIGHT TO SUE.

ASSUMPTION OF RISKS AND COVENANT NOT TO SUE: I am aware helicopter skiing has, in addition to the usual dangers and risks inherent in skiing, certain additional dangers and risks, some of which include:

1. AVALANCHES - which can frequently occur in the mountain terrain used for helicopter skiing and may be caused by natural forces including steepness of slopes, snow depth, instability of the snowpack or changing weather conditions, or by skiers, the helicopter, or the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur;
2. MOUNTAINOUS AND STEEP TERRAIN - where a fall may cause injury or death. The areas used by CMH have steep or vertical slopes, overhangs, and cornices that in their natural state are inherently dangerous.
3. WEATHER - which can be extreme and change rapidly, without warning.
4. HELICOPTER - additional risks are posed by mechanized travel due to mechanical failure, operational error or changeable weather.

I understand that the risks from helicopter skiing are varied and difficult to anticipate. I intend this release of liability, waiver of claims, and assumption of risks to include ALL RISKS, even if the risks or cause of injury are not identified in this document or known to me at the time of signing.

I AM AWARE OF THE RISKS ASSOCIATED WITH HELICOPTER SKIING ("HELI-SKIING") AND I FREELY ACCEPT AND FULLY ASSUME ALL SUCH RISKS, DANGERS, AND HAZARDS. I AGREE NOT TO SUE FOR ANY INJURY RESULTING FROM RISKS OF HELICOPTER SKIING.

RELEASE OF LIABILITY: In consideration of allowing me to participate in helicopter skiing activities, I hereby agree as follows:

I WAIVE ANY AND ALL CLAIMS I MAY HAVE AGAINST, RELEASE FROM ALL LIABILITY, AND AGREE NOT TO SUE CMH, ITS SKIING GUIDES AND EMPLOYEES FOR ANY PERSONAL INJURY, DEATH, PROPERTY DAMAGE OR LOSS SUSTAINED BY ME AS A RESULT OF MY PARTICIPATION IN ANY HELI-SKIING TRIP WITH CMH DUE TO ANY CAUSE WHATSOEVER, INCLUDING, WITHOUT LIMITATION, NEGLIGENCE ON THE PART OF CMH OR ITS STAFF.

I HAVE READ AND UNDERSTAND THIS RELEASE AND WAIVER.

Signed this 10th day of January, 2009.

Miguel Mendez — Witness

Alfredo Ochoa — Signature of Participant

GALENA COUNTY CORONER
Coroner's Report
Judgment of Inquiry
Department of Public Safety
Into the Death of ALFREDO OCHOA

SUMMARY OF EVENTS:

On March 12, 2009, at approximately 1630 hours, the Galena County Sheriff Detachment was advised that there had been an avalanche in the Torre Mountain area of the Sierra Sonora, and that there were numerous burials and losses of life. Search and rescue efforts had been underway since 1600 hours. When outside help arrived the rescue effort was almost complete.

Those involved in the avalanche accident were guides and clients of Columbia Mountain Heli-ski, LLC (CMH). Ten people had been descending a steep ski run on the mountainside when they triggered an avalanche. All ten people were involved in the avalanche; nine died of asphyxiation before they could be rescued.

CMH is a lodge-based backcountry heli-skiing company located in the Sierra Sonora Mountain range. The company caters to experienced clientele who want a physically challenging skiing experience. The area is accessible only by helicopter.

INVESTIGATIVE FINDINGS:

1. Alfredo Ochoa, age 48 years, of Medina, Mexico, was killed along with 8 other people by a large avalanche while heli-skiing in the Sierra Sonora. The accident occurred on March 12, 2009 on a run known as Bay Street. Nine skiers and their guide, Joyce Long, were beginning the last run of the March 12 afternoon.

2. CMH ski guides Hans Moser and Joyce Long put together two groups of skiers of twelve and ten respectively for the last ski descent of the day. Mr. Moser's group of twelve was flown to the top of Bay Street. Bay Street is a 2500 foot run on Torre Mountain.

3. Bay Street is made up of three bowl shaped features, converging about midway down the slope into one large pathway to the bottom. All three bowls have been skied in the past. CMH had not skied the run this season. Mr. Moser led his group of guests down the run. He found the run to be excellent skiing.

4. Ms. Long arrived at the helicopter landing and instructed her group to follow her into Bay Street, and to ski down and regroup about ten turns down. She stopped about 100 yards down the slope.

5. Ms. Long testified that as she was watching and waiting for the last skiers to join the group she suddenly felt the snow move under her skis. There was no warning sound. There was no time to even move and ski out. The snow enveloped Ms. Long. She, along with the nine other skiers, was swept down the slope. Ms. Long was the sole survivor. In the circumstances, her survival with only very minor injuries defied all odds.

6. A textbook rescue was undertaken within moments. All of the nine skiers' bodies were located within 45 minutes. It was clear from the way in which they were found that the impact of the snow and obstacles and suffocation had killed them.

7. The history of the winter snow pack in the Sierra Sonora Mountains is an important aspect of the accident. In mid to late November 2008 a rain storm created a weak layer in the snow pack that remained throughout the winter. This November rain crust layer was seen as a serious threat throughout the ski industry. The Columbia Avalanche Association issued a Bulletin on February 17, 2009, that warned of "a complex and unusual snow pack for the mountains of Columbia. Be vigilant about avoiding those big steep alpine faces. Any avalanche triggered on the older weaknesses may propagate extensively into a large and dangerous avalanche event."

8. Investigation of the site after the avalanche found that the November rain crust layer was the cause of the avalanche.

9. CMH was well aware of the February 17, 2009 avalanche warning. However, as a result of its own assessment of the snow stability, the CMH guides were confident that there was no deep layer instability as a result of the November rain crust in the Torre Mountain area as of March 12, 2009.

10. Hans Moser, the leader of the first group to ski Bay Street, is the owner of Columbia Mountain Heli-ski. He is a heli-skiing guide with 25 years of experience, skiing and guiding almost every day from December to May on every slope that has ever been skied in the Torre Mountain area. Ms. Long, the guide of Mr. Ochoa's group, has worked as a heli-ski guide in the Sierra Sonora for 10 years for CMH. Ms. Long holds the highest certification of "Alpine Guide" issued by the International Federation of Mountain Guides Association (IFMGA). All CMH guides have taken every course on avalanche analysis and prediction offered by the Columbia Avalanche Association and hold Emergency First Responder Certification (First Aid) from the Columbia Red Cross.

CONCLUSION

I find that ALFREDO OCHOA died on March 12, 2009, in the area known as Torre Mountain, Columbia. The cause of death was determined to be asphyxiation, due to being buried in snow following an avalanche. I classify this death as accidental.

Dated this 23rd day of September 2009.

Charles H. Purse

Charles H. Purse, Coroner
Galena County, Columbia

LAW OFFICES OF CASTRO AND RUZ
713 Pasado
Vista, Columbia

KRISTINA CASTRO'S NOTES FROM OCHOA v. CMH ENE SESSION OF FEBRUARY 22, 2010

9:15 am. I opened by stating ground rules: no cross-exam; questions/arguments addressed to evaluator, not opposing counsel; no transcript; all evidence, arguments, concessions stay here and may not be used later in case. Informed counsel that first I wanted to hear positions on the waiver Alfredo Ochoa signed.

OPENING STATEMENTS

For Plaintiff:

Plaintiff is aware that the defendant will attempt to avoid responsibility for its negligence because of the waiver. Plaintiff does not dispute that Alfredo Ochoa signed a waiver for his heli-ski trip in March of 2009. However, the signed waiver is a sham. The waiver is not binding on several grounds:

(1) Waiver is unenforceable because not valid and its scope is ambiguous and inadequate:

-It is contrary to Civil Code §1668, which provides that contracts intended to exempt anyone from responsibility for injury to another person "whether willful or negligent, are against the policy of law."

-Waiver is ineffective because a reasonable person would not understand the word "negligence" to mean that it absolves defendant from failing to take measures available and understood to be necessary for safety of its clients, which was purpose of hiring CMH and its professional heli-ski guides.

(2) Even if waivers in beneficial recreational activities may not violate Civil Code §1668, a waiver cannot exempt responsibility for negligence in ultra-dangerous activities such as helicopter skiing. A defendant who intentionally and for profit places others, who are in its care, at great risk does not deserve absolute legal shield from its own negligence.

(3) Most important, a waiver cannot bind someone who could not read it. CMH has overreached, and Alfredo Ochoa is excused from the waiver's terms because CMH knew that Ochoa was neither fluent nor literate in English, and knowing that Ochoa did

not read English, no one from CMH bothered to translate the waiver for Ochoa or to have any of the people available to CMH translate the waiver for Ochoa. One fact is not disputable, and it is determinative: Mr. Ochoa could not understand the waiver.

For Defendant:

Alfredo Ochoa and his estate are bound by the waiver. The validity of waivers, even as to risky recreational activities, is not open to question. CMH's waiver is simple and clear.

Ochoa knew or had every reason to know that the waiver he signed on January 10, 2009, affected his legal rights. He well knew the risks of heli-skiing. Absent fraud or excusable neglect, one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.

Ochoa heli-skied with CMH in the Sierra Sonora three times, in 2007, 2008, and 2009. Each time he went he was asked to sign a waiver of liability in essentially the same terms. He complied each year. If Ochoa could not read it, he could have had it read or explained to him. Contents of the waiver were either known or immaterial to him. The evidence will show that either way, he was prepared to be bound by it.

WITNESSES

Plaintiff Louise Ochoa: (General Comments) The death of Alfredo Ochoa left her without a husband, six children without a father, and the family without its only provider. Louise Ochoa experienced a devastating loss. Her marriage was an exceptionally good one. She shared most aspects of her husband's life, both business and pleasure. Mr. Ochoa was clearly closely involved with his children. He was a loving, giving parent who took pride in his children's accomplishments. He included his children and his wife as often as possible in his many activities. He cycled, sailed, skied, swam and socialized with an enthusiasm which was matched by his enthusiasm for business. He had plans for his children which included attending top universities and business careers. Ochoa himself did not attend high school or university. He was a self-made man, who appreciated the advantages of an education. His older children, though still young at his death, were in awe of their father, inspired by him and proud of him. When he died, the older children were left rudderless, no less so because they quickly moved from Mexico to Louise Ochoa's family's home in Santo Diego, Columbia. There was no business left for them to grow into as had been planned by their father. Louise Ochoa has had to cope with the loss, not only of a beloved husband with whom she shared

most of her activities in their life, but the rock on which her children's future was dependent. She is still a young, vibrant woman, but coping with six children, the three oldest boys who were adolescents at the time of their father's death, has been difficult. The children are traumatized by the loss of their father.

Ochoa was a highly resourceful, successful entrepreneur in the steel industry. He was among the top three in that industry in Mexico. His business expanded, primarily by his efforts, ranging from selling scrap steel from a bicycle at the age of 17, to owning a partnership with his brother and occasionally others, in a steel remanufacturing business, a steel distribution business, and other related businesses such as trucking. At the time of his death he was working on the construction of a steel mill costing over $100,000,000 in Guadalajara, Mexico. Ochoa's business interests took him all over the US and to Europe. He attended trade shows, conferences, and conventions relating to his business. He purchased large machinery and developed business relationships with U.S. companies.

Ochoa also vacationed frequently in the United States. In addition to visiting regularly in Santo Diego with his parents in-law and Louise Ochoa's brothers, he skied regularly at Vail, Aspen, and other popular ski resorts either with his family or with friends.

It is Ochoa's signature on the CMH waiver, dated 1/10/09, but Louise does not recall seeing it before. She is certain he never asked her to translate it for him. The witness signature is that of Miguel Mendez, Ochoa's bilingual secretary.

Q (by ENE EVALUATOR KRISTINA CASTRO): How would you describe Mr. Ochoa's English skills and understanding?

LOUISE OCHOA: He understood quite a lot of spoken, conversational English. He could understand most American TV, but he wouldn't go to English theatrical performances and would put on Spanish subtitles when we'd watch a movie at home.

Q: Did Mr. Ochoa ask you to translate documents that were in English?

LOUISE OCHOA: Sometimes, but not a complete document, just a specific phrase or

sentence in a contract, something like that. He was very, very limited in reading English.

Q: Can you recall any business deal that Mr. Ochoa did not pursue because of his language limitation?

LOUISE OCHOA: No, never. He did whatever he had to, to get a deal done. By one means or another he understood others and made himself understood in order to participate fully. He'd seal deals with just a handshake, and have contracts sent to his office, where Mr. Mendez could review them.

Q: When in the US, could he shop or order in a restaurant?

LOUISE OCHOA: Oh, yes, even when we dined out, he never seemed to find his language limitations a barrier.

Q: What about recreational activities, any that he didn't participate in because of his limited English proficiency?

LOUISE OCHOA: No, he did everything he wanted.

Q: And that included vacation activities in the US, such as skiing, hunting, fly-fishing?

LOUISE OCHOA: Yes. A few years ago, Alfredo went big game hunting in Montana, and on other years, he'd go quail hunting in Texas.

Q: And he handled business negotiations and participation in hunting and skiing without any translation services?

LOUISE OCHOA: Almost everything except written English, yes.

***

Hans Moser: (General Comments) Owner of CMH. Heli-skiing in Sierra Sonora 25 years. Heli-skiing is an inherently dangerous sport. Even if everything possible is done to make it safe, significant risks remain. People who ski at this level are aware of the risk. Alfredo Ochoa was a highly skilled and experienced skier who was spending a week of guided skiing at CMH. He and the other clients would rely on the decisions made by their guide to give them the best skiing experience possible, balanced against the risk involved. At CMH no one skis, even gets taken on helicopter to lodge without signing the waiver. Waiver has changed, but it has been the same for the last 8 years.

Q (by KRISTINA CASTRO): What is your understanding of what waiver means?

MOSER: It protects us in case, despite our best efforts, we make a mistake.

Q: But what if, instead of a mistake, a CMH guide did not take the usual precautions that you follow for safety, say from risks such as avalanches, would you understand the waiver to protect CMH then?

MOSER: Certainly not. That would be reckless. We would never do that.

Q: But if a guide did, would you expect the waiver to cover that situation?

MOSER: I've never thought of that. I don't know, but every client has a right to believe that we will use our best judgment, experience and training to provide the safest experience possible.

***

Jonathan Ripka: (General Comments) Investigator for CMH's insurer. Flew to the lodge day after March 12th accident. The ski clients were still at the lodge, and Ripka interviewed most of them. He summarized interviews of Tom Weaver, Oscar de la Pena, and Jaime Gomez:

Tom Weaver. CMH "greeter" and Galena contact person. The Mexican group comes every year, organized by one of them, Oscar de la Pena. Weaver's responsibilities include putting together a folder on each client, and assuring that each has filled out the application, made deposit and final payment, and that there is a signed/witnessed waiver from each. Waivers are usually sent to clients to be signed and returned with final payment. Weaver recalls Ochoa. Ochoa's first trip with group came about because someone else in the group canceled. Ochoa's total payment came in late and without application and waiver. CMH's practice is to list clients who had not returned a properly executed waiver and require them to sign the waiver at hotel and have it witnessed. Signing was a condition of going to lodge and skiing. Weaver recalls contacting Ochoa at the hotel in Galena on February 10, 2007 through de la Pena. De la Pena himself had executed such waivers on the previous 5 or 6 occasions he went skiing with CMH. He is fluent in both English and Spanish. In Weaver's presence, de la Pena asked Ochoa to sign the waiver and de la Pena witnessed it. De la Pena probably spoke in Spanish to Ochoa, since most of them in the Mexican group spoke Spanish among themselves. Weaver can "get by" in Spanish. He did not translate the waiver in Spanish for Ochoa or any of the Mexican group. Why

not? Never thought that necessary. He can recall speaking to Ochoa and the others in English. He had to make all of the arrangements for each of them for transportation to helicopter, often change flights home, help with lost bags, arrange rentals of anything they didn't have. He does not recall any problems communicating with Ochoa in English.

Oscar de la Pena. Organizer of Mexican group. De la Pena did not recall witnessing Mr. Ochoa sign the first waiver, dated February 10, 2007, although it is his signature as a witness. De la Pena had read the document or one similar to it in earlier years and he understood that when he signed it, he was waiving legal rights to risks of

heli-skiing. His understanding did not seem to extend beyond this. He asked no questions and not only signed such documents himself regularly, but assisted in having others of his Mexican ski group sign them. De la Pena emphasized that since heli-skiing at CMH cost about $1,200 a day, each skier in the Mexican group is a successful business person with considerable contact with the English language in relation to either his education, his business, or his recreation.

At the end of the first week of skiing at CMH in 2007, Ochoa signed up for heli-skiing for the next year. On the last day at the lodge, February 18, 2007, Ochoa along with the other members of the Mexican ski group signed another waiver form which was witnessed by a fellow skier from Mexico who was fluent in English, Jaime Gomez.

Jaime Gomez. Was with the group again in 2009, and acknowledged his signature as the witness on the waiver that Ochoa signed on February 18, 2007. Gomez had no recollection of witnessing this document. He can read English and probably had read the big print in the waiver. Gomez is sure he didn't translate waiver to Spanish for Ochoa ("I would have remembered that"). As to Gomez' understanding of the waiver, he thought that he could not sue in case of an accident. As to why he signed, he said he thought he had to sign the document in order to participate in the activity. As with all vacation documents he does not bother to read them, he just signs them so he can enjoy his vacations.

Ripka said that this attitude of Gomez was typical among the Mexican group he interviewed. None of the Mexican group suggested that there was any time pressure or salesmanship applied by CMH to any of the Mexican group in order to obtain their signatures. Gomez and de la Pena said that Ochoa seemed to understand instructions in English from the CMH guides and personnel, although both knew that Ochoa could not read English very well, if at all. Both also said that all the Mexicans, including Ochoa, talked in English with the other skiers at the lodge although sometimes one of them would ask another how to say a particular word or phrase.

The third waiver was signed by Ochoa at his place of business in Mexico. It was sent to him there by CMH, in a package with a request for final payment, a waiver form, and a trip cancellation insurance form for completion. This package was in English as was all correspondence sent to Mr. Ochoa by CMH. All the correspondence received back from Mr. Ochoa was likewise in English, possibly prepared and sent by Ochoa's bilingual secretary. CMH received the waiver, the final payment, the completed insurance form, and a completed and witnessed waiver.

Ripka interviewed others from the Mexican group at the lodge. All described Ochoa as self-confident, resourceful, and without inhibition in asking for and getting what he wanted.

Q (by KRISTINA CASTRO): Did you locate anyone at lodge or at CMH who said that CMH waiver was read or translated into Spanish for Ochoa at any time?

RIPKA: No, no one thought that was necessary.

After leaving lodge, Ripka contacted Montana and Texas hunting and Jackson Hole fly fishing operations visited by Ochoa. Each required waiver of liability, and had on file waivers signed by Ochoa before he participated.

CLOSING CONFERENCE WITH COUNSEL

Plaintiff's counsel insists that the waiver is invalid. Plaintiff asserts even defendant's investigator could find no evidence of a knowing waiver. Further across-the-board-waivers should not absolve a tortfeasor in an activity that cannot be made safe. Liability will easily be established, and only real question is the amount of damages.

Defendant disagrees. However, both agreed that my conclusion on enforceability of waiver would move the case forward.

FEBRUARY 2010

California
Bar
Examination

Performance Test A

LIBRARY

LIBRARY

Randas v. YMCA of City of Angeles

Columbia Court of Appeal (1998)

In this personal injury action, plaintiff-appellant appeals from an adverse summary judgment and contends the release she signed was invalid because it was against public interest and because she couldn't read it. The facts are simple and undisputed. The issue is one of law. As plaintiff implicitly concedes, if the release she signed is valid, summary judgment was properly awarded to defendant.

Plaintiff Lemonia Randas, literate in Greek but not English, enrolled in a swimming class at a local YMCA. She was provided a Release and Waiver of Liability and Indemnity Agreement that she signed. After her swimming class, she slipped and fell on the wet poolside tile, injuring herself.

1. THE RELEASE DOES NOT AFFECT THE PUBLIC INTEREST AND IS NOT INVALID UNDER CIVIL CODE SECTION 1668.

The section reads: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

If an exculpatory provision, such as the subject release, involves "the public interest" it is invalid under Civil Code section 1668. (*Tunkl v. University Regents*, Col. Sup. Ct., 1963). In *Tunkl*, the seminal case, the Columbia Supreme Court stated: "no definition of the concept of public interest can be contained within the four corners of a formula." *Tunkl* instead listed characteristics,[1] some or all of which characterize invalid

[1] "It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a

exculpatory provisions. It held that the hospital-patient contract clearly falls within the category of agreements affecting the public interest.

This court has not been apprised of any case, applying the *Tunkl* factors, that voided a release on public interest grounds in the sports and recreation field. For example, the following activities have been found *not* to involve a public interest: an international bicycle racing competition, “motocross” races, operating a dirt-bike park, and commercial river rafting. See generally *Buchan v. United States Cycling Federation*, Col. Ct. App., 1990. Swimming, like other athletic or recreational activities, however enjoyable or beneficial, is not "essential" as a hospital is to a patient or a repair garage is to a Columbia motorist. *Buchan, supra.*

Moreover, there is good reason *not* to invalidate such releases because the public as a whole receives the benefit of such waivers so that groups such as the YMCA, as well as the Boy and Girl Scouts, Little League, and parent-teacher associations, are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of adults and children benefit from the availability of recreational and sports activities. Those options are steadily decreasing -- victims of decreasing financial and tax support for other than the bare essentials of an education. Every learning experience involves risk. No public policy forbids the shifting of that burden.

We reject plaintiff’s attempt to distinguish the sports and recreational cases on the ground that they involved "death defying" activities. *Tunkl* fails to include dangerousness as a relevant characteristic, and releases have been upheld in moderate sports, such as bicycle riding and aerobics, as well as to hazardous activities, including skydiving, motorcycle races, and mountain climbing. See generally *Hulsey v. Elsinore Parachute Center*, Col. Ct. App., 1985.

2. THE RELEASE IS CLEAR AND UNAMBIGUOUS.

---

purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." (*Tunkl, supra*.)

An agreement exculpating the drafter from liability for his or her own future negligence must clearly and explicitly express that this is the intent of the parties. We first note that whether a contract provision is clear and unambiguous is a question of law.

The subject release is captioned in bold lettering: "Release and Waiver of Liability and Indemnity Agreement." Its one-page text states: "The undersigned hereby releases the YMCA from all liability to the undersigned for any loss or damage on account of injury to the undersigned caused by the negligence of the YMCA . . . ." It further states: “The undersigned hereby assumes full responsibility for and risk of bodily injury due to the negligence of the YMCA."

We find the release neither unclear nor ambiguous.

3. THE RELEASE IS NOT INVALID EVEN THOUGH PLAINTIFF COULD NOT READ IT.

It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it.

On the record here, there is no indication of fraud or overreaching by defendant. Nor did plaintiff claim that defendant had reason to suspect she did not or could not read the release she had signed and which in full captions above and below her signature stated: "I Have Read This Release."

Absent bad faith or misrepresentation, ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms, and cannot escape liability on the ground that he has not read it. If he cannot read, he should have it read or explained to him. One who signs an instrument when for some reason, such as illiteracy or blindness, he cannot read it, will be bound by its terms in case the other party acts in good faith without trick or misrepresentation. The signer should have had the instrument read to him.

The judgment is affirmed.

Allan v. Snow Summit, Inc.

Columbia Court Of Appeal (1999)

Plaintiff Gary Allan sued defendant Snow Summit for injuries he allegedly suffered during a ski lesson. The trial court granted summary judgment in favor of Snow Summit on the basis of a release and waiver Allan had signed.

Allan paid for skiing lessons. Snow Summit gave Allan a card in connection with the skiing lessons. The first side of the card contained information about the date and times of the ski lessons. The second side contained a statement entitled "Agreement and Release of Liability." Although he averred he did not remember reading or signing the card, Allan acknowledged that he did print his name in the indicated blank and that it is his signature at the end. The second side reads as follows:

> Agreement and Release of Liability. I Gary Allan have voluntarily enrolled in a ski lesson offered by Snow Summit, Inc. I am aware that my participation in the ski lesson and the sport of skiing involves numerous risks of injury, including, but not limited to, falls, loss of control, collisions with other skiers and natural and man-made objects and I freely assume those risks.
>
> As lawful consideration for being permitted to enroll, I agree to release from any legal liability and agree not to sue Snow Summit, Inc., their owners, officers, directors, members, agents and employees, for any and all injuries caused by or resulting from any participation in the ski lesson or the sport of skiing whether or not such injury or death was caused by alleged negligence.
>
> I Am Aware That This Contract Is Legally Binding and That I Am Releasing Legal Rights by Signing It. Signed: Gary Allan.

Snow Summit assigned Shawn Oldt, a professional ski instructor, to conduct the lesson. Allan told Oldt that he was a novice skier. The lesson, which took place in the beginners' area, apparently went well. The next day, Allan returned for another lesson. After a period of time in the beginners' area, Oldt told Allan that he was ready to go to

the "top of the mountain." Allan was nervous and reluctant to leave the beginners' area. Oldt told Allan he could not ski on the beginners' slope forever, and that the only way to learn to ski properly was to be aggressive and "go after the challenge."

Allan went to the ski run at the top of the mountain. He found he could not turn as he could in the beginners' area. Each time he attempted to turn, he fell. The ski run was icy. The ice made it difficult to turn and felt hard. Allan fell numerous times during the run. Oldt continued to encourage Allan to get up and keep trying after each fall. When Allan finally reached the bottom of the run, Oldt remarked that the top portion of the mountain was frequently icy, and that many people jokingly referred to the icy conditions as "Summit Cement."

After he had finished skiing, Allan felt pain in his back. Allan sought treatment; he was informed he had sustained herniated discs in his lumbar spine.

Allan filed this action against Snow Summit and Oldt, apparently on the theory that, despite the Agreement and Release of Liability, Snow Summit continued to owe him a duty of care which Allan characterizes as a duty not to increase the risks inherent in the sport because of the instructor/pupil relationship.

Snow Summit successfully moved for summary judgment on grounds that (1) Allan expressly assumed the risk of injury from skiing, and (2) the release agreement expressly bound Allan not to sue, even if Snow Summit was negligent. The court based its ruling exclusively on the release and did not consider Allan's contentions that Snow Summit or Oldt had somehow increased the risks inherent in the sport of skiing.
On appeal after a summary judgment has been granted, we review the matter de novo to determine whether there are any triable issues of material fact.

It is undisputed that Allan signed the Agreement and Release of Liability as a condition to enrolling in the ski school. Allan stated he did not remember seeing or signing the document, although he acknowledged he received it and that it is his signature. He alleges there is a disputed issue of fact as to whether or not he agreed to its terms. However, it is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the

ground that he failed to read the instrument before signing it. This principle has been extended even to cases where the person who signs the contract is illiterate -- in such cases, the individual has a responsibility to have the contract read to him. See *Randas v. YMCA*, Col. Ct. App., 1998.

Allan suggests that his neglect in not reading the contract was "excusable," since he was given the contract only a few moments before the lesson and therefore had no time to read it thoroughly. However, Allan could have taken the time to read it. Notably he does not say that he was precluded from taking the time to read it; and there is no evidence that he did not do so, only that he does not recall reading it. Also, Allan conceded that he had signed similar releases at his fitness gym, and when taking yoga classes, renting roller blades, and participating in recreational running races. Whether he read it or not, he knew or had every reason to know that the document affected his legal rights.

Allan contends that the ski instructor's misrepresentations concerning his abilities to ski from the summit constitute bad faith or misrepresentation. However, Allan misconstrues the court's decision in *Randas*. The fraud or misrepresentation must be as to the contents of the waiver.

The Agreement and Release of Liability states plainly on its face that skiing is a dangerous activity, and that in consideration of receiving ski lessons, the student must agree to hold Snow Summit and its employees harmless and not to sue for any injury caused by participation in the hazardous activity, even if Snow Summit or its employees were negligent.

Allan admits he signed the Agreement and Release of Liability, in which he agreed not to sue Snow Summit, or its employees, even if he suffered injury or death, and even if the injury or death was caused by Snow Summit's or Oldt's negligence. A release or waiver could hardly be more clear.

The general principle remains unaltered that there is no public policy which opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party. Only exculpatory clauses affecting the public interest are invalid (*Tunkl v. University Regents*,

Col. Sup. Ct, 1963), and exculpatory agreements in the recreational sports context do not implicate the public interest. See generally, *Buchan v. United States Cycling Federation*, Col. Ct. App., 1990.

Allan here expressly agreed, for a consideration, to "shoulder the risk" that otherwise might have been placed on Snow Summit. The defendants' business was not generally thought to be suitable for public regulation; defendants did not perform a service of great importance to the public, and the business was not a matter of practical necessity for members of the public.

Here, the release provisions were prominent, including large, bold type. Allan had to look at the release agreement at least long enough to fill his name in the indicated blank and to sign at the end. Notification was plain and clear. The effect of an adequate notice, of course, is simply to alter preexisting expectations. Allan cannot avoid the effect of the notice on his reasonable expectations simply by not reading the contracts he is given to sign.

The summary judgment is affirmed.

Pritikin v. Billy's Fitness Club and Spa

Columbia Court of Appeal (2005)

Plaintiff and appellant Tom Pritikin was a member of a health club. Defendant Billy's purchased the health club and renamed it Billy's Fitness Club and Spa. Billy's required each existing member to sign a new membership agreement. Pritikin signed a two-page, single-spaced membership agreement. The membership agreement is comprised of eleven itemized paragraphs, and included subjects such as fees, right to change fees, transferability, and termination. In the introductory paragraph, Billy's offered members "[t]he use of its services and facilities in conformance with the terms and conditions set forth below." Paragraph 7 is entitled "Waiver of Liability." It contained three paragraphs in the same type and type size as the remainder of the agreement. In an initial paragraph on waiver, the member "acknowledges and understands that he/she is using the facilities and services of the club and spa at member's own risk." The next waiver paragraph was as follows: "[t]he club and spa and their owners, officers, employees, agents, contractors and affiliates shall not be liable, and the member hereby expressly waives any claim of liability, for personal/bodily injury or damages, which occur to any member, or any guest of any member, or for any loss of or injury to person or property. This waiver is intended to be a complete release of any responsibility for personal injuries and/or property loss/damage sustained by any member or any guest of any member while on the club and spa premises, whether using exercise equipment or not."

Pritikin was injured at the health club prior to beginning his regular workout. Pritikin intended to use an elliptical training machine that ordinarily faced a television set suspended on a rack above head level. The television set was facing away from the elliptical training machine. In an attempt to return the television set to its normal position, Pritikin touched the rack on which the television lay, and the television slid off the rack over Pritikin's head. Pritikin attempted to hold the television in place; however, he was unable to bear the weight of the television and injured his knee.

The trial court granted summary judgment, concluding the written release clearly and unambiguously defeated Pritikin's lawsuit.

An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, the defendant breached the duty, and the breach was a proximate cause of the injuries suffered by the plaintiff. A release may negate the duty element of a negligence action. Contract principles apply when interpreting a release, and normally the meaning of contract language, including a release, is a legal question. It therefore follows that we must independently determine whether the release in this case negated the duty element of plaintiff's cause of action.

To be effective, such a release must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties. The release need not achieve perfection. We note that the waiver of liability signed by Pritikin does not expressly include the term "negligence." Pritikin contends that the release is ineffective on this basis. However, the inclusion of the term "negligence" is simply not required to validate an exculpatory clause. Whether the exculpatory clause bars recovery against a negligent party is controlled by the intent of the parties as expressed in the written agreement. A waiver of liability in a health or fitness club membership agreement necessarily releases the health club from liability for its negligence, since there is no other liability to release.

The determination of whether a release contains ambiguities is a matter of contractual construction. An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. The circumstances under which a release is executed can give rise to an ambiguity that is not apparent on the face of the release. If an ambiguity as to the scope of the release exists, it should normally be construed against the drafter.

The scope of a release is determined by the express language of the release. The express terms of the release must be applicable to the particular negligence of the defendant, but every possible specific act of negligence of the defendant need not be spelled out in the agreement. It is only necessary that the act of negligence, which results in injury to the releasor, be reasonably related to the object or purpose for which the release is given. The issue is not whether the particular risk of injury is inherent in the recreational activity to which the release applies, but rather the scope of the release.

An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release. Thus, a release given in connection with scuba diving activities was applicable to the death of a scuba diving student who was inadequately supervised and who drowned; similarly, releases given in connection with fitness activities were applicable to a slip and fall on a slide exercise mat during exercise class or while using weightlifting equipment under supervision of a personal trainer.

The release Pritikin signed was clear, unambiguous, and explicit. It released Billy's from liability for any personal injuries suffered while on Billy's premises, "whether using exercise equipment or not." Pritikin contends the release should be interpreted to apply only to injuries suffered while actively using Pritikin's exercise equipment. In this regard, Pritikin first contends the release cannot bar his action because, as a matter of law, a health club release is not effective to release claims for injuries arising out of circumstances unrelated to fitness. He argues that the negligence released must be reasonably related to the purpose of the release, i.e., fitness. This assertion is incorrect.

Pritikin's fitness-related argument is not a semantically reasonable interpretation of the release; indeed, it is contrary to the express language of the release. Given its unambiguous broad language, the release reached all personal injuries suffered by Pritikin on Billy's premises, including the injury Pritikin suffered because of the falling television.

In determining the purpose for which the release was signed, courts look at the language of the release and the agreement in which it is included, and not the inherent risks of the underlying recreational or sports activity. The release signed by Pritikin unambiguously, clearly, and explicitly released Billy's from liability for any injury suffered on the fitness club premises, whether using exercise equipment or not. The purpose of the release included access to and entry on Billy's facilities; the injury suffered by Pritikin was, therefore, reasonably related to the purpose of the release.

Thus, we conclude that the release would be effective to bar Pritikin's action, if it was executed and signed by Pritikin. Pritikin does not challenge that his membership form

bears his signature. He now alleges, however, there is a disputed issue of material fact as to whether or not he agreed to all of its terms.

It is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it. There is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. Where a party has signed a written agreement, it is immaterial to the question of whether he is bound by it that he has not read it and does not know its contents. In the usual commercial situation, there is no need for the party presenting the document to bring exclusions of liability or onerous terms to the attention of the signing party, nor need he advise him to read the document. In such situations, it is safe to assume that the party signing the contract intends to be bound by its terms.

However, limited situations may arise which suggest that the party does not intend to be bound by a term. In *Leon v. Sienna Resort Hotel*, Col. Ct. App., 1998, the plaintiff, who was injured when a sauna bench collapsed beneath him, had signed a 2-page admission form for a single day use of the defendant hotel's fitness room. The exculpatory clause was inconspicuously buried in small print on the reverse side of the admission form; defendant's employee watched plaintiff sign the form in a hasty, informal way, without reading, let alone understanding, the document given its length and the amount of small print on its reverse side. The *Leon* court concluded that the exculpatory clause was not sufficiently conspicuous to be enforceable. In these special circumstances, there was a duty on defendant to take reasonable measures to bring the onerous exclusion clause in question to the plaintiff's attention.

Many factors may be relevant to whether the duty to take reasonable steps to advise of an exclusion clause or waiver arises. The effect of the exclusion clause in relation to the nature of the contract is important if it runs contrary to the party's normal expectations. Patrons of recreational facilities are accustomed to exculpatory clauses limiting liability for use of exercise equipment and are aware or should be aware signing releases affects their legal rights. The length and format of the contract and the time available for reading and understanding it also bear on whether a reasonable person

should know that the other party did not in fact intend to sign what he was signing. This list is not exhaustive. Other considerations may be important, depending on the facts of the particular case.

The key is recognition of the limited applicability of the rule that a party proffering for signature an exclusion of liability must take reasonable steps to bring it to the other party's attention. It is not a general principle of contract law establishing requirements which must be met in each case. Rather, it is a limited principle, applicable only in special circumstances, where the agreement has been induced by fraud, misrepresentation, or where the party seeking to enforce the document knew or had reason to know of the other's mistake as to its items.

Here, Pritikin's claim is that he signed the form after Billy's acquired the fitness center as part of his membership renewal and that he was not aware of the new release terms. However, neither party presented evidence in the summary judgment proceeding of the circumstances concerning execution of the membership release form. For example, Pritikin never testified that he had not read the form, nor that he was not given time to read the form. Billy's did not attempt to show that steps were taken to bring the release terms to the attention of Pritikin or other members.

The determination that a party who signs a waiver may be excused from its consequences requires a close examination on the totality of the circumstances surrounding the waiver's content, its execution, the parties' expectations, experience, and notice of the legal rights affected. However, there is simply no record before us, and on that basis we reverse the summary judgment and return the case for further proceeding on the issue.

Answer 1 to Performance Test A

IN THE SUPERIOR COURT OF COLUMBIA

COUNTY OF GALENA

Louise Oddo Ochoa,	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 03031955 KRB**
	)	**Early Neutral Evaluation**
Columbia Mountain Heli-Ski, LLC,	)	**Evaluator's Written Opinion**
Defendant	)	
	)	
_____	)	

STATEMENT OF FACTS

Alfredo Ochoa was a successful father, entrepreneur, and sports enthusiast. At the time of his death, Ochoa worked in a very successful steel remanufacturing business in Guadalajara, Mexico. His work at the business required him to frequent Europe and the United States for business, often attending trade shows, conferences, and conventions. Despite not being fluent in English, Mr. Ochoa understood quite a lot of spoken, conversational English and never let any lack of English skills prevent him from engaging in the business he wanted to engage in. Mr. Ochoa frequently had to enter into deals in English and any lack of ability to understand English did not prevent him from engaging in these business transactions. Additionally, Mr. Ochoa surrounded his business with individuals who were bilingual, most notably his secretary, who could help him with any lack of English knowledge or skill.

Outside of work, Mr. Ochoa was an active sports enthusiast. He enjoyed cycling, sailing, skiing, and swimming. Since 2007, Mr. Ochoa made annual trips to Columbia Mountain Heli-Ski, LLC ("CMH") in the Sierra Sonora mountains in Columbia, USA, to engage in the highly dangerous sport of heli-skiing. Heli-skiing is a highly dangerous sport whereby experienced skiers go by helicopter to ski in remote areas that are not

accessible otherwise. These annual trips to CMH were organized by Oscar de la Pena and were always with a large group of Mexican tourists. If Mr. Ochoa had any lack of grasp of the English language regarding the risks involved in these sports, he did not show it. He was accustomed to signing waivers of liability through the recreational activities he engaged in, and typically surrounded himself with individuals who had more knowledge of the English language than himself.

CMH is a company that specializes in providing these experienced skiers with a heli-skiing experience. Because of the inherent dangers and risks involved in heli-skiing, for the past 8 years, CMH has required every skier who skis with them to sign a waiver of liability before CMH. This waiver provided that the signer would not sue CMH for both the usual dangers and risks inherent in skiing as well as any additional dangers and risks in skiing, including avalanches, mountainous and steep terrain, weather, and helicopter risks.

On March 12, 2009, Mr. Ochoa, along with 8 other skiers, were killed by a large avalanche while heli-skiing with CMH in the Sierra Sonora. Mrs. Louise Oddo Ochoa has brought a wrongful death suit against CMH, asserting that CMH was negligent in the operation of its heli-skiing business and that the waiver of liability for this negligence was invalid.

LEGAL AND FACTUAL ISSUES PRESENTED TO THE EVALUATOR

The parties have both agreed that the determination of whether the waiver signed by Mr. Ochoa is valid and enforceable is dispositive in this case. Accordingly, during the Early Neutral Evaluation Session on February 22, 2010, the parties largely limited themselves to presentation of evidence surrounding the waiver's applicability and enforceability to this action. This written opinion will be limited to a discussion of whether this waiver is enforceable against Mr. Ochoa and thus bars CMH liability for negligence in Mr. Ochoa's death.

STRENGTHS & WEAKNESSES OF PARTIES' CONTENTIONS AND EVIDENCE

Plaintiff asserts that the waiver signed by Mr. Ochoa is unenforceable on three grounds: (1) the validity and scope of the waiver is insufficient; (2) waivers limiting liability are void for hazardous activities; and (3) Mr. Ochoa's signature is not effective because he could not and did not understand the document. Plaintiffs assertions on each of these grounds, however, are contrary to law and fact. Each argument's shortcomings will be discussed in turn below.

A. The Waiver Signed by Mr. Ochoa is Valid and its Scope is Clear and Unambiguous

"An agreement exculpating the drafter from liability for his or her own future negligence must clearly and explicitly express that this is the intent of the parties." *Randas.* In determining whether a waiver is "clear and unambiguous," the courts of Columbia will look to the description in the text of the waiver, as well as the visual impact of the waiver. *See Randas.* When a waiver is in large, bold type and is prominent, Columbia courts have frequently found that these waivers are clear and unambiguous. *See Randas, Allan.* Here, the waiver signed by Mr. Ochoa is written in plain and unambiguous language. The waiver has several boxed off portions of bolded, capitalized text which plainly indicate that "by signing this document, you will waive your legal rights" and "I agree not to sue for any injury." The waiver is not written in legalese, nor does it use language that a lay person cannot understand. It very clearly states that the individual signing the waiver is not going to be allowed to sue CMH. Further, this waiver not only plainly discusses waiver of the "usual dangers and risks inherent in skiing," but also specifically references specific types of risks that CMH will not have liability for. These types of risks are not written in bold but are capitalized and include the risk of avalanches. The gist of the waiver is very clear by simply glancing at it, as the boxed bolded, and capitalized portions of the waiver direct the reader's attention to the important part of the waiver. From the face of the waiver, then the scope of the waiver and the risks that it guards against are very clearly articulated to the signing party.

In determining what the scope of the waiver is, the courts of Columbia look to "the intent of the parties as expressed in the written agreement." *Pritikin.* Further, "the scope of a release is determined by the express language of the release." *Pritikin.* The courts of Columbia have frequently upheld waivers that explicitly mention a prohibition against liability for "negligence." *See Randas* (holding waiver clear and unambiguous when waiver explicitly waived responsibility for negligence and victim alleged negligence against exculpating party). The courts of Columbia have also upheld waivers that do not explicitly reference "negligence" but where a waiver of liability for negligence is clearly the intent of the parties. *See Pritikin.* Here, the waiver specifically disclaims CMH's liability for negligence. The last bolded boxed portion of text expressly states that "negligence on the part of CMH or its staff" is waived. Thus, on its face, this waiver releases CMH's liability for negligence.

Plaintiff argues that a reasonable person would not understand what negligence means. While this argument may have teeth in the context of other waivers in Columbia, that cannot be said to be the case here. The waiver signed by Mr. Ochoa not only explicitly Disclaims liability for "negligence," but under the avalanches section specifically describes what could constitute negligence -- "or the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur." Thus, this waiver uses the legal word -- negligence -- as well as a layperson description of failure of care to describe the types of activities and risks that are specifically disclaimed through the waiver.

It is important to note that the waiver signed by Mr. Ochoa specifically guards against the exact type of harm that led to Mr. Ochoa's death. Under the "Avalanches" section of the waiver, there is explicit reference to the instability of the snow pack and the lack of precision in predicting when that snowpack will cause an avalanche. In *Pritikin,* where the waiver did not expressly reference "negligence," the Court of Appeals paid close attention to the fact that the type of injury suffered by the plaintiff necessarily had to be the type of injury waived by the waiver. Here that basis is even stronger because the waiver signed by Mr. Ochoa specifically references negligence and the type of negligence that CMH was trying to disclaim.

Because the waiver signed by Mr. Ochoa clearly and unambiguously disclaims liability for both "the usual dangers and risks inherent in skiing" but also specifically "Avalanches" because the waiver specifically describes the exact type of harm which led to Mr. Ochoa's untimely death and waives it, and because the intent of CMH in having the waiver was to disclaim liability.

B. A Waiver Can Limit Liability for Hazardous Activities

Waivers of liability are generally accepted ways to limit liability. The only exception to the premise is if the waiver is a violation of public policy under Columbia Civil Code Section 1668. The Columbia Supreme Court has interpreted that provision to be that a waiver can validly limit liability for activities as long as such activities do not involve "the public interest." *See Tunkl.* Whether the activity is in the public interest is the only relevant consideration. To determine whether an activity involves the "public interest," a number of factors must be considered, including whether the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public or if the party is holding himself out as willing to perform a service for any member of the public who seeks it. *Tunkl.* After *Tunkl,* there have not been any cases in Columbia that have voided a release on public interest grounds in the sports and recreation field. *See Randas.* In *Randas,* the Columbia Court of Appeals refused to invalidate a waiver signed by a plaintiff who slipped and fell at a swimming class at the local YMCA. In so doing, the court noted that "[s]wimming, like other athletic or recreational activities, however enjoyable or beneficial, is not 'essential' as a shospital is to a pratient or a repair garage is to a Columbia motorist".

Here, Mr. Ochoa was engaged in a highly dangerous recreational activity that has no "great importance to the public." While some individuals, including Mr. Ochoa, may have considered heli-skiing and other recreational activities essential to their annual vacations, these types of recreational activities do not rise to the level of necessity of a "public interest." Because recreational activities, like heli-skiing, cannot be considered in "the public interest," waivers which limit liability in these situations cannot be invalidated on grounds that they are contrary to public policy under Columbia Civil Code Section 1668.

The public interest exception for liability despite waivers under *Trukl* cannot be extended to situations involving high dangerous activities. *Tunkl* is clear that the only limitation on liability of waivers under Columbia Civil Code 1668 is when a waiver is against public policy because the activity is the public interest. *Tunkl* expressly does not include dangerousness of an activity as a relevant consideration in determining whether a waiver violates the public interest. In *Randas* the Columbia Court of Appeals refused to hold that waivers that do not involve "death defying" activities are held to a lower standard than that expressed in *Tunkl* because *"Tunkl* fails to include dangerousness as a relevant characteristic." Here, too, the court will not consider the dangerousness of heli-skiing in determining if a waiver of liability for heli-skiing is against the public interest. The only relevant consideration under Civil Code Section 1668 is whether heli-skiing is a public interest activity, which it is not.

In summary, the only exception to a waiver limiting liability is if that waiver purports to waive a public interest activity. Heli-skiing is not a public interest activity; thus its degree of dangerousness has no bearing in determining whether liability can be waived for heli-skiing.

C. Despite not Reading or Understanding the Document, a Signature on a Waiver is Valid

Despite Mr. Ochoa's inability to be fully literate in English, the facts and circumstances of his signing this waiver indicate that he had to know that he was signing a document which affected his legal rights and that CMH had no way of knowing that he did not fully understand the scope of the waiver. Relevant facts and circumstances in making this determination are discussed below.

Even if Mr. Ochoa could not understand English, the Columbia Court of Appeal has not invalidated a waiver of liability on illiteracy grounds. In *Randas,* the Columbia Court of Appeal held a English language written waiver of liability valid when it was signed by a plaintiff who was only literate in Greek and not in English. "[I]n the absence of fraud, overreaching or excusable neglect, … one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it." *Randas.* Plaintiff here was not alleged that there is any fraud or overreaching on the

part of CMH. Thus, even if it was Mr. Ochoa's custom to not read the document and just sign it, as testified [by] Mr. Gomez, Mr. Ochoa would be charged with knowing what was in the specific waiver.

While excusable neglect can be found if the party signing the waiver "only [had] a few moments" to sign and those moments did not constitute enough time to read the waiver, *see Allan,* there is no evidence that Mr. Ochoa was pressed for signing the waiver here. In fact there is contrary evidence by Mr. Gomez that Mr. Ochoa and the rest of the Mexican ski vacation ground had as much time as they needed to sign the waiver presented to them by CMH. Additionally, CMH would send the waivers to the individuals in advance for them to sign. This advance requirement would have afforded Mr. Ochoa all the time he needed to confer with anyone if he had any apprehensions about signing a document in English. The presence of Mr. Ochoa's bilingual secretary – who served as his witness for the last waiver -- makes this fact all the more in favor of finding validity of waiver. If Mr. Ochoa had any types of questions about what he was signing, he would have consulted with his secretary.

In determining whether waivers are effective against individuals, Columbia courts also have considered whether the individual has signed other similar releases. *See Allan.* In *Allan*, for example, the Court of Appeals noted that the plaintiff had signed similar releases in several types of activities and that because he had signed similar releases on similar occasions, even if he did not read the release at issue in the case, he had to know that the release affected his rights. Mr. Ochoa has been an avid sports enthusiast for years. His wife testified that he has cycled, sailed, skied, and swarm throughout his life and that he particularly was a regular skier who frequented not only CMH but other resorts with his family and friends. Further, Mr. Ochoa had signed waivers on file at Montana and Texas [for] hunting and Jackson Hole fly fishing operations visited by Ochoa. Most notably, Mr. Ochoa has gone to CMH on three occasions and signed waivers of his rights three time s with CMH. Mr. Ochoa also has experience in signing business documents that affect his legal rights. As an intelligent businessman and sports enthusiast, Mr. Ochoa had to know that he was signing something that affected his legal rights. It is also probable that given the amount of documents he had signed in this life, he could recognize the word "legal" or "waiver."

It is only a very limited situation whereby a party proffering the waiver of liability "must take reasonable steps to bring it to the other party's attention." *See Pritikin.* This only occurs when the party proffering has reason to know that the individual signing the waiver will not be aware of its existence. Here, however, this is not the case, and all the facts point to the CMH staff not being aware of Mr. Ochoa's English language shortcomings. The impression that Mr. Ochoa gave to both the business and sports would was that he was a worldly successful intelligent businessman. Mr. Ochoa has gone to CMH on three occasions and signed waivers of his rights three times with CMH. Mr. Ochoa also has experience in signing business documents that affect legal rights. The Plaintiff testified that Mr. Ochoa did not let his English shortcomings affect either his business or recreational participation in activities. Further, the individuals at CMH saw Mr. Ochoa interact on at least three occasions with other Spanish speakers who would speak Spanish among themselves but would speak English with the staff of CMH. The CMH staff further believed that Mr. Ochoa could understand instructions from the guides and personnel.

Plaintiff points to the fact that Mr. Ochoa was not fluent in English and would not watch television in English. This activity, however, occurred in the privacy of Mr. Ochoa's home. The impression Mr. Ochoa represented to the staff of CMH was very different than a man who was confused by the English language. Plaintiff also argues that the CMH staff, even if Mr. Ochoa could speak English sufficiently, knew that he could not read English sufficiently. While this distinction may have some merit if Mr. Ochoa were travelling alone, the fact that CMH saw Mr. Ochoa travelling with bilingual speakers and that he had a bilingual secretary makes it reasonable to believe that the staff believed Mr. Ochoa would consult with those English speakers if he had difficulty with written English. Although no one at CMH translated the waiver to Mr. Ochoa in Spanish, none of them realized they needed to, likely because they saw that Mr. Ochoa could always consult with another Spanish speaker if he needed assistance.

Because Mr. Ochoa has signed documents – in both the business and recreational worlds – that have affected his legal rights, it is improbable to think that he did not understand the gravity of signing the CMH waivers. Mr. Ochoa was an intelligent man who was very successful in business and seemed to know his limits of grasp of the English language. If he had any questions about what the CMH waiver would have

meant, he would have asked one of the individuals with him who knew more English to explain the document to him. "If he cannot read, he should have it read or explained to him. One who signs an instrument when for some reason, such as illiteracy or blindness, he cannot read it, will be bound by its terms in case the other party acts in good faith without trick or misrepresentation." *Randas.* Accordingly, because Mr. Ochoa acted as if he fully understood the gravity of what he was signing. CMH cannot be held to knowing whether or not he could fully understand the waiver of liability and had no duty to make sure that Mr. Ochoa understood the full ramifications of his actions.

CONCLUSION AS TO LIKELY OUTCOME ON EACH LEGAL & FACTUAL ISSUE

Because Mr. Ochoa signed a waiver which validly excused CMH of liability for negligence in heli-skiing generally, and the type of harm that specifically threatened Mr. Ochoa, the waiver will be valid and CMH will not have liability for Mr. Ochoa's death. Heli-skiing is not an activity in the public interest; accordingly the waiver is not void for public policy under Columbia Civil Code Section 1668. Accordingly, even though Mr. Ochoa may not have fully understood the waiver because he was not literate in English, he acted as if he understood the waiver through his conduct and thus will be charged with the contents therein. Mr. Ochoa, although not a fluent English speaker, was a sophisticated business man who had experience in signing English documents affecting both his business and recreational life. Because he gave that impression to the individuals at CMH and had surrounded himself with bilingual speakers, it is unreasonable to charge CMH with knowing his English shortcomings, and accordingly they had no duty to translate the waiver to Spanish for it to be valid.

Answer 2 to Performance Test A

Ochoa v. Columbia Mountain Heli-ski, LLC Early Neutral Evaluation Opinion

Plaintiff Louise Ochoa and Defendant Columbia Mountain Heli-ski, LLC (CMH) appeared before the undersigned on February 22, 2010 for an Early Neutral Evaluation. At the request of the parties, the undersigned is providing this opinion on the enforceability of the waiver that Defendant is invoking.

Statement of Facts

Alfredo Ochoa, the deceased husband of Plaintiff, heli-skied and Defendant on three occasions: in 2007, 2008 and 2009. Heli-skiing is physically challenging and, as such, Defendant catered to experienced clientele. Ochoa was experienced at skiing.

Ochoa signed a waiver on each of the three occasions in which he skied with Defendant. The waiver stated in large, bold font at the top: "By singing this document, you will waive your legal rights, including the right to sue." The waiver begins with an acknowledgement that helicopter skiing has the usual risks and dangers associated with skiing, as well as additional risks, which include avalanche. Avalanche is the first listed additional risk and the paragraph on avalanche provides that they can frequently occur and may be caused by natural forces or "the failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur." On January 10, 2009, Ochoa signed the waiver, with Miguel Mendez, his bilingual secretary, as his witness.

Ochoa was fluent in Spanish and although he was limited in reading English, he could speak and understand spoken English. On occasions where he did not understand a word or phrase, he would ask his wife or others around him for the English translation. In general, he did not request his wife to translate entire documents for him, but just specific phrases or sentences in contracts. Ochoa generally had contracts sent to his office, where Mendez could review them.

On March 12, 2009, Ochoa and eight other skiers followed CMH ski guide Joyce Long down the Bay Street run. A sudden avalanche occurred and although rescue efforts began immediately, the nine skiers, including Ochoa, died of suffocation from the impact of the snow.

Legal and Factual issues Presented to the Evaluator

1. Validity and Scope of Waiver

Strengths and Weaknesses of Parties' Contentions and Evidence

Validity

Plaintiff contends that the waiver is unenforceable because it is contrary to Civil Code sec. 1668, which provides that contracts intended to exempt from liability for injury to another are against public policy. Defendant responds that the validity of waivers is not open to question.

Civil Cod sec. 1668 invalidates exculpatory provisions that involve the "public interest." *Randas.* In the seminal case on sec. 1668, the Columbia Supreme Court did not define "public interest," but listed characteristics that would lead to a finding of a public interest. *Tunkl.* the characteristics include a business of a type that is generally suitable for public regulation; the performance of a service of great importance to the public; the party providing the service holds itself out as willing to provide the service for any member of the public who seeks it; the party invoking exculpation has an advantage of bargaining strength against anyone seeking its services; and the person seeking the services is placed under the control of the provider of services, subject to the risk of the provider's carelessness. *Tunkl.* The court *Tunkl* found that a hospital-patient contract clearly falls within the public interest. Exculpatory agreements in the recreational sports context do not implicate the public interest. *See Allan, Buchanan.*

Here, unlike a hospital, a recreational mountain ski company is not a business that is generally suitable for public regulation. Defendant's company does not perform a service of great importance to the public, as it provides ski tours for only that portion of the public that is experienced and adventurous enough to heli-ski. Defendant caters

only to experienced clientele and, as such, does not hold itself out as willing to perform services for all members of the public. Defendant did condition its services on the signing of waivers, placing it at a position of bargaining strength for those clients who desired to ski with them. This, in turn, would place clients under the control of Defendant, subject to the risk of Defendant's negligence. However, the balance of these characteristics weigh heavily against a finding of public interest. The characteristics pertaining to bargaining power will be found in any contract where a waiver of liability is required before services will be rendered. As the case law suggests, such contracts include those for sports and recreation activities, in which releases of liability are generally upheld. *See Randas, Hulsey, Allan, Pritikin.* Although Plaintiff may be able to meet the final two characteristics pertaining to bargaining power, Plaintiff will not be able to meet any of the other *Tunkl* characteristics because Defendant's business is not one that falls within the public interest. Unless Plaintiff can meet the *Tunkl* characteristics, Civil Code sec. 1668 will not apply and will not invalidate the waiver. As Columbia courts have held, waivers for recreational sports do not implicate the public interest.

Scope

Plaintiff also contends that the waiver is unenforceable because a reasonable person would not understand "negligence" to mean that the waiver absolves Defendant from failing to take measures available and understood to be necessary for the safety of its clients. Defendant asserts that its waiver is simple and clear.

The Columbia court of Appeal has found that waivers need not achieve perfection, but must be clear and unambiguous. *Pritikin.* The scope of a waiver is determined by the express language of the waiver, which should be applicable to the particular negligence of the defendant, but need not list every possible specific act of negligence. *Pritikin.* The alleged negligence resulting in injury to the plaintiff must be reasonably related to the object or purpose for which the waiver is given. To determine the purpose of a waiver, courts look at the language of the waiver and not the inherent risks of the underlying activity. *Id.* Where a waiver stated that it applied to injures suffered while on the fitness center's premises, "whether using exercise equipment or not," defendant's liability for plaintiff's injury from a falling TV was deemed validly waived. *Id.*

In this case, the waiver stated that the signer assumed the risk of avalanches, which may be caused by natural forces or by the "failure for any reason of CMH or its staff to predict whether the terrain is safe for skiing or where or when an avalanche may or may not occur." The coroner's report indicated that ski guide Hans Moser and a group of twelve skiers preceded Ochoa and his group of skiers down the same run, finding it to be in excellent condition. Ski guide Joyce Long accompanied Ochoa and the eight other skiers down the run and testified that the snow suddenly shifted below her skis. There was no warning sound and no time to move and ski out. Although the Columbia Avalanche Association issued a bulletin on February 17, 2009 warning of a weak layer in the snow caused by rain that could lead to a dangerous avalanche event, CMH guides conducted their own assessment of the snow stability and determined that there was no instability.

Plaintiff is arguing that Defendant failed to take necessary measures for the safety of its clients, and thus Defendant's actions in this case are not covered by the scope of the term "negligence" in the waiver. However, the facts indicate that CMH conducted an assessment and determined the runs to be safe. This is evidenced by the fact that the same guides who conducted the assessment were themselves willing to ski down the Bay Street run, and did in fact ski it on the same day as Ochoa. Defendant's guides failed to predict the avalanche and failed to ascertain the danger of skiing down the run that day. Defendant's waiver clearly and unambiguously provided that clients waived their right to sue regarding death or injury resulting from avalanche that could be caused by CMH's failure to predict the safety of the terrain or the occurrence of an avalanche. This is precisely the negligence that Plaintiff is asserting here. By the plain language of the waiver, Plaintiff waived his right to sue for Defendant's inability to adequately assess or predict the occurrence of an avalanche.

Conclusion

In conclusion, Defendant has a very strong argument for the enforceability of the waiver as to its validity and scope. There is little to no legal or factual support for Plaintiff's argument on this issue.

2. Voidability of Waivers as to Hazardous Activities

Strengths and Weaknesses of Parties' Contentions and Evidence

Plaintiff next contends that the waiver is voidable because waivers cannot exempt responsibility for negligence in ultra-dangerous activities like helicopter skiing. Defendant responds that the validity of waivers as to risky recreational activities is not open to question.

In *Randas,* the Columbia Court of Appeal pointed out that no case applying the *Tunkl* factors had found sec. 1668 public interest grounds in the sports and recreation field that would require invalidating a waiver. Further, the court rejected plaintiff's arguments that "death defying" activities should be treated differently from other sports activities. The court found that dangerousness is not a T*unkl* characteristic and that releases had been upheld in both moderate and hazardous sports. *Randas.* Releases have been upheld as to skydiving, motorcycle racing, and mountain climbing. *See Randas and Hulsey*.

Here, the facts indicate that helicopter skiing is an inherently dangerous sport, as only helicopters can access the spots for skiing. Defendant's ski guide Moser asserted that even if everything possible is done to make the sport safe, there are still significant risks that remain. He stated that people who ski "at this level are aware of the risk." Although Plaintiff attempts to point to these inherent dangers in asserting that the waiver is voidable, there is simply no legal support for this contention. The Columbia case law is clear that participants in even hazardous sporting activities, such as skydiving, can validly waive their right to sue for injury. The hazardousness of the activity does not affect the validity of the waiver.

Conclusion

In conclusion, Columbia law and the facts of this case support Defendant's contention that the waiver is valid, despite the existence of a hazardous activity.

3. Plaintiff's Inability to Read English as Precluding Waiver

Strengths and Weaknesses of Parties' Contentions and Evidence

Plaintiff's final argument is that the waiver is not binding because Ochoa had a limited ability to read in English and CMH knew that Ochoa was not literate in English. Plaintiff asserts that Defendant's failure to translate the waiver for Ochoa renders it nonbinding. Defendant responds that Ochoa knew the risks of heli-skiing and signed three different waivers that affected his legal rights. Defendant contends that, absent fraud or excusable neglect, Ochoa could not set aside the waiver on the basis that he did not read it.

It is widely accepted that a party that has signed a written agreement cannot later disclaim the agreement by arguing that he did not read it or does not know its contents. *See Pritikin, Randas, Allan.* The party signing the waiver has a duty to read the agreement or to have it read to him. *See Pritikin, Randas, Allan.* This principle extends even to situations where a party is illiterate. *Randas.*

Here, Ochoa's limited ability to read English will not preclude the validity of the waiver, as Columbia case law places the burden on the signing party to discover the contents of the agreement he is signing. Under Columbia law, Ochoa had a duty to read the document, or have it read to him.

The issue here is whether this case falls within the limited circumstances where a defendant has a duty to inform the signing party of the exculpatory provisions in an agreement. These limited circumstances arise where an agreement is induced by fraud, misrepresentation, or where the party seeking to enforce the waiver knew or had reason to know of the other's mistake as to its terms. *See Pritikin, Allan, Randas.* The fraud or misrepresentation must be as to the contents of the waiver. *Allan.* In addition to fraud or misrepresentation, a plaintiff can set aside a waiver on the basis of excusable neglect, such as under circumstances where the plaintiff is precluded from taking the time to read the agreement. *Allan.*

In certain narrow instances, a defendant may have a duty to inform the plaintiff of an exculpatory clause. For instance, where a plaintiff signed a 2 page admission form for a single day use of a fitness room and the exculpatory clause was inconspicuously buried in small print on the back of the form, plaintiff's hasty and informal signing of the document was excusable. *Leon.* In such circumstances, the defendant should know that the plaintiff does not intend to sign what he is signing, and the defendant has a duty to bring the exculpatory clause to the attention of the signer. This duty may arise where the effect of the clause is contrary to the parties' normal expectations; the length and format of the contract is not conducive to the time available for reading and understanding it. *Pritikin.* The waiver of liability in recreational activities is customary and patrons of recreational activities should be aware that signing a release affects their legal rights. *Id.*

In this case, Plaintiff does not appear to be asserting fraud or misrepresentation. Even if Plaintiff were asserting these claims, the facts do not support a finding of either fraud or misrepresentation on the part of Defendant, as there is nothing to indicate that Defendant attempted to hid the contents of the waiver from its clients. On the contrary, every client was required to sign the waiver, with large and legible print, before every excursion with Defendant.

However, Plaintiff is asserting that Defendant knew Ochoa could not read English and this precluded Ochoa from understanding what he was signing. The facts of this case indicate that Ochoa could speak English reasonably well and that he and his Mexican group mates generally spoke English with Defendant's staff. Tom Weaver, Defendant's "greeter," did not recall any problems communicating with Ochoa in English. Weaver generally makes transportation and any other arrangements for clients and was able to speak to Ochoa and the rest of the group in English. Although the Mexican group generally spoke Spanish among themselves, none of Defendant's employees felt it necessary to translate the waiver for them because the group generally spoke English with Defendant's staff. Additionally, each member of the group, Ochoa included, was a successful businessman with considerable contact with the English language. Plaintiff, Ochoa's wife, admitted that Ochoa spoke English reasonably well and always managed to "get by." Thus, there is nothing in the facts to indicate that Defendant knew, or should have known, that Ochoa did not know English sufficiently well to sign the waiver.

Even if Defendant had reason to know that Ochoa was limited in English proficiency, the following considerations weigh against the imposition of a duty on Defendant to inform Plaintiff of the exculpatory provisions.

Here, Defendant did not present Ochoa with a lengthy form to be signed in a short amount of time. On the contrary, the waiver is only one page long, with large font, and was sent to Ochoa's office prior to the ski trip for his review. Defendant's policy is to mail the waiver to clients and the waiver is to be returned with payment. This process ensures that clients have ample time to review and understand the waiver before choosing to join the ski group. The exculpatory provisions are not in small font, or buried in any manner. The exculpatory provisions are actually bolded and in larger font then the rest of the waiver, putting all clients on notice that they are waiving their legal rights. Ochoa had plenty of time to review the document himself, or find someone, like Miguel, to read the document to him.

Additionally, Columbia case law provides that the waiver of liability in recreational activities is customary and patrons of recreational activities should be aware that signing a release affects their legal rights. This is true here, as Ochoa was a vociferous patron of recreational activities and signed waivers in most, if not all, of them. Ochoa went hunting in Montana and Texas and fly fishing in Wyoming. Each of these activities required a waiver of liability, and each recreational facility had on record a waiver of liability signed by Ochoa before he participated. Ochoa had previously signed two waivers for Defendant before participating in the same heli-ski tour as the one in the instant case. Thus, it cannot be said that Ochoa did not understand what document he was signing or that he was waiving legal rights.

Conclusion

In conclusion, Defendant has a very strong argument that the waiver is enforceable. Columbia case law places the burden on the plaintiff to read the agreement, or have it read to him, and Defendant did not have a duty to inform Plaintiff of the exculpatory provisions.

ENE Opinion Conclusion

The probable outcome if this case were to proceed to discovery and trial would be judgment in favor of Defendant, CMH.

FEBRUARY 2010

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

FILE

RETTICK v. FLOYD INDUSTRIES, LLC, 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.
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.

Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906

MEMORANDUM

To: Applicant

From: Bram Fenton

Date: February 25, 2010

Re: **Rettick v. Floyd Industries, LLC, et al.**

We represent Floyd Industries, LLC, a manufacturer and seller of firearms, and Sandra Floyd. Floyd Industries is a limited liability company formed under Columbia law and located here in Columbia. Sandra Floyd is its owner.

Floyd Industries and Sandra Floyd were sued in the Tribal Court of the Taraconic Tribe by Orrin Rettick, the Tribe's Chief of Police, for products liability after one of Floyd Industries' handguns misfired and injured him. Ms. Floyd authorized us to seek a permanent injunction in federal district court to prohibit Rettick from prosecuting his products liability action in the Taraconic Tribal Court. Although she happens to be a member of the White Eagle Tribe, she didn't want to litigate in the Taraconic Tribal Court. Rettick is a prominent and popular member of the Taraconic Tribe, whose claim, in her view, is bogus or at least highly inflated, based on the misfiring of one of five handguns sold to a police force numbering more than 50 officers.

Rettick has filed a motion in federal district court, with a supporting memorandum of points and authorities, asking the court to dismiss or stay our action for a permanent injunction. Please draft a memorandum of points and authorities in opposition to Rettick's motion, making sure to follow the firm's instructions. Present our best arguments, and rebut each of Rettick's arguments, including any of his unsupported legal or factual assertions.

Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906

MEMORANDUM

To: Associates

From: Executive Committee

Date: March 1, 2007

Re: **Memoranda of Points and Authorities for Motions**

All memoranda of points and authorities in support of, or in opposition to, motions must include the following sections and conform to the following guidelines.

The *introduction* must state the nature of the motion to be supported or opposed, and must briefly summarize the argument to be presented.

The *factual background and procedural history* must (1) contain the facts supporting our client's position and take account of the facts supporting our opponent's position, dealing with all such facts persuasively, in our client's favor, and (2) concisely indicate the major procedural events.

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 our opponent 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 Smith's Statement Is Hearsay and Does Not Come Within Any Exception, It Is Inadmissible," and should *not* state a bare conclusion, such as, "Smith's Statement Is Inadmissible."

The *conclusion* must state, in simple fashion, that the court should grant our client's motion, or deny our opponent's motion, for the reasons set forth in the argument.

Each memorandum of points and authorities will have its cover, table of contents, and table of authorities prepared by clerical and non-attorney staff prior to filing.

Megan La Plante, Esq.
La Plante & La Plante, LLP
700 Williams Road
Green River, Columbia 99906
(555) 567-6700

Attorneys for Plaintiff
Orrin Rettick

IN THE TRIBAL COURT OF THE TARACONIC TRIBE
SILVER OAK RESERVATION, STATE OF COLUMBIA

ORRIN RETTICK,	)	
Plaintiff,	)	**No. 13-368**
v.	)	**COMPLAINT FOR DAMAGES:**
FLOYD INDUSTRIES, LLC, and	)	**PRODUCTS LIABILITY**
SANDRA FLOYD,	)	
Defendants.	)	
_____	)	

Orrin Rettick ("Rettick") hereby complains in tort against Floyd Industries, LLC, and Sandra Floyd, for products liability, alleging as follows:

1. Rettick is a member of the Taraconic Tribe, resident on the Silver Oak Reservation in the State of Columbia. He holds the position of Chief of Police for the Taraconic Tribe, overseeing the operations of a police force numbering more than 50 officers. In addition, he sits on the Tribal Council of the Taraconic Tribe as one of its five members.

2. Floyd Industries is not a member of the Taraconic Tribe, but is a limited liability company, formed under the law of the State of Columbia, and with its principal place of business in this state, engaged in the manufacture and sale of firearms. On information and belief, the owner of Floyd Industries is Sandra Floyd, who, on information and belief, is a member of the White Eagle Tribe.

3. In 2008, on land owned by the Taraconic Tribe within the Silver Oak Reservation, Rettick, as Chief of Police for the Taraconic Tribe, and Floyd Industries, through Sandra Floyd, entered into a contract under which Floyd Industries agreed to sell and Rettick agreed to buy five (5) nine-millimeter (9 mm.) semi-automatic handguns styled the "Model 9." Immediately thereafter, Floyd Industries, through Sandra Floyd, delivered

the handguns that were the subject of the contract to Rettick on land owned by the Taraconic Tribe within the Silver Oak Reservation.

4. On or about May 1, 2009, on land owned by the Taraconic Tribe within the Silver Oak Reservation, Rettick was seriously injured in the course of performing his duties as Chief of Police for the Taraconic Tribe when a Model 9 he attempted to fire exploded in his hand.

5. Floyd Industries and Sandra Floyd knew that the Model 9 would be bought and used without inspection for defects.

6. When it left the control of Floyd Industries and Sandra Floyd, the Model 9 was defective in design and/or manufacture.

7. At the time of Rettick's serious injury, Rettick was using the Model 9 in the manner intended by Floyd Industries and Sandra Floyd.

8. Rettick's serious injury was proximately caused by Floyd Industries and Sandra Floyd's defective design and/or manufacture of the Model 9.

9. Rettick's serious injury caused him loss in the amount of five million dollars ($5,000,000).

Wherefore, Rettick prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and specifically for damages in the amount of five million dollars ($5,000,000).

Date: December 28, 2009 La Plante & La Plante, LLP

by: *Megan La Plante*

Megan La Plante

Attorneys for Plaintiff Orrin Rettick

Bram Fenton, Esq.
Morris, Fenton & Suzuki, LLP
1660 Rhoades Boulevard
Green River, Columbia 99906
(555) 357-1010

Attorneys for Plaintiffs
Floyd Industries, LLC, and Sandra Floyd

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA

FLOYD INDUSTRIES, LLC, and SANDRA FLOYD, Plaintiffs,	)	**No. Civ. 203-489 KMB**
v.	)	**COMPLAINT FOR**
ORRIN RETTICK, Defendant.	)	**PERMANENT INJUNCTION**

With the allegations that follow, Floyd Industries, LLC, and Sandra Floyd bring this action to permanently enjoin Orrin Rettick ("Rettick") from prosecuting a tort action for products liability that he brought against Floyd Industries and Sandra Floyd in the Tribal Court of the Taraconic Tribe, Silver Oak Reservation, State of Columbia, styled *Orrin Rettick v. Floyd Industries, LLC, and Sandra Floyd*, No. 13-368 (hereafter "the Tribal Court Products Liability Action"):

1. This Court has subject matter jurisdiction over this action for permanent injunction under 28 U.S.C. § 1331, inasmuch as it arises under the law of the United States bearing on the sovereignty of the Taraconic Tribe.

2. Venue in this District is proper under 28 U.S.C. § 1391(b) because Rettick resides herein.

3. Floyd Industries is a manufacturer and seller of firearms, formed as a limited liability company under the law of the State of Columbia and maintaining its principal place of business in this state, and is not a member of the Taraconic Tribe.

4. Sandra Floyd is the owner of Floyd Industries and a resident of the State of Columbia, and is not a member of the Taraconic Tribe.

5. Rettick is a member of the Taraconic Tribe, and resides within this District on the Silver Oak Reservation in the State of Columbia.

6. Rettick brought the Tribal Court Products Liability Action against Floyd Industries in the Tribal Court of the Taraconic Tribe, alleging, among other things, that: (a) Rettick held the position as Chief of Police for the Taraconic Tribe and sat on the Tribal Council of the Taraconic Tribe as one of its five members; (b) on information and belief, the owner of Floyd Industries is Sandra Floyd; (c) on information and belief, Sandra Floyd is a member of the White Eagle Tribe; (d) Rettick and Floyd Industries entered into a contract, on land owned by the Taraconic Tribe within the Silver Oak Reservation, pursuant to which Rettick bought and Floyd Industries sold certain handguns; and (e) Rettick suffered serious injury, on land owned by the Taraconic Tribe within the Silver Oak Reservation, as a result of a defect in one such handgun.

7. Because Floyd Industries and Sandra Floyd are not members of the Taraconic Tribe, the Tribal Court of the Taraconic Tribe lacks jurisdiction over the Tribal Court Products Liability Action.

8. Because the Tribal Court of the Taraconic Tribe clearly lacks jurisdiction over the Tribal Court Products Liability Action, Floyd Industries and Sandra Floyd have not presented the question of jurisdiction to the Tribal Court for its consideration.

Wherefore, Floyd Industries and Sandra Floyd request this Court, in the exercise of its equitable powers, to:

a. Permanently enjoin Rettick from prosecuting the Tribal Court Products Liability Action; and

b. Award Floyd Industries the costs of bringing this action for permanent injunction, as well as other and additional relief as this Court may determine to be just and proper.

Date: January 26, 2010 Morris, Fenton & Suzuki, LLP

by: Bram Fenton

Bram Fenton
Attorneys for Plaintiffs
Floyd Industries, LLC, and Sandra Floyd
Megan La Plante, Esq.
La Plante & La Plante, LLP
700 Williams Road
Green River, Columbia 99906
(555) 567-6700

Attorneys for Defendant
Orrin Rettick

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA

FLOYD INDUSTRIES, LLC, and	)	
SANDRA FLOYD,	)	**No. Civ. 203-489 KMB**
Plaintiffs,	)	**MOTION OF DEFENDANT**
v.	)	**ORRIN RETTICK TO DISMISS**
ORRIN RETTICK,	)	**OR, IN THE ALTERNATIVE,**
Defendant.	)	**FOR A STAY**
_____	)	

Orrin Rettick moves this Court to enter an order against Floyd Industries, LLC, and Sandra Floyd, as follows:

1. To dismiss Floyd Industries and Sandra Floyd's action for permanent injunction because their complaint fails to state a claim upon which relief can be granted; or, in the alternative,

2. To stay Floyd Industries and Sandra Floyd's action for permanent injunction because they have failed to exhaust their remedies in the Tribal Court of the Taraconic Tribe, Silver Oak Reservation, State of Columbia.

This motion is supported by the pleadings on file and by a memorandum of points and authorities submitted herewith.

Date: February 16, 2010

Respectfully submitted,
La Plante & La Plante, LLP

by: Megan La Plante

Megan La Plante
Attorneys for Defendant Orrin Rettick

Megan La Plante, Esq.
La Plante & La Plante, LLP
700 Williams Road
Green River, Columbia 99906
(555) 567-6700

Attorneys for Defendant
Orrin Rettick

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF THE STATE OF COLUMBIA

FLOYD INDUSTRIES, LLC, and	)	
SANDRA FLOYD,	)	**No. Civ. 203-489 KMB**
Plaintiffs,	)	**MEMORANDUM OF POINTS AND**
v.	)	**AUTHORITIES IN SUPPORT OF**
ORRIN RETTICK,	)	**MOTION OF DEFENDANT ORRIN**
Defendant.	)	**RETTICK TO DISMISS OR, IN THE**
	)	**ALTERNATIVE, FOR A STAY**

I. Introduction

In this action, Floyd Industries, LLC, a manufacturer and seller of firearms, and Sandra Floyd, its owner, are seeking to prevent Orrin Rettick ("Rettick"), the Chief of Police for the Taraconic Tribe and one of the five members of the Tribal Council of the Taraconic Tribe, from obtaining relief in the Tribal Court for the serious injury they have caused him. Floyd Industries and Sandra Floyd's claim is that, notwithstanding the tribe's inherent sovereignty, the tribal court lacks jurisdiction.

Because, as will appear, Floyd Industries and Sandra Floyd's claim is meritless, Rettick now moves this Court to dismiss Floyd Industries and Sandra Floyd's action because their complaint fails to state a claim upon which relief can be granted, or, in the alternative, to stay their action because they have failed to exhaust their remedies.

II. Factual Background and Procedural History

In 2008, on land owned by the Taraconic Tribe within the Silver Oak Reservation in the State of Columbia, Rettick, the Tribe's Chief of Police, entered into a contract with Floyd Industries, through its owner Sandra Floyd, to buy five Model 9 semi-automatic 9- mm. handguns that Floyd Industries manufactured, and received delivery of the handguns there immediately thereafter.

Floyd Industries and Sandra Floyd have not denied that the Model 9 handgun was defective in design and manufacture.

On or about May 1, 2009, also on land owned by the Taraconic Tribe, Rettick was seriously injured in the course of performing his duties as the Tribe's Chief of Police when a Model 9 handgun manufactured and sold by Floyd Industries and Sandra Floyd exploded in his hand and caused him serious injury, resulting in $5 million in damages, as he attempted to fire the weapon. As the Tribe's Chief of Police, Rettick was, and is, responsible for the safety of all persons within the Silver Oak Reservation, both members and nonmembers of the Taraconic Tribe. He also sat, and sits, on the Tribal Council of the Taraconic Tribe as one of it five members.

Floyd Industries and Sandra Floyd have not denied that the design and manufacturing defect tainting the Model 9 caused Rettick's serious injury and resulting substantial damages.

On December 28, 2009, Rettick filed an action in the Tribal Court of the Taraconic Tribe seeking $5 million in damages for the serious injury caused by Floyd Industries and Sandra Floyd's defective Model 9.

On January 26, 2010, unable to deny their liability but attempting to avoid it, Floyd Industries and Sandra Floyd filed this action seeking a permanent injunction to prohibit Rettick from prosecuting his action in the Tribal Court of the Taraconic Tribe, claiming that the Tribal Court lacks jurisdiction.

Because Floyd Industries and Sandra Floyd's claim is specious, Rettick has today filed a motion to dismiss, or at least stay, their action.

III. Argument

A. This Court Should Dismiss Floyd Industries' Action for Failure to State a Claim Because the Tribal Court Unquestionably Has Jurisdiction.

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss an action for "failure [by the plaintiff] to state a claim upon which relief can be granted."

The Taraconic Tribe possesses "inherent power as a sovereign." *Montana v. United States* (U.S. Sup. Ct., 1981). As a consequence, it enjoys "inherent adjudicatory authority." *Nevada v. Hicks* (U.S. Sup. Ct., 2001). Its authority is broadest where the claim in question arises on tribal land and involves members of the tribe. *Cf*. *Nevada v. Hicks*, *supra* (implying that authority is limited as to nontribal members).

In their complaint in this Court, Floyd Industries and Sandra Floyd have admitted: (1) Floyd Industries' owner, Sandra Floyd, is a member of a tribe; (2) Rettick is a member of a tribe; and (3) Rettick's claim arose on tribal land.

In light of Floyd Industries' and Sandra Floyd's admissions, the Tribal Court of the Taraconic Tribe unquestionably has jurisdiction over Rettick's claim against them. In all of its particulars, Rettick's claim arose on tribal land—specifically, land owned by the Taraconic Tribe within the Silver Oak Reservation—and involves members of a tribe—specifically, Rettick and Sandra Floyd, in entering into the contract for the purchase of the Model 9, in receiving delivery of the Model 9, and causing and suffering serious injury through the Model 9.

Floyd Industries and Sandra Floyd may be expected to invoke the so-called rule of *Montana v. United States* in an attempt to argue against the Tribal Court's jurisdiction, but any such attempt is doomed to failure.

Given a reasonable reading, the *Montana* "rule" is that tribal courts lack jurisdiction over claims arising on nontribal land and involving non-tribe members. Certainly, the Supreme Court has never held—contrary to what Floyd Industries and Sandra Floyd may be expected to argue—that a tribal court lacks jurisdiction *whenever* a claim is asserted against a nonmember, whether the claim arose on tribal or nontribal land. *See Smith v. Salish College* (U.S. 15th Cir. Ct. App., 2004).

As such, the *Montana* "rule" is inapplicable to the claim here, which arose on tribal land and involves members of a tribe.

But even if the *Montana* "rule" were applicable, the result would be no different. By its own terms, the *Montana* "rule" contains two exceptions, one for claims based on "consensual relationships," the other for claims based on conduct that "threatens" a

tribe's "political integrity, . . . economic security, or . . . health or welfare." *Montana v. United States*, *supra*. Each exception is satisfied here. As Floyd Industries and Sandra Floyd have admitted, Rettick's claim is based *both* on a contract under which "Rettick bought and Floyd Industries sold certain handguns" *and also* on conduct that resulted in "serious injury" to Rettick as "Chief of Police for the Taraconic Tribe." Complaint ¶ 6. By coming to the Silver Oak Reservation and by staying to enjoy its protection, Floyd Industries and Sandra Floyd have subjected themselves to the jurisdiction of the Taraconic Tribe.

In sum, because Floyd Industries and Sandra Floyd have effectively conceded the jurisdiction of the Tribal Court of the Taraconic Tribe, they have necessarily failed to state a claim upon which relief can be granted.

B. At The Very Least, This Court Should Stay Floyd Industries' Action Because It Failed to Exhaust Its Remedies in the Tribal Court.

Because the Taraconic Tribe possesses "inherent power as a sovereign," *Montana v. United States*, *supra*, Floyd Industries and Sandra Floyd must present their claim denying the jurisdiction of the Tribal Court of the Taraconic Tribe to the Tribal Court itself in the first instance. *See National Farmers Union Ins. Cos. v. Crow Tribe* (U.S. Supreme Ct., 1985); *cf*. *Nevada v. Hicks*, *supra*.

Not only have Floyd Industries and Sandra failed to exhaust their remedies in the Tribal Court, by their own admission, they have admittedly not even invoked those remedies. Complaint ¶ 8.

It follows that, at the very least, Floyd Industries' and Sandra Floyd's action must be stayed. *See National Farmers Union Ins. Cos. v. Crow Tribe*, *supra*; *cf*. *Nevada v. Hicks*, *supra*.

IV. Conclusion

For the reasons stated, in light of the undoubted jurisdiction of the Tribal Court of the Taraconic Tribe, this Court should grant Rettick's motion and accordingly dismiss Floyd Industries' and Sandra Floyd's action because their complaint fails to state a claim upon which relief can be granted, or, in the alternative, should stay their action because they have failed to exhaust their remedies in the Tribal Court.

Date: February 15, 2010

Respectfully submitted,

La Plante & La Plante, LLP

by: Megan La Plante

Megan La Plante

Attorneys for Defendant Orrin Rettick

FEBRUARY 2010

California
Bar
Examination

Performance Test B

LIBRARY

LIBRARY

Montana v. United States

United States Supreme Court (1981)

By a tribal regulation, the Crow Tribe of Montana ("Tribe") sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the Tribe. Relying on its inherent power as a sovereign, the Tribe claimed authority to prohibit hunting and fishing by nonmembers of the Tribe even on land within the reservation owned by nonmembers. The State of Montana, however, continued to assert its authority to regulate hunting and fishing by nonmembers within the reservation.

To resolve the conflict between the Tribe and the State of Montana, the United States, proceeding as fiduciary for the Tribe, filed the present action, seeking a declaratory judgment establishing that the Tribe has sole authority to regulate hunting and fishing within the reservation. The District Court denied relief. The Court of Appeals reversed. We granted certiorari and now reverse.

Although the Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to the Tribe or its members, it has no power to regulate fishing and hunting by nonmembers of the Tribe on land within the reservation owned by nonmembers.

The Tribe's "inherent sovereignty" does not support its regulation of nonmember hunting and fishing on nonmember land within the reservation. Through their original incorporation into the United States, the tribes have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers. Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.

As a general proposition, the inherent sovereign powers of a tribe do not extend to the activities of nonmembers. To be sure, tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over nonmembers on their reservations, even on nonmember land. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members. A tribe may also retain inherent power to exercise civil authority over the

conduct of nonmembers on nonmember land within its reservation when that conduct threatens the political integrity, the economic security, or the health or welfare of the tribe.

No such circumstances, however, are involved in this case. Nonmember hunters and fishermen on nonmember land do not enter into any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such nonmember hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation.

Reversed and remanded.

National Farmers Union Ins. Cos. v. Crow Tribe

United States Supreme Court (1985)

Leroy Sage ("Sage"), a Crow Tribe minor, was struck by a motorcycle in the Lodge Grass Elementary School parking lot. The school is located on land owned by the State of Montana within the boundaries of the Crow Reservation. Through his guardian, Sage initiated a lawsuit in the Crow Tribal Court against the School District, a political subdivision of the State, alleging damages of $150,000.

Thereafter, the School District and its insurer, National Farmers Union Insurance Companies, petitioners herein, commenced this litigation in the District Court for the District of Montana seeking an injunction. That court was persuaded that the Crow Tribal Court had no jurisdiction over a civil action against a nonmember and entered an injunction against further proceedings in the Tribal Court under 28 U.S.C. § 1331, which grants district courts jurisdiction over actions "arising under" federal law. The Court of Appeals reversed, holding that the District Court had no jurisdiction to enter such an injunction.

We granted certiorari to consider whether the District Court properly entertained petitioners' request for an injunction under § 1331.

We agree with the District Court that § 1331 encompasses the federal question whether the Tribal Court exceeded the lawful limits of its jurisdiction. Since petitioners contend that federal law has divested the Tribe of its power to compel a nonmember property owner to submit to the civil jurisdiction of the Tribal Court, it is federal law on which petitioners rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331.

Although the District Court was right in its understanding of the scope of its jurisdiction under § 1331, it was wrong to exercise that jurisdiction when it did. As a matter of comity, exhaustion of Tribal Court remedies is required before petitioners' claim may be entertained by the District Court. The existence and extent of the Tribal Court's

jurisdiction should be determined in the first instance by the Tribal Court. It follows that the federal action should be stayed pending the development of the Tribal Court proceedings.

Reversed and remanded.

Nevada v. Hicks

United States Supreme Court (2001)

This case presents the question whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.

Hicks is a member of the Fallon Paiute-Shoshone Tribes of western Nevada and lives on the Tribes' reservation.

After game wardens of the State of Nevada executed state court and tribal court search warrants to search Hicks's home for evidence of an off-reservation crime, he filed suit in the Tribal Court against the game wardens, in their individual capacities, and the State of Nevada, alleging trespass and abuse of process. The Tribal Court held that it had jurisdiction over the claims, and the Tribal Appeals Court affirmed.

Nevada and the game wardens then sought, in Federal District Court, a declaratory judgment that the Tribal Court lacked jurisdiction over the claims. The District Court granted Hicks summary judgment on that issue and held that the game wardens would have to exhaust their qualified immunity claims in the Tribal Court.

The Ninth Circuit affirmed. It concluded that the fact that Hicks's home is on tribe-owned reservation land was sufficient to support tribal jurisdiction over civil claims against nonmembers arising from their activities on that land.

Having granted certiorari, we conclude that the Ninth Circuit erred.

First, the Tribal Court did not have jurisdiction to adjudicate the game wardens' alleged tortious conduct in executing a search warrant for an off-reservation crime. As to nonmembers, a tribal court's inherent adjudicatory authority is at most as broad as the tribe's regulatory authority. The rule of *Montana v. United States* (U.S. Supreme Ct., 1981)—that, where nonmembers are concerned, "the exercise of tribal power" is limited to "what is necessary to protect tribal self-government or to control internal relations"—

applies both to the land belonging to the tribe or its members and also to land that belongs to nonmembers. The land's ownership status is only one factor to be considered in determining whether the protection of tribal self-government or the control of internal relations calls for the exercise of tribal power. While tribal ownership of land may sometimes be dispositive, it is not alone enough to support regulatory jurisdiction over nonmembers. The ultimate question always remains, in *Montana*'s words, whether "the exercise of tribal power" is "necessary to protect tribal self-government or to control internal relations." The answer here is plain: Tribal authority to regulate state officers in executing process related to the off-reservation violation of state laws is not essential to tribal self-government or internal relations. The State's interest in executing process is considerable, and it no more impairs the Tribes' self-government than federal enforcement of federal law impairs state government. We hasten to add that our holding is limited to the question of tribal court jurisdiction over state officers enforcing state law. We leave open the question of tribal court jurisdiction over nonmember defendants in general.

Second, the game wardens were not required to exhaust their qualified immunity claims in the Tribal Court before bringing them in the Federal District Court. Because under the facts presented the Tribal Court's lack of jurisdiction is clear, adherence to the tribal exhaustion requirement of *National Farmers Ins. Union Cos. v. Crow Tribe* (U.S. Supreme Ct., 1985) would serve no purpose other than delay and is therefore unnecessary.

Reversed and remanded.

Smith v. Salish College

United States Court of Appeals for the Fifteenth Circuit (2004)

This case arises from a one-vehicle rollover. James Smith was a student at Salish College ("the college"), a community college operated by the Salish Tribe of the Flathead Reservation (“the tribe”) as a tribal entity, and was not a member of the tribe. One day, he was driving a college dump truck, as part of a college vocational course, on United States Highway 93, a public road on nontribal land, as it ran through the Flathead Reservation. At the unfortunate time, for reasons still unclear, Smith caused the dump truck to veer sharply left. With great presence of mind and agility of body, Smith leapt from the truck unharmed. The truck was not as lucky, ending up a total loss after rolling over several times.

The college brought an action against Smith in tribal court, claiming that he negligently drove the dump truck.

In advance of trial in tribal court, Smith moved for dismissal of the college’s action against him on the ground that the tribal court lacked jurisdiction.

At the same time, Smith filed suit in the United States District Court for the District of Franklin, seeking an injunction against the college’s prosecution of its claim against him in the tribal court on the same lack of jurisdiction ground.

The tribal court subsequently denied Smith’s motion to dismiss, concluding it had jurisdiction.

The federal district court proceeded to dismiss Smith’s suit, arriving at the same conclusion.

Smith appealed from the federal district court’s dismissal. We reverse.

Any time a tribal court wishes to exercise jurisdiction over a nonmember of the tribe, the framework in *Montana v. United States* (U.S. Supreme Ct., 1981) must be satisfied. *See Nevada v. Hicks* (U.S. Supreme Ct., 2001). A tribal court's adjudicative authority is,

at most, only as broad as the tribe's regulatory authority. *Hicks*. Thus, while *Montana* dealt with a tribe's regulatory authority, it applies equally to a tribe's adjudicative authority.

Thus, *Montana* sets the framework: The general rule is that tribal courts lack jurisdiction over claims against nonmembers. There is an exception for claims against nonmembers who enter into consensual relationships with the tribe or its members. There is another exception for claims against nonmembers based on conduct that threatens the tribe's political integrity, economic security, health, or welfare. Albeit rebuttable by proof of one of these two exceptions, the presumption is that a tribal court does *not* have jurisdiction.

In *Hicks*, the Supreme Court's reasoning implies that *Montana*'s general rule that tribal courts lack jurisdiction over claims against nonmembers applies *whenever* a claim is asserted against a nonmember, whether the claim arose on tribal or nontribal land. To be sure, the *Hicks* Court limited its "*holding*" to the "question of tribal court jurisdiction over state officers enforcing state law." But the fact that the *Hicks* Court chose not to hold that the *Montana*'s general rule applies *whenever* a claim is asserted against a nonmember does not mean that we are powerless to do so. We are confident when the Supreme Court revisits the question, it will give the same answer as we do here.

With that said, *Montana*'s first exception is inapplicable here. To be sure, Smith may be deemed to have entered into a consensual relationship with the tribe by enrolling in the college, a tribal entity. But the focus of the inquiry is not so much whether Smith had entered into a consensual relationship with the tribe, but whether the claim against him—negligently driving a dump truck—is contractual in nature. It is not. Instead, it sounds in tort, specifically the tort of negligence.

Montana's second exception is also inapplicable. We do not disagree that the tribe's health and welfare requires maintaining public safety. But the conduct that the college alleges against Smith in its claim—negligently driving a dump truck—seems hardly capable of threatening public safety other than minimally. Were it otherwise, any tort claim against a nonmember would come within a tribal court's jurisdiction, and the exception would swallow the rule. Nor do we disagree that the tribe's political integrity

is a matter of highest moment to the tribe. But to require the college to sue Smith, if at all, outside of tribal court would not erode the tribe's political integrity. The college's claim against Smith presents a simple tort issue and nothing more.

Reversed.

Answer 1 to Performance Test B

Plaintiffs Floyd Industries and Sandra Floyd's Memorandum of Points and Authorities In Opposition to Defendant Orrin Rettick's Motion to Dismiss the Injunction Action

I. Introduction

Defendant Rettick's motion to dismiss or stay Floyd Industries' action for a permanent injunction should be denied, and the court should proceed to a full hearing on the injunction. Mr. Rettick's motion should be denied because the Taraconic Tribe has no adjudicatory civil authority over nontribe members Floyd Industries or Sandra Floyd, and because the claim at issue neither arises out of a consensual contractual relationship, nor does it affect the Tribe's ability to regulate its own politics, health, safety or welfare. Furthermore, a stay should not be granted because the facts clearly show that the Taraconic Tribe lacks jurisdiction, and a stay to bring the issue in tribal court would only cause undue delay.

II. Factual Background and Procedural History

Facts

Plaintiff Floyd Industries, LLP is a manufacturer and seller of firearms, formed in the state of Columbia, and having its principal place of business in Columbia. Defendant Sandra Floyd is the president of Floyd Industries. Sandra Floyd is a member of the White Eagle Tribe, which is a different tribe from the Taraconic Tribe. Neither Floyd Industries nor Sandra Floyd are members of the Taraconic Tribe. The only member of the Traconic Tribe in this case is defendant Rettick, who is the Chief of Police for the tribe, and also sits as one of five members on the tribal council (Rettick Complaint in Tribal Court).

Underlying this injunction suit is a products liability claim by Rettick against Floyd Industries. Rettick contracted to purchase five handguns from Floyd Industries, for a

tribal police department with over 50 members (*Note - we should secure an affidavit from Sandra Floyd for this fact and attach it to this memo, as it wasn't in our complaint for an injunction). Based on the alleged malfunction of only one of the five handguns, Rettick has made a products liability claim in Taraconic Tribal Court. Rettick alleges the contract was executed on Tribal Land, but as of yet has provided the court no substantive proof of this fact (Rettick Tribal Court Complaint).

Rettick asserts in his Motion to Dismiss that Floyd has admitted that the contract did indeed occur on tribal land (Floyd Complaint for Injunction). However, this is factually untrue as can be determined by Floyd's Complaint, which does not mention this issue at all (Floyd Complaint for Injunction). Rettick also points out that Floyd has not denied any of Rettick's product liability claims. But this is simply because Floyd contests the Tribal Court's jurisdiction, and so has not answered the complaint in tribal court (Floyd Complaint for Injunction).

Procedural History

Rettick's Complaint for products liability was filed in Taraconic Tribal court on Dec 28, 2009. Based on the fact that the Tribal court lacks jurisdiction, Floyd's complaint for permanent injunction was filed in this District Court on Jan 26, 2010. Rettick's motion to dismiss or stay the motion for injunction was filed on Feb 16, 2010, along with a memorandum of point and authorities. Floyd now opposes Rettick's motion to dismiss.

III. Argument

A. Because the Taraconic Tribe has no civil adjudication jurisdiction over nonmembers Floyd Industries or Sandra Floyd, the Court should deny Rettick's motion to dismiss the action for an injunction

Generally the inherent sovereign powers of a tribe do not extend to nonmembers, for both the regulatory authority of the tribe (Montana v. US, US Supreme Ct.) and civil adjudication (Nevada v. Hicks, Smith v. Salish). A reasonable reading of "nonmembers" includes members of other tribes, as membership in another tribe logically has no more

connection to jurisdiction by a foreign tribe than being a citizen of one state has connection to jurisdiction by a different state. Suggesting that "all tribes are the same" for jurisdictional purposes would be an offensive, discriminatory, and incorrect reading of Montana. And in all of the cases relevant, the persons the court considered "tribe members" were members of the same tribe (Montana, Hicks, Smith). When a claim is against a nonmember, it raises a presumption that the Tribal Court lacks jurisdiction, and the party claiming jurisdiction bears the burden of rebutting this presumption (Smith v. Salish, US Court of Appeals, 15 Circuit). The fact that the claim arose on tribal land will not be sufficient in itself to support jurisdiction (Nevada v. Hicks). This rule applies to a claim against a state government official (Nevada v. Hicks), and has been persuasively extended to a nonmember private citizen (Smith).

In this case, neither Floyd Industries nor Sandra Floyd is a member of the Taraconic Tribe. The fact Sandra Floyd is a member of the White Eagle Tribe is not relevant under a reasonable reading of "nonmembers" – White Eagle Tribe is a completely distinct tribe from the Taraconic. Though Floyd Industries and Sandra Floyd are private parties, the Montana rule applies to private parties, as extended by Smith, which is the only persuasive authority on point. This raises a presumption that the Tribal Court lacks jurisdiction, and plaintiff Rettick bears the burden of defeating this presumption.

Rettick has alleged in the Tribal Court complaint that the contract was executed on tribal land. Rettick argues in his memorandum of points and authorities that Floyd has admitted that the contract occurred on tribal land, but upon examination of Floyd's complaint for an injunction, this factual assertion is revealed to be false. Floyd admitted no such fact in its complaint. Additionally, even if the transaction occurred in tribal land this will not in and of itself meet Rettick's burden of establishing Tribal Court Jurisdiction. Under Hicks (extended to private parties by Smith), the fact the claim arose on tribal land is not enough to establish jurisdiction when a nonmember is involved in the claim.

Because Sandra Floyd and Floyd Industries are not members of the Taraconic tribe, the Tribal Court lacks jurisdiction over them.

A1. Because the products liability claim against Floyd arises out of tort, and not contract, the Tribe does not have jurisdiction under the "consensual relationship" exception to the Montana Rule

A tribe may regulate the activities on nonmembers who enter into consensual relationships with the tribe (Montana). However, contrary to what Rettick asserts in his Memorandum of Points and Authorities, the focus of consensual relationship inquiry is not whether a contract was made, but whether the claim was contractual in nature (Smith). The Smith court found that the consensual relationship exception didn't apply because the claim at issue in that case was the tort of negligence. In Smith, a state college brought an action against a tribe member for negligent destruction of a college truck. Though the use of the property arose out of a contract between the tribe member and the College, the court held that the consensual relationship exception did not apply because the underlying claim was a negligence tort claim.

In this case, a contract to buy handguns was formed between Floyd Industries and Rettick. However, Rettick's complaint does not arise from this contract, but rather is a classic tort complaint alleging strict liability for a defective product (Rettick Tribal Court Complaint). The fact a contract was made is not even essential to this claim, as products liability applies equally to all foreseeable plaintiffs, even those not in privity. Thus, like the negligence claim in Smith, this claim is a "simple tort issue and nothing more."

Because Rettick's claim is a tort claim, consensual relationship jurisdiction doe not exist.

A2. Because a rare handgun defect does not affect the Tribe's political integrity, economic security, or health and welfare, the self-regulation exception to the Montana Rule does not apply

In an exception to the Montana rule, a tribe may exercise civil authority over nonmembers when that conduct threatens the political integrity, the economic security, or the health or welfare of the tribe (Montana), or is "necessary to protect tribal self-government or control internal relations." (Hicks). For a tort claim, there must be more

than a minimal threat to public safety, or else jurisdiction over torts would be unlimited. For example, the negligent driving of a dump truck does not pose a sufficient threat to create tribal jurisdiction (Smith). Nor does the fact that a police officer is involved in the claim create a sufficient basis to find an exception for public safety (Hicks).

In this case, the tort claim alleges only the failure of one of five handguns sold to a police force with over 50 members. The fact that one of five handguns may be defective has minimal effect on the ability of the police force to regulate tribal safety. It is rare that police officers even have to draw guns, let alone use guns. Even if [it] became common knowledge that one gun out of five guns sold to a police force of 50 officers was defective, it would have no discernable effect on crime. Thus, this is just the type of "minimal threat" to public safety that the Smith court worried would extend nearly unlimited jurisdiction if it was sufficient basis for the Tribal Court to hear the claim.

Secondly, the fact that the Tribal Chief of police has been injured [does not] affect tribal self-government or control over internal relations. The Taraconic Tribal police force is large – with over 50 members, and certainly there is a deputy chief that can take over any of Rettick's duties while he recovers from his injuries. Policing is an inherently risky profession, and police departments are well trained in how to continue effective operations even when commanding officers have been injured.

Lastly, the fact that Rettick allegedly sits as one of five members on the tribal council does not affect the tribe's control over self-regulation. From Rettick's complaint, which states that Rettick still sits on the council, it appears Rettick can still perform his duties. Even if not, there are four other members of the council, and surely there are other members of the tribal government who can sit in Rettick's place. Like the tribal police department, the tribal government must have procedures in place to deal with the illness or injury of a tribal council member without compromising tribal government.

Because the alleged tort does not pose a threat to public safety or to the Tribe's self-government, Rettick cannot claim the Tribal Court has jurisdiction under the self-regulation exception to the Montana Rule.

B. Because the facts are clear that the Taraconic Tribe lacks jurisdiction, the court should deny defendant's motion for a stay

In some cases, exhaustion of remedies in the Tribal Court are required before a party can bring a claim in Federal Court (National Farmers Union v. Crow Tribe). However, when the facts are clear that the Tribal Court lacks jurisdiction, the exhaustion requirement of Farmers v. Crow does not apply, and would serve no purpose but to delay (Nevada v. Hicks). Unlike the first holding in Hicks on tribal court jurisdiction, this second holding was not expressly limited to state police. And, regardless, Smith persuasively extends the holdings of Hicks to private actors.

The Hicks exception is met as the facts in this case are clear that the Tribal Court lacks jurisdiction. Because Floyd Industries and Sandra Floyd are not tribe members, a presumption arises that the Tribal Court lacks jurisdiction. Defendant Rettick has merely alleged the contract was formed on tribal land, and even if this fact was true, this alone is not sufficient to meet Rettick's burden or [for] proving jurisdiction. The "consensual relationship" exception does not apply as this is a tort action, not a contract action, and the malfunction of one handgun and injury to one police officer does not affect the Tribe's ability to govern itself.

Because the facts clearly show the Tribal Court lacks jurisdiction, the court should deny defendant Rettick's motion to stay the action pending resolution by the Tribal Court.

IV Conclusion

Because the Taraconic Tribal Court generally lacks jurisdictions over nonmembers, and neither the consensual relationship exception nor the self-regulation exception applies, the court should deny defendant Rettick's motion to dismiss the complaint for an injunction. Because the facts are clear that the Tribal Court lacks jurisdiction, the court should also deny defendant Rettick's motion to stay the action pending resolution in Tribal Court. The court should proceed promptly to a full hearing on plaintiff Rettick's complaint for an injunction.

Bram Fenton, Esq.
1660 Rhoades Boulevard
Green River, Columbia 99906
(555) 357-1010

Attorneys for Plaintiffs Floyd Industries, LLC, and Sandra Floyd

Memorandum of Points and Authorities in Opposition of Defendant's Motion to Dismiss or, in the Alternative, for a Stay
No. 203-CV-489 (KMB)

I. Introduction

Orrin Rettick ("Rettick"), the Chief of Police for the Taraconic Tribe and one of the five members of the Tribal Council, moves this court to dismiss the motion for a permanent injunction filed by Sandra Floyd ("Floyd") and Floyd Industries, LLC ("Floyd Industries") or, in the alternative, for a stay. Floyd and Floyd Industries now files its opposition to Rettick's motion. Specifically, Floyd and Floyd Industries (collectively "the plaintiffs") maintain that the complaint states a claim for relief because the Taraconic Tribal Court lacks jurisdiction over the products liability action filed by Rettick. In addition, the plaintiffs argue that due to the clear lack of jurisdiction in the Tribal Court, exhaustion of remedies in front of the Tribal Court was unnecessary. Accordingly, the plaintiffs respectfully request that this court deny the motion to dismiss and the motion for a stay.

II. Factual Background and Procedural History

Rettick is a member of the Taraconic Tribe, serving as the Chief of Police for the Tribe as well as a member of the Taraconic Tribal Council. Rettick is a resident of the Silver Oak Reservation in the State of Columbia. Floyd Industries is a limited liability company, formed under the law of the State of Columbia, involved in the manufacture and sale of firearms. Sandra Floyd is the owner of Floyd Industries. Neither Floyd

Industries nor Floyd is a member of the Taraconic Tribe. Neither Floyd Industries nor Floyd is a resident of the Silver Oak Reservation. In 2008, within the Silver Oak Reservation and within the state of Columbia, Rettick, as Chief of Police, entered into a contract with Floyd Industries, represented by Floyd. The contract involved the sale of five nine-millimeter semi-automatic handguns in the style "Model 9." In compliance with its contractual duties, Floyd Industries immediately delivered the handguns to Rettick. On or about May 1, 2009, Rettick was seriously injured during the course of performing his duties as Chief of Police. He alleges that his injury occurred while attempting to fire his Model 9 handgun. Rettick was the only individual injured during this incident.

On December 28, 2009, Rettick filed his complaint agains Floyd Industries and Floyd in the Tribal Court of the Taraconic Tribe. See Rettick v. Floyd Industries, LLC and Sandra Floyd (No. 13-368). Specifically, Rettick alleged that the Model 9 handgun was defectively designed and manufactured by Floyd Industries. Rettick seeks damages in the amount of $5,000,000 (five million dollars). Before any action was taken by the Tribal Court, on January 26, 2010, Floyd Industries and Floyd filed its complaint for a permanent injunction in this court, the U.S. District Court for the Western District of Columbia. Specifically, the plaintiffs have requested that this court permanently enjoin Rettick from prosecuting this products liability action in the Tribal Court and award other relief that the court determines to be just and proper. On February 15, 2010, the defendant, Rettick, filed a motion to dismiss the plaintiffs' complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. In the alternative, Rettick request that this court stay the injunction proceedings until the plaintiffs had exhausted their remedies before the Tribal Court.

III. Argument

This court had jurisdiction over this case pursuant to 28 U.S.C. 1331, which grants federal district courts jurisdiction over actions "arising under" federal law. Because the issue before this court involves resolution of the question of whether the Tribal Court has jurisdiction over the products liability action filed by Rettick, jurisdiction before this court is proper. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe.* There are two motions

before the court at the present time: a motion to dismiss and a motion to stay. Both should be denied.

A. *Because Neither Floyd nor Floyd Industries is a Member of the Taraconic Tribe, the Tribal Court Lacks Jurisdiction Over Rettick's Complaint.*

The Taraconic Tribal Court lacks jurisdiction over the products liability action filed by Rettick because neither Floyd Industries nor Floyd is a member of the Taraconic Tribe. "As a general proposition, the inherent sovereign powers of a tribe do not extend the activities of nonmembers." *Montana v. United States.* This is the general rule set forth by the Supreme Court in 1981 in *Montana v. United States.* Although *Montana* discussed a tribe's regulatory authority, the court further held in *Nevada v. Hicks* that a tribe's adjudicative authority extends only as far as its regulatory power. Thus, the same limit to a tribal court's regulatory authority applies to its adjudicative authority.

Here, the case brought by Rettick is against two parties – Floyd Industries and Floyd. Neither entity is a member of the Taraconic Tribe. The defendant argues that his claim involves "members of a tribe – specifically, Rettick and Sandra Floyd." This is misleading. Floyd is a member of the White Eagle Tribe – an entirely unrelated and different tribe to the Taraconic Tribe. The fact that Floyd is a member of a tribe is immaterial to this inquiry. The issue is whether the Taraconic tribe has the "inherent sovereignty" to exercise jurisdiction here. Just as that sovereignty generally cannot be exercised over a nontribal member it cannot be exercised over the member of a wholly different tribe. The inherent sovereignty of one tribe is not coextensive with the inherent sovereignty of every other tribe. There are absolutely no allegations in any of the defendant's pleadings of any involvement whatsoever of the White Eagle Tribe in this matter. The focus of this inquiry must be whether the litigants are members of the particular tribe exercising jurisdiction over the case. As a result, since Floyd is not a member of the Taraconic Tribe, she is a nonmember just as Floyd Industries. Accordingly, the "presumption" remains that the Tribal Court does not have jurisdiction over Rettick's action. *Smith v. Salish.*

The defendant argues that the rule as articulated by *Montana* does not mean that the tribal court lacks jurisdiction whenever a claim is asserted against a nonmember. He contends that the Supreme Court has not foreclosed the possibility of tribal jurisdiction over a claim that arises on tribal land and, accordingly, the *Montana* rule is inapplicable. Although the court did reserve judgment on the issue of whether a tribal court could exercise jurisdiction over nonmembers in general, the plaintiffs maintain that its reasoning in *Montana* and *Hicks* implies that an exercise in jurisdiction based entirely on where the claim arose would be improper. *Smith.* In *Montana,* the court articulated the general rule, subject to two exceptions further discussed below, that the powers of a tribe do not extend to activities of nonmembers. The implication of its holding is that the rule applies whether the claim arose on tribal or nontribal land. *Smith.* In fact, in *Hicks,* the court specifically reversed the Ninth Circuit's finding that the fact that the Hicks home, where the search warrant was executed, was on tribe-owned land was insufficient to support tribal jurisdiction over civil claims against nonmembers. Although the court limited its holding in *Montana,* the implication from *Montana* and *Hicks* is clear. *Smith* ("We are confident when the Supreme Court revisits this question, it will give the same answer as we do here."). Accordingly, the plaintiffs urge this court to hold that the Tribal Court cannot exercise its jurisdiction over nonmembers even when the claim arose from incidents on tribal land.

However, even without such a finding by this court, the rule articulated in *Montana* is still dispositive. The defendant argues in his motion papers that the tribe's "authority is broadest where the claim in question arises on tribal land and involves members of the tribe." However, there is absolutely no legal authority for such a claim. As he must, the defendant cites to contrary Supreme Court authority which indicates that the tribe's jurisdiction is limited as to nontribal authorities. Specifically, the court in *Montana* held that "the exercise of tribal power" is limited to "what is necessary to protect tribal self-government or to control internal relations." The exercise of jurisdiction beyond such matters is "inconsistent with the dependent status of the tribes." Twenty years after its decision in *Montana,* the Supreme Court held that the ownership status of the land is "only one factor to be considered" in whether a tribal court can exercise jurisdiction. *Hicks.* This element is not always dispositive of the question of jurisdiction. Rather the "[u]ltimate question … [is] whether 'the exercise of tribal power' is 'necessary' to protect

tribal self-government control internal relations." *Hicks.* As the court in *Smith* stated, "[a]ny time a tribal court wishes to exercise jurisdiction over a nonmember of the tribe, the framework in *Montana v. United States* … must be satisfied." (citations omitted). That framework is not satisfied here.

In this case, the defendant has made no argument that the exercise of jurisdiction over this products liability action is necessary for the tribe's self-government or internal relations control. This case involves the alleged accidental misfiring of a handgun sold by a nonmember to a member of the Tribe. It does not implicate any internal tribal relation issues. In fact, no other member of the Tribe, other than Rittick, was injured during this incident. Again, the fact that Floyd is a member of the White Eagle Tribe is irrelevant. In fact, her membership in a tribe necessarily creates an inter-tribal issue and not an internal one. In addition, issues of self-government are not present. Simply because Rettick sits on the Tribal Council does not implicate issues of self-government. The sale of five handguns to the Taraconic Tribe does not threaten or impede the ability to the Tribe to govern itself in any way. Rather, Rettick's claim "presents a simple tort issues and nothing more." *Smith.* The exercise of tribal power is not essential [to] the tribe's ability to self-govern or control internal relations. As a result, the presumption remains that the tribal court does not have jurisdiction. See *Smith.*

Accordingly, the defendant's assertions that Floyd Industries and Floyd have not denied that the handgun was defective in design and manufacture or that it caused Rettick's injuries is irrelevant. The plaintiffs have no reason to deny these allegations before the Tribal Court. Since the Tribal Court is without jurisdiction and the proceedings before this court do not involve the merits of Rettick's action, no such denials are necessary. Rather, denials of any such allegations are proper only in a court with jurisdiction. That court, as argued above, is not the Taraconic Tribal Court.

1. *Because Rettick's Claim Sounds in Tort, the Consensual Relationship Exception to the Montana Rule is Inapplicable.*

The Supreme Court in *Montana* articulated two exceptions to the presumption of lack of jurisdiction. First, tribal courts maintain jurisdiction over nonmembers who enter into

consensual relationships with the tribe or its members. *Montana.* This exception, however, is inapplicable to Rettick's claim.

The Fifteenth Circuit in *Smith* held that this inquiry focuses not on whether a consensual relationship existed between the parties, but rather whether the claim asserted against the nonmember arises from such a relationship. In *Smith,* the court held that although the defendant had a consensual relationship as a student of the plaintiff-college, the claim asserted against the defendant was not "contractual in nature." Rather, the court held that the claim, negligent driving, sounded in tort. That analysis is highly relevant to the inquiry before this court. Although the plaintiffs do admit that they consensually entered into a contract with Rettick and the tribe for the sale of five handguns, there is no allegation that that contract was breached in any way. In fact, the contract between the parties was entirely complete at the time of the incident. Rather, Rettick brings a products liability action against Floyd and Floyd Industries, arguing that the handguns were defectively designed and manufactured. This is a classic tort action. To establish a prima facie case for this tort does not require proof of any consensual relationship between the parties. In fact, if Rettick were to have sold this gun to a third party, that third party could allege the same suit against Floyd and Floyd Industries without the existence of any such consensual relationship. A contractual relationship between Rettick and Floyd and Floyd Industries is not an essential element to the tort action brought by Rettick. In reality, it is wholly irrelevant. As a result, it cannot justify the exercise of jurisdiction by the Tribal Court in this matter.

2. *Because the Sale of Five Guns Does Not Threaten the Health, Safety or Political Integrity of the Tribe, the Second Exception to the Montana Rule is Inapplicable.*

The court carved out a second exception in its decision in *Montana.* The court found that a tribal court may exercise jurisdiction over "the conduct of nonmembers on nonmember land within its reservation when the conduct threatens the political integrity, the economic security, or the health or welfare of the tribe." *Montana.* The defendants argue that the sale of the handguns by Floyd Industries threatens the "health or welfare

of the tribe." However, as described below, this exception is inapplicable to the case at bar.

Although Rettick suffered "serious injury", the injury to one Tribe member by the alleged acts of a nonmember cannot be sufficient for the exercise of jurisdiction. The exception carved out in *Montana* permits tribes to maintain public safety. However, the sale of five handguns is not a threat to public safety or the health and welfare of its members. There are 50 officers in the Tribal Police department. Each officer presumably carries a gun. Floyd Industries sold only five handguns to Rettick and only one of those five allegedly misfired. The resulting injury affected one tribal member. Rettick appears to argue that, because he is "responsible for the safety of all persons within the Silver Oak Reservation," that the health and safety of the Tribe is implicated by his injuries. However, this is not the logical extension of the exception articulated by the Supreme Court. Rettick's status as a police officer for the Tribe, and the Chief at that, does not inherently implicate the health and safety of the entire Tribe. If this argument were correct, it would mean that any time the Chief of Police was injured by any action of a nonmember, the health and safety of the Tribe would be threatened. Moreover, as stated above, Rettick is one of 50 police officers on the Tribe's police force. Each one of the remaining 49 officers was available to keep order and safety in the Tribe. In fact, there are no allegations that the Tribe suffered any safety or health injuries. In fact, the Tribe itself suffered no injuries whatsoever. Rettick was the only individual injured by the alleged misfiring of the gun. The connection to the health and welfare of the Tribe to the incident at issue is tangential at best. In fact, Rettick's claim "seems hardly capable of threatening public safety other than minimally." *Smith.*

Furthermore, just as the Fifteenth Circuit articulated in *Smith,* if this exception permitted any tort claim to be brought against a nonmember, then the exception would certainly "swallow the rule." *Smith.* If every time a piece of equipment purchased by a tribal member from a nonmember breaks or is allegedly faulty, according to Rettick, a claim could be brought against the nonmember. Every time any tribal member was injured by any act taken by a nonmember, that claim could be brought in tribal court. Such a result is not sustainable given the court's jurisprudence in *Montana* and *Hicks.* Although admittedly the injury to Rettick is more serious than any property damage to a dump

truck as in *Smith,* the analysis in *Smith* is still applicable. The injury was to one individual -- it was not inflicted on a mass scale and it did not affect the Tribe in any way other than to impact one of its members. As articulated by *Smith,* that the Tribe is impacted by injury in a minimal way -- in this case by injury to one of its members – cannot be sufficient to justify the exercise of jurisdiction by the Tribal Court. Given the lack of any overall threat to the health or safety of the Tribe, the plaintiffs maintain that the second exception is likewise inapplicable to this case.

Although not explicitly argued in his brief, Rettick appears to implicitly argue that as a member of the Tribal Council his injury threatened the political integrity of the Tribe. This argument must fail for the same reason the health and safety argument does. Rettick's status as a Tribal Council member does not give rise to a threat against the political integrity of the Tribe. The injury to Rettick was completely unrelated to his activities as a member of the Tribal Council. The ability of the Tribal Council to retain political control over the Tribe was not threatened in any way. Although the Tribal Council has only five members, the injury to one Council member can certainly not threaten the political integrity of the entire Tribe. Such an argument is wholly unsupported by law or the facts of this case. Accordingly, it must be rejected.

The arguments presented by the defendant with regards to the first and second exceptions are not sufficient to rebut the presumption that the Tribal Court does not have jurisdiction. This presumption operates to deprive the Tribal Court of jurisdiction. Accordingly, the plaintiffs respectfully request that the defendant's motion to dismiss be denied.

B. *Because the Tribal Court's Lack of Jurisdiction is Clear, Exhaustion of the Plaintiffs' Remedies Before the Tribal Court is Not Required.*

In the alternative, the defendant requests that this court stay the proceedings before it until the plaintiffs have exhausted their remedies before the Tribal Court. In *Nat'l Farmers Union Ins. Cos. v. Crow Tribe,* the Supreme Court held that, although the District Court had jurisdiction pursuant to section 1331, the court should not have exercised its jurisdiction over the matter before it. Rather, the court held that the Tribal

Court should, in the first instance, determine whether it has jurisdiction over the claim. As a result, as a matter of comity, the court found that litigants seeking declaratory or injunctive relief in federal court based on jurisdictional grounds must first exhaust their remedies before the Tribal Court.

The defendant contends that the exhaustion requirement is applicable here. However, Rettick fails to mention the court's decision in *Hicks* and its alteration to the exhaustion requirement. There, the Court held that, if the lack of jurisdiction by the Tribal Court is clear, the litigants need not adhere to the exhaustion requirement articulated in *National Farmers.* Specifically, the court held that mandating such exhaustion, even when the result is clear, "would serve no purpose other than delay and is therefore unnecessary." *Hicks.*

As articulated in paragraph 8 of the plaintiffs' complaint, the plaintiffs did not exhaust their remedies in Tribal Court because that court clearly lacks such jurisdiction. As articulated above, the Tribal Court cannot properly exercise jurisdiction in this case. The defendant urges this court to ignore the *Montana* rule, but the *Montana* rule is essential to the court's inquiry. It is not necessary for this court to find that the Tribal Court is deprived entirely of jurisdiction over a nonmember. Rather, this court's decision need only rest on the issue of whether the exercise of jurisdiction implicates notions of self-government and internal relations. As stated above, it clearly does not. Furthermore, the only way the Tribal Court can exercise jurisdiction is if the defendant provides sufficient evidence to rebut the presumption of nonjurisdiction. The defendant utterly fails to do so in this case. First, the products liability claim brought by Rettick is not based on any consensual relationship between the parties. It is an action sounded only in tort -- there is absolutely no allegation that Floyd Industries or Floyd breached its contract to Rettick. Second, the misfiring of one gun injuring one member of the tribe is insufficient to constitute a threat to the "health and safety" or political integrity of the Tribe. Accordingly, the presumption against the exercise of jurisdiction remains in place.

The record is clear in this case. The Tribal Court has absolutely no basis by which to assert jurisdiction over this matter. The defendant's arguments to the contrary are

unavailing for the reasons stated above. As a result, the plaintiffs are under no obligation to exhaust their claims before the Tribal Court. Accordingly, the plaintiffs respectfully request that the defendant's motion for a stay be denied.

IV. Conclusion

For the reasons stated above, the plaintiffs respectfully request that the court deny Rettick's motion to dismiss or, in the alternative, for a stay.

Date: February 25, 2010.
Respectfully submitted,

Bram Fenton, Esq.

California Bar Examination

Performance Tests And Selected Answers

July 2010

THE STATE BAR OF CALIFORNIA
OFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 - 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 – 1500

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2010 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the July 2010 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 2010

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP

FILE

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP

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 Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

MEMORANDUM

To: Applicant

From: Anatoly Krotov, Senior Partner

Date: July 27, 2010

Re: **Vasquez v. SpeakEasy, Inc. and Northern Center of Worship**

Our clients, Greg and Mary Vasquez, filed a complaint seeking to enjoin SpeakEasy, Inc., a cellular telephone company, from erecting a 50-foot cellular tower on property owned by Northern Center of Worship adjacent to the Vasquez' property. We have agreed to submit resolution of this matter to the judge based on the Stipulated Statement of Agreed Facts. Please draft the brief supporting our position. You need not include an additional statement of facts at the beginning of your brief.

Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

MEMORANDUM

To: All Attorneys

From: Executive Committee

Re: **Persuasive Briefs and Memoranda**

In drafting persuasive briefs, the firm conforms to the following guidelines:

Except when there is already an agreed or stipulated identification of the facts, the brief should begin with a short statement of facts, using only those facts supported by the record. Include only those facts you need for your persuasive argument.

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 analysis following each heading should flow logically from each heading.

The body of each argument should persuasively argue how the facts and law support our client's position. Contrary arguments and authority must be acknowledged and responded to rather than ignored.

In writing a first draft, the attorney should not prepare a table of contents, a table of cases, a summary of argument, or an index. These will be prepared, where required, after the draft is approved.

Anatoly Krotov, Esq.
Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia
Attorney for Plaintiff

Paul McDonald, Esq.
McDonald, Carpenter & Dean
98 Rebecca Lane
Francisco, Columbia
Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF MICO

Greg Vasquez and Mary Vasquez,
Plaintiffs,
v.

Civil Action No. 03281955 DEB

Northern Center for Worship,
a Columbia Nonprofit Corporation,
and
SpeakEasy, Inc.,
a Columbia Corporation,
Defendants
_____ /

STATEMENT OF AGREED FACTS AND SUBMISSION OF THE CASE

INTRODUCTION

The Complaint filed herein by Plaintiffs on June 27, 2010 seeks a mandatory permanent injunction requiring Defendants to dismantle and demolish a 50-foot bell tower housing a cellular telephone transmission facility constructed on the property of Defendant Northern Center for Worship by Defendant Speakeasy, Inc. ("SpeakEasy"). The Complaint alleges that the tower violates the Covenants, Conditions and Restrictions ("CC&R's") limiting and restricting uses of the property within the Pinnacle Canyon Estates Subdivision. Pursuant to the Order of this Court, the parties have entered into this Statement of Agreed Facts and Submission of the Case, and shall each submit supporting briefs, after receipt of which this Court shall issue its decree.

JOINT STIPULATION OF FACTS

Plaintiffs and Defendants agree that:

1. Pinnacle Canyon Estates (the "subdivision") is a residential subdivision of 42 lots located in the City of San Claritan, Mico County, Columbia.

2. Plaintiffs Greg and Mary Vasquez own and reside in a detached one story single-family dwelling on Lot Two of Pinnacle Canyon Estates.

3. SpeakEasy is a Columbia corporation conducting a cellular telephone business in Mico County.

4. Northern Center for Worship (the "Church") is a Columbia nonprofit corporation and is conducting business in Mico County.

5. Covenants, Conditions and Restrictions, which limit and restrict uses of the property in the subdivision, are the agreement that is the subject of this litigation. These CC&R's were executed on December 9, 1960. Selected provisions of the CC&R's are attached as Exhibit "A."

6. The Church owns and occupies Lots Seven, Eight and Nine of the subdivision.

7. The Vasquez' property, Lot Two of the subdivision, shares a boundary line with the Church's Lot Seven.

8. On July 29, 2009, the Church entered into agreement with SpeakEasy for construction of a 50-foot bell tower on Lot Seven that would house a wireless telephone

facility. The terms of the agreement were that SpeakEasy would pay all costs for construction of the bell tower and a monthly rental of $1,000 for use of the property.

9. On September 27, 2009, a group of neighbors in the subdivision, including the Vasquezes, voiced objections to the construction of the tower. The Church convened a meeting to discuss the matter with the neighbors and advised each objecting neighbor that SpeakEasy had already expended $106,000 on the tower, and that the Church would be obligated to reimburse SpeakEasy for at least that amount were the Church to terminate its agreement with SpeakEasy for the construction of the bell tower. The Church told the neighbors that it had no real choice but to proceed with its agreement and so advised the complaining neighbors.

10. On January 27, 2010, the Vasquezes notified the Church and SpeakEasy in writing by letter that construction of the bell tower was in violation of the CC&R's. From the time of the meeting until the lawsuit was filed, there were no objections or complaints to the tower other than the letter from the Vasquezes.

11. On February 13, 2010, Defendant SpeakEasy completed construction of the bell tower housing the wireless telephone facility.

12. Prior to construction of the tower in Pinnacle Canyon Estates that is the subject of this lawsuit, the following potential violations of the subdivision's CC&R's existed:

(a) a two-story barn converted into living quarters;

(b) a two-story house addition;

(c) two amateur radio towers;

(d) a satellite dish on the peak of a house;

(e) a flagpole;

(f) a previously existing 40-foot bell tower at the Church;

(g) a steeple at the Church with a cross on the top, which extends nearly as high as the disputed tower;

(h) a flagpole at the Church;

(i) a large sign for the Church at the front entrance; and

(j) several large, wooden telephone poles and electric lines located throughout

the subdivision and between Plaintiffs' home and the Church.

13. Mr. and Mrs. Vasquez purchased their home on Lot Two in 2001 for $114,000. The highest recent sale of a comparable residence in the subdivision was for $360,000. The parties retained separate experts to determine the impact of the disputed tower on the value of Plaintiffs' property. The experts could not agree. However, they put the range of diminution of value between 0% and 5%.

14. On the date Plaintiffs filed their complaint and application for injunction, SpeakEasy had spent the following in resources concerning planning and construction of the bell tower: $106,000 for planning, architecture, and pre-construction permits and $148,000 for all aspects of construction, for a total construction cost of $254,000.

15. Demolition and removal of the tower from its present location would cost $50,000.

16. Thus the total loss to SpeakEasy should it be required to remove the tower would be $304,000, which is calculated as the $254,000 construction cost plus the $50,000 cost for demolition and removal.

17. A church, the present existing sign, and cross on the steeple have occupied Lot Nine for 25 years.

18. When Lot Nine was acquired by the Church in 1995, the lot was covered with weeds, the driveways were rough and dusty, and in general the property was in bad repair.

19. Over the years the Church has steadily improved their properties, expending more than $4 million. By the time the Plaintiffs acquired their property in the subdivision, the Church had already made substantial additions and improvements to Lots Eight and Nine.

20. In 2005 the Church acquired Lot Seven, and shortly thereafter designed and built the sanctuary with the same stucco walls and tile roof and covered porches as the other buildings, so as to blend in with the other buildings on the Church grounds. The Vasquez' lot had no rear fence, so the Church arranged for erection of a block wall at its own expense. Mr. and Mrs. Vasquez never complained about any of these improvements.

21. In the 50 years since the CC&R's were recorded, no action has ever been filed to enforce any of the provisions thereof.

22. No neighbor or lot owner in the subdivision has ever attempted to stop the operation or expansion of the Church or any sign, bell tower, cross or other church-related structure or improvement on Lots Seven, Eight, or Nine.

23. Plaintiffs allege that Defendants' proposed structure has disturbed, and will continue to disturb, the quiet enjoyment of Plaintiffs' property.

SUBMISSION OF THE CASE

The parties agree to submit for determination by this Court the following issues:

1. Do the CC&R's prohibit the construction of the disputed tower?

2. Has the CC&Rs' prohibition of the disputed tower, if found to exist, been waived or abandoned?

3. Are the Plaintiffs barred from obtaining the injunctive relief sought due to laches?

4. Does the balance of hardships dictate that the Plaintiffs' sought remedy of removal of the tower be denied?

Respectfully submitted,

Dated: July 27, 2010

Law Offices of Anatoly Krotov

by: *Anatoly Katov*

Anatoly Krotov, Esq.
Attorney for Plaintiff

McDonald, Carpenter & Dean

by: *Paul McDonald*

Paul McDonald, Esq.
Attorneys for Defendants

EXHIBIT “A”

Selected Provisions of the Declaration of Covenants, Conditions and Restrictions for Pinnacle Canyon Estates

* * *

General Provisions:

1. All of the lots in Pinnacle Canyon Estates shall be known and described as residential lots.

2. All structures on the lots shall be of new construction and no building shall be moved from another location onto any lot. At no time shall house trailers be allowed on the lots.

3. No garage or other building shall be erected on any of the lots until a dwelling house shall have been erected.

4. No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed one story in height and a private garage not to exceed one story in height for not more than three cars, and a guest or servant quarters for the sole use of actual non-paying guests or actual servants of the occupants of the main residential building.

* * *

7. No fence or solid wall, other than the wall of the building, shall be more than 6 feet in height, nor any hedge more than 3 feet in height, or closer than 20 feet to front lot line.

* * *

15. No structure of any kind shall be erected, permitted or maintained on the easements for utilities as shown on the plat of Pinnacle Canyon Estates.

* * *

Enforcement: Upon the breach of any of the covenants or restrictions herein, anyone owning land in Pinnacle Canyon Estates may bring a proper action in the proper court to enjoin or restrain the violation, or to collect damages or other dues on account thereof.

Anti-waiver Provision: Failure to enforce any of the restrictions, rights, reservations, limitations and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof.

Choice Residential District: All deeds shall be given and accepted upon the express understanding that Pinnacle Canyon Estates has been carefully planned as a Choice Residential District exclusively, and to assure lot owners in Pinnacle Canyon Estates that under no pretext will there be an abandonment of the original plan to preserve Pinnacle Canyon Estates as a Choice Residential District.

* * *

JULY 2010

California
Bar
Examination

Performance Test A

LIBRARY

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP

LIBRARY

Horton v. Mitchell

Columbia Supreme Court (2004)

The facts in this matter are largely undisputed. In June 2003, Michael and Gayle Horton (the “Hortons”) acquired Lot 1 in Erin Shannon Estates, a deed restricted nine lot subdivision in Mateo, Columbia, and constructed a home on the lot. Shortly after the Hortons acquired Lot 1, Zoe Mitchell (“Mitchell”), who owned lot 2, advised them that the Erin Shannon Estates community intended to seek construction of a roadway across Lot 2 that would connect to a main road. The Hortons objected to the plan, mainly because they would be backed into a corner and their home would be surrounded by asphalt. Nevertheless, over the Hortons' objections, Erin Shannon Estates property owners obtained approval and assistance for completion of the public roadway project. The Hortons then filed suit against Mitchell seeking a permanent injunction preventing the construction of the roadway and the dedication of Lot 2 to the City of Mateo for purposes of constructing the roadway. The Hortons based their complaint on Erin Shannon Estates' recorded Covenants, Conditions and Restrictions (“CC&R’s”) that forbid the construction of "any structure" on the lots except for one single-family dwelling. After a bench trial, the trial court summarily denied the Hortons' request for injunctive relief and dismissed their complaint, necessarily concluding that despite the language contained in the CC&R’s, Erin Shannon Estates could construct a roadway over Lot 2. The Hortons timely appealed.

DISCUSSION

Restrictive covenants such as the CC&R’s for this subdivision constitute a contract between the property owners as a whole and each individual property owner, pursuant to which each owner agrees to refrain from using his or her property in a particular manner. One purpose of restrictive covenants is to maintain or enhance the value of land by controlling the nature and use of lands subject to a covenant's provisions. Columbia law permits restrictive covenants but finds them disfavored; they are justified only to the extent they are unambiguous and enforcement is not adverse to public

policy. When courts are called upon to interpret restrictive covenants, they are to be strictly construed, and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions.

Because CC&R's are a form of express contract, we apply the same rules of construction. The covenanting parties' intent must be determined from the specific language used. Specific words and phrases cannot be read exclusive of other contractual provisions. The parties' intentions must be determined from the contract read in its entirety. We attempt to construe contractual provisions so as to harmonize the agreement and so as not to render any terms ineffective or meaningless.

The Hortons claim that the trial court abused its discretion because the CC&R's clearly preclude the construction of a roadway over Lot 2. The interpretation of the CC&R's presents a question of law. The Hortons took possession of Lot 1 with both actual and constructive knowledge of the CC&R's, and are therefore entitled to enforce the contractual obligations contained therein.

The provisions of the CC&R's on which the Hortons rely state:

> 4. No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed two stories in height, or tri-level single-family dwelling and a private garage not to exceed one story in height for not more than three cars.

The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable. The CC&R's are clear and unambiguous. They state that all of the lots in Erin Shannon Estates are single-family residential lots and that no structure except for a single-family home shall be erected on or be permitted to remain on any of the lots. The relevant inquiry is whether the proposed roadway is a "structure."

We conclude that the roadway is a structure within the ordinary meaning of the word

and within the meaning of the CC&R's. Our review of the CC&R's does not evidence an intent to limit the term "structure" to anything other than its ordinary meaning. For example, paragraph 7 of the CC&R's states that "[a]ll structures of the Lots shall be of new construction and no building shall be moved from any other location onto any of the lots." Therefore, buildings are not the only structures that are anticipated on the lots. For example, driveways, fences, and gates are also contemplated. The CC&R's specifically provide for other structures such as attached garages, dwelling houses, open porches, pergolas, storage rooms, and basements. Moreover, paragraph 8 of the CC&R's indicates that "structure" was meant to be given its ordinary meaning by stating that "[n]o structure of any kind or nature shall be erected on the easements for public utilities shown on the plat of ERIN SHANNON ESTATES." Finally, paragraph 13 of the CC&R's states that "[n]o structure shall be commenced or erected on any of the lots" unless approved by the architectural committee, "[p]rovided ... that the building shall be in harmony with existing buildings and structures."

The dictionary defines a "structure" as "[s]omething constructed." *The American Legacy Dictionary of the English Language*. 1782 (3d ed., 2002). A roadway is a structure — that is, "something constructed" — within the ordinary meaning of the term and within the meaning of the CC&R's.

Mitchell's argument that such an interpretation would preclude the construction of complementary or auxiliary structures does not convince us otherwise. In construing restrictive covenants, the intention of the parties to the instrument is paramount. The CC&R's provide that all of the lots in the subdivision are intended to be "residential lots," and that the "subdivision has been carefully planned as a Choice Residential District exclusively." Paragraph 4 of the CC&R's gives homeowners in the subdivision the ability to prevent structures on the lots that might compromise the aesthetics and general character of the neighborhood. Applying the provision as we interpret it furthers the goal of maintaining the subdivision as a "Choice Residential District." The fact that the homeowners may choose to allow complementary structures that do not negatively

impact the character of the neighborhood does not defeat the meaning of paragraph 4.

For the foregoing reasons, we reverse the trial court's judgment and remand with directions to grant the relief sought by the Hortons in their complaint.

Blaire v. Evans

Columbia Supreme Court (1999)

Dana and Ryan Blaire (the “Blaires”) and Laura and John Evans (the “Evans”) are residents and lot owners in Occidental, a residential community located in Soper County, Columbia. Covenants, Conditions and Restrictions (“CC&R’s”) were promulgated and adopted for Occidental and were recorded in the Soper County Recorder's Office. The Evans' lot currently contains a detached single-family dwelling, which includes an attached private garage for two cars, and they seek to build an additional detached private garage for two additional cars.

> CC&R No. 2 of the Occidental Restrictive Covenants provides:
>
> No structure shall be erected, altered, placed or permitted to remain on any residential building lot other than one detached single-family dwelling not to exceed two stories in height and a private garage for not more than three cars; carports shall be considered as garages.

The trial court issued an injunction prohibiting the Evans from erecting the additional detached private garage.

Waiver by Acquiescence

The Evans argue that in light of evidence that other property owners in Occidental have spaces for more than three cars, the Blaires have acquiesced in prior restrictive covenant violations of other Occidental landowners, have waived their ability to assert a violation and are therefore barred from challenging the Evans' building of the additional detached two-car garage.

The defense of waiver by acquiescence is raised when the restrictions sought to be enforced are not universally enforced or when there are frequent violations of the restrictions. A review of the relevant case law reveals three factors particularly significant to the analysis: 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property

upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.

Acquiescence by the complainant to violations of dissimilar restrictions cannot be a bar to enforcement where the restrictions are essentially different so that abandonment of one would not induce a reasonable person to assume that the other was also abandoned. Likewise, failure to sue for prior breaches by others where the breaches were noninjurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and damaging violation. This situation may arise where the prior violations have been in a distant part of the subdivision while the present violation is immediately adjacent to the complainant's land.

In the past, there has been a marked lack of enforcement of the restrictive covenant in question. A significant number of Occidental properties have been permitted to maintain garage space for more than three cars (the trial court record indicates the number to be somewhere between 15 and 26), including several on the same block as the Blaires. Thus the location of the objecting landowner and the frequency of prior nonconforming uses suggests acquiescence. In addition, the evidence is that the violation is identical to the violation the Blaires seek to enjoin. The Evans thus appear to have established sufficient evidence that the Blaires should be held to having acquiesced to the Evans' building of the additional detached two-car garage.

The Non-Waiver Provision — Paragraph Number 27

The Blaires, however, argue that even if these facts indicate acquiescence, under paragraph No. 27 of the CC&R's the Blaires are still entitled to enforce CC&R paragraph No. 2, despite prior violations by other Occidental landowners. CC&R No. 27 of the Occidental restrictive covenants states:

> The failure for any period of time to compel compliance with any covenant, condition or restrictions shall in no event be deemed as a waiver of the

> right to do so thereafter, and shall in no way be construed as a permission to deviate from the covenants, conditions and restrictions.

The Evans are concerned that the enforcement of the non-waiver clause raises the specter of selective enforcement. Nevertheless, unambiguous provisions in restrictive covenants generally should be enforced according to their terms. Enforcement of the non-waiver clause allows prospective purchasers of property to rely on recorded CC&R's. Thus so long as the waiver clause is unambiguous and not adverse to public policy, it can be enforced.

CC&R No. 27 of the Occidental restrictive covenants is an unambiguous non-waiver clause. Indeed, the Evans do not dispute this, and instead argue that its enforcement would be adverse to public policy. They correctly point out that Columbia courts have the power to decline to enforce restrictive covenants. According to the Evans, application of the non-waiver provision would lead to "the entirely selective, random, arbitrary, capricious, and potentially discriminatory enforcement" of the CC&R's and thus would be adverse to public policy. They thus urge us not to enforce CC&R No. 27.

We conclude that the non-waiver provision in the CC&R's is reasonable. There is nothing arbitrary or capricious in homeowners seeking to prevent additional detached garages being erected on a neighboring lot. Without the non-waiver provision, the inaction of a homeowner on one side of the subdivision could result in a waiver of the right of a homeowner on the other side of the subdivision to enforce the CC&R's in regard to an adjacent lot.

Abandonment

The non-waiver provision would be ineffective if a complete abandonment of the entire set of CC&R's has occurred. The test for determining a complete abandonment of deed restrictions — in contrast to waiver of a particular section of restrictions — is whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of

the CC&R's, defeat the purposes for which they were imposed, and consequently amount to an abandonment thereof.

No evidence was presented, however, that Occidental is no longer a "Choice Residential District." The violations described by the Evans have not destroyed the fundamental character of the neighborhood. We conclude, as a matter of law on the record before us, that the non-waiver provision of the CC&R's remains enforceable and the subdivision property owners have not waived or abandoned enforcement of CC&R No. 2 even though they or their predecessors have acquiesced in several prior violations of its provisions.

As such, it was not error to conclude that the Evans are barred from raising the defense of acquiescence by the non-waiver provision.

Affirmed.

Lutz v. Gundersen

Columbia Court of Appeals (2000)

Kent Lutz, an owner of property in Honker Bay Estates (HBE), a subdivision in Madison, Columbia, brought suit against Peter Gundersen, seeking to have Gundersen vacate, abandon and remove his warehouse building in HBE that Lutz claimed was in violation of certain Conditions, Covenants and Restrictions ("CC&R's") for the subdivision. The Superior Court granted a mandatory injunction directing the removal of the building.

The Honker Bay Estates CC&R's provide:

> All the property shall be used for residential property only except that portion fronting on Gessler St. with a depth of 200 ft., which may be used for neighborhood retail business purposes.

Gundersen purchased lot Sixty-One in HBE and within a year commenced construction of a bowling alley and cocktail lounge on the lot. Gundersen stopped the construction after three weeks upon being informed by an attorney that the building was in violation of use and depth restrictions in the CC&R's. Gundersen recommenced construction about six months later, modifying the building to a warehouse he intended to lease, and completed the building at a cost of approximately $200,000.

Fundamental Change to the Neighborhood

Gundersen argues that rapid and radical changes in the character of the neighborhood adjacent to the restricted property preclude the homeowners from enforcing the restrictive covenant. This state follows the general rule that a court will enforce the terms of restrictive covenants unless the changes in the surrounding areas are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions. It is true that across the street from the warehouse were a miniature golf course and a polka dance hall, that one block further east was a large shopping center, and that across Gessler to the north and approximately one block to the west was a large bowling alley and a veterinary hospital. While this appears to constitute substantial

change so as to render the restriction ineffective, in this case the changes from residential to business were not within the restricted area.

Laches

Gundersen also argues that Plaintiff Lutz is precluded from obtaining equitable relief on the ground of laches, due to the fact that Lutz was aware of Gundersen's commercial building construction plans a year before construction started yet did not file his complaint seeking permanent injunction until construction was completed. The trial court rejected his argument.

Courts may provide relief in whole or in part upon a finding of laches. In order to bar a claim on the basis of laches, a court must find more than mere delay in the assertion of the claim. The delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial of relief.

Here, the CC&R's do not require an enforcing landowner to seek injunctive relief prior to a violation of the CC&R's. Section 18 of the CC&R's authorizes a landowner to seek injunctive relief "in the event of a breach of any of the covenants and restrictions contained herein." It is not clear from the record the point at which a violation of the CC&R's was patently obvious to the Plaintiff Lutz, and, in any event, Plaintiff, to avoid laches, is not required to file a lawsuit as the very first course of action. Gundersen knew or should have known of the restrictive covenant because it appears in the deed, and nothing prevented him from filing a declaratory judgment action seeking a determination of its enforceability. Under such circumstances Gundersen acted at his own peril without first obtaining a resolution of the covenant. We conclude that Plaintiff Lutz is not precluded by laches from seeking injunctive relief.

Balance of Hardships

Gundersen also contends that the granting of injunctive relief results in damage and hardship to him out of all proportion to any benefits to be gained by the homeowners. It is true that in cases of this nature courts are motivated by such matters as comparative value and consider relative hardship by weighing the interest of both sides. But no court will allow an intentional violator of CC&R's to rely upon the contention of relative hardship. It would indeed be inequitable to permit a party who is fully cognizant of building restrictions and the opposition of at least some homeowners to changes in those restrictions to expend large sums of money on the gamble that the restrictions would not be enforced against him and then claim that enforcement of the restrictions works a hardship on him.

That Gundersen is an intentional wrongdoer for all expenditures that took place after he was informed of the deed restriction is clear from the following testimony:

Q: Were you aware that a warehouse was equally prohibited under the CC&R's?

A: I heard that they were.

Q: Knowing you couldn't build a warehouse there, why did you do it?

A: Because I had so much money in it that I couldn't do otherwise, I had to finish it. I had a terrific financial investment in that property and practically everything that I owned was in it. You are going to try to salvage and do something with that, are you not?

Q: So you were trying to make the most of a bad situation then?

A: That's right.

Were we to adopt Gundersen's argument, CC&R's would become difficult to enforce. Any owner of real property governed by CC&R's could claim that he had commenced construction in ignorance of the restriction or under a different interpretation of the restriction. The adjoining property owners would not have had an opportunity to object, but the violator could require a decision on relative hardships. This would erode the uniformity to which all owners of property covered by the CC&R's, including the violating owner, agreed.

Delay by homeowners will, in many instances, prevent injunctive relief to enforce deed restrictions. Our opinion should not be understood as suggesting that the homeowners of a subdivision could force removal of structures that have been uncontested and present for a lengthy period of time. Here, while it is correct that the suit came after construction was complete, it was not an unreasonable delay, in light of the wilful violation of covenants by the defendant.

Therefore, we find no abuse of discretion in the trial court's judgment.

Piedmont Valley Homes Association v. Walter

Columbia Supreme Court (2002)

The rear property line of Dr. Alexander Walter's property in Piedmont Valley abuts a parkland parcel owned by the City of Piedmont Valley. Because no homes can be built on the parkland parcel, Walter has an unobstructed ocean view from the back of his property. Property within Piedmont Valley is subject to Contracts, Covenants and Restrictions ("CC&R's"), and the Piedmont Valley Homes Association ("PVHA") has the authority to enforce these CC&R's. The CC&R's, which require prior written approval from PVHA's design review committee (the "committee") for all construction or alteration, dictate that the required minimum rear yard "setback distance between a structure and the parklands parcel is five feet."

When Walter originally bought his property, there was a wrought iron fence along the rear of his lot which he believed marked the line between his property and the parkland parcel. In 1983, Walter submitted plans, received approval, and completed construction of a deck, a breakfast nook, and other additions to the back of the house, spending about $176,000 on the project. The plans identified Walter's property line consistent with the location of that fence. However, in 1999 a neighboring homeowner complained that Walter was encroaching on city parkland, and a subsequent investigation and survey revealed that the fence had not properly marked Walter's property line. Thus the plans for the project, submitted by Walter's architect and approved by the committee, were erroneous. In fact, the breakfast nook and deck extended several feet onto the City's parkland.

PVHA sought declaratory relief and a permanent injunction against Walter. Walter argued that the parkland setback should not be enforced due to relative hardship.

Balancing the hardships

A court has discretion to balance the hardships and deny a mandatory injunction to

remove a building or structure that has encroached or otherwise violates an enforceable restriction, even in the absence of an affirmative defense such as laches. In exercising its discretion and in weighing the relative hardships to determine whether to grant or deny a mandatory injunction, a court should start with the premise that an owner who violates a restriction is a wrongdoer and that the interests of the plaintiffs have been impaired. Thus, doubtful cases should be resolved in favor of the plaintiff. In order to deny the injunction under a balance of hardships, a court must find certain factors to be present: 1) the Defendant must be innocent — the encroachment must not be the result of Defendant's willful act. In this same connection the court should also weigh Plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2) The Defendant's acts must not cause irreparable harm to the Plaintiff. If the Plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to the defendant. 3) The hardship to the Defendant by the granting of the injunction must be greatly disproportionate to the hardship caused to the Plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant.

1. Innocent Violation

Equitable discretion should not be used to protect an intentional wrongdoer. The case law both in Columbia and in other jurisdictions supports the conclusion that where a party has actual or constructive notice prior to actually violating a restriction that his structure will violate a restriction, and then completes construction of the structure, the party may not claim the benefit of relative hardships. Although the amount of hardship and the date it is incurred may be relevant if a court reaches the third step of determining the relative levels of hardships, those factors are not relevant to a determination of the intent of the violator.

The trial court concluded that Dr. Walter constructively knew of the restriction by virtue of being a landowner, was responsible for determining the boundary line for his property, and thus was precluded from arguing balance of hardships. The trial court stated:

> Dr. Walter's only excuse is mistake of fact. What is to stop all other property owners whose rear property line abuts City property from extending their homes past the boundary limits with an "I don't know" excuse? It was Dr. Walter's responsibility to confirm the property lines whether through his own efforts or that of his agents. Walter's remedy, if any, is against his architect or contractor.

We disagree, and find that the genuine mistake of fact is sufficient to enable Dr. Walter to argue balance of hardships. Landowners who live in a restricted subdivision receive constructive notice of the CC&R's when they purchase, rendering Dr. Walter aware of the restriction. Nevertheless Dr. Walter was not an intentional violator. Dr. Walter might well be held responsible were this a matter of contractual "mistake." But he is on different footing from the usual "wrongdoer" who is aware that the construction at least arguably violates the CC&R's but constructs anyway, in the hope that no one will notice or do anything about it or that an argument that the CC&R's do not apply or have been waived will succeed. The undisputed evidence demonstrates that Dr. Walter, his architect, and his contractor all honestly believed his construction complied with the CC&R's and was not an encroachment.

2. Irreparable Injury

The trial court found that regardless of whether Dr. Walter's encroachment was wilful, PVHA suffered irreparable injury. At trial, PVHA's counsel stated "We don't like being here but we're here because we have a duty to enforce the CC&R's against everybody. If we can't enforce them against everybody equally, we can't enforce them against anybody. And if we can't enforce our CC&R's, we are irreparably harmed." The trial court agreed, stating:

> This Court finds that PVHA would suffer great and irreparable injury if this Court did not enforce the CC&R's. Property owners purchase property here, in part, because of these very restrictions. To allow Dr. Walter a variance of his structures to the limit line of his property would violate all notions of light, air and space. This would be a harmful precedent,

> causing the harm which the PVHA seeks to prevent: a flood of setback variance requests or violations justified by other previously granted variances. There would be no end to the variances sought and the whole purpose of the minimum setback requirement would be undermined.

We disagree. Despite the balance of hardship, injunctions will issue on behalf of a homeowner whose property is irreparably damaged due to a violation of the CC&R's. Irreparable damage occurs when a CC&R violation interferes with uses, views, or other quiet enjoyment of the property, or undermines property values, in a manner that cannot easily be ascertained and remedied. In those situations, despite the hardship suffered by the encroacher, an injunction is appropriate. On this record, however, there is nothing to support the PVHA's assertions that the parkland setback restrictions are inviolate or that it will be irreparably harmed if Walter's property is allowed to remain within the setback area. It has made allowances for other properties already built within the setback area, and has identified no principled distinction between the variances repeatedly granted and Walter's effective request for one here. Dr. Walter's encroachment does not impair a view, present a lot owner with an unsightly obstruction inconsistent with the neighborhood, or possibly affect the property values of the subdivision in any way. The city has allowed it without objection for 16 years. There is no irreparable injury.

3. Relative Hardship

When balancing hardships, it is important to note that the analysis is not merely a mechanical toting up of the dollar amount of the violator's losses compared to the dollar harms of the landowner(s) seeking to enforce the restriction. Such an "efficiency-style" balance would too often preclude an injunction, as construction and removal costs often are substantially greater than the diminished property value to an individual landowner affected by the violation of a restriction. A balance of hardships analysis appropriately may consider impairment of property values and other harms to the entire subdivision.

At trial, testimony revealed that it would cost $104,570 to remove the encroachments to within five feet of the property line. Combined with the amount spent on the project, the out-of-pocket loss to Dr. Walter would be roughly $280,000. Although he enjoyed the benefit of the 16 years, the removal likely will significantly reduce the value of his property. The disproportionate hardship borne by Dr. Walter is of considerable magnitude, because, as noted above, in this unusual case there is no apparent harm to the subdivision or the City of Piedmont Valley that owns the parkland. Finally the fact that the suit was brought years after the violation, rather than contemporaneous with the construction, is also a factor leaning strongly in the direction of giving relief to the homeowner.

Reversed.

Answer 1 to Performance Test A

Brief in Support of Plaintiffs' Motion Seeking Mandatory Injunctive Relief of the Form of Removal of the Defendant's Cell Tower From Pinnacle's Lot Seven

The Vasquezes took possession of Lot Two of Pinnacle Canyon Estates subdivision in 2001 with actual and constructive notice of the Pinnacle CC&R and are thus entitled to enforce the contractual obligations contained in the CC&R.

1. Defendant's Cellular Tower is a Prohibited Structure According to Ordinary and Plain Meaning and Provision 4 of the Pinnacle Canyon Estates CC&R.

a) Clear and Unambiguous Language in the Pinnacle CC&R Requires the Court to Construe Terms of the CC&R Using Their Ordinary and Plain Meaning.

The Columbia Supreme Court ("CSC") has held that the interpretation of CC&R's is a question of law to be determined by the court. Because CC&R's are express contracts (K's), the covenanting parties' intent is to be determined by the specific language used in the CC&R. Rules of K construction require the ordinary and plain meaning be used where circumstances do not show that a different meaning is applicable.

According to the Provisions of the Declaration of Covenants, Conditions and Restrictions ("CC&R") for Pinnacle Canyon Estates, Provision 4 clearly and unambiguously states that each lot in the Pinnacle Canyon Estates is a residential lot and that no structures, except for single-family dwellings not exceeding one story in height and one private garage not exceeding one story in height, shall be erected or permitted to remain on any of the lots. See Exhibit A, Provision 4. Such language has been held to be clear and unambiguous by the CSC. See Horton v. Mitchell.

Thus, the issue of whether SpeakEasy's cellular tower was prohibited by the Pinnacle CC&R will turn on whether or not the cellular tower is a "structure." See Horton.

b) Defendant's Tower is a Prohibited "Structure" According to the Pinnacle CC&R and the Ordinary and Plain Meaning of the Term.

The Pinnacle CC&R does not contemplate only buildings as structures, as can be seen by the CC&R's provisions for fences, solid walls, and hedges (see Provision 7). In addition, Provision 15 provides that "no structures of any kind shall be erected, permitted or maintained on the easements for utilities . . . ." Had the CC&R meant to include only buildings within its meaning of structures, it would not have qualified that provision with the language "no structures of any kind," nor would the CC&R have specifically mentioned or provided for fences, solid walls, hedges, private garages, dwelling houses, servant and guest quarters, etc. The CSC has held that similar language indicated that the word "structure" used in a CC&R contemplated for more than just "buildings." See Horton.

As the Court in Horton noted, once it becomes clear that the word "structure" is not used with a specific, different meaning in mind, the ordinary and plain meaning of the word should be applied as per the usual rules of K construction. See Horton. The Horton Court took judicial notice that the word "structure" is defined as "something constructed" by the American Legacy Dictionary of the English Language (3d ed. 2002). Thus, SpeakEasy's cellular tower is a "structure"--that is, something constructed--within the ordinary dictionary meaning of the term. Thus, applying Provision 4 of the Pinnacle CC&R, SpeakEasy's cellular tower is a structure that does not come within the definition of an allowed single-family, one-story dwelling, single-story garage not to exceed three car capacity, or a "guest or servant quarter" maintained for "sole use of actual non-paying guests or servants of the occupants of the main residential building. "See Exhibit A, Provision 4.

c) Intention of Parties to the CC&R in Planning Pinnacle as a "Choice Residential District" Is Paramount and thus Further Supports Its Prohibition Within the Pinnacle Subdivision.

The CSC has also held that the intention of the parties to an instrument is paramount in construing restrictive covenants. See Horton. Here, the "Choice Residential District" clause in the Pinnacle Canyon Estates CC&R provides that Pinnacle was "carefully planned as a Choice Residential District exclusively." See Exhibit A. Similarly, the Horton Court held that language in a CC&R providing that the "subdivision [was] carefully planned as a Choice Residential District exclusively" gave homeowners living in that subdivision the right to prevent the construction [and] maintenance of structures that might "compromise aesthetics and general character of the neighborhood" as an exclusive "Choice Residential District."

In conclusion, because of the clear and unambiguous language contained in the Pinnacle CC&R, the clear intent of the parties to the Pinnacle CC&R, and the plain and ordinary meaning of the word "structure" (which encompasses the defendants' cell tower), the Pinnacle CC&R clearly prohibited the construction and maintenance of the cell tower on Lot Seven.

2. The Vasquezes Have Not Waived or Abandoned Their Right to Prohibit Construction or Maintenance of the SpeakEasy Cell Tower.

The Columbia Supreme Court (CSC) defined both the doctrines of waiver by acquiescence and abandonment in Blaire v. Evans (1999). The Blaire court defined waiver by acquiescence as a defense to restrictions included in a restrictive covenant that arises when those restrictions plaintiffs seek to enforce have either: 1) not been universally enforced, or 2) when there have been frequent violations of the restrictions. See Blaire. The CSC uses three factors in determining whether waiver by acquiescence will permit a violator of a restrictive covenant to claim a defense. These three factors include: 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is a sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses. Id.

a) Under the Blaire Three Factor Test, Plaintiffs Have Not Waived Their Right to Prohibit Construction of the SpeakEasy Cell Tower.

1) Only the Nonconforming Use of SpeakEasy's Cell Tower is Immediately Close Enough in Location to be Injurious to the Vasquezes.

The CSC has held that the relative location of the landowners who seek to enjoin the nonconforming use is important because when the previously allowed nonconforming use was far away from the plaintiff's land, that nonconforming use would be noninjurious to the plaintiff and thus the plaintiff would have no reason to sue--making the absence of a suit to enjoin such nonconforming but noninjurious uses insufficient to constitute acquiescence. See Blaire.

Here, the Vasquezes' property is located on Lot Two, which shares a boundary line with Lot Seven, owned by the church and on which the SpeakEasy Tower has been constructed. In the past, there were ten instances of nonconforming use amount the 42 lots constituting Pinnacle Canyon Estates. See Stipulated Facts Paragraph 12 (a) - (j). While the location of many of the nonconforming uses have not been stipulated, it is undisputed that the church owns Lots Seven, Eight, and Nine, of which Lot Seven is directly adjacent to the Vasquezes' property. Assuming that Lot Eight and Nine, which also belong to the Church, are directly adjacent to Lot Seven, this would put them in some proximity to the Vasquezes' land. The Church's nonconforming uses constitute the existence of a 40-foot bell tower on top of the Church, a steeple on the Church which extends nearly as high as the SpeakEasy tower, a flagpole at the Church, and a large sign for the Church at the front entrance. It is true that the Vasquezes have not objected to any of these other nonconforming uses of the Church's property. However, Lot Seven is the only lot that is directly adjacent to the Vasquezes' property, and thus the construction of the SpeakEasy cell tower is the most immediately and directly adjacent violation of Vasquezes' use of the land. Because it is directly adjacent to the Vasquezes' property, it is thus the most offensive to their use and enjoyment of their property because it most directly blocks the Vasquezes' view and right to light, air, and

scenery.

2) Prior Nonconforming Uses in the Pinnacle Estates Have Rarely, If Ever, Been Similar to Defendants' Nonconforming Cellular Tower.

The CSC has also held that the previous nonconforming uses which were not objected to must have been similar to the current nonconforming use being objected to in order for there to be waiver by acquiescence. See Blaire. This is because acquiescence by plaintiffs to dissimilar restrictions, which may constitute an abandonment of a right to object to the particular usage, would not induce a reasonable person to assume that the right to object to a completely dissimilar restriction was also abandoned. See Blaire.

The prior nonconforming uses within the Pinnacle Estates which the Vasquezes failed to object to are in many ways dissimilar to SpeakEasy's construction and maintenance of the cellular tower. The two story barn converted into living quarters and the two story house addition are different in nature from a cell tower since the two nonconforming uses are still residential in nature, and only exceed the maximum height of one story by a mere story. The flagpole mentioned in Paragraph 12(e) of the Stipulated Facts, as well as the flagpole located on Church grounds, is a staple of many American residential neighborhoods, even if they may be literal violations of Pinnacle's CC&R. Flagpoles exist for the purpose of displaying flags and patriotism, and are not commercial in nature like a cell tower. Nor do flagpoles tend to look anything like cellular towers or tend to be as high as them. In addition, the wooden telephone poles and electrical lines located on the road from the Vasquezes' property to the Church are dissimilar in nature to the SpeakEasy cell tower because electricity and land line telephone poles were already in existence when the Vasquezes moved to the neighborhood and are essential utilities. While cellular phones have become, in many ways, essential in modern life, they do not occupy the same sphere of necessity as electricity or telephone lines do. It may also have been possible for SpeakEasy to have built several relay stations instead of constructing one large tower directly abutting the Vasquezes' property. The satellite dish located on top of the peak of a house is also

dissimilar to the cell tower because it is at the peak of a one story house, thus being much closer to the ground than the cell tower and smaller in size as well.

The two most arguably "similar" nonconforming uses are the 40-foot bell tower and the Church steeple and cross, both of which are similar in height to the SpeakEasy cellular tower. However, while the cellular tower is a commercial use, the Church steeple tower and bell tower are within the character of a residential neighborhood. Schools, churches and hospitals tend to be located in residential neighborhoods and do not destroy the character of such neighborhoods because education, medicine and religion are regarded as essentials to a community. A cellular phone tower, while similar in height to the Church's steeple, cross and bell, is not a neighborhood essential that serves an educational, religious, or medical purpose.

As such, the Vasquezes' non-objections to dissimilar prior nonconforming uses would not induce a reasonable person to believe that they had abandoned their right to object to the SpeakEasy cell tower.

3) While Ten Nonconforming Uses May Constitute a Marked Lack of Enforcement, Dissimilarity of the Nonconforming Uses to the Cell Tower Should Prevent Finding of Waiver.

In the Pinnacle subdivision, there have been at least ten documented nonconforming prior uses that directly conflict with the CC&R provisions. The CSC in Blaire held that a trial record indicating somewhere between 15 and 26 prior nonconforming uses was sufficient to constitute a "marked lack of enforcement" of the restrictive covenant in question. Thus, the Blaire Court held that there had effectively been a waiver of the restrictions in the CC&R. Here, the ten nonconforming uses may constitute a "marked lack of enforcement" similar to that in Blaire. However, the Blaire Court stressed that the nonconforming use the Blaire [Court] sought to enjoin was an exactly identical violation that they had previously failed to object to. Here, the Vasquezes have never had the opportunity to object to the construction or maintenance of an unsightly cellular

tower, and thus, even if the ten prior nonconforming uses constitute a marked lack of enforcement, this alone should not be sufficient to find a waiver.

b) The Non-Waiver Provision in the Pinnacle CC&R Should Control Regardless of the Outcome of a Blaire Analysis.

Even if the three factor Blaire test were found in favor of defendants, the non-waiver provision included in the Pinnacle CC&R should control, thus allowing the Vasquezes to challenge the SpeakEasy tower even if they are found to have waived their right to object to similar, close, and frequent nonconforming uses.

In Blaire, the CSC held that as long as a waiver clause in a CC&R is unambiguous and not adverse to public policy, it can and should be enforced. See Blaire.

The Anti-Waiver Provision of the Pinnacle CC&R reads: “Failure to enforce any of the restrictions, rights, reservations, limitations and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof.” Similar language in an anti-waiver provision was held by the Blaire Court to have been completely unambiguous. The Court found that were the non-waiver provision held to be unenforceable, homeowners in the subdivision may be unable to enforce their rights if homeowners on the opposite side of the subdivision fail to act.

c) There Was No Abandonment of the CC&R as a Whole to Justify Nonenforcement of the Non-Waiver Provision of the Pinnacle CC&R.

The Blaire Court also held that a non-waiver provision would be ineffective if there were a complete abandonment of the entire set of CC&R. The test is whether the CC&R has been so thoroughly disregarded as to have resulted in such a change to the area that the effectiveness of the CC&R was completely destroyed, defeating the purpose for which they are imposed. See Blaire. Here, there has been no evidence presented in

the Stipulated Facts that Pinnacle is no longer a "Choice Residential District." Based on a similar absence of evidence, the Blaire Court held that abandonment of the CC&R had not occurred, and that the plaintiffs were entitled to enforce the non-waiver provision. Similar[ly], here the Vasquezes should be allowed to rely on the non-waiver provision.

d) The Fundamental Character of the Neighborhood Has Not Been Altered So as to Defeat Purpose of Original CC&R.

In Lutz, the Columbia Court of Appeals (CCA) held that where the fundamental character of a neighborhood has been so changed as to defeat or frustrate the purpose of the original CC&R, the original CC&R should be disregarded. Again, as shown above, there are no facts in the Stipulated Facts tending to prove that the Pinnacle Estates have been so changed in their fundamental nature that it is no longer a strictly Choice Residential District. The only evidence of nonconforming uses are based on amateur activities, residential activities, or church activities. No strictly commercial activity has taken place in the neighborhood aside from the SpeakEasy cell tower, and thus the original purpose of the Pinnacle CC&R has not been frustrated.

Because the Vasquezes have not waived their right to object to the defendants' construction by acquiescence according to the 3-factor Blaire test, nor is the non-waiver provision in the Pinnacle CC&R unenforceable either due to abandonment of the CC&R or a fundamental change in the character of the neighborhood, the Vasquezes have not waived or abandoned their right to seek injunctive relief against SpeakEasy or the Church.

3. The Vasquezes Are Not Barred from Relief Due to the Doctrine of Laches.

The CCA has held that in order to prevent plaintiffs from enforcing a mandatory injunction under the doctrine of laches, plaintiffs must have delayed bringing the action to the point where there is a substantial prejudice to the other party sufficient to deny

relief in equity. See Lutz. The Lutz court held that "mere delay of the assertion of the claim" was insufficient to constitute a laches defense. The Lutz court held that an enforcing landowner is not required to seek injunctive relief prior to a violation of the CC&R. In fact, the Lutz court held that a plaintiff need not pursue a legal claim as its first course of action once the plaintiff has learned of the potential violation of the CC&R. Here, the Vasquezes, upon learning of the potential violation by defendants, first objected to the nonconforming use at the community meeting held by the Church. They then again objected to the construction in a formal letter sent to defendants. Thus, the Vasquezes, once they were informed of the "patently obvious" intention of defendants to breach the CC&R, took appropriate measures to object. They then filed suit for injunctive relief once the CC&R was violated--that is, once construction of the cell tower was complete. Because the defendants were on notice that residents objected to the plan (as evidenced by the several residents objecting at the church meeting, and by the letter sent by the Vasquezes), they were not prejudiced. In fact, defendants could have filed a declaratory judgment action in order to seek determination of whether Pinnacle's CC&R would be enforced, much like the court in Lutz held that the defendants in Lutz should have done.

Had the Vasquezes waited a much longer period of time to enjoin the activity, such as the City of Piedmont did in Piedmont Valley v. Walter, by waiting sixteen (16) years before trying to enjoin Dr. Walter's activities, it would be much more appropriate for the court to find that the Vasquezes are barred by the doctrine of laches from injunctive relief. Here, the construction of the SpeakEasy tower was completed in February 2010, while the Stipulated Facts were filed in June of 2010. Thus, the Vasquezes brought action within less than half a year. A mere delay of several months after the completion of construction to the filing of a lawsuit for injunctive relief is insufficient to find that plaintiffs waited an inordinate amount of time to sue in order to cause prejudice to defendants.

Thus, the Vasquezes' action should not be barred by the doctrine of laches.

4. As Wrongdoers, SpeakEasy and the Church Are Not Entitled to a Balancing of Hardships, and Thus Balancing Does Not Preclude the Vasquezes' Relief.

a) A Pure Economic Balancing Test May Favor the Defendants, But It Is Not Dispositive According to Columbia Case Law.

Were a balancing test adopted, the balance of hardships would indeed tip in favor of the defendants SpeakEasy and the Church. SpeakEasy has already spent more than $250,000 in constructing the cell tower, and tearing it down would cost an additional $50,000. Thus, the loss SpeakEasy would suffer would be more than $300,000. The Church has also spent more than $4 million improving its properties, and should it be forced to terminate its agreement with SpeakEasy, it would suffer losses in the form of damages it would need to pay to SpeakEasy for breach of contract. When compared to the 0-5% loss of property value the Vasquezes would face due to the construction of the tower on a property that ranges in value from $114,000 to $360,000, or a total of $0 to $13,000, the pure economic balance of hardships tips in defendants' favor.

b) Because Defendants Are Wrongdoers with Unclean Hands, the Vasquezes Are Entitled to Relief Even if the Balance of Hardships Would Normally Tip in Defendants' Favor.

However, the CSC has held that a court has discretion to balance the hardships and either deny or grant a mandatory injunction. See Piedmont Valley Home Association v. Walter; Lutz. Where the defendant is a wrongdoer, Columbia courts have held that intentional violators of CC&Rs should not be allowed to rely on a balancing of hardships, since it would be inequitable to allow a party who is fully aware of building restrictions in a CC&R and the opposition of at least some homeowners to take a gamble that the restrictions either would not be enforced against him or that a court would balance hardships in the wrongdoer's favor. Ultimately, Columbia courts will refuse to balance the hardships where the defendant has "unclean hands."

In Lutz, the court held that it would be inequitable where a party, who is both fully aware of restrictions placed on its construction in a CC&R and also aware of the opposition of at least some homeowners, to go ahead and spend large amounts of money in the hopes that the restrictions will not be enforced. Here, not only did the Vasquezes object to SpeakEasy's tower, but other residents also objected to the tower in the community meeting held by the Church. See Stipulated Facts. In Lutz, Defendant Gundersen said in his testimony that because he had invested so much money into his project, he could not abandon it and felt compelled to finish it. See Gundersen's Testimony in Lutz. Here, defendant Church told the objecting residents at its community meeting that because SpeakEasy had already expanded more than $100K in planning the tower it had to go through with it, and that the Church had no choice but to go through with it as well because it would be forced to cough up the $100K+ in damages to SpeakEasy. Such an argument was not enough to trigger a balancing of the hardships in Lutz, and neither is it a sufficient trigger in balancing the hardships in the instant case. While many of the homeowners stopped objecting after the Church meeting, the Vasquezes did not give up and sent a letter to defendants, again making their objection to the tower known.

In fact, defendants SpeakEasay's and Church's conduct is more similar to that which the CSC found was a "usual wrongdoer"--that is, one who is aware that construction at least arguably violates the CC&R's prohibitions but constructs anyway, in the hope that either: a) no one will notice, b) no one will object, c) an argument that the CC&R does not apply will succeed, or finally 4) that an argument that the CC&R has been waived will succeed. Here, SpeakEasy and Church no doubt counted on all of the above when they started the construction. As such, instead of being an "innocent violator," as the Piedmont Valley Court defined, the defendants here are "usual wrongdoers" as both the Piedmont Court and the Lutz court have defined.

<u>c) The Vasquezes Will Suffer Irreparable Injury if the Injunction Is Not Granted, and Thus Should be Afforded Relief Regardless of Balancing.</u>

In Piedmont Valley, the CSC stated that an injunction is appropriate, even if the balance of hardships tips in defendants' favor, if the CC&R violation will interfere with the plaintiffs' uses, views, or other quiet enjoyment of their property in a manner that cannot be easily ascertained and remedied. While economically the experts agree that plaintiffs' property value will only fall from 0 to 5%, the injury plaintiffs will suffer when their right to have the view from their home unobstructed by an ugly cell tower is hard to measure in economic terms. The sentimental value of the Vasquezes' real property will certainly be diminished to a great extent, and because that extent cannot be easily ascertained or remedied with money damages, the Vasquezes should be afforded mandatory injunctive relief regardless of how the court may balance the hardships.

d) Public Policy Favors a Disallowance of a Balancing of Hardships in Defendants' Favor.

The Court in Lutz noted that, were arguments such as Gundersen's adopted (see above), CC&R's would become difficult to enforce. The court reasoned that any owner of real property could feign ignorance of restrictions under a CC&R, start construction, and then rely on a favorable balancing of hardships by the trial court. The court reasoned that this would erode the uniformity with which owners of property are covered by CC&R's, thereby making them useless (or at least, less useful). See Lutz.

In addition, the Piedmont Valley Court stated that a pure "efficiency-style" balancing of hardships, which would mechanically tally up the total dollar amount of the violator's loss as compared to the dollar amount of the harm the landowners seek to enjoin, would too often preclude granting of an injunction because defendants' costs of construction and removal will almost always be greater than the property value damage suffered by plaintiffs seeking to enjoin the construction. Thus, the Piedmont Court concluded that a balancing of hardships should not merely include monetary damages, but that it should also consider impairment of property values as well as other harms to the entire subdivision. Here, there is evidence that many residents of the subdivision objected to the construction of the SpeakEasy cell tower on Church's land prior to the meeting, and

thus a finding that other, nonmonetary harms to the entire subdivision may result in refusing to grant the Vasquezes injunctive relief could easily be supported.

In conclusion, because defendants SpeakEasy and the Church had unclean hands as wrongdoers (with sufficient notice of the CC&R's prohibition against the construction of the cell tower), in addition to the irreparable nonmonetary damage the Vasquezes would suffer and public policy favoring the plaintiffs, the court should grant injunctive relief to the Vasquezes regardless of the results of a pure "efficiency-style" balancing.

Answer 2 to Performance Test A

Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

To: Anatoly Krotov, Senior Partner
From: Applicant
Date: July 27, 2010
Re: **Vasquez v. SpeakEasy, Inc. and Northern Center of Worship**

MEMORANDUM

Parties have submitted to the court for determination the following issues: (1) Do the CC&R's prohibit the construction of the disputed tower? (2) Has the CC&R's prohibition of the disputed tower, if found to exist, been waived or abandoned? (3) Are the Plaintiffs barred from obtaining the injunctive relief sought due to laches? (4) Does the balance of hardships dictate that Plaintiffs' sought remedy of removal of the tower be denied?

The CC&Rs Prohibit Construction of the Disputed Tower Because the Tower is a Structure Within the Meaning of CC&R General Provision 4 Under the Rules of Contract Interpretation.

Columbia law permits restrictive covenants "to the extent they are unambiguous and enforcement is not adverse to public policy." Mitchell. In interpreting these covenants, courts will strictly construe them and resolve any ambiguities or doubts in favor of the "the free use and enjoyment of the property and against restrictions." Mitchell. The meaning of a specific word will be interpreted by reference to other parts of the contract and by reliance on the plain meaning of the word.

In Mitchell, the parties argued about the meaning of the word "structure" in a CC&R with provisions substantially the same as those found in our case. The court interpreted the meaning of the word in the context of the following covenant: "No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed two stories in height, or one tri-level single-family dwelling and a private garage not to exceed one story in height for not more than three cars." In interpreting this provision, the court noted that other provisions in the restrictive covenant at times distinguished buildings from structures where a narrower interpretation was appropriate. The court inferred that the drafters therefore intended for the word "structure" to encompass more than simply a building. Furthermore, the court turned to the American Legacy Dictionary of the English Language to define structure as "something constructed." The meaning in both cases is clear: the intent of the parties was to define "structure" broadly.

In our case, the same is true. Our covenant provides, in general provision 4, that "[n]o structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed one story in height and a private garage not to exceed one story in height for not more than three cars, and a guest or servant quarters for the sole use of actual non-paying guests, or actual servants of the occupants of the main residential building." The relevant part of this language is substantially similar to that found in Mitchell, which there indicated an intent to define "structure" broadly.

Furthermore, the CC&R draws a distinction between "structure" and "building" where appropriate. In provision 2, the CC&R states that "[a]ll structure on the lots shall be of new construction and no building shall be moved from another location onto any lot. At no time shall house trailers be allowed on the lots." This provision makes clear that a "structure" is not simply a "building" or a "house trailer." Indeed it is something more broad, likely in keeping with the dictionary definition of "something constructed."

Under this interpretation, a 50-foot bell tower counts as a "structure" under the CC&R. Although it is not a building, the meaning of "structure" is broader than that. It is a tower, which was something constructed on the property, and given the drafter's broad intent when purposefully using the word "structure," even a strict construction would put the tower within the purview of the CC&R. Accordingly, the CC&R applies to the building of the bell tower, and Columbia law will honor its enforcement.

The Vasquezes May Enforce the Covenant Because It Has Not Been Waived Due to the Construction of Other Violative Structures, And the Deed of Restrictions Has Not Been Wholly Abandoned.

Notwithstanding the initial applicability of the CC&R, the Vasquezes may be unable to enforce the CC&R if the court determines that enforcement has been waived or that the deed or restrictions has been abandoned.

The Vasquezes Have Not Waived Their Rights To Enforce the Covenant By Acquiescence to Other Structures Because These Structures Are Sufficiently Far, Dissimilar, or Infrequent So As Not to Apply to the Instant Case.

A homeowner in a covenanting development may not enforce a restrictive covenant if he or she has waived his or her rights by acquiescence. "The defense of waiver by acquiescence is raised when the restrictions sought to be enforced are not universally enforced or when there are frequent violations of the restrictions." Blaire. The court considers three factors when determining whether there has been a waiver: "1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses." Blaire.

The Northern Center of Worship (NCW) and the Vasquezes agree as to the following prior violations:

(a) a two-story barn converted into living quarters;

(b) a two-story house addition;

(c) two amateur radio towers;

(d) a satellite dish on the peak of a house;

(e) a flagpole;

(f) a previously existing 40-foot bell tower at the Church;

(g) a steeple at the church with a cross on the top, which extends nearly as high as the disputed tower;

(h) a flagpole at the Church;

(I) a large sign for the Church at the front entrance; and

(j) several large, wooden telephone poles and electric lines located throughout the subdivision and between Plaintiff's home and the Church (para 12).

Several of the violations took place sufficiently far from the Vasquezes' home that it would be inappropriate to interpret lack of enforcement to be a waiver. The "failure to sue for prior breaches by others where the breaches were noninjurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and damaging violation. This situation may arise where the prior violations have been in a distant part of the subdivision while the present violation is immediately adjacent to the complainant's land." Blaire. The joint stipulation of facts fails to include any information regarding the location of these prior violations. However, some of the items, such as the conversion of a two-story barn into living quarters (12(a)) and the two amateur radio towers (12(c)) may be sufficiently far so as not to have been injurious to the Vasquezes. Those violations that occurred near to the Vasquezes, principally those involving the Church, are not waive[d] for other grounds. However, on its face, the joint stipulation of facts does not succeed in demonstrating waiver without a showing that those violations took place near enough to the Vasquezes so as to constitute an injury. The mere fact that other homeowners did not previously enforce the CC&Rs when violations affected them, as agreed to in paragraph 21, does not affect the Vasquezes' rights to bring suit when a violation specifically affects them.

Furthermore, the violations do not constitute a waiver because they were sufficiently dissimilar from the construction of the bell tower. In several instances, these violations were actually beneficial to the Vasquezes. This would not include the construction of the wall to the rear of the Vasquezes' property (para 20) which would also violate general provision 7, and the improvement of lot Nine by the Church, which, though occurring before the Vasquezes purchased their home, would have affected the Vasquezes' predecessor in interest (para 18). Many of the items listed in paragraph 12 are in no way similar to the current case: the barn into living quarters (a), the two-story house addition (b), the satellite dish on the peak of a house (d), the flagpoles (e and h), the large sign for the Church (i), the telephone poles located throughout the subdivision (j). These violations are relatively minor and would not indicate an acquiescence to a large, potentially dangerous violation such as the bell tower.

Other items are more similar. These include the two amateur radio towers (c), the previously existing 40-foot bell tower at the Church (f), and the steeple with the cross at the top of the Church which extends nearly as high as the disputed tower (g). These violations are more similar to the alleged violation, and, with the exception of the two amateur towers, they are located near the Vasquezes. However, at least with regard to the amateur towers, a commercial company's leasing premises for use for commercial radio waves is much more of a burden than 2 radio towers. Moreover, the church steeple would not have emitted the potentially dangerous cell phone waves that may cause grief to the Vasquezes. The biggest burden is the 40-foot tower, which is both similar in height and close by. Even this, though, is dissimilar because the facts do not indicate that this served as a tower for a cellular telephone provider, which may cause adverse health effects that none of the prior violations did.

However, prior violations will still not constitute waiver if they are infrequent. The only violation that defendants have alleged that is both similar in part to the instant violation and close to the Vasquezes is the 40-foot bell tower. The construction of this was a onetime only thing. The facts do not allege whether or not the tower was in existence before the Vasquezes moved in, but if it were, then the Vasquezes' failure to

act upon something that was built during the time of a prior occupier should not be held against them. If they did not acquiesce, and the one sufficient prior violation happened a single time, then the Vasquezes' failure to enforce the covenant against prior restrictions should not be held to be waiver by acquiescence.

Because all of the other violations occurred far enough so as not to constitute an injury to the Vasquezes, were sufficiently dissimilar to the violation at issue, or were infrequent, the Vasquezes' failure to enforce prior violations of the CC&R do not amount to waiver by acquiescence.

In the Event the Court Determines the Vasquezes Have Waived Their Right To Enforce the Covenant By Acquiescence, the Alleged Waiver Fails Because of the Anti-Waiver Provision in the Covenant.

Even if the court finds that the actions of the Vasquezes would be a waiver, the restrictive covenant makes clear that such actions will not be a waiver. Following the general rule that "unambiguous provisions in restrictive covenants generally should be enforced according to their terms," a court will enforce a non-waiver clause "so long as the waiver clause is unambiguous and not adverse to public policy…." Blaire.

In Blaire, the non-waiver provision at issue stated that "The failure for any period of time to compel compliance with any covenant, condition or restrictions shall in no event be deemed as a waiver of the right to do so thereafter, and shall in no way be construed as a permission to deviate from the covenants, conditions and restrictions." The court interpreted that provision so as to be non-ambiguous, also finding that it was reasonable to enforce it because enforcement in that instance was not arbitrary or capricious.

The court should enforce this covenant for the same reasons. In relevant part, the CC&R states: "**Anti-waiver Provision**: Failure to enforce any of the restrictions, rights, reservations, limitations and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach

or violation thereof." Even given a strict construction, this provision would make clear that actions which by themselves might imply a waiver will not do so.

In addition, enforcement is reasonable and not arbitrary or capricious. The Vasquezes have acquiesced to previous violations if they were minor and affected only a few parties. This new violation is large in scale, inviting in a commercial provider to their residential community, and potentially hazardous to health. In addition, not simply the Vasquezes but a group of neighbors voiced their concerns (para 9). This indicates that the complained-of violation was large enough to warrant such a response. Such a response would not be likely if there were not reasonable concerns behind the construction. The showing of reasonable negates the implication that the response is arbitrary or capricious.

Accordingly, notwithstanding any waiver that might have been implied by the Vasquezes' actions, the anti-waiver provision in the CC&R will be enforced, and the Vasquezes may proceed with their suit.

The Deed of Restrictions Has Not Been Abandoned Because the Effectiveness of the Covenants and the Purpose for Which They Were Created Have Not Been Defeated.

Notwithstanding the existence of any waiver provision, opposing counsel may argue that the deed of restrictions has been abandoned. The will argue that there have been so many violations as to indicate an intent to abandon the restriction.

"The test for determining a complete abandonment of deed restrictions … is whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the CC&R's, defeat the purposes for which they were imposed, and consequently amount to an abandonment thereof." Blaire. Evidence tending to show that the development is no longer a Choice Residential District or that the fundamental nature of

the character has been changed will indicate an abandonment. Blaire; Lutz.

The restrictions have not been disregarded. The proposed construction of the tower elicited such a response from the neighbors so as to cause them to approach Church about the covenants. It is true that the Vasquezes were the only family to subsequently write a letter of complaint; however, this may well be due to a belief that there were no recourses or that such recourses would be futile to pursue given the Church's early dismissal of their complaints. Furthermore, the Vasquezes were the most affected by the tower. It does not indicate an intent to abandon.

Moreover, there is no showing that there has been a fundamental change in the nature of the neighborhood. The CC&R still contains the provision understanding the development to be a Choice Residential District. And recent house sales in the neighborhood have been into the $300,000s. This indicates a premium neighborhood, with no intent to abandon the restrictions.

In Lutz, the court held that changes in the surrounding area that included a golf course, a polka dance hall, a shopping center, a bowling alley, and a veterinary hospital would have been "so fundamental or radical as to defeat or frustrate the original purpose of the restrictions." However, that case ultimately concluded that they did not apply in the instant case because the property affected was not part of the development. In our case, we do not need to consider the locations of the violations. The presence of some converted barns and telephone poles is not the same kind of changed circumstances that the facts of Lutz would contemplate. This is a much more minor change, indicating no intent to abandon.

Finally, the clause describing the development as a Choice Residential District contained in the CC&R also includes the "understanding . . . that under no pretext will there be an abandonment of the original plan to preserve Pinnacle Canyon Estates as a Choice Residential District." This should be interpreted according to the provisions on non-waiver clauses described above to negate a claim of abandonment in the unlikely

event that defendants can show that the deed of restrictions was abandoned.

The Doctrine of Laches Does Not Bar Plaintiffs' Claim for Relief Because Their Delay in Filing Suit Was Reasonable and Caused No Undue Prejudice to Defendants.

Under the doctrine of laches, a court may bar all or part of a plaintiff's claim for relief. "In order to bar a claim on the basis of laches, a court must find more than mere delay in the assertion of the claim. The delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify a denial of relief." Lutz.

The contract between NCW and Speakeasy, Inc. (SE) was entered into on July 29, 2009. However, it is unclear when construction began. At any rate, defendants received notice as early as September 27, 2009 that the neighborhood residents were not in favor of the proposed bell tower. NCW dismissed their claims on the grounds that SE had already spent a significant amount in construction. On January 27, 2010, the Vasquezes informed NCW that it was violating the CC&R. Notwithstanding this notice, SE continued the construction and completed it on February 13, 2010.

The Vasquezes' delay here was not unreasonable. Within 2 months of the contract being entered into, defendants received notice of discontent. There is no evidence that plaintiffs even knew of the construction before this time. This should have been enough to encourage NCW and SE to file a declaratory judgment of their rights under the CC&R at that point. Any further construction they completed they did knowing full well of the risk of a response from the neighborhood. The Vasquezes were not required to immediately file suit. Rather, the burden was on NCW and SE to investigate the legality of their actions.

In addition, SE continued to build after receiving more formal notice from the

Vasquezes. This notice came closer to the completion of the construction. SE and NCW may argue that the Vasquezes should have filed suit before this much construction
had been completed. However, a plaintiff is "not required to file a lawsuit as the very first course of action." Lutz. NCW and SE had notice of the CC&R through the covenant, through the neighborhood response, and through the Vasquezes' letter. Any action they took notwithstanding these warnings was their assumption of the risk, and defendants cannot now claim an unreasonable delay or unfair prejudice to the Vasquezes bring suit. Accordingly, the Vasquezes' suit is not barred under the doctrine of laches.

The Court Should Grant the Vasquezes' Injunction Because Defendants' Actions Were Intentional or the Balance of Hardships Favors the Granting of the Injunction.

When determining whether or not to grant an injunction, the court should first determine whether the violative act was committed intentionally. If so, the court should grant the injunction without considering the relative hardships. Lutz; Piedmont Valley. If the act was committed unintentionally, the court should grant the injunction if the balance of hardships favors the plaintiffs.

The Court Should Grant the Injunction Without Considering Hardships Because Defendants Acted Intentionally.

In granting injunctions, courts are often "motivated by such matters as comparative value and consider relative hardship by weighing the interest of both sides." Lutz. However, "no court will allow an intentional violator of CC&R's to rely upon the contention of relative hardship. It would indeed be inequitable to permit a party who is fully cognizant of building restrictions and the opposition of at least some homeowners to changes in those restrictions to expend large sums of money on the gamble that the restrictions would not be enforced against him and then claim that enforcement of the

restrictions works a hardship on him." Lutz. "[W]here a party has actual or constructive notice prior to actually violating a restriction that his structure will violate a restriction, and then completes construction of the structure, the party may not claim the benefit of relative hardships." Piedmont Valley. The amount expended is not relative to the determination of intent. Piedmont Valley.

In the instant case, NCW and SE were on constructive notice as early as July 2009 that their tower would violate the prohibition on structures contained in the CC&R. They were put on actual notice of neighborhood opposition at least as early as September 2009.

Their actions only can be construed as willful. In Piedmont Valley, the defendant's conduct was deemed unintentional when the defendant had knowledge of the CC&R but had a good faith belief that he was complying with the terms of the CC&R. This case is not the same here. NCW and SE knew full well of the unambiguous ban on structures contained in the CC&R. There was no mistake of fact that what they were building was not actually a structure. The defendants acted willingly, with constructive and eventually actual notice. Thus, the court should grant the injunction without balancing the hardships.

Defendants may argue that they knew that they were violating the CC&R but that they did not do so willfully because they believed that the residents would waive enforcement of the CC&R. However, this is exactly the course of conduct that this line of law is designed to prevent. As Lutz makes clear, a defendant cannot take its chances on the fact that no suit will be brought against it and then subsequently gain from the balance of hardships by completing construction if suit is later brought. The fact that SE had spent $106,000 before September did not affect its intent to violate the terms of the CC&R when it began construction.

If the Court Determines that Defendants Acted Unintentionally, It Should Still Grant the Injunction Because the Balance of Hardships Favors Plaintiffs.

In the event that the court determines that defendants acted unintentionally, the court will grant the injunction if the balance of hardships favors plaintiffs. The court will consider the following factors: "1) the Defendant must be innocent – the encroachment must not be the result of Defendant's willful act. In this same connection the court should also weigh Plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2) The Defendant's acts must not cause irreparable harm to the Plaintiff. If the Plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to the defendant. 3) The hardship to the Defendant by the granting of the injunction must be greatly disproportionate to the hardship caused to the Plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant." Piedmont Valley.

Defendants will have a difficult time proving that they were innocent. As the previous analysis demonstrates, defendants' actions were intentional and not a good faith mistake of fact. Therefore, defendants will lose on this prong.

As to the second prong, plaintiffs must allege a concrete irreparable injury, more than just a lessened ability to enforce future violations of the CC&R. See Piedmont Valley. "Irreparable damage occurs when a CC&R violation interferes with uses, views, or other quiet enjoyment of the property, or undermines property values, in a manner that cannot easily be ascertained and remedied." Piedmont Valley. In Piedmont Valley, the court found against plaintiffs when it considered that many other allowances had been made and defendant's encroachment had been allowed without objection for 16 years.

In the instant case, the Vasquezes are not sitting on their rights but are rather bringing suit immediately, informing defendants of the CC&R violations before construction had even been complete. It is unclear what damages the Vasquezes are claiming based on the Joint Stipulation of Facts. However, part of their complaint must be based on a decreased view. In addition, the harm from cellular telephone transmissions to health cannot be easily quantified financially, and so it is hard to

ascertain. Indeed, the experts' projected diminution of value was only between 0% and 5% (para 13). Harm to the Vasquezes' health is difficult to quantify and would be irreparable. It constitutes an interference with the quiet enjoyment of property in a manner that cannot easily be ascertained and remedied. Because this is the case, the injunction should be granted regardless of injury of the defendants.

With regards to the third prong, the balance of hardships favors defendants on an economic level. Although the Supreme Court has cautioned that "the analysis is not merely a mechanical toting up of the dollar amount of the violator's losses compared to the dollar harms of the landowner(s) seeking to enforce the restriction," such evidence is certainly relevant. Piedmont Valley. Total loss to SE from having to tear down the structure would be $304,000 ($254,000 to construct, and $50,000 to tear it down) (para 16). Meanwhile, the decrease in property value would be only 0 to 5%. On a purely economic level, the balance of hardships favors defendants. The court may consider harm to other plots in the subdivision, but as the Vasquezes' lot is the most affected, the harm to the subdivision as a whole probably would not favor the plaintiffs. Plaintiffs may argue that intangible losses, such as loss of view or harm to health, would tip the balance in their favor. This is a close call, but given the certainty of the defendants' hardship and the speculative nature of plaintiffs', the court may well find in favor of defendants on this prong.

Overall, though, the court must grant the Vasquezes' injunction even under the balance of hardships test. In the first case, defendants' conduct was intentional, which automatically leads to an injunction. In the second, plaintiffs will suffer irreparable injury if there is no injunction, which again leads to an injunction without considering hardship to defendants. Although the balance of economic hardships may favor defendants, the court cannot consider these grounds if the first two prongs are not satisfied.

Conclusion

In conclusion, the court should grant the Vasquezes' injunction. The bell tower is a "structure" within the meaning of the CC&R and so may be enforced by any of the

residents. Enforcement of the CC&R has not been waived by acquiescence, and if it has, the non-waiver provision negates any alleged waiver. In addition, the deed of restrictions has not been abandoned, and the Vasquezes' claim is not barred by the doctrine of laches. Finally, the court must issue the injunction because the defendants acted willfully and the plaintiffs will suffer irreparable injury if it is not granted.

JULY 2010

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

IN RE BLACK

FILE

IN RE BLACK

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.

Smith & Wong, LLP

Attorneys at Law
897 Claire Avenue
Bodie, Columbia 99922
(555)602-1959

MEMORANDUM

To: Applicant

From: Donna Granata

Date: July 29, 2010

Re: **In re Black**

We represent Amanda Black, a local attorney, who has retained us for consultation in a fee dispute with one of her clients, Brian Lester.

Black was retained by Lester eight months ago under a contingent fee agreement to resolve a matter involving a parcel of real property located at 42 Valle Vista Drive here in River County just outside Bodie. Under the agreement, Black is entitled to fees if Lester obtains a recovery. Black has retained us to prepare an opinion letter to guide her in seeking fees from him.

Please draft an opinion letter, in accordance with our guidelines, addressed to Black, answering the questions she asked in the interview.

Smith & Wong, LLP
Attorneys at Law
897 Claire Avenue
Bodie, Columbia 99922
(555)602-1959

MEMORANDUM

To: Associates
From: Executive Committee
Date: October 29, 2007
Re: **Opinion Letters**

The firm follows these guidelines in preparing opinion letters to clients:

- State the questions asked by the client.

- Following each question, provide a concise statement giving a short answer to the question of no more than a few sentences.

- Following the short answer, write an explanation of the issues raised by the question, including how the relevant authorities combined with the facts lead to your conclusion.

TRANSCRIPT OF INTERVIEW WITH AMANDA BLACK

July 28, 2010

DONNA GRANATA (DG): Amanda, it's good to meet you in person. As I mentioned on the phone, we're glad to be able to take your case. Do you mind if I tape-record our conversation, to free me from the distraction of taking lots of notes?

AMANDA BLACK (AB): No, Donna, that's perfectly fine with me.

DG: You told me a bit about the case when we talked on the phone. Why don't you fill me in on the details?

AB: Sure. It's a fee dispute with a client. No fireworks, but I know he doesn't want to pay and I need an opinion letter on how to try to get my fees, legally and ethically.

DG: Fine. Go ahead.

AB: My client, a fellow named Brian Lester, owned a piece of property here in River County as a joint tenant with a woman named Joyce Tunnell. The property is located at 42 Valle Vista Drive just outside Bodie. Lester said he thought it was worth between $1 million and $2 million. Lester wanted to sell, but Tunnell didn't. That meant, as a practical matter, Lester's interest was unmarketable. Lester retained me to resolve the matter in some way—one way, of course, was to bring an action against Tunnell to partition the property.

DG: When did Lester retain you?

AB: On December 1, 2009.

DG: Hourly?

AB: No, contingent fee. I brought a copy of the fee agreement with me. I also brought copies of all the other documents I have that relate to it in any way—a lien agreement, a notice of lien, an e-mail Lester sent me, and a notice I sent him of his rights under the Mandatory Fee Arbitration Act.

DG: Thanks. Are there any other papers relating to the fee agreement or the lien agreement?

AB: No, none.

DG: Going back to the beginning, what happened right after Lester retained you?

AB: I started work on the matter immediately, and made some overtures to Tunnell,

who hadn't hired a lawyer yet, but had no luck in resolving the matter. I then brought an action for partition.

DG: When did you do that?

AB: On December 21, 2009. I filed a notice of lien that same day. Lester was in a hurry. We served Tunnell and commenced what would turn out to be extensive discovery within a relatively brief period of time. I took Tunnell's deposition, and was quite happy with the outcome. That proved to be the turning point.

DG: Why do you say that?

AB: Shortly after Tunnell's deposition, Lester told me it was over. That's what he said, "It's over."

DG: What did he mean?

AB: He said he and Tunnell settled the matter between themselves, "privately," he said. He said he just decided to "give up," in his words, and that was that.

DG: When was that?

AB: On June 29, 2010.

DG: You didn't believe Lester?

AB: No, I didn't.

DG: Why?

AB: It's a complicated story. Let me start at the beginning. For starters, Lester wasn't the sort just to "give up," and I suspected that he might have been the sort to *"say"* he gave up to avoid paying my fees.

DG: You pursued the matter, I suppose.

AB: Right. I called Tunnell's lawyer, but he said he didn't have a clue what had happened. Over a period of about two weeks, I called Lester repeatedly, but he never answered. We finally connected, though.

DG: When was that?

AB: On July 14, 2010. We talked at some length; he knew I had worked hard on this case, and had to forego other opportunities, and his conscience seemed to bother him; he said he'd be willing to pay me for my services at the hourly rate I had quoted him originally—$300—as soon as I brought the case to a close by filing a dismissal with prejudice. I wasn't very happy about that, and I said so. I had expected that my fees

under the contingent fee agreement would be much higher. But some fees were better than no fees. I told him I had put in 120 hours, yielding fees of $36,000. I guess he hadn't expected the number to be that high, and said he'd have to think about it and then ended the call.

DG: Did you speak with him again after that?

AB: No. But on July 17, 2010, I received an e-mail from him, reminding me that I should file the dismissal with prejudice and that the representation would then end.

DG: Have you done so?

AB: Not yet. I didn't want to end the representation before talking to you.

DG: Have you done anything else?

AB: About the case, no. About my fees, yes—I sent him a written notice of his right to arbitration under the Mandatory Fee Arbitration Act.

DG: I was going to ask about that. When did you send the notice?

AB: On July 19, 2010, ten days ago.

DG: Have you heard anything about it from Lester?

AB: You mean, has he requested arbitration? No; he certainly hasn't told me he has. I'd like to avoid arbitration under the Mandatory Fee Arbitration Act if I can, in favor of the sort of arbitration provided for in the contingent fee agreement—you know, standard arbitration under the Columbia Arbitration Act. Can I do that?

DG: I'll take a look at that. Just to clarify, you haven't brought any claim against Lester yet, either in court or in arbitration?

AB: No.

DG: Thanks. Now, going back to Lester's "private" settlement with Tunnell—do you know anything about it?

AB: Yes, I heard that Lester and Tunnell have made some kind of deal. On July 18, 2010, I heard from a real estate broker who's a mutual acquaintance of Lester and me that the Valle Vista property was about to be sold for $1.4 million, and that the sale was set to close in a week, on August 5, 2010.

DG: Did you hear how much Lester was going to get?

AB: That's a bit uncertain. But it seems that under the "private" settlement, Tunnell had either bought Lester out already, at Lester's asking price of $600,000, or had

agreed to pay him half the $1.4 million once the sale closed.

DG: How sure are you that this real estate broker got it right?

AB: Pretty sure, but who can really tell?

DG: Interesting. Well, that gives me enough information to begin my research for the opinion letter. What's your time-frame? I assume you want the opinion letter as soon as possible.

AB: Please. When we talked on the phone, you estimated that your fee would be about $1,500, isn't that right?

DG: That's right, barring any unforeseen difficulties—which, of course, I'd bring to your attention.

AB: Fine. In preparing the opinion letter, could you take a look at the fee agreement to see if I'd be entitled to obtain reimbursement from Lester for your fees as costs under the agreement?

DG: Will do. By the way, does he owe you anything for costs?

AB: No, thank goodness, he kept current with my billings for costs.

DG: Anything else you'd like me to address?

AB: No.

DG: So, let me summarize what you want to know. First, can you bring a claim against Lester under your fee agreement, whether in court or in arbitration? Second, can you bring a claim against him under your lien agreement, whether in court or in arbitration? Third, can you arbitrate under the Columbia Arbitration Act rather than the Mandatory Fee Arbitration Act? Fourth, how much are you entitled to in fees? And fifth, can you get reimbursement of the fees you're paying us for the opinion letter as "costs" under your fee agreement with Lester?

AB: That's it.

DG: I should have a draft ready in a day or two.

AB: Great. Thanks so much.

ATTORNEY-CLIENT CONTINGENT FEE AGREEMENT

AMANDA BLACK ("Attorney") and BRIAN LESTER ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below:

SCOPE OF SERVICES. Client is hiring Attorney to represent Client in the matter of Client's claims relating to Client's dispute with one Joyce Tunnell regarding a parcel of real property located at 42 Valle Vista Drive in River County, Columbia.

FEES. Attorney will be compensated for services from any recovery in the matter, whether by judgment or settlement or otherwise. If recovery occurs during Attorney's representation, Attorney's fees shall be calculated as follows: (1) If recovery is obtained without the filing of a complaint on behalf of Client, Attorney's fees will be equal to 25% of the amount recovered; (2) if recovery is obtained within 30 days after the filing of a complaint, Attorney's fees will be equal to 33% of the amount recovered; and (3) if recovery is obtained beyond 30 days after the filing of a complaint, Attorney's fees will be equal to 40% of the amount recovered. If a real property interest is recovered, the value of such real property interest shall be the basis for the amount recovered as described in this paragraph. For example, if Client owns real property as a joint tenant worth $100,000 and the result of the matter is an equal partition, Client would own a share of real property worth $50,000. Client would then owe Attorney either 25% or 33% or 40% of that resulting share, meaning $12,500 or $16,500 or $20,000, respectively. If recovery occurs after Attorney's representation has terminated, Client agrees that, upon recovery, Attorney shall be entitled to be paid by Client a reasonable fee for the services rendered at an hourly rate of $300.00.

COSTS. Attorney will incur various costs in performing services for Client under this Agreement. Client agrees to reimburse Attorney for all such costs.

DISPUTES. If any dispute arises between Attorney and Client as to fees or costs, Attorney and Client agree to submit the dispute to binding arbitration before the

Columbia Arbitration and Mediation Service pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280), with the expenses of arbitration shared equally by Attorney and Client.

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Brian Lester*

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Amanda Black*

AMANDA BLACK

LIEN AGREEMENT

AMANDA BLACK ("Attorney") and BRIAN LESTER ("Client") hereby agree as follows:

LIEN. Client grants, and Attorney accepts, a lien on any amount recovered pursuant to the Attorney-Client Contingent Fee Agreement entered into by Client and Attorney on this date in order to secure payment and reimbursement for any fees Attorney has earned and any costs Attorney has incurred under that agreement.

DISPUTES. If any dispute arises between Attorney and Client as to fees or costs, Attorney and Client agree to submit the dispute to binding arbitration before the Columbia Arbitration and Mediation Service pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280), with the expenses of arbitration shared equally by Attorney and Client.

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Brian Lester*

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Amanda Black*

AMANDA BLACK

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
500 Ruxton Street
Bodie, Columbia

Attorney for Plaintiff Brian Lester

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
FOR RIVER COUNTY

BRIAN LESTER,	)	No. Civ. 103007
Plaintiff,	)	
v.	)	**NOTICE OF LIEN**
JOYCE TUNNELL,	)	
Defendant.	)	
	)	

TO ALL PARTIES AND THEIR ATTORNEYS AND TO OTHERS INTERESTED:

PLEASE TAKE NOTICE THAT Amanda Black, of the Law Offices of Amanda Black, attorney of record for Plaintiff Brian Lester, has and claims a lien ahead of all others on any recovery that Plaintiff may obtain in this matter in order to secure payment for fees earned and costs incurred.

Date: December 21, 2009

Amanda Black

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
Attorney for Plaintiff Brian Lester

E-MAIL MESSAGE

From: Lester, Brian

Sent: July 17, 2010 at 11:27 AM

To: Black, Amanda

Subject: Lester v. Tunnell

Dear Amanda:

This is just a reminder for you to file the dismissal with prejudice we talked about within the next week or two. Once you've done so, I won't have any further need of your services, and the representation will be over.

I appreciate all the work you've put into this. I wish it could have turned out better for both our sakes, but I guess it wasn't meant to be.

Sincerely,

Brian

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
500 Ruxton Street
Bodie, Columbia
(555)303-1955

July 19, 2010

Brian Lester
67 Clarendon Avenue
Bodie, Columbia 99911

Re: Notice of Rights Under Mandatory Fee Arbitration Act (Lester v. Tunnell)

Dear Brian:

I hereby give you written notice of your right to arbitration under the Mandatory Fee Arbitration Act (Columbia Business & Professional Code, §6200) with respect to our dispute about attorney's fees in this matter. If you wish to exercise your right, you must send (1) a written request to the Office of Mandatory Fee Arbitration, State Bar of Columbia, 555 Franklin Street, Bodie, Columbia 99902, and (2) a copy of that request to me. If you fail to do so within 30 days, you will waive your right.

Very truly yours,

Amanda Black

Amanda Black

JULY 2010

California
Bar
Examination

Performance Test B

LIBRARY

IN RE BLACK

LIBRARY

SELECTED COLUMBIA STATUTORY AND RULE PROVISIONS

Section 1280 of the Columbia Code of Civil Procedure

(a) This section shall be known as the Columbia Arbitration Act.

(b) A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

(c) Any party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award.

* * *

Section 6200 of the Columbia Business and Professions Code

(a) This section shall be known as the Mandatory Fee Arbitration Act.

(b) The State Bar of Columbia shall offer to conduct arbitration of disputes concerning fees, costs, or both, charged for professional services by attorneys, under rules that the Board of Governors of the State Bar of Columbia may, from time to time, determine, with the costs borne solely by the attorney.

(c) This section shall not apply to any of the following:

(1) Claims for affirmative relief against the attorney, for damages or otherwise, based upon alleged malpractice or professional misconduct.

(2) Disputes where the fees or costs to be paid by the client, or on his or her

behalf, have been determined pursuant to statute or court order.

(d) Arbitration under this section shall be voluntary and non-binding for a client and shall be mandatory and binding for the attorney.

(e) An attorney shall send a written notice to the client prior to or at the time of service of summons or claim in an action against the client, or prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration under this section, for recovery of fees, costs, or both. The written notice shall include a statement that (1) the client has a right to arbitration under this section and (2) the client shall be deemed to waive that right if, within 30 days, he or she fails to send (a) a written request for arbitration to the State Bar of Columbia and (b) a copy of such request to the attorney. The sending of the written notice provided for in this subsection shall not be deemed to commence any action or other proceeding against the client. The attorney's failure to send the written notice provided for in this subsection shall be a ground for the dismissal of the action or other proceeding.

(f) Within 30 days of the written notice provided for in subsection (e), a client must send:

(1) a written request for arbitration to the State Bar of Columbia and (2) a copy of such request to the attorney, in order to preserve the client's right to arbitration under this section. Failure to do so shall be deemed a waiver of such right by the client.

(g) A client's right to request or maintain arbitration under this section is waived by the client commencing an action or filing any pleading seeking either of the following:

(1) Judicial resolution of a fee dispute to which this section applies.

(2) Affirmative relief against the attorney, for damages or otherwise, based upon

alleged malpractice or professional misconduct.

* * *

Rule 3-300 of the Columbia Rules of Professional Conduct

An attorney shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) The acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably be understood by the client; and

(b) The client is advised in writing that the client may seek the advice of an independent attorney of the client's choice and is given a reasonable opportunity to seek that advice; and

(c) The client thereafter consents in writing to the terms of the acquisition.

Discussion

Rule 3-300 is intended to apply to any agreement through which an attorney seeks to acquire any ownership, possessory, security, or other pecuniary interest adverse to the client. The rule regularly comes into play when an attorney seeks to acquire a security interest—that is, a lien—in order to secure the payment of his or her fees.

Columbia law provides that any agreement between an attorney and a client involving the acquisition of an interest adverse to the client is unenforceable, as is the interest purportedly acquired, if the attorney has not complied with Rule 3-300.

Fracasse v. Brent

Columbia Supreme Court (1972)

Plaintiff George Fracasse, an attorney, was retained by defendant Renee Brent to prosecute a claim for personal injuries on her behalf. Fracasse and Brent entered into a written contingent fee agreement, under which Brent agreed that Fracasse's compensation would be one-third of any recovery. Sometime thereafter, but before any recovery had been obtained, Brent informed Fracasse that she wished to discharge him and retain another attorney, and did so. Fracasse then filed the present action seeking declaratory relief. Alleging that his discharge was without cause, and that Brent had breached the agreement and had refused to give him the fees to which he would have been entitled, Fracasse prayed for a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Brent demurred to the complaint. The trial court sustained the demurrer without leave to amend and dismissed the action. The Court of Appeal affirmed. We granted review.

At the threshold, Brent claims that we should affirm the judgment without reaching the merits. She argues that Fracasse was ethically prohibited from bringing this action against her in the first place by the duty of loyalty imposed on him by the Columbia Rules of Professional Conduct. To be sure, during his or her representation of a client, an attorney is indeed ethically prohibited by the duty of loyalty from asserting any claim against a client, whether in or out of court. But the ethical prohibition dissolves once the representation has terminated. Here, of course, prior to suing Brent, Fracasse's representation had in fact terminated—when he was discharged by Brent. Under the law of Columbia, a client, like Brent, has an absolute right to discharge an attorney, at any time and for any, or no, reason—a right the attorney may not interfere with to protect his or her fees. But once the client exercises that right, he or she releases the attorney from the ethical prohibition in question.

Brent goes on to claim that, in any event, we should affirm the judgment on the merits. Under a contingent fee agreement, an attorney is not entitled to fees, and hence does

not have a cause of action against the client for breach arising from failure to pay fees, unless and until the contingency specified has occurred. And if the contingency specified occurs after the representation has terminated, the attorney's right to, and cause of action for, fees is limited to the reasonable value of the services rendered during the representation, and does not extend to the full fees that would have been due under the agreement. Otherwise, the client's absolute right to discharge the attorney might be unduly burdened by the prospect of paying the discharged attorney's full fees plus fees to a successor attorney as well. We find no injustice in limiting the fees of a discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right to discharge the attorney without undue burden. We also preserve the attorney's entitlement to fair fees for part performance—albeit not to full fees, which would have been earned only by full performance.

In light of the foregoing, Fracasse's action is premature. Since Brent has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. Indeed, Brent may end up obtaining no recovery at all—in which case, Fracasse would be entitled to no fee whatsoever. One thing, however, is sure: Fracasse does not yet have any entitlement to fees, and hence does not yet have a cause of action against Brent for breach arising from failure to pay fees.

Affirmed.

Carroll v. Interstate Brands Corporation

Columbia Court of Appeal (2002)

In this action for employment discrimination against defendant Interstate Brands Corporation ("Interstate"), plaintiff Daniel Carroll was originally represented by Allen & Allen, LLP. Allen & Allen in turn hired William McMahon, an attorney, to perform certain legal work on the case. When McMahon left the Allen firm's employ, Carroll discharged the firm and substituted McMahon in its place, entering into a contingent fee agreement with McMahon based on obtaining a recovery against Interstate through settlement or judgment, and also agreeing to a lien in McMahon's favor against any recovery he might obtain against Interstate. Through McMahon's services, Carroll did indeed obtain recovery, via settlement, against Interstate. Simultaneously with obtaining the recovery, Carroll refused to pay McMahon any fees. Prior to dismissal of the action pursuant to the settlement, McMahon filed a motion to enforce his lien against Carroll to obtain his fees. The trial court granted McMahon's motion. Carroll filed an appeal. We reverse.

In order to obtain his or her fees, an attorney may assert a cause of action for breach of contract based on the underlying fee agreement. To prevail on the claim, the attorney must prove that the client breached the fee agreement by failing to pay fees to which the attorney was entitled, and thereby caused the attorney damages in the amount of the fees in question. To the same end, the attorney may also assert a cause of action to enforce a lien. To prevail on this claim, the attorney must prove the same facts as for breach of contract, but must also prove that the lien is enforceable as authorized by the law of contract and also compliant with Columbia Rule of Professional Conduct 3-300. The attorney is not compelled to choose between these causes of action, but may bring both at the same time in the alternative—although, of course, if the attorney should prevail on both, he or she may not obtain double recovery.

That said, it is the rule that the attorney may not seek to obtain his or her fees in the same action in which he or she is representing the client, but must bring a separate action against the client. Because that is so, the trial court should have denied

McMahon's motion at the threshold without considering the merits. McMahon argues that this rule is subject to exceptions. True, but none of the exceptions helps McMahon, since all of them require the client's consent—which is altogether lacking here.

Reversed.

Aguilar v. Lerner

Columbia Supreme Court (2004)

Plaintiff Raul Aguilar hired defendant Esther Lerner, an attorney specializing in family law, to represent him in a marital dissolution proceeding. Aguilar explained to Lerner that he desired the matter to be resolved quickly and inexpensively. Lerner agreed to represent him and produced a written fee agreement that included the following arbitration provision:

> In the event that there is any dispute between CLIENT and ATTORNEY concerning fees, this Agreement, or any other claim relating to CLIENT'S legal matter which arises out of CLIENT'S legal representation, CLIENT hereby agrees to submit such dispute to binding arbitration, pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280). Any such arbitration shall be conducted before the Columbia Arbitration and Mediation Service, with CLIENT and ATTORNEY sharing the costs of such arbitration equally.

Aguilar signed the fee agreement and initialed the arbitration provision.

After a dispute arose, Aguilar discharged Lerner and filed a complaint for damages in Sommerview County Superior Court, alleging Lerner had committed malpractice. In response, Lerner petitioned to compel arbitration of these claims pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280); she also added her own claim for unpaid attorney fees and costs. The Superior Court granted the petition to compel, stating that the results of the arbitration would be binding, and that Aguilar's "claim for malpractice falls within the scope of the arbitration provision he initialed." Lerner prevailed in arbitration, the arbitrator granting her judgment against Aguilar on his complaint for damages. On Lerner's claim for unpaid legal fees and costs, the arbitrator awarded her $32,710. The costs of arbitration amounted to $3,000, with Lerner and Aguilar each paying $1,500. Aguilar paid under protest. The Superior

Court denied Aguilar's motion to vacate the arbitration award and granted Lerner's motion to confirm it. The Court of Appeal affirmed. We granted review, and now affirm.

Aguilar contends the parties' agreement to arbitrate was invalid and unenforceable because it was contrary to the Mandatory Fee Arbitration Act (Columbia Business & Professional Code, §6200), which makes arbitrating attorney fee disputes voluntary for a client and non-binding as well, thereby giving the client the option of rejecting the arbitrator's decision and proceeding to trial. Moreover, he contends that although he filed a lawsuit against Lerner for malpractice, he is entitled to rely on the protections of the Mandatory Fee Arbitration Act. In response, Lerner invokes the Columbia Arbitration Act, pursuant to which the parties arbitrated their dispute.

The Columbia Arbitration Act represents a comprehensive statutory scheme regulating arbitration in this state. Through this statutory scheme, the Legislature has expressed a strong public policy in favor of arbitration, as agreed to by the parties themselves, as a speedy and relatively inexpensive means of dispute resolution.

By contrast, the Mandatory Fee Arbitration Act constitutes a separate and distinct arbitration scheme. The nature of the obligation to arbitrate under the Mandatory Fee Arbitration Act differs from that under the Columbia Arbitration Act in important ways. First, the arbitration obligation under the Mandatory Fee Arbitration Act is limited to disputes between attorneys and clients about fees and/or costs. Second, the arbitration obligation under the Mandatory Fee Arbitration Act is based on a statutory directive and not the parties' agreement. Third, although a client cannot be forced under the Mandatory Fee Arbitration Act to arbitrate a dispute concerning legal fees or costs, at the client's election an unwilling attorney can be forced to do so. Fourth, whereas an attorney is bound by an arbitration award under the Mandatory Fee Arbitration Act, a client is not bound, but may seek a trial *de novo*. Fifth, the Mandatory Fee Arbitration Act specifies conditions under which the client can waive its protections, including by commencing an action or filing any pleading seeking either judicial resolution of a fee dispute or affirmative relief against the attorney based on malpractice or professional

misconduct. The Mandatory Fee Arbitration Act thus provides the client with an *alternative* method of resolving a dispute with his or her attorney about fees or costs, *not one in addition* to traditional litigation.

As indicated, the parties in this case arbitrated their dispute pursuant to the Columbia Arbitration Act, not the Mandatory Fee Arbitration Act. Although Aguilar never sought to arbitrate the fee aspect of the dispute under the Mandatory Fee Arbitration Act, he seeks to invoke the Act's protections in order to invalidate the parties' agreement.

This case thus poses the question whether the parties' agreement to arbitrate is enforceable or is superseded by the Mandatory Fee Arbitration Act.

Lerner contends Aguilar waived his statutory rights under the Mandatory Fee Arbitration Act because he sued her for malpractice. That Aguilar filed a lawsuit against Lerner alleging malpractice is undisputed. Consequently, pursuant to the plain language of the Act, he waived his rights thereunder.

Aguilar's counterargument is unavailing. He argues that a client does not waive his or her rights under the Mandatory Fee Arbitration Act by entering into a fee agreement with an arbitration provision invoking the Columbia Arbitration Act *before* a dispute arises. We agree. The Mandatory Fee Arbitration Act does not provide for the pre-dispute waiver of its protection. Phrased positively, the Mandatory Fee Arbitration Act renders an arbitration provision invoking the Columbia Arbitration Act unenforceable unless and until the Mandatory Fee Arbitration Act's protection is waived. Our agreement with Aguilar on this point benefits him not at all. Our conclusion that he waived his rights under the Mandatory Fee Arbitration Act rests not on the arbitration provision in his fee agreement with Lerner, but, rather, on the malpractice lawsuit he filed against her.

Affirmed.

Answer 1 to Performance Test B

Amanda Black, Esq.
Law Offices of Amanda Black
500 Ruxton Street
Bodie, Columbia

July 29, 2010

Dear Ms. Black:

Thank you for taking the time to meet with Ms. Granada in our office yesterday. I am assisting her with your case. The information you provided was comprehensive and helpful. We have researched the five questions you posed during the meeting yesterday, and this opinion letter contains the answers to your questions, along with the legal and factual bases for them.

1. <u>Can you bring a claim against Lester under your fee agreement, whether in court or arbitration</u>?

Answer:
You may bring a claim against Lester under your fee agreement; however, you may not do so until your representation of him has ended. *Brent*. Once the representation has ended, you may bring a breach of contract action based on the fee agreement so long as the contingency in the fee agreement has occurred, making you entitled to the fees. *Carroll; Brent*.

Explanation:
An attorney is ethically prohibited by the duty of loyalty from asserting any claim against a client, whether in or out of court, during his representation of a client. *Brent*. This ethical prohibition ends once the representation has terminated. *Brent*. Here, it

appears that you and Lester agree that your representation of him is continuing until you file the dismissal of his case against Tunnell. Lester's e-mail to you acknowledges this, as he states therein that once you file the dismissal with prejudice, he will no longer need your services and the representation will end. You also acknowledged that you have not filed that dismissal yet because you wanted to seek our legal opinion. Therefore, you may not ethically bring a claim against Lester under the fee agreement until you terminate your representation of him.

Once your representation of Lester is terminated, you may bring a claim under the fee agreement for breach of contract. In order to obtain his fees, an attorney may assert a cause of action for breach of contract based on the underlying fee agreement, and he must do so in a separate [claim] against the client. *Carroll.*

However, under a contingent fee agreement, an attorney does not have a cause of action for breach of contract arising from failure to pay fees unless and until the contingency specified has occurred. *Brent*.

Here, the contingency in your fee agreement with Lester is that a recovery must occur in the matter, whether by judgment or settlement or otherwise. Once a recovery has occurred, then your fee is calculated based on when the recovery occurred. You were advised by Lester himself that he settled the matter with Tunnell "privately" and that Lester decided to "give up." Also, a real estate broker told you that Lester's and Tunnell's property was about to be sold for $1.4 million, and that the sale was to close in a week on August 5, 2010. Lester apparently was either bought out by Tunnell already for $600,000, or Tunnell agreed to pay him half of the sale proceeds once the sale closes. If Lester and Tunnell have agreed to a settlement between them, whether Lester has been paid yet or not, we have a good argument that the contingency of recovery has occurred. However, a court could find that recovery does not occur until Lester is actually paid by Tunnell. Either way, though, it appears recovery is imminent or happened already, but we should confirm this.

Therefore, once you terminate representation of Lester and recovery is confirmed to have occurred, you can bring a claim against Lester under your fee agreement.

2. <u>Can you bring a claim against Lester under your lien agreement, whether in court or arbitration</u>?

Answer:

You cannot bring a claim against Lester under your lien agreement because it does not comply with Rule 3-300 of the Columbia Rules of Professional Conduct. Failure to comply with Rule 3-300 renders a lien agreement between attorney and client unenforceable. *See Discussion of Rule 3-300*.

Explanation:

An attorney may bring a cause of action against a client to enforce a lien. *Carroll*. To do so, however, the attorney must not only prove that the lien agreement has been breached, but she must also prove that the lien is enforceable as authorized by the law of contract and also compliant with Columbia Rule of Professional Conduct 3-300 (CRPC 3-300). *Carroll*.

CRPC 3-300 applies to any agreement through which an attorney seeks to acquire any ownership, possessory, security, or other pecuniary interest adverse to the client, and it includes liens which the attorney acquires in order to secure payment of his fees. *See Discussion of CRPC 3-300*. CRPC 3-300 requires that a security interest, like a lien, meet three requirements: (a) its terms must be fair and reasonable to the client and fully disclosed and transmitted to the client in writing in a manner which should reasonably be understood by the client; (b) the client must be advised in writing that he may seek the advice of an independent attorney of his choice and is given a reasonable opportunity to do so; and (c) the client thereafter consents in writing to the terms of the lien.

In your case, you and Lester signed the written Lien Agreement on December 1, 2009.

By its terms, the Lien Agreement states that Lester accepts your lien on any amount recovered, pursuant to the fee agreement, in order to secure payment and reimbursement for your attorney fees. It also contains an arbitration clause. There is nothing on the face of the Lien Agreement to indicate that its terms are not fair and reasonable to Lester, and the terms are disclosed to Lester in writing in this Lien Agreement, which should reasonably have been understood by him. Lester signed the agreement, so he consented in writing to its terms.

The problem, however, is the requirement that Lester be advised in writing that he may seek advice of an independent attorney, and be given a reasonable opportunity to do so, before entering into the Lien Agreement. You began representation of Lester on December 1, 2009, and you both also signed the Lien Agreement on the same date. There is no evidence that Lester was advised in writing of his right to seek independent counsel with respect to the Lien Agreement, and even if we could somehow show that he was, he was likely not given the time to do so because he signed the Lien Agreement at the time he retained you.

Therefore, you likely cannot bring a claim against Lester under the lien agreement.

3. <u>Can you arbitrate under the Columbia Arbitration Act (CAA) rather than the Mandatory Fee Arbitration Act (MFAA)</u>?

Answer:

You cannot arbitrate your claim under the CAA until Lester has waived the MFAA's protection. *Aguilar*. The MFAA renders an arbitration provision invoking the CAA unenforceable unless and until the MFAA's protection is waived by the client. *Aguilar*. A client does not waive his rights under the MFAA by entering into a fee agreement with an arbitration provision invoking the CAA before a dispute arises. *Aguilar.*

Explanation:

The CAA and MFAA are separate and distinct arbitration schemes, and they have

several differences. *See Columbia Code of Civil Procedure Section 1280; Section 6200 of the Columbia Business and Professions Code; Aguilar*. It is settled Columbia law that the MFAA renders an arbitration provision invoking the CAA unenforceable unless and until the MFAA's protection is waived by the client. *Aguilar*.

A client does not waive the MFAA's protection by entering into a fee agreement with an arbitration provision invoking the CAA before a dispute arises. *Aguilar*. (This, of course, is the situation between you and Lester: you entered into a CAA arbitration provision by way of the fee agreement, before any dispute arose between you.) Rather, a client may waive the protection of the MFAA in two ways. First, he may do so by failing to properly respond within 30 days to an attorney's written notice of the client's right to arbitrate. *Section 6200 (f)*. Second, a client may waive the protection by commencing an action or filing any pleading against the attorney seeking either: (1) judicial resolution of a fee dispute or (2) affirmative relief against the attorney based upon malpractice or professional misconduct. *Section 6200 (g); Aguilar*.

As to the first method of waiver, you mailed Lester written notice of his right to arbitrate the fee dispute under the MDAA on July 19, 2010. The written notice met the requirements for such a notice under Section 6200 (e), as it notified Lester of his right to arbitration under the MFAA, and that he would waive the right if he failed to send a written request to the State Bar, and a copy of that request to you, within 30 days. However, 30 days have not yet elapsed since that July 19 notice was given to Lester, so he has not yet waived his rights under the MFAA.

As to the second method of waiver, based on the information you have provided, Lester has not yet filed any type of judicial action or other claim against you to resolve the fee dispute, or to claim malpractice or professional misconduct. Therefore, he has not waived his rights under the MFAA under this method.

In conclusion, then, you cannot arbitrate your claim under the CAA unless and until Lester waives his rights under the MFAA. If we wait until 30 days from July 19, 2010

and Lester fails to properly respond to your written notice of his rights, then he will be deemed to have waived the MFAA's protections and you may proceed with arbitration under the CAA. Likewise, if he files an action for fee dispute, malpractice, or professional misconduct, he will have waived his right, and you can similarly proceed under the CAA.

4. <u>How much are you entitled to in fees</u>?

Answer:

If the contingency on which your contingent fee arrangement is based occurs (or has occurred) before your representation of Lester is terminated, you are entitled to seek the full amount of your contingent fee owed. *Brent.* However, if the contingency occurs after your representation of Lester is terminated, you will be limited to recovery of the reasonable value of the services rendered during the representation. *Brent.*

Explanation:

As discussed above under question 1, how much you are entitled to recover in fees depends in part on whether recovery (settlement) has already occurred. It also depends on whether that recovery occurs before or after termination of your representation of Lester. *Brent.* Under a contingent fee agreement, an attorney is entitled to fees, or a cause of action for fees, once the contingency has occurred. *Brent*. If the contingency does not occur until after the representation has terminated, the attorney's right to, and cause of action for, fees is limited to the reasonable value of the services rendered during the representation. *Brent*.

In your case, you have not yet terminated your representation of Lester because you have not filed the request for dismissal of his case against Tunnell. However, we are uncertain whether recovery has occurred between Lester and Tunnell yet, although the facts seem to imply that it has, or that it is at the very least imminent. Assuming recovery occurs before you terminate representation, then under the fee agreement, you will be entitled to 40% of the amount Lester recovered from Tunnell, because you

already filed a complaint on Lester's behalf and more than 30 days will have elapsed between December 21, 2009, the date on which the complaint was filed, and June 29, 2010, when Lester told you he had privately settled the matter with Tunnell.

Alternatively, if recovery is determined to have not occurred until after you terminate your representation of Lester, then you will be limited to the reasonable value of your services rendered during the representation. A court is likely to agree that $36,000 is a fair and reasonable fee for your 120 hours of service to Lester, given the filing of the complaint, the heavy account of discovery propounded, including Tunnell's deposition, and your fee of $300, which Lester himself offered to pay you on July 14, 2010, and which was referenced in the fee agreement he signed.

Therefore, provided that recovery occurs or has occurred in Lester's case against Tunnell, you are either going to be entitled to 40% of Lester's recovery based on the fee agreement, or reasonable fees for your services rendered during representation, depending on whether recovery occurred before or after termination of representation.

5. <u>Can you get reimbursement of the fees you're paying us for the opinion letter as "costs" under your fee agreement with Lester</u>?

Answer:

No. Your fee agreement states the following with respect to costs: "Attorney will incur various costs in performing services for Client under this Agreement. Client agrees to reimburse Attorney for all such costs." The fees you are paying us for this opinion letter are not "costs" as costs are defined within the fee agreement.

Explanation:

In the fee agreement, Lester agreed to reimburse you for all costs that you would incur in performing services for him under the fee agreement. Under the "Scope of Services" section of the fee agreement, Lester agreed to hire you to represent him in the matter of his claims relating to his dispute with Joyce Tunnell regarding the piece of real property

they co-owned. You are paying us to seek payment of your legal fees owed by Lester arising out of representation of him in that case. Because you are not incurring our attorney's fees as part of your performance of services for Lester in connection with the Tunnell case, but rather to enforce your own right to payment, our attorney's fees would not likely be considered "costs" as that term is defined within the fee agreement.

After you have had the opportunity to review this letter, please contact me or Ms. Granada to discuss your case further. If you have any questions or concerns regarding my answers to your questions, please contact me so that we can discuss those as well. We look forward to working with you to resolve this matter.

Sincerely,

Applicant

Answer 2 to Performance Test B

Amanda Black, Esq.
Law Offices of Amanda Black
500 Ruxton Street
Bodie, Columbia

July 29, 2010

Dear Ms. Black:

It was a pleasure meeting you yesterday, and I am pleased that we are able to assist you with your fee dispute with your client, Brian Lester. You asked [me] to prepare an opinion letter to you on the subject of how you can obtain your fees from Mr. Lester legally and ethically. We are pleased to provide you with the following analysis, organized by each question you asked us.

I. Bringing a Claim Under Your Fee Agreement

You asked if you can bring a claim against Mr. Lester under your contingency fee agreement, either in court or in arbitration.

Brief Conclusion

You may not file a claim against Mr. Lester so long as you continue to represent him in any capacity. Further, you may not file a claim against Mr. Lester until he has obtained recovery, as contemplated in the fee agreement. Once your representation of Mr. Lester comes to an end and he obtains recovery, you may assert a cause of action for breach of contract based on the contingency fee agreement in a new and separate action. You may not file a claim in arbitration unless and until Mr. Lester waives his rights to arbitrate under the Mandatory Fee Arbitration Act (MFAA). If such waiver does occur, your judicial action would likely be stayed due to the arbitration provision in the

fee agreement.

Analysis

Duty of Loyalty Prohibits Claims During Representation

As you know, an attorney owes a duty of loyalty to her client. The Columbia Supreme Court held in Fracasse v. Brent that during the representation of a client, an attorney is ethically prohibited by the duty of loyalty from asserting any claim against the client in or out of court. You noted in our meeting yesterday that you have not yet ended the representation with Mr. Lester, preferring to wait until you had met with us. Per your phone call with Mr. Lester and the e-mail he sent you on July 17, 2010, your representation with Mr. Lester will come to an end once you have filed a motion to dismiss with prejudice the matter of Lester v. Tunnell. As soon as that happens and the representation is over, you may pursue a claim for breach of contract in Columbia court. While it is therefore in your interests to end the representation, it is also worth recalling that clients have an absolute right to discharge their attorney without any undue burden, and this right may not be interfered with by an attorney in order to protect his or her fees. Fracasse.

Breach of Contract

To prevail on a claim of breach of contract based on the contingency fee agreement, you will have to prove that Lester breached the fee agreement by failing to pay fees to which you were entitled, and thereby causing you damages in the amount of the fees in question. Carroll. You must bring this claim in a separate action against the client; that is, it cannot be part of the same action in which you have been representing Mr. Lester. Carroll. The facts are in your favor. You have invested 120 hours of work on this case. In addition, it is possible Mr. Lester has already obtained recovery, and if not, is highly likely to do so on August 5, when the sale of the Valle Vista property is completed. You will have to prove that once Mr. Lester has obtained recovery that he has not paid you any fees. Since he has not yet paid you any fees (only your costs), and has ended the representation, it seems unlikely that he will pay you. We discuss your fees in Part IV of

this letter, below.

In addition, the Columbia Supreme Court held in Fracasse that an attorney does not have a causation of action against a client for breach arising from failure to pay fees, "unless and until the contingency specified has occurred." Fracasse. In your case, the contingency specified, of course, is Mr. Lester obtaining recovery through the sale of his interest in the real property located at 42 Valle Vista Drive in River County, Columbia. Until Mr. Lester obtains recovery, you do not have a claim for breach of contract, either in court or in arbitration. If Mr. Lester has already been bought out by Tunnell through private settlement, then he has obtained recovery. If Tunnell has agreed to pay him half of the sale price once the sale of the property closes on August 5, 2010, that is when Mr. Lester will obtain recovery and your claim for breach of contract will ripen.

Preclusive Effect of Arbitration Provision

There is also the issue of the provision in the contingency fee agreement by which you and Mr. Lester agree to submit any disputes over fees or costs to binding arbitration before the Columbia Arbitration and Mediation Service (CAMS) pursuant to the Columbia Arbitration Act (CAA). The CAA itself provides in Columbia Code of Civil Procedure Section 1280(b) that such an agreement is valid, enforceable, and irrevocable, excluding any grounds as exist for the revocation of the contract. However, as we discuss in greater length in Part III of this letter, the Columbia Supreme Court ruled in 2004 that "the Mandatory Fee Arbitration Act renders an arbitration provision invoking the [CAA] unenforceable unless and until the [MFAA's] protection is waived." Aguilar v. Lerner. It is our opinion that the Supreme Court's ruling on this issue is controlling, and accordingly, until such time as Mr. Lerner has waived his MFAA protections, it is our opinion that you may see judicial remedy for your fee dispute.

While discussed in greater detail below, there are multiple ways by which Mr. Lester can waive his MFAA rights, one of which is the passing of 30 days without action on his part. Once the MFAA rights have been waived, the CAA provision in the fee agreement will be fully enforceable, and a court would likely find it controlling. Once again, however,

we do believe that while the MFAA option exists for Mr. Lester, you have the right to file a claim for breach of contract after your representation has ended and before the CAA provision is enforceable.

II. Bringing a Claim Under Your Lien Agreement

You asked us if you can bring a claim against Mr. Lester under your lien agreement, either in court or in arbitration.

Brief Conclusion

Based on the information you provided us and our review of the relevant statutes and case law, your lien agreement is unenforceable. Lien agreements must be compliant with Columbia Rule of Professional Conduct (CRPC) 3-300. It is our opinion that your lien agreement unfortunately does not meet the requirements of Rule 3-300, and therefore your lien is unenforceable and you cannot bring a claim against Mr. Lester under it, either in court or in arbitration.

Analysis – Lien Agreements Must Comply with CRPC 3-300

An attorney may assert a cause of action to enforce a lien. Carroll. This action may be brought at the same time as a cause of action for breach of contract on an underlying fee agreement, in the alternative. Carroll. Were the attorney to win on both the breach of contract claims and the claim to enforce the lien, the attorney is of course not permitted to obtain double recovery. Carroll.

To prevail on a cause of action to enforce a lien, the attorney must prove the same facts as required for breach of K, as we discussed above in Part I of this letter, and must also prove that the lien is enforceable as authorized by contract law, and is compliant with CRPC 3-300. Carroll. CRPC 3-300 prohibits an attorney form knowingly acquiring a security interest adverse to a client unless the following three requirements are met:

"a) The acquisition and its terms are fair and reasonable to the client, and are fully

disclosed and transmitted in writing to the client, in a manner which should reasonably be understood by the client; and

b) The client is advised in writing that the client may seek the advice of an independent attorney of the client's choice and is given a reasonable opportunity to see that advice; and

c) The client thereafter consents in writing to the terms of the acquisition." CRPC 3-300.

The discussion included with the rule specifically provides that the rule is applicable when an attorney seeks a lien in order to secure the payment of fees, as is the case here, between you and Mr. Lester. The discussion continues to state that any lien and/or interest acquired via lien is unenforceable unless it complies with Rule 3-300. In reviewing the lien agreement into which you and Mr. Lester ended, it is clear that requirement (c), client consent in writing, has been obtained, as Mr. Lester signed the agreement. While the terms of the agreement are fair as required, it is arguable whether the writing is a manner which Mr. Lester should reasonable have understood; the language could have been clearer. It is not necessary to further examine this issue, however, because it is clear that requirement (b) has not been met and therefore the lien agreement is unenforceable.

In your lien agreement, there is no written advice to Mr. Lester that he may seek the advice of independent counsel of his choosing to review this agreement, and no indication that Mr. Lester had a reasonable opportunity seek that advice. You told us during our meeting yesterday that there are no other papers relating to the fee agreement or lien agreement, other than those you have given to us. Accordingly, it is our conclusion the Mr. Lester was not advised in writing that he may seek independent counsel before signing the lien agreement, and therefore, under Columbia law, the lien agreement is unenforceable and you may not bring any claims thereunder.

III. Arbitration Under the CAA Rather than the MFAA

You asked us if you can arbitrate under the Columbia Arbitration Act (CAA) rather than

the Mandatory Fee Arbitration Act (MFAA).

Brief Conclusion

Mr. Lester has the right to force you to arbitrate your dispute under the MFAA. If Mr. Lester waives his rights under the MFAA either by filing for judicial resolution of the fee dispute, by seeking affirmative relief against you for alleged malpractice or professional misconduct, or be passage of time, you may enforce the arbitration provision in your fee agreement and arbitrate under the CAA.

Analysis

The MFAA Bars a CAA Provision Until Waived.

The MFAA is a statutory alternative to litigating disputes over fees or cost for clients. Lerner. The Columbia Supreme Court held in Aguilar v. Lerner that a client does not waive his rights under the MFAA by agreeing to a fee agreement with an arbitration provision invoking the CAA, before any dispute arises. Lerner. Or, reworded and as we stated above, "the [MFAA] renders an arbitration provision invoking the [CAA] unenforceable unless and until the [MFAA's] protection is waived." Lerner. Should Mr. Lester wish, he has the right to force you into MFAA arbitration. Lerner. MFAA arbitration is limited to disputes between attorneys and clients about fees and/or costs, which of course covers your dispute with Mr. Lester. Lerner. Under the MFAA, you would be bound by the arbitrator's ruling, while Mr. Lester could seek trail de novo. Lerner. In addition, you would have to cover all costs of the MFAA arbitration. Columbia Business & Professional Code (CBPC) 6200(b).

There are three ways by which Mr. Lester can waive his rights under the MFAA. First, he can file an action or any pleading against you, seeking judicial resolution of the fee dispute, or second, seeking affirmative relief against you based on malpractice or professional misconduct. Lerner; CBPC 6200(g). Third, failure to invoke MFAA arbitration by sending a written request to the State Bar and a copy to you within 30 days of the written notice you sent constitutes waiver. CBPC 6200(f). Once Mr. Lester

has waived his rights by any of these three methods, he may no longer utilize the MFAA, and you are free to enforce the arbitration provision in your fee agreement.

To bring an action against Mr. Lester, you must comply with CBPC 6200(e), the written notice requirement. We have reviewed the written notice you sent to Mr. Lester, and it fully complies with the requirements of the MFAA, by notifying him of his right to arbitration under the MFAA, of his filing obligations within 30 days, or waiver. Since you sent Mr. Lester written notice on July 19, he has thirty days in which to invoke those rights. Accordingly, on or about August 19, 2010, depending on when he received the notice, his rights under MFAA will be deemed to have been waived and the CAA arbitration provision in the fee agreement will be enforceable.

IV. Total Fees

You asked us to determine how much you are entitled to in fees.

Brief Conclusion

Payment of your fees is contingent upon Mr. Lester's recovery in his efforts to sell his real property interest. Unless and until Mr. Lester obtains recovery, you are not entitled to any fees. If Mr. Lester has obtained recovery prior to the end of your representation, then you are entitled to 40% of the value of the real property interest he received. If Mr. Lester obtains recovery after the representation has ended, you are entitled to the reasonable value of the services you rendered during the representation, most likely at the $300 per hour rate included in the contingency fee agreement.

Analysis

As we discussed in Part I, a client must obtain recovery before an attorney is entitled to fees under a contingent fee agreement. Fracasse. The Columbia Supreme Court further held that if the contingency specified occurs after the representation has ended, the attorney's right to fees is "limited to the reasonable value of the services rendered during the representation, and does not extend to the full fees that would have been due

under the agreement." Fracasse.

The amount of fees to which you are entitled depends upon when the representation ends, and when and how much Mr. Lester obtain recovery.

When did the representation end?

Mr. Lester informed you by e-mail on July 17, 2010, that you should file a dismissal with prejudice and that the representation would then end. In his e-mail, he requested that you file the dismissal within a week or two. To date, you have not yet filed the dismissal. Per his request, you are supposed to file the dismissal by approximately July 31, 2010. The representation would then come to an end. Any unreasonable delay by you in filing the dismissal would likely lead to a determination that the representation ended within the time period requested by Mr. Lester, as he has an absolute right to end the representation at any time. As such, it is our opinion that the representation cannot continue into the month of August.

When and how much did or will Mr. Lester obtain recovery?

Mr. Lester informed you on June 29, 2010, that he and Tunnell had privately settled the matter, and that he had decided to "give up." This is the first indication that Mr. Lester had obtained some recovery, and your contingent fee agreement provides you are entitled to fees from any recovery, "whether by judgment of settlement or otherwise." The determination of when Mr. Lester obtained recovery, however, is almost certainly dependent on when he is actually paid. On July 18, you were told by a mutual acquaintance of you and Mr. Lester, a real estate broker, that the Valle Vista property was about to be sold. Further, you believe from the real estate broker that Tunnell has either already bought out Lester for a price of $600,000 under the private settlement mentioned on June 29, or will be paid half of the sale price of $1.4 million when the sale closes on August 5, 2010 for a total recovery of $700,000.

How much are you entitled to in fees?

There are two possible outcomes. We assume for the purpose of this discussion as we discussed above, that the representation will end no later than July 31, 2010.

1) Prior to the End of Representation. If Mr. Lester obtained recovery in the amount of $600,000, prior to the end of the representation, then you are entitled to 40%. This is per the contingent fee agreement, which provides that if recovery is obtained beyond 30 days after the filing of a complaint, your fees will be equal to 40% of the amount recovered. You brought an action for partition on December 21, 2009; if the private settlement occurred at its earliest possible date, June 29, that is much more than 30 days later.

2) After the End of Representation. If Mr. Lester obtained or obtains recovery in the amount of $600,000, or in the amount of $700,000, after the representation has ended, then you are entitled to the reasonable value of the services you rendered during the representation, but not the total fees envisioned by the complaint. Your services extend through the filing of the dismissal with prejudice. Your contingent fee agreement provides that if recovery occurs after the end of representation, you will be paid for your services at an hourly rate of $300. Assuming the court or arbitrator upholds this figure, as well as your calculation of 120 hours of work, plus the time you need to file the dismissal, you will be entitled to fees of approximately $36,000.

V. Reimbursement for Our Services

You asked us whether you can obtain reimbursement of the fees you are paying us for this opinion letter as costs under your fee agreement with Mr. Lester.

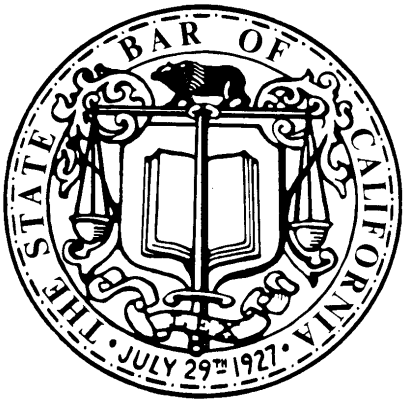
Brief Conclusion

Our research did not discover any provision by which you can obtain reimbursement for attorney fees incurred in the course of determining your rights in pursuing a fee dispute with a client. Further, it is our opinion that your seeking counsel in regards to this fee dispute does not qualify as “performing services” for Mr. Lester under your contingent fee agreement. Accordingly, it is our opinion that you cannot seek reimbursement of the fees you are paying our firm as costs under your fee agreement with Mr. Lester.

Analysis

Your contingent fee agreement provides: “Attorney will incur various costs in performing services for Client under this Agreement. Client agrees to reimburse Attorney for all such costs.” Our research did not produce any statutes or case law that specifically addressed whether an attorney can obtain reimbursement for attorney costs she incurs in pursuing a fee dispute with a client. Nor did any of our research address how a court or arbitrator would define the scope of series for the Client. That said, it is our opinion that seeking our counsel does not constitute services performed for Mr. Lester. The scope of your contingent fee agreement is Mr. Lester seeking recovery for his real property interest against Tunnell. Our services do not fit within the scope of your duties or services performed for Mr. Lester.

Our opinion is that your best option is including the costs of our services in any claim you decide to file with a Columbia Court, CAA or MFAA arbitrator. It would then be up to the judge or arbitrator to decide whether you are entitled to reimbursement from Mr. Lester for the costs you incurred in obtaining our counsel. Our opinion is that your chances of success are limited.



California Bar Examination

Performance Test And Selected Answers

February 2011

THE STATE BAR OF CALIFORNIA OFFICE OF ADMISSIONS
180 HOWARD STREET • SAN FRANCISCO CALIFORNIA 94105 1639 • (415) 538 2303
1149 SOUTH HILL STREET • LOS ANGELES CALIFORNIA 90015-2299 • (213) 765 – 1500

PERFORMANCE TEST SELECTED ANSWERS

FEBRUARY 2011 CALIFORNIA BAR EXAMINATION

This publication contains two selected answers for each performance test from the February 2011 California Bar Examination.

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.

FEBRUARY 2011

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

FILE

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

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.

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Legal Unit

MEMORANDUM

To: Applicant

From: Marla Brevette, Chief Counsel

Subject: Enviroscan, Inc. v. Structural Environmental Safety Agency

Date: February 22, 2011

Last year the Legislature enacted Columbia Professions Code § 14752 authorizing the Structural Environmental Safety Agency ("SESA") to certify as Residential Specialists persons and businesses that install and operate residential environmental monitoring systems. Deputy Counsel Raymond Barkley has set forth the background in a memorandum that I have included with these materials.

We have been served with the first petition for a writ of mandate challenging the decision of SESA's Specialty Certification Board to deny an application for certification as a Residential Specialist under the new law: *Enviroscan, Inc. v. SESA*.

Please draft an objective memorandum that analyzes the legal and factual issues related to each of the four Grounds of Relief asserted in Enviroscan's petition. Be sure to include in your memorandum an analysis of which party (SESA or Enviroscan) is likely to prevail on each of these grounds.

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Legal Unit

MEMORANDUM

TO: Staff

FROM: Raymond Barkley, Deputy Counsel

Date: December 28, 2010

SESA is a statewide agency which, under Columbia Professions Code § 14700 *et seq*., regulates and licenses Environmental Abatement Contractors ("contractors") engaged in the business of detecting, remedying, abating, and removing toxic and other environmental hazards in commercial, industrial, and residential structures. Newly enacted Professions Code § 14752 directs SESA to develop and implement a program for certifying Residential Specialists from among contractors already licensed by the SESA.

Recent advances in technology include the development of highly effective monitoring systems consisting of programmable computerized devices designed to detect and isolate toxic and other structural environmental hazards. This technology has created expanded business opportunities for contractors in the trade to enter into the residential market to detect and control hazards commonly found in homes and that are harmful, particularly to children. Contractors in the business of installing, maintaining, and operating these devices ("residential systems") also typically offer the service of monitoring and programming the systems from remote locations. The privacy and security implications of such expansion into private homes and the accompanying remote monitoring and programming services prompted the Legislature to authorize SESA to identify and certify qualified specialists in the field.

All contractors engaged in the structural environmental toxic and hazard abatement business are required to be licensed by the SESA as Environmental Abatement Contractors. That license allows them, and their employees working under their

direction and supervision, to engage lawfully in the business, including the business of installing, servicing, monitoring, and programming residential systems. The new legislation does not prevent licensed contractors from continuing to do so. However, it does require that, before any such contractors can hold themselves out as "specialists" in the field, they must be certified as such by the SESA. From the contractors' perspective, there is significant economic value in being able to advertise that they have qualified for and have received State approval as "specialists."

The statute directs SESA to establish a five-person Specialty Certification Board and to implement a certification procedure. The legislative history of Professions Code § 14752 makes it clear that, because of the privacy and safety implications of the use of residential systems in private homes, SESA is granted extremely broad discretion in carrying out this mandate and in establishing the standards for certification. In view of the fact that certification carries with it the imprimatur of the State of Columbia, SESA should apply strict standards in granting certification. This admonition is implicit in SESA's Regulations for Application and Certification as Residential Specialist, which have been approved under the applicable provisions of the Administrative Procedures Act and properly disseminated to all interested parties.

SESA takes the position that all decisions of the agency granting or denying certification are final and subject only to narrow, limited review by the courts under Columbia Code of Civil Procedure § 1085.

Albert Marsden, SBN 40811
MARSDEN, MARKS, & JAMES LLP
One Plaza Place, Suite 2700
Astoria, Columbia 98720
Telephone: (502) 872-7108

SUPERIOR COURT OF THE STATE OF COLUMBIA

CALEB COUNTY

ENVIROSCAN, INC., a Columbia Corporation, Petitioner, v. STATE OF COLUMBIA, STRUCTURAL ENVIRONMENTAL SAFETY AGENCY, an administrative agency of the State of Columbia, Respondent.	Case No.: 10047-06 **PETITION FOR WRIT OF MANDATE UNDER COLUMBIA CODE OF CIVIL PROCEDURE § 1094.5**

Petitioner, Enviroscan, Inc., a corporation duly authorized and existing under the laws of the State of Columbia, petitions this Court for a writ of administrative mandate under Columbia Code of Civil Procedure ("C.C.P.") § 1094.5.

I. STATEMENT OF FACTS

Petitioner has been an Environmental Abatement Contractor licensed by the Structural Environmental Safety Agency ("SESA") continuously and in good standing since 2001. On February 22, 2010, Petitioner filed with SESA an application for certification as a Residential Specialist as authorized by Columbia Professions Code § 14752 and SESA's regulations, Columbia Code of Regulations § 101.752.

Despite the fact that Petitioner's application was complete and sufficient in all particulars and that Petitioner was in all respects qualified for certification as a Residential Specialist, SESA's Specialty Certification Board denied Petitioner's application on June 21, 2010. SESA ignored substantial and persuasive evidence of Petitioner's qualifications in the record before the Board and refused to allow Petitioner to present its case at an evidentiary hearing and to augment the record with additional evidence to rebut evidence placed in the record by SESA's investigator.

II. THE ADMINISTRATIVE RECORD

Petitioner has filed in support of this petition the administrative record of the proceedings before SESA and the Specialty Certification Board. The record consists of:

- The SESA Report of Investigation dated April 16, 2010.
- The SESA Letter of Notification and attached minutes of the Specialty Certification Board dated June 21, 2010.
- The Enviroscan, Inc. letter dated July 12, 2010.
- The minutes of the Specialty Certification Board meeting dated September 10, 2010.

III. GROUNDS FOR RELIEF

The grounds for relief are:

1. That this petition be treated as one arising under C.C.P. § 1094.5 because, under § 1094.5(a):

(a) SESA was required to receive any and all evidence presented by Petitioner at the proceedings below;

(b) Certification is granted or denied by SESA based on the exercise of discretion by the Specialty Certification Board; and

(c) The Specialty Certification Board was required to give Petitioner the opportunity to be heard at an evidentiary hearing.

2. That, in reviewing the decision of the Specialty Certification Board denying Petitioner's application for certification, the Court should apply its independent judgment and find that by the weight of the evidence the denial of certification was an abuse of discretion. In the alternative, and at a minimum, the court should review the record and conclude that no substantial evidence exists in the record to support the denial of Petitioner's application for certification.

3. That the Court allow Petitioner to introduce evidence that SESA and the Specialty Certification Board improperly refused to receive and consider during the proceedings below. In this regard, Petitioner intends to present additional evidentiary proof to support each of the grounds for relief at the hearing before the Court on this matter.

4. That, at the hearing, the Court exclude the evidence in the record concerning: (a) the alleged inadequacy of the training of Petitioner's technicians and (b) the civil actions against Petitioner that were settled, on the grounds that these items of evidence are irrelevant and unduly prejudicial because they exceed the SESA regulations.

IV. CONCLUSION

Based on the foregoing, the Court should grant the Petition for a writ of mandate pursuant to Columbia Code of Civil Procedure § 1094.5.

Date: February 11, 2011

MARSDEN, MARKS & JAMES, LLP

By /s/

Albert Marsden

Attorneys for Petitioner, Enviroscan, Inc.

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Office of Field Investigations

REPORT OF INVESTIGATION:

Investigator: Rodney Bellamy, Senior Investigator III

Subject: Application for Certification as Residential Specialist

Applicant: Enviroscan, Inc.
17525 Industrial Way, Bldg. 7
Darbyville, Columbia 98755

Environmental Abatement Contractor's License # 107562

Principal: Elroy Riggins, President and Chief Executive Officer

Date: April 16, 2010

Summary of Report and Findings

This investigation was carried out pursuant to SESA Regulations governing the application for certification as Residential Specialist, pursuant to Columbia Code of Regulations § 101.752.

Application No.: RS 244-06

Date Application Received: February 22, 2010

Dates of Investigation: Commenced on March 19, 2010.

Summary: This investigator conducted the investigation in accordance with all steps specified in the SESA Manual for Field Investigations. This contractor has been in the environmental hazards abatement business since 2001, and holds a valid SESA Environmental Abatement Contractor's license # 107562, issued June 14, 2001.

Opening Conference: The initial contact was with Elroy Riggins, President and CEO of Enviroscan. He is an earthy, plainspoken person. I held an opening conference in which we discussed the following:

a) We reviewed Enviroscan's application, and I told Mr. Riggins that, on the face of it, the application appeared to contain all the items required by the Columbia Code of Regulations. I handed him a copy of the Columbia Code of Regulations, which he stated he had already reviewed in the process of preparing and submitting his application.
b) I told him I would take steps to verify all the information contained in the application, including seeking written verification from any and all sources and conducting oral interviews with customers, vendors, competitors, and employees.
c) I told him that, up to the time of the completion of my investigation, he was encouraged under Section 4 of the Columbia Code of Regulations (Statement of Qualifications and Additional Evidence) to submit any and all additional information he believed might be helpful. I also told him I would advise him of any negative information received and give him an opportunity to submit further information. He stated he was confident that he had already submitted everything necessary for certification.

Review of Application: Enviroscan's application appears to satisfy all the technical requirements of the Columbia Code of Regulations. However, this investigator reports the following "exceptions," which are supported by backup documentation accompanying this report:

a) Enviroscan technically satisfies the requirement of Columbia Code of Regulations Section 1(b)(2) for 60 hours training of its technicians, but information from suppliers and vendors of residential systems reveals that none of that training occurred within the past three years. Enviroscan's vendors and suppliers all said that in the last couple of years technologically more advanced residential systems have come

on the market, making more current training desirable. Although Enviroscan's application does not specifically say that its employees have received more recent training, this investigator has been unable to confirm that they have.

b) Regarding Columbia Code of Regulations Section 2(c), two Enviroscan customers have filed civil actions alleging faulty installation. No judgments have been entered against the contractor; both actions were settled by the contractor's insurance company for undisclosed amounts. Enviroscan's application does not mention this.

c) Regarding the surety bonding requirements in Columbia Code of Regulations Section 3, Enviroscan was unable to verify that all of its installation and service employees are bonded. There have been instances in the past two years where bonds were denied to at least three employees for reasons relating to criminal records.

d) Statements taken from two of Enviroscan's current systems and parts vendors classify Enviroscan as "slow to pay." One of them ships to Enviroscan on a C.O.D. basis only.

e) Enviroscan has filed a mechanic's lien on the home of a customer for the customer's failure to pay the balance due on the installation of a system. The customer says Enviroscan departed from the specifications that the customer ordered and that Mr. Riggins refuses to discuss it. The customer says she learned from the Enviroscan employee who did the installation that he was ordered by Mr. Riggins to install a Detecto system because the supplier of the HomeSafe system (which is the one the customer says she ordered) would not ship to Enviroscan on credit.

Closure: On April 2, 2010, I spoke with Mr. Riggins by telephone and discussed with him in detail the "exceptions" noted above, telling him all names, dates, and sources regarding these exceptions and inviting him to submit to me any information he wished by way of explanation or rebuttal of the "exceptions" within

the next 10 days. He stated he was in a very "busy season" but would do the "best I can."

This investigator received no further information from Enviroscan or Mr. Riggins within the 10-day period. Thus, the investigation is closed, and this report is submitted to the Specialty Certification Board for its consideration in connection with Enviroscan's application for certification.

Date: April 16, 2010 Rodney Bellamy

Rodney Bellamy, Senior Investigator III

State of Columbia
STRUCTURAL ENVIRONMENTAL SAFETY AGENCY
Specialty Certification Board
404 State Building
P.O. Box 6523
Astoria, Columbia 98720-6523

June 21, 2010

Mr. Elroy Riggins
President and Chief Executive Officer
Enviroscan, Inc.
17525 Industrial Way, Bldg. 7
Darbyville, Columbia, 98755

Re: Enviroscan, Inc.
Application No. RS 244-06

Dear Mr. Riggins:

I am instructed by the Specialty Certification Board of the Structural Environmental Safety Agency to inform you that, at its regular meeting on June 15, 2010, the Board considered your application for certification as a Residential Specialist.

I regret to inform you that the Board DENIED your application for the reasons stated in the copy of the Board's minutes, which are attached to this letter.

The minutes and the record upon which this decision was based will be made available to you for inspection and copying. If you wish to inspect and copy the record, please contact me by telephone so we can make the necessary arrangements.

Imelda Galano

Imelda Galano
Secretary to the Board

Attachment to Notification Letter

SESA – Specialty Certification Board
Minutes of June 15, 2010 Regular Board Meeting

At its regular quarterly meeting on June 15, 2010, the Board, with all members present, considered and took action upon the following applications for certification as Residential Specialists:

*** * ***

Application of Enviroscan, Inc. (Application No. RS 244-06): Upon review by the Board of the Record, including all supporting documents, the Board, by unanimous vote, DENIES the application. The Record reveals customer and vendor dissatisfaction with contractor, questionable currency of training, and employee bonding issues such that the Board does not believe contractor should be allowed to represent to the consuming public that contractor has the State's approval as a Residential Specialist.

*** * ***

Imelda Galano

Imelda Galano, Secretary
SESA, Specialty Certification Board

ENVIROSCAN, INC.

WHEN YOUR SAFETY IS AT STAKE
17525 INDUSTRIAL WAY, BLDG. 7
DARBYVILLE, COLUMBIA 98755
TEL: (502)877-6542

July 12, 2010

Specialty Certification Board, SESA
404 State Building
P.O. Box 6523
Astoria, Columbia 98720-6523

Re: Enviroscan, Inc.
Application No. RS 244-06

Dear Secretary Galano and Members of the Board:

You have arbitrarily refused to certify my company as a Residential Specialist. I was unable to attend the Board's meeting, but if I had been there, I could have set the record straight. I hereby request that you reopen the record and allow me to appear before you to come forth with the truth in this matter.

Your investigator, Rodney Bellamy, told me about a few negative statements he got from customers and suppliers about my service and I told him they were totally off-base. He said he would hold the file open for 10 days until I could come up with evidence to disprove those lies. I told him that it would be easy for me to disprove them, but that he caught me at a particularly busy time in my business, and that I needed more than 10 days.

Denial of my certification will end up costing me a lot of lost business. What your investigator failed to put in his report is that Enviroscan is the largest single installer of residential monitoring systems in the Darbyville metropolitan area. I have been in business for over 10 years. I would have been able to present evidence that your failure to certify Enviroscan as a Residential Specialist will result in a loss of at least $250,000 a year in current business, as well as a loss of new and existing commercial/industrial business.

If you do not reopen the record and allow me a hearing, I will sue you all the way up to the Supreme Court!

Sincerely,

Elroy Riggins

Elroy Riggins
President of Enviroscan

SESA – Specialty Certification Board

Minutes of September 10, 2010 Regular Board Meeting

At its regular quarterly meeting on September 10, 2010, the Board, with all members present, considered and took action on the following matters:

*** * ***

Letter from Enviroscan, Inc., dated July 12, 2010: The Board took under submission the letter from Enviroscan, Inc. dated July 12, 2010 and treated it as (1) a request for reconsideration and (2) a request to augment the record. The Board DENIED both requests.

*** * ***

Imelda Galano

Imelda Galano, Secretary
SESA, Specialty Certification Board

FEBRUARY 2011

California
Bar
Examination

Performance Test A

LIBRARY

ENVIROSCAN, INC. v. STRUCTURAL ENVIRONMENTAL SAFETY AGENCY

LIBRARY

Columbia Professions Code § 14700 *et seq.*

*** * ***

§ 14752. The Structural Environmental Safety Agency ("SESA") shall establish a five-member Specialty Certification Board ("Board") and shall implement standards and procedures for the certification of Residential Specialists. All persons certified as Residential Specialists must be SESA-licensed Environmental Abatement Contractors who, because of their superior skills and experience in installing, servicing, monitoring, and programming residential systems, shall, by reason of such certification, be authorized to hold themselves out as specialists certified by the State of Columbia. The Board shall consist of two members representing manufacturers and vendors of residential systems, two members representing SESA-licensed contractors, and one unaffiliated public member. The Board shall act upon the basis of a written evidentiary record without the requirement for a hearing. SESA shall have broad discretion in determining and applying the criteria for certification.

Columbia Code of Civil Procedure

Writs of Mandate

§ 1085 Ordinary Mandamus. A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person to compel performance of an act which the law specially imposes as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by such inferior tribunal, corporation, board, or person.

§ 1094.5 Administrative Mandamus.

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case

shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with the respondent's points and authorities, or may be ordered to be filed by the court.

(b) The inquiry in such a case shall extend to whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record.

§ 1100. Evidentiary Record. In any proceeding on a writ of mandate under Columbia Code of Civil Procedure § 1085 or § 1094.5 where the court finds that there is:

(a) relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was produced but improperly excluded from the record below or (b) irrelevant and unduly prejudicial evidence that was included in the record below, the court may remand the case to the inferior tribunal, corporation, board, or officer to be reconsidered in light of that evidence, or in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit or exclude the evidence at the hearing on the writ without remanding the case.

REGULATIONS FOR APPLICATION AND CERTIFICATION AS RESIDENTIAL SPECIALIST

Columbia Code of Regulations § 101.752

Preamble: The purpose of these regulations is to specify the requirements and procedures for certification by the Specialty Certification Board ("Board") pursuant to Columbia Professions Code § 14752. The Legislature has determined that it is in the interest of the consuming public that persons who are licensed by the Structural Environmental Safety Agency ("SESA") and who are specially skilled and qualified in the field of installing, servicing, monitoring, and programming residential environmental monitoring systems ("residential systems") may be certified as "Residential Specialists" and may lawfully hold themselves out as specialists certified by the State of Columbia as such. Only persons who hold current and valid licenses issued by the SESA as environmental abatement contractors may apply for certification as specialists. The following procedures and requirements are designed to ensure to the maximum extent possible that only persons who meet strict standards shall be certified as Residential Specialists under Professions Code § 14752.

Section 1. Application and Qualifications

(a) Persons applying for certification as Residential Specialists shall obtain, complete, and submit the official application form issued and approved by the SESA.

(b) The contractor shall furnish complete and satisfactory evidence of the following requirements:

(1) For at least five years preceding the date of the application the contractor has been continuously engaged in the business of installing and servicing residential systems, including monitoring such systems;

(2) The contractor has received from manufacturers, suppliers, or vendors of residential systems no less than 60 hours of training in installing, servicing, monitoring, and programming such systems;

(3) A description of the systems the contractor typically handles and the services the contractor furnishes;

(4) The contractor has and can maintain an experienced staffing level adequate to service customers promptly and responsively within the geographical area in which the business is conducted.

Section 2. Representations

The contractor shall declare under penalty of perjury the following:

(a) That, as of the date of the application, the contractor is in good standing with and current in payment to the contractor's suppliers, vendors, and employees;

(b) That the contractor has not within the past five years been convicted of any criminal offense (not including minor traffic violations);

(c) That no civil action filed against the contractor within the past five years for recovery of damages in any way related to the conduct of his home security contracting business resulted in a judgment for damages against the contractor; and

(d) That the contractor has not within the past five years of the date of the application been denied certification as a Residential Specialist.

Section 3. Bond

The contractor shall furnish evidence that all employees of contractor who install, monitor, program, and service residential systems are bonded and that the contractor otherwise maintains an adequate surety bond against customer, supplier, and vendor losses incurred in the conduct of the contractor's business.

Section 4. Statement of Qualifications and Additional Evidence

The contractor shall submit with the application a written, signed statement explaining the contractor's special qualifications and may, in addition to the items required in Sections 1, 2, and 3, above, submit any and all further documentary evidence the contractor believes reflects favorably on the contractor's qualifications and skill and that will inform the Board thereof, including, without limitation, certificates of training or achievement, written statements from

customers, vendors, suppliers, manufacturers, and other documentation attesting to the contractor's skill and qualifications.

Section 5. Investigation

Investigators employed by SESA will conduct an investigation of the matters set forth in the application and accompanying documents submitted by the contractor and shall prepare a written report of the results of the investigation.

Section 6. The Record

Upon completion of the investigation referred to in Section 5, the entire record shall be submitted to the Secretary of the Board to be compiled for presentation to the members of the Board for review and consideration.

Section 7. Board Meeting, Deliberation, and Decision

At the regular meetings of the Board, which shall be no less than quarterly and open to all interested parties, the Board shall review and discuss the record of each candidate presented pursuant to Section 6, above.

The Board's deliberations shall be based solely on the record before it. There shall be no evidentiary hearing or other oral presentation by the candidates under consideration or their representatives.

The Board shall, upon completion of its review and discussion of each such record, vote on whether to certify the candidate under consideration. An affirmative vote of the majority of the Board shall be required to certify any candidate for certification. In any case in which the result of the vote is that the candidate shall not be certified, the Board shall state the reasons for its decision, and the Secretary of the Board shall note said reasons in the minutes of the meeting. The decision of the Board shall be final.

Within 10 days of the Board's decision, the Board shall issue the certifications of the successful candidates and shall serve notice of the denials of certification on

the unsuccessful candidates. In the case of the latter, the notice shall include a statement informing the unsuccessful candidates that the record described in Section 6, above, and the minutes stating the reasons for the denial are available for inspection and copying by the candidates.

Butler v. State Pension Commission

Columbia Supreme Court (1995)

Professor Emeritus James Butler ("Butler") sought a writ of mandate against the State Pension Commission ("Commission") challenging its decision denying his request to be allowed to participate in an enhanced retirement plan. The Commission is a statewide agency of the Columbia state government that regulates and administers the retirement plans of its member entities. The Superior Court issued a peremptory writ of mandate directing the Commission to reconsider its decision. The Commission appealed.

Butler had taken an early retirement in 1990 from Maloney College, a member entity of the state retirement system, which in 1992 adopted an enhancement to the retirement plan that if applied to Butler would have increased his annuity by 15%. Butler applied to the Commission for the enhanced benefit, claiming that the terms of the plan under which he retired provided that he would automatically be eligible to receive any future enhancements; or that, at the very least, there was an ambiguity in the terms which should be resolved in his favor. His application was denied by the Commission. With his petition for mandamus, Butler lodged the record of the proceedings before the Commission and sought to introduce documentary evidence to supplement the record, i.e., evidence that he had not presented when he submitted his application to the Commission. The trial court accepted the new evidence over the Commission's objection.

The proper method of obtaining judicial review of a public agency decision is by instituting a proceeding for a writ of mandate, or, as it is sometimes called, mandamus.[1] The statutes provide for two types of review by mandate: ordinary

[1] Although the term "writ" is of old usage, there is no mystery to it. A writ of mandate is, simply put, an order of a reviewing court commanding that an inferior tribunal or agency do or refrain from doing an act that it is either duty-bound to perform or duty-bound to refrain from performing. It is in the nature of a mandatory or prohibitory injunction.

mandamus (Columbia Code of Civil Procedure ["C.C.P."] § 1085) and administrative mandamus (C.C.P. § 1094.5).

Judicial review via administrative mandate is available only if the agency decision under scrutiny resulted from a proceeding in which by law: (1) a hearing is required to be given at the agency level, (2) evidence is required to be taken, and (3) discretion in the determination of the facts is vested in the agency. Unless all three elements are present, ordinary mandamus is the procedure for reviewing the agency decision. The retirement plan under which Butler retired, and under which he seeks to obtain the enhanced benefit, provides that all entitlement decisions are made by the Commission upon review of the application and record of the participant seeking to obtain a benefit without an evidentiary hearing. Thus, the Commission was not required to hold an evidentiary hearing and Butler's petition was necessarily one under § 1085.

The Standard of Review: There are subtle differences in the scopes of judicial review for ordinary and administrative mandate. In general, when review is sought by means of ordinary mandate under § 1085, the inquiry by the reviewing court is limited to whether the decision being challenged was "arbitrary, capricious, or entirely lacking in evidentiary support."

When review is sought by means of administrative mandamus under § 1094.5, the standard of review is whether "substantial evidence" supports the decision.

The Commission asserts correctly that the instant case is a § 1085 petition for ordinary mandate and argues that the trial court erred in applying the substantial evidence standard of review. The Commission also argues that the trial court erred in admitting new evidence that was outside the record in the proceedings before the Commission.

In this particular case, the applicable standard of review is something of a hybrid. Although the regulations (i.e., the terms of the plan) do not provide for an administrative hearing, the plan itself provides that any reviewing court shall apply the substantial evidence standard. But for this provision in the language of the retirement plan, the court would have been limited to the "arbitrary and capricious or entirely lacking in evidence" standard. If there were any credible evidence to support the decision, including reasonable inferences drawn from the record — even if it amounts to merely a "scintilla," the court would have had to defer almost entirely to the agency's expertise.

However, because of the language in the retirement plan directing a reviewing court to apply the substantial evidence standard, the court below was required to apply the substantial evidence standard in reviewing the record. The record consisted of Butler's application for benefits, the staff's review and recommendation, and the Commission's minutes of its decision to deny the application. The task for the court was to determine whether there was substantial evidence in the record to support the denial; i.e., "substantial evidence" means more than a mere "scintilla" but less than the "weight of the evidence."

Nevertheless, this expansion in the standard of review did not change the fact that the petition remains one for ordinary mandamus under § 1085. In such a case, the reviewing court does not sit as a trier of fact in a hearing *de novo*. Rather, the court's function is to determine as a question of law whether, under the applicable standard of review (in this particular case the substantial evidence standard), there was adequate evidence to support the agency's decision. In all cases, the court is required to indulge the rule of appellate review that the agency's decision is entitled to deference and is imbued with a presumption of correctness, especially when the enabling legislation confers broad discretion upon the agency. With these rules in mind, we find that there was substantial evidence to support the Commission's decision.

New Evidence: Regarding Butler's effort to introduce evidence that he did not proffer during the agency proceedings below, case law has developed three principles relative to the rejection or admissibility of new evidence in mandamus proceedings, applicable equally in § 1085 and § 1094.5 cases: (1) if it should appear from the record that "irrelevant and unduly prejudicial" evidence had been received by the agency, the complaining party should not be foreclosed from objecting to its admission at the court hearing on the petition for mandate; (2) if the agency improperly refused to receive admissible evidence timely proffered, the litigant should not be foreclosed from offering it at the court hearing on the petition; and (3) if a party seeks to introduce additional evidence not included in either of the foregoing categories, the court may receive it upon a showing that, exercising reasonable diligence, the petitioner could not have acquired and introduced the newly-acquired evidence at the time of the agency proceedings. (*See* C.C.P. § 1100.) As an additional gloss on these three principles, the courts also consider whether the practices and regulations of the agency tend to discourage or encourage the petitioner to submit all evidence available to him/her in proceedings before the agency. If the agency is receptive to the liberal presentation of evidence by the petitioner at the agency proceedings, the burden on the petitioner to make the requisite showing of a justification for the later admission of evidence not earlier proffered is greater.

Butler's additional proffer falls into the third category. Our review of the record and Butler's rationale for offering the new evidence discloses that he did not make a showing that, in the exercise of reasonable diligence, he could not have produced the documents at the agency level. It appears that the documents were readily available to him at all times but that only belatedly did he conclude they might help him advance his case. The trial court erred in admitting and considering them.

As we have noted above, terms of the retirement plan allowed the court to apply the substantial evidence standard. However, we believe the court went beyond

that and determined, based on its own independent evaluation of the evidence, that the Commission erred. Our review of the record shows that there was substantial evidence to support the Commission's decision. The inquiry should have ended there. It was not appropriate for the trial court to go further and determine whether, based on its own independent review of the record, it would have decided otherwise.

Accordingly, we vacate the peremptory writ of mandate issued below and deny Butler's petition.

Darnell v. Columbia Board of Funeral Directors

Columbia Supreme Court (2001)

In this appeal from the denial of a writ of mandate by the Superior Court, we are asked to declare the law on a question of first impression: When is it, in cases arising under Columbia Code of Civil Procedure ("C.C.P.") § 1085 and § 1094.5, that the reviewing courts are required: (1) to apply their independent judgment to the evidence in the record upon which the administrative agency relied in making its decision; and (2) to decide the writ petition upon their independent view of the weight of the evidence in the record?

The instant case arises from decisions of the State Bureau of Embalmers ("Bureau") and its parent agency, the Columbia Board of Funeral Directors ("Board"). James Darnell, an embalmer duly licensed by the Board, had a number of complaints lodged against him for practices that allegedly exceeded the lawful and acceptable practices prescribed by the Bureau regulations. After review and investigation of the complaints, the Bureau concluded that the complaints were meritorious. Without a hearing and in accordance with Bureau regulations, it suspended Darnell's license, the consequence of which was that he could no longer lawfully engage in the embalming business. Darnell appealed the Bureau's decision to the Board, which, after a full evidentiary hearing required by the Board's regulations, affirmed the Bureau's suspension decision and revoked Darnell's license.

Darnell filed a petition for a peremptory and alternative writ of mandate against the Bureau under C.C.P. § 1085 and against the Board under § 1094.5, in each case seeking a writ directing both agencies to vacate their decisions and reinstate his license. The trial court, reviewing the agency record under the "arbitrary and capricious" standard of review, denied the petition.

We assume for present purposes that there is nothing inconsistent in Darnell's two claims – one for ordinary mandamus against the Bureau and the other against the Board under § 1094.5. Ordinary mandamus under § 1085 lies to review the decision of a statewide administrative agency, such as the Bureau, which is not required to grant an evidentiary hearing before taking action, and administrative mandamus under § 1094.5 lies to review the decision of an agency, such as the Board, made after a required evidentiary hearing.

Although it may be unnecessary for Darnell to bring the claims in tandem – because a § 1094.5 petition alone, if granted against the Board, would accomplish the petitioner's goal of reinstatement of his license – there is nothing to prohibit it. Indeed, for purposes of the present case, the presence of both types of claims helps to illustrate the similarities and differences in the judicial standards of review applicable to each type of proceeding. In both cases, irrespective of which section applies to the case under review, the ultimate question for the reviewing court is whether the agency decision was an abuse of discretion.[1]

In the ordinary § 1085 case, the case law clearly is that when the agency regulations properly do not require that the agency grant an evidentiary hearing, the reviewing court is limited to examining the record of the agency's action to determine whether the agency's action was "arbitrary, capricious, or entirely lacking in evidentiary support." In the § 1094.5 cases, the issue is more complicated.

Columbia Code of Civil Procedure § 1094.5(c) provides essentially that, in the usual § 1094.5 case, the court reviews the record to determine whether the agency's findings are supported by substantial evidence, but that "in cases in

[1] A court should not dismiss a § 1085 case merely because it is filed as a § 1094.5 petition. Rather, it should deem it filed under the appropriate section and proceed with its analysis as if the petition had been filed under the correct section.

which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." However, § 1094.5 is silent on when it is that the court is "authorized by law to exercise its independent judgment" and decide the case on the basis of the weight of the evidence. That is the question before us, and we hold that this is such a case.

Irrespective of which of § 1085 or § 1094.5 applies, the question whether the court is authorized to exercise its independent judgment on the record as a whole depends on whether the decision affects a fundamental vested right of the individual. If the decision does affect a fundamental vested right, the court must exercise its independent judgment. There are two parts to the question: (1) is the right fundamental? and (2) is the right vested?

In determining whether the right in question is fundamental, the courts engage in a two-step analysis of the nature of the right to the individual. The first step is whether the right is a basic one which will suffer substantial interference by the action of the administrative agency if the right is abridged. Rights that bear directly on one's ability to work and make a living are *per se* fundamental. The second step is whether the fundamental right is already possessed by and vested in the individual at the time of the adverse agency action, or whether it is a right that the person is merely applying to acquire.

In the case where one is merely applying to acquire the right, since the administrative agency endowed with the power to exercise discretion must engage in the delicate task of determining whether the person applying for the right qualifies for the sought right, the courts have deferred to the administrative expertise of the agency. However, if the right has already been acquired by the individual and if the right is fundamental, the courts have held that the loss of it is sufficiently vital to the individual to compel a full and independent review of the

adverse agency decision. The abrogation of such a right is too important to the individual to relegate it to exclusive administrative power of extinction.

The courts do not alone weigh the economic aspect of it, but also the effect of it in human terms and the importance of it to the individual. This approach is particularly evident in instances such as this, where the practice of one's trade or profession is at stake. As this court held in *Markum v. State Board* (1987), "[i]t necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise its independent judgment on the facts. This protection is needed to overcome the likely prejudices of the licensing body against maverick and unconventional practitioners who are pushing the edges of the envelope." Clearly, the right to practice a trade or profession is a fundamental right.

If the individual already possesses the right by virtue of a license issued by the agency, the agency's subsequent revocation of the right calls for an independent judgment review of the facts underlying the revocation decision. If, on the other hand, the individual is merely seeking to obtain the right, the courts have largely deferred to the administrative expertise of the agency unless it lacks evidentiary support in the record. This is particularly so in instances where, as here, the agency has broad discretionary powers.

Accordingly, when a vested fundamental right is at stake, the independent judgment rule applies in both § 1085 and § 1094.5 proceedings. In other words, irrespective of which section the writ petition is brought under, if a vested fundamental right is at stake, the reviewing court must apply its independent judgment to the facts in the record as a whole.

A further and concomitant consequence of the requirement that the court exercise its independent judgment is that the court's inquiry then shifts from the "arbitrary and capricious" standard (usually applicable in a § 1085 petition) and

the “substantial evidence” standard (usually applicable in a § 1094.5 petition) to the weight of the evidence standard, i.e., whether in either case the agency decision was supported by the weight of the evidence. Essentially, then, the court conducts something of a trial *de novo*, determines as a trier of fact, based on its independent review of the agency record, where the weight of the evidence lies and decides the case as if of first impression.

The revocation of Darnell’s license involved a vested fundamental right. The Superior Court erred in failing to apply the independent judgment/weight of the evidence standard of review.

Accordingly, we reverse and remand for further proceedings consistent with this decision.

Answer 1 to Performance Test A

Memorandum

To: **Marla Brevette, Chief Counsel, SESA**

From: **Applicant**

Subject: **Enviroscan, Inc. v. Structural Environmental Safety Agency**

Date: **February 22, 2011**

As you know, we have been served with the first petition for a writ of mandate challenging the decision of SESA's Specialty Certification Board to deny an application for certification as a Residential Specialist under the new law. That application was received by, and the writ of mandate was served by, Enviroscan, Inc. We received Enviroscan's application for Certification as Residential Specialist on February 22, 2010. Pursuant to that application we performed an investigation beginning on March 19, 2010. After the investigation, based on the record findings in the investigation and by unanimous vote of the SESA Speciality Certification Board that application was denied on June 15, 2010. The denial was reported to Mr. Elroy Riggins of Enviroscan, Inc. on June 21, 2010, approximately six days after the decision. Pursuant to your request for an objective memorandum, I have analyzed the legal and factual issues relating to each of the four grounds of relief asserted in Enviroscan's petition below. Each ground for relief has been set forth under a separate heading. I have also made a determination as to whether SESA or Enviroscan is likely to prevail on each of these grounds.

(1) Ground One: That the petition be treated as one arising under CCP Section 1094.5.

The Petitioner (Enviroscan) correctly identifies the elements for a writ of mandate under Section 1094.5, an Administrative Mandamus, namely that (i) by law the agency was required to provide a hearing, (ii) evidence was required to be taken, and (iii) discretion in the determination of the facts was vested in the agency. If these elements are present, the Petitioner is entitled to an Administrative Mandamus. See Columbia Code of Civil Procedure Section 1094.5. See also *Butler v. State Pension Commission*. In *Butler*, the court set

forth these exact requirements for an administrative mandate as well, in accord with the statute. It is important to determine whether the Petitioner is entitled to review under an Ordinary Mandate or an Administrative Mandate because the standard for review, to be discussed below, may be different depending on whether it is an Administrative or an Ordinary. CCP Sections 1085 and 1094.5; *Butler*. If the Petitioner is not entitled to an Administrative Mandamus the Petitioner is entitled to an Ordinary Mandamus. That the Petitioner filed the petition for writ of mandate under Section 1094.5 is not determinative and if Petitioner is not entitled to relief under that section, the case should be deemed filed under the appropriate section (Section 1085 - Ordinary Mandamus) and the court should proceed with its analysis as if the petition had been filed under the correction section. *See Darnell*.

Thus, it must be determined whether three requirements are present entitling Petitioner to relief under CCP Section 1094.5.

(i) Is a hearing required by the agency? Under Section 14752 of the Columbia Professions Code, the authorizing statute for SESA, the Board shall act upon the basis of a written evidentiary record "without the requirement for a hearing." The Board meeting at which they review and discuss the record of each candidate is "open to all interested parties." However, the Board's deliberations are based solely on the record before it and "no evidentiary hearing or other oral presentation by the candidates under consideration or their representatives" shall be made. Reg Section 7. Thus, absolutely no hearing is required by the agency in its review of applications for the certification of Residential Specialists. The Petitioner will fail to show this element is present.

(ii) Is evidence required to be taken? Yes, under Professions Code 14752 the agency is required to act on the basis of a written evidentiary record. In addition, the Regulations for Application and Certification As Residential Specialist specifically state that the applicant contractor shall furnish complete and satisfactory evidence of the applicant’s qualifications (Reg Section 1), evidence that all employees are bonded (Section 3) and, in addition to these required items, any and all further documentary evidence the contractor believes reflects favorably on the contractor's qualifications and skill (Section 4). An investigation is made on the basis of matters set forth in the application and the accompanying documents submitted by the contractor (Section 5). Finally, the entire evidentiary record shall be submitted to the board and the Board's deliberations shall be based solely on the record before it - on the evidence obtained as part of the application process (Sections 6-7). Thus, evidence is required to be taken. This element for relief is satisfied by the Petitioner.

(iii) Does the agency have broad discretion? The Authorizing statute for SESA states specifically that SESA shall have broad discretion in determining and applying the criteria for certification. Professions Code 14752. In addition, in the materials received from Raymond Barkley, Deputy Counsel, he specifically stated that the legislative history of Professions Code 14572 makes it clear that, because of the privacy and safety implications of the use of residential systems in private homes, SESA is granted *extremely broad discretion* in carrying out this mandate and in establishing the standards for certification. As such, this element for relief is satisfied by Petitioner.

However, because no hearing is required under the authorizing statute or under the Regulations for Application and Certification As Residential Specialist, the Petitioner will fail to meet the first prong for relief under CCP Section 1094.5 and thus will not be entitled to Administrative Mandamus. This result was affirmed in *Butler v. State Pension Commission*. In that court the [court] stated that the "proper method of obtaining judicial review of a public agency decision is by instituting a proceeding for a writ of mandate, or, as it is sometimes called, mandamus." *Butler*. As we know from the CCP, the CCP provides for two types of review, ordinary and administrative mandamus. The court found where the agency was not required to hold an evidentiary hearing, the petition is "necessarily one under Section 1085." As such, Petitioner's request for writ of mandate should have been filed under Section 1085 and not Section 1094.5. However, where the petitioner files under the wrong section, the court will deem that it is filed under the correct section and proceed with its analysis as such.

On these facts, Petitioner has lost a showing on the first of his Grounds for Relief: that Petitioner is entitled to an Administrative Mandamus under Section 1094.5. Thus Petitioner is only entitled to an Ordinary Mandamus under Section 1085. *Thus the Court must deny the first Grounds for Relief requested by Petitioner*.

(2) Ground 2: That, in reviewing the decision of the Specialty Certification Board, the court should apply its independent judgment and find by the weight of the evidence the denial for certification was an abuse of discretion; or in the alternative, review the record and conclude that no substantial evidence exists in the record to support the denial of Petitioner's application for certification.

Petitioner's second Ground for Relief relates to the level of review of the court reviewing the agency's decision. Here the Petitioner requests either a

"weight of the evidence" review, or at the very least, a "substantial evidence" review. The level of review depends first on the type of mandate requested - Ordinary or Administrative, and second on the rights involved.

Standards of Review

The ultimate question for the reviewing court is whether the agency decision was an abuse of discretion. *Darnell*. The standard for that review depends on the type of mandamus.

Administrative: The inquiry under an Administrative Mandate extends to whether the respondent has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required [by] law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. Where it is claimed that the findings are not supported by the evidence, the standard of review may be one of the following: (i) where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence or (ii) abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record. CCP 1094.5. Here Petitioner is claiming that the findings are not supported by the evidence, so one of (i) or (ii) would apply if an Administrative Mandate were the appropriate relief.

Ordinary: Where Petitioner fails to meet the requirements for an Administrative Mandate, however, he will be heard under the requirements for an Ordinary Mandate. The standard for review under an Ordinary Mandate is set forth in both *Darnell* and *Butler* as an "inquiry by the reviewing court . . . to whether the decision being challenged was 'arbitrary, capricious, or entirely lacking in evidentiary support." *Butler* and *Darnell*. In *Butler*, the court was presented with a "hybrid" standard which is not present here. In that case, the agency was required to use the "substantial evidence" standard and so the court applied a hybrid. Here, no such issue exists - the regulations for SESA do not require the court's review use the "substantial evidence" standard. In fact, as Mr. Barkley set forth, the agency's decisions are final and subject only to narrow, limited review by the courts under Section 1085 (Ordinary Mandamus). Thus, under the present facts based on the requirements for an Ordinary Mandamus review, the "arbitrary and capricious" standard must be used.

Fundamental Right: However, as discussed in *Darnell*, irrespective of whether Ordinary or Administrative Mandamus applies, the question whether the court is authorized to exercise its independent judgment on the record as a whole depends on whether the decision affects a fundamental vested right of the individual. This means that the court may be required to use a "trial type - de novo" review of an agency's actions, contrary to the requirements of even the Ordinary Mandamus, and apply its "independent judgment." To determine whether the court must do so, *Darnell* court set forth a two part test: (1) Is the right fundamental? and (2) Is the right vested? *Darnell*.

Is the right fundamental?

Is the right a "basic one which will suffer substantial interference by the action of the administrative agency if the right is abridged?" *Darnell*. Per se fundamental rights are those that bear directly on one's ability to work and make a living. *See Darnell*. Here the right is to a "specialist" certification. The SESA "specialist" certification does not interfere with licensed contractors from continuing to engage lawfully in the business. *Darnell*. It merely requires that before any contractors hold themselves out as "specialists" that they obtain certification. Petitioner did state in its letter to SESA after it was denied certification that they are the "largest single installer of residential monitoring systems in the Darbyville metropolitan area," that they have been in the business for more than 10 years, and that it will result in a certain loss of at least "$250,000 per year in current business" and even more in future business. Thus they may actually be able to show that the agency's ruling interferes with its right to continue to do business and thus may interfere with its ability to work and make a living. Mr. Barkley's letter even indicates that there is a "significant economic value" in being able to advertise that they have qualified as "specialists." However, Petitioner is still permitted to engage lawfully in the field and continue working as it has been over the past ten years.

Is the right vested?

The issue here is whether the fundamental right is "already possessed by and vested in the individual" at the time of the adverse finding or whether it is a right that the person is "merely applying to acquire." Here the Petitioner is applying to obtain the specialist certification; that certification is not being taken away. Thus, assuming the Petitioner is asserting a fundamental right, where one is merely applying to acquire the right, the courts "have deferred to the administrative expertise of the agency." Where the right is fundamental and where the right has already been acquired (vested) the courts have held that the loss is sufficiently vital to compel a full and independent review of the adverse

agency opinion. Here, though, where Petitioner is merely applying to acquire a right, the court will defer to the administrative expertise of SESA unless it lacks evidentiary support in the record. This is particularly so where, as here, the agency has broad discretionary powers. *Darnell*.

Thus, the standard of review is that of an Ordinary Mandamus and is the "arbitrary and capricious standard". The court will use the arbitrary and capricious standard of review instead of the "independent judgment" or "substantial evidence" standards. *Thus the court must deny the second Grounds for Relief requested by Petitioner*.

(3) Ground 3: That the Court allow Petitioner to introduce evidence that SESA and the Specialty Certification Board improperly refused to receive and consider during the proceedings below. In this regard, Petitioner intends to present additional evidentiary proof to support each of the grounds for relief at the hearing before the court on this matter.

Is additional evidence admissible?

Under CCP 1100, the court may remand the case if there is (i) relevant evidence [that], in the exercise of reasonable diligence, could not have been produced or that was produced but improperly excluded from the record below or (ii) irrelevant and unduly prejudicial evidence that was included in the record below. If the court is authorized by law to "exercise its independent judgment on the evidence" the court may admit or exclude the evidence without so remanding. Here the standard is not one of "independent judgment" so the question appears to be whether, based on the additional evidence or the irrelevant evidence, the court may remand the case. However, in *Butler*, the court stated principles relative to the rejection or admissibility of new evidence into the mandamus proceedings (applicable to Sections 1085 and 1094.5) and not on remand. With respect to additional evidence, (i) if the agency improperly refused to receive admissible evidence timely proffered, the litigant should not be foreclosed from offering that evidence at the court hearing or (ii) if a party seeks to introduce additional evidence not included in either of the foregoing categories, the court may receive it upon a showing that exercising reasonable diligence, the petitioner could not have acquired and introduced the newly-acquired evidence at the time of the agency proceedings. *Butler*.

With respect to the additional evidence there are two questions: first whether there was evidence the agency improperly refused to receive and second whether the party may be permitted to introduce additional new evidence (not previously offered).

As to whether the agency improperly refused to receive evidence of Petitioner, the agency did not refuse any of Petitioner's evidence. It merely made its decision within the 10 day time frame it told Petitioner it would. In addition, when making its determination, the court considers whether the practices and regulations of the agency tend to discourage or encourage the petitioner to submit all evidence available to him/her in proceedings before the agency. *Butler*. In the present case, the agency (SESA) provided at least two opportunities for Petitioner to present evidence available to him. First, at the application stage, the agency specifically calls for the applicant to submit evidence showing sufficiency of the qualifications and "any and all further documentary evidence the contractor believes reflects favorably on the contractor's qualifications." Again on April 2, 2010, Mr. Bellamy (of SESA) spoke with Mr. Riggins and invited him to submit any information he wished by way of explanation or rebuttal of the "exceptions" noted in my report" within 10 days. Mr. Riggins stated he was busy but that he would try. After 10 days SESA did not refuse the evidence; it merely made a decision on the record it had. Mr. Riggins had failed to provide any further evidence. Thus, as here, where the agency encourages the Petitioner [to] submit additional evidence, the Petitioner should not now be able to submit evidence that with "reasonable diligence" could have [been] submitted at the time of the agency proceedings. There is no suggestion that Mr. Riggins made any attempt to submit additional evidence before this writ petition. Thus the first part of Petitioner's third grounds for relief must be denied - he should not be permitted to submit evidence that SESA allegedly refused to receive and consider.

As to whether additional new evidence should be admitted, the question is whether in the exercise of reasonable diligence, Mr. Riggins could have procured the documents at the agency level. The court will again consider that the agency encouraged the Petitioner to submit all evidence available to him. Mr. Riggins must show that somehow he recently came across new evidence and could not have obtained such evidence during the agency proceedings with reasonable diligence. Where, as here, the documents were readily available at all times but only belatedly did Mr. Riggins conclude they might help him advance his case, such new evidence will not be admitted. Mr. Riggins made no attempt to acquire additional documents for SESA's review during the agency proceedings and as such should not be permitted to belatedly offer them into evidence in the court's proceedings on the writ of mandate. *Butler*.

As such, Petitioner's third Grounds for Relief should be denied and no additional evidence should be permitted.

(4) Ground Four: That the Court exclude the evidence in the record concerning (a) the alleged inadequacy of the training of Petitioner's technicians, and (b) the civil actions against Petitioner that were settled, on the grounds that these items of evidence are irrelevant and unduly prejudicial because they exceed the SESA regulations.

For "irrelevant and unduly prejudicial" evidence that has been received by the agency, the complaining party should not be foreclosed from objecting to its admission at the court hearing on the petition. *Butler*. This is in accord with CCP Section 1100. The question then is whether (a) and (b) above are irrelevant and unfairly prejudicial. The court again views this question in the light of whether the agency encourages the petitioner to submit all evidence available to him. Again, SESA specifically prompts applicants to submit any and all favorable evidence (Section 4). The investigator also asked Mr. Riggins if he wanted to submit any evidence to rebut the "exceptions" noted in SESA's report.

Is the evidence Irrelevant and Unfairly Prejudicial thus permitted petitioner to object to its admission?

(a) Inadequacy of Training: The evidence regarding the lack of training in the last year is directly relevant to both requirements (2) and (4) under Regulation Section 1 - that contractor receive no less than 60 hours of training and that contractor has and can maintain an experienced staffing level adequate to service customers. That Petitioner has been unable to provide training over the past three years indicates that requirement (2) that 60 hours of training be provided was not met. It also indicates that Petitioner does not have the manpower or experience to provide the training or that he maintains an "experienced staffing level." Without training, it's possible his staff is inexperienced. Thus the adequacy of training evidence is relevant. It is also not unduly prejudicial. That the trainings haven't occurred over the past three years does not indicate that the application should be outright denied; it is just one of the requirements. Mr. Riggins could have rebutted it as well. In addition, Mr. Riggins was told that the investigator would interview suppliers and vendors so this evidence should not come as a surprise to him. That it may be prejudicial to Petitioner's case does not mean it should be excluded. Because the evidence is relevant it should remain in the record and be heard by the court in the writ hearing.

(b) Civil Settlements: The evidence that the Petitioner asks the court to exclude is in fact relevant. Pursuant to Section 2 of the regulations, the contractor (Petitioner) must certify that "no civil action" has been filed against contractor within the past five years for recovery of damages. The two civil

actions that Petitioner notes were regarding faulty installations, which relates directly to "the conduct of his home security contracting business." However, Section 2 only requires contractor to certify as to civil suits that "resulted in a judgment." These civil suits resulted in settlements and no judgments, and so are irrelevant to the contractor's declaration under Section 2. They are also highly prejudicial as they indicate that Petitioner has been sued before, even though it is not a specific requirement that no suits have occurred (only that no judgments have occurred). In any event, the Board minutes do not suggest that the Board relied on the civil settlements. Thus the evidence with respect to the settlements is irrelevant and highly prejudicial and Petitioner should not be foreclosed from having that evidence excluded.

Thus, Petitioner's Fourth Grounds for Relief should be denied in part and granted in part. SESA will lose on its argument that the civil settlements should be included.

CONCLUSION: Based on the Petitioner's Grounds for Relief, Petitioner requests that the court grant its writ of mandate pursuant to CCP Section 1094.5.

We have determined that the proper grounds for relief is under CCP Section 1085, writ of Ordinary Mandamus. The standard of review is that of an Ordinary Mandamus and is the "arbitrary and capricious standard" and we must determine whether under the applicable standard of review (arbitrary and capricious), there was adequate evidence to support the agency's decision." *Butler*. Under the "arbitrary" standard of review, if there were any credible evidence to support the decision, including reasonable inferences drawn from the record - even if it amounts to merely a "scintilla," the court must defer almost entirely to the agency's expertise. *Butler*. The requirements to obtain the "specialist" certification are simple and the review will be based on whether there was even a "scintilla" of evidence for each. If there is, the court must defer to SESA. The requirements are set forth in Regulations Section 1.

First, for at least five years preceding the date of the application, the contractor has been continuously engaged in the business of installing and servicing residential systems, including monitoring such systems. Second, the contractor has received from manufacturers, suppliers, or vendors no less than 60 hours of training in installing, servicing, monitoring, and programming such systems. Third, a description of the systems the contractor typically handles and the services the contractor furnishes must be provided. Fourth and finally, the contractor has and can maintain an experienced staffing level adequate to service customers promptly and responsively within the geographical area in which the business is conducted. In addition, the Petitioner (applicant) is

required to declare that the contractor is in good standing, and in the past five years has not been convicted of any criminal offense, no civil action has been filed and the contractor has not been denied certification as a Residential Specialist. The contractor must also furnish evidence that all employees of the contractor are bonded and that the contractor otherwise maintains an adequate surety bond.

Based on the evidence in the record, even excluding the civil suit settlements, the court must deny Petitioner request for relief. Petitioner has been in good standing for at least five years (10 years it appears to have been in business) and the Petitioner provided a description of its systems (or at least the report of the investigator indicates as much). However, there is evidence to indicate that 60 hours of training has not occurred. It is also possible based on the inadequate training that it may not maintain an experienced staffing level. Even assuming these two elements were met, the contractor's declaration made pursuant to Reg. Section 2 may be inaccurate. The contractor appears to be late or "slow to pay" some of its customers. In addition, there was a mechanic's lien filed by one of its customers. Thus it does not appear that Petitioner is in good standing with its customers. The civil settlements are not in the record, so the court may not consider these. Notably, the Board minutes to not appear to suggest that the Board relied on the civil settlements either. Otherwise, it also appears that perhaps not all of Petitioner's installation and service employees are bonded. There is indication that at least three were denied bonds. Without any evidence rebutting the evidence on the record, there is adequate evidence to support the agency's decision - there is a "scintilla" of evidence if not more for the agency's decision. *The court therefore must defer to the expertise of the agency and deny the petition for writ of mandate. SESA will succeed in having the writ of mandate denied*.

Answer 2 to Performance Test A

To: Marla Brevette, Chief Counsel

From: Applicant

Subject: Enviroscan, Inc. v. Structural Environmental Safety Agency: Analysis of Grounds for Relief in Enviroscan Petition

Date: February 22, 2011

Abstract:

This memorandum provides an objective analysis of the legal and factual issues related to each of the four Grounds of Relief asserted in Enviroscan's petition, filed February 11, 2011.

Enviroscan's petition

Analysis:

Enviroscan's petition raises four Grounds of Relief: (1) that the petition be treated as one arising under C.C.P. sec. 1094.5; (2) that the court should apply its independent judgment in reviewing the decision, or in the alternative review the record under the "substantial evidence" standard; (3) that petitioner be allowed to introduce evidence not considered below; and (4) that certain record evidence purportedly irrelevant and prejudicial be excluded. Each of these four Grounds is discussed below.

(1) Whether the Petition properly arises under CCP sec. 1094.5

The CCP "provide[s] for two types of review by mandate: ordinary mandamus [sec. 1085] and administrative mandamus [sec. 1094.5]." *Butler v. State Pension Comm'n*, (Col. Sup. Ct. 1995). Here, Enviroscan petitions the court under the administrative mandamus provision, i.e., sec. 1094.5. (See Petition ("Pet.")). Further, Enviroscan's first Ground for Relief is that the court expressly find that sec. 1094.5 is the proper provision for review of Enviroscan's petition.

In support of Enviroscan's argument, Enviroscan ("E") asserts three facts: (a) that SESA was required to receive any and all evidence that E

presented below; (b) that certification is granted or denied by SESA based on the exercise of discretion by the SCB; and (c) that the SCB was required to give petitioner the opportunity to be heard at an evidentiary hearing. However, as to (c), Enviroscan is in error. The SCB was not required to provide the opportunity for an evidentiary hearing. Further, because no hearing was in fact required, E's petition is not properly styled as a petition under sec. 1094.5 for administrative mandamus.

(a) No evidentiary hearing is required by the SCB.

Despite Enviroscan's allegation that the SCB was required to give E the opportunity to be heard at an evidentiary hearing, no such hearing was required. Section 14752, which establishes the SCB, expressly provides that, "The Board [i.e., the SCB] shall act upon the basis of a written evidentiary record without the requirement for a hearing." E has pointed to no authority, nor has any been found, which contradicts the express language of sec. 14752.

(b) Because no hearing is required, E's petition should have been styled as one for relief under sec. 1085.

Section 1094.5 provides in relevant part that writs may be issued thereunder for review of a "final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given." As noted above, there is no hearing requirement under sec. 14752. Hence, section 1094.5 is inapplicable. As the court in *Butler* confirms, "[j]udicial review via administrative mandate is available only if the agency decision under scrutiny resulted from a proceeding in which by law . . . a hearing is required to be given at the agency level. . . [Otherwise], ordinary mandamus is the procedure for reviewing the agency decision." See id. (Holding that because "the Commission was not required to hold an evidentiary hearing [the] petition was necessarily one under sec. 1085.").

(c) Although filed under the inapposite provision of the CCP, E's petition should not be dismissed.

As explained above, E's first Ground of Relief will be denied, because the petition is properly one for ordinary mandamus, not administrative mandamus. While this impacts E's remaining grounds for relief, as further described below, it is not grounds for dismissal of the entire petition. In *Darnell v. Columbia Board of Funeral Directors*, (Col. Sup. Ct. 2001), the court explained that, "A court should not dismiss a sec. 1085 case merely because it is filed as a sec. 1094 petition. Rather it should deem it filed under the appropriate section and proceed with its analysis as if the petition had been filed under the correct section." Id. at n.1.

Accordingly, the court will treat E's petition as if filed under sec. 1085. For purposes of the analysis below, E's remaining Grounds for Relief are also examined as if contained in a properly filed petition for ordinary mandamus, as they will be reviewed as such by the court.

(2) Whether the court should apply its "independent judgment" to the record, or alternatively, whether "substantial evidence" is the proper standard

(a) Whether the court will apply its independent judgment to the record

In *Darnell*, the court squarely faced the issue of whether a court is authorized to exercise its independent judgment on the record as a whole, as E seeks the court to do here. There, the court explained that, irrespective of which CCP section a petition is filed under, a court will only review a record using its independent judgment in a case where "the decision affects a fundamental vested right of the individual." In *Darnell*, the court set forth a straight forward two-part standard to determine whether a fundamental vested right is sought: (1) is the right fundamental; and (2) is the right vested.

(i) Whether E's right is fundamental is debatable.

According to the *Darnell* court, a right is "fundamental" if it is "a basic one which will suffer substantial interference by the action of the administrative agency." *Darnell* specifically held that "[r]ights that bear directly on one's ability to work and make a living are per se fundamental." To determine whether a right is fundamental, the court can look at the economic aspect, but must also weigh the effect of the right "in human terms" and in its "importance" "to the individual," particularly "where the practice of one's trade or profession is at stake."

Here, of course, the right at issue is the right of E to obtain a specialty certification as a "Residential Specialist." While failure to obtain this certification certainly does not preclude E from working or making a living, it does bear on his ability to do so. Indeed, as Raymond Barkley of this Office points out in his memo, "there is significant economic value in being able to advertise that they have qualified for and have received State approval as 'specialists.'" E raises the same point in its letter to the SESA, observing that "[d]enial of [a] certification will end up costing [E] a lot of lost business," potentially "a loss of at least $250,000 a year in current business, as well as a loss of new and existing commercial/industrial business." Thus E will assert a significant economic interest in a certificate. Further, E will likely be able to assert facts as to its importance "in human terms" to E's employees, such as president Elroy Riggins (for instance, judging by the tone of his letter to the SESA board, he has quite a

personal interest in obtaining the certificate). If supported, these facts would allow E to argue, perhaps successfully, that E's right in a certificate is fundamental, thus meeting the first step of the *Darnell* standard.

(ii) Under *Darnell*, E's right is not vested.

However, *Darnell* requires that the fundamental right also be "vested." Based on the language of the court in *Darnell*, E would not be able to show that this step is met. Whether a right is vested is determined by whether it "is already possessed by and vested in the individual at the time of the adverse agency action, or whether it is a right that the person is merely applying to acquire." In other words, a right is only vested if it is capable of being lost, and a right is not vested if petitioner is merely seeking a particular right "If the individual already possesses the right by virtue of a license issued by the agency, the agency's subsequent revocation of the right calls for an independent judgment review of the facts underlying the revocation decision." *Darnell*; cf. id. (quoting Markum, "[i]t necessarily follows that the court to which the application for mandate is made to secure the restoration of a professional license must exercise its independent judgment on the facts"). Here, E is seeking a specialty certificate in the first instance. E does not already possess such certificate, nor has he ever had such certificate, so he is not seeking review of its revocation, or denial of its restoration. Hence, E's right is not vested.

(iii) Because E's right is not a "fundamental vested right," the court will not apply its independent judgment of the facts in the record.

As explained above, a court will only apply its independent judgment when reviewing the denial of a fundamental vested right. As further explained, E's right, while arguably "fundamental," is not "vested" because it is not yet earned; E seeks a new right for the first time. Hence, the independent judgment standard is inappropriate for the review of E's petition. Indeed, application of the independent judgment standard to E's petition would likely be reversible error. See *Butler* (on review of sec. 1085 petition based on the denial of an enhanced benefit, explaining that it is "not appropriate for the trial court to go further and determine whether, based on its own independent review of the record, it would have decided otherwise").

(b) Whether the court should review the record based on the substantial evidence standard

(i) The proper standard for review of a sec. 1085 petition is the "arbitrary and capricious" standard.

In *Butler*, the court explained: "In general, when review is sought by means of ordinary mandate under sec. 1085, the inquiry by the reviewing court is limited to whether the decision being challenged was 'arbitrary, capricious, or entirely lacking in evidentiary support." By contrast, in sec. 1094.5 review, the standard is "whether 'substantial evidence' supports the decision." In its second Ground for Relief, E seeks as an alternative to the independent judgment standard that the court apply the "substantial evidence" standard. While E raised its petition under sec. 1094.5, as explained above, that section is inappropriate, and review is properly sought under section 1085. Accordingly, the proper standard is whether the decision was arbitrary and capricious.

(ii) The limited exception in *Butler* for 1085 review of regulations explicitly providing for substantial evidence review is inapplicable.

Although, as a general matter, petitions arising under 1085 are reviewed using the arbitrary and capricious standard, *Butler* created one exception where the regulations at issue provided explicitly for substantial evidence review. As *Butler* notes, "[b]ut for this provision in the language of the [regulations], the court would have been limited to the 'arbitrary and capricious or entirely lacking in evidence' standard." Here, the applicable regulation, CCR sec. 101.752, contains no such language. Indeed, it states that "[t]he decision of the Board shall be final." This evidences legislative intent for the court to exercise minimal review of the SCB's actions, not higher scrutiny. Similarly, CPC sec. 14752 expressly states that "SESA shall have broad discretion in determining and applying the criteria for certification."

(iii) Under the arbitrary and capricious standard, the SCB's decision will not be vacated as long as there was "any credible evidence" in its support.

Accordingly, under *Butler*, the court should apply neither the independent judgment standard, nor the substantial evidence standard. Rather, the reviewing court's review must be limited to the "arbitrary and capricious or entirely lacking in evidence" standard. Under this standard "[i]f there were any credible evidence to support the decision, including reasonable inferences drawn from the record--even if it amounts to merely a 'scintilla,'" the court must defer to the agency's expertise. *Butler*.

E's Second Ground for Relief should therefore be denied.

(3) Whether the court will allow E to introduce evidence not considered by the SCB

(a) The court in *Butler* set forth three principles relative to the introduction of new evidence not in the record below.

In *Butler*, the court set forth three principles relative to the rejection or admissibility of new evidence in mandamus proceedings. These principles are equally applicable in sec. 1085 and sec. 1094.5 proceedings. Applicable here is the principle that new evidence may be introduced if the agency "improperly refused to receive admissible evidence timely proffered." New evidence may also be introduced if it could not have been acquired and introduced below "exercising reasonable diligence." In making this determination, the court will also consider "whether the practices and regulations of the agency tend to discourage or encourage the petitioner to submit all evidence available to him/her in proceedings before the agency."

(i) The SCB did not improperly refuse to receive admissible evidence timely proffered.

E was given several opportunities to supply the SCB with evidence supporting its application for certification. In an opening conference following the initial application, the SCB senior investigator Mr. Bellamy specifically advised E that the submission of any and all additional helpful information was encouraged. (Invest. Rept.) Subsequently, Bellamy spoke with E's representative regarding certain "exceptions" to his application, and again invited him to submit any information to explain or rebut these exceptions. E was given a 10 day window. According to the report, E stated that he was busy, and would do the best he could. Although it has not been determined what SCB's policies are regarding extensions of deadlines, and whether an extension would have been afforded E upon request or for good cause, according to Bellamy, E merely stated that he was very busy and would do the best he could. According to E, E's representative stated that he would have a difficult time complying with a 10 day period, and needed more time. However from the record it appears that no extension was sought, and no further information or communication was received during the period. Additionally, while there is no evidentiary hearing or presentation allowed at the SCB hearing itself, all interested parties are allowed to attend the hearing. E did not attend, nor did E raise any further complaint regarding the need to submit further evidence until following E's denial of a certificate.

On these facts, the court would not likely determine that the SCB improperly refused to receive admissible evidence timely proffered. E exclaims that he "could" have set the record straight, but he made no attempt to do so. His mere assertion that he "needed more time" should be considered insufficient without tangible factual support. As by his own admission the president of the largest installer of residential monitoring systems in the area, E could have assigned a deputy to gather the evidence or seek an extension.

(ii) E makes no showing that the evidence it seeks to introduce was unavailable to it with reasonable diligence during the proper time for submission.

As above, several times E was invited to submit evidence in E's support, but failed to do so. The evidence E seeks to introduce now appears to be evidence that E had available to it during the proper time for submission, but because of E's own scheduling constraints, E failed to do so. It does not appear from the record or the petition that E has further evidence that was discovered after the time for submission, that could not have been discovered earlier with reasonable diligence. Similar to the petitioner in *Butler*, with E "the documents were readily available to him at all times but that only belatedly did he conclude they might help him advance his case." E initially stated he "had already submitted everything necessary for certification" (Invest. Rept.), and only later did he explain that had he been at the hearing, he "could have set the record straight." (E ltr. to SCB).

(iii) The practices and regulations of the agency do not appear to discourage the submission of evidence.

As set forth above, E was advised several times to submit evidence to the Board in his support. E's failure to submit evidence was not a result of any particular difficulty or onerous condition, besides the 10-day limit as already discussed. And again, while evidence is not allowed to be submitted at the SCB hearing itself, the hearing is intended to review and make a decision on the evidence discovered and submitted during the investigation phase. A court would likely find it reasonable that the agency cut off the time to submit evidence at some point before the final decision, and there do not appear to be strong grounds here to challenge the cutoff date chosen by the SCB.

Indeed, here the multiple explicit invitations to support E's application with evidence, particularly the invitation to do so to rebut the "exceptions" would likely be found to be active encouragement by the agency to submit evidence. Thus, under *Butler*, the burden on E to introduce this evidence now should be high, "If

the agency is receptive to the liberal presentation of evidence by the petitioner at the agency proceedings, the burden on the petitioner to make the requisite showing of a justification for the later admission of evidence not earlier proffered is greater."

(4) Whether the court will exclude evidence already in the record, as irrelevant or unduly prejudicial

Butler explains that if "irrelevant and unduly prejudicial" evidence was received by the agency, petitioner should not be foreclosed from objecting to its admission on review. Here, E wishes to have the court exclude evidence in the record concerning (a) the inadequacy of training of E's technicians; and (b) the civil actions against E that were settled. (Compl.)

(a) The court would consider whether the evidence E complains [about] is "irrelevant and unduly prejudicial" should have been excluded.

Neither *Butler* nor *Darnell* sets forth the standard for what constitutes irrelevant and unduly prejudicial evidence, or discusses whether there is any initial hurdle to getting a court to review particular evidence to see whether it should have been excluded below. *Butler* only discusses, in dicta, that a petitioner should not be foreclosed from objecting to the admission of such evidence at the court hearing on mandate. Further research is therefore needed, but likely the court would review the evidence complained about by E, to determine whether it is irrelevant and unduly prejudicial.

(b) The evidence complained of by E would likely not be found to be irrelevant or unduly prejudicial.

The CCR, sec. 101.752, sets forth the qualifications and standards for the application for certification. Amongst the qualifications are that contractors must have received "no less than 60 hours in training." Likewise, applicants must declare, under penalty of perjury, whether any civil actions have been filed against contractors. Hence, E's assertions that evidence that the alleged inadequacy of training and the civil actions that were settled is irrelevant and highly prejudicial would likely not be looked on favorably by the reviewing court.

E asserts that such evidence exceeds the SESA regulations. As shown above, the SESA regulations call expressly for evidence of training and civil actions. Although E may be correct that whether the 60 hours of training were received recently is different than whether they were received at all, which arguably is what the regulations inquire about; and similarly that E may be correct that settlements against contractors differs technically from civil actions

that resulted in judgments for damages, the evidence pertains closely to these requirements. E will have a hard argument showing that they are entirely irrelevant or prejudicial, however it is for the court to decide. Likely the court will not decide in E's favor on this Ground for Relief either.

FEBRUARY 2011

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

IN RE SANTOS

FILE

IN RE SANTOS

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.

Brescia & Kahler
Attorneys-at-Law
12 Manning Blvd.
Avrill Park, Columbia

Date: February 24, 2011
To: Applicant
From: Raymond Brescia
Re: In re Maria Santos

This firm represents individuals seeking asylum in the United States. Maria Santos seeks review by the Board of Immigration Appeals ("BIA") of the immigration judge's ("IJ") decision denying her application for asylum. Our position on appeal is that she has established her eligibility for asylum because her testimony and documentary evidence support her position that she has suffered and would continue to suffer persecution in Colombia on account of her political opinion.

Please draft a persuasive memorandum of points and authorities that argues that the IJ's decision should be reversed. The regulations provide the framework for the issues that have to be addressed on appeal. In your memorandum, be sure to address each of the regulatory requirements for establishing the right to asylum, show how the available facts support our client's position, indicate how the IJ erred, and show why the BIA should reverse.

Brescia & Kahler
Attorneys-at-Law
12 Manning Blvd.
Avrill Park, Columbia

DATE: August 21, 2009
TO: Attorneys
FROM: Gregory Mandel
RE: Persuasive Briefs and Memoranda

The law in our field of practice, representing individuals seeking asylum in the U.S., is heavily laden with detailed statutes and regulations that set forth the elements of the analytical framework for arguing a case. In writing briefs and memoranda of points and authorities, it is particularly important to carefully parse the statutes and regulations into their components and apply the facts to each of them.

As usual, the brief should contain a very short statement of facts, carefully selecting the facts that are pertinent to our case. The object is to highlight the facts that support our client, not simply to regurgitate all the known facts.

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: THE APPLICANT WAS PERSECUTED IN HER HOME COUNTRY. Proper: THE APPLICANT SUFFERED PERSECUTION BY THE GOVERNMENT BECAUSE OF HER FREQUENT STATEMENTS CRITICIZING THE GOVERNMENT'S LAND REFORM POLICY.

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.

TRANSCRIPT OF IMMIGRATION HEARING BEFORE IMMIGRATION JUDGE HARRIET STONEMAN

February 18, 2011

Direct Examination of Maria Santos

Q [By Mr. Raymond Brescia]: Would you state your name for the record?

A [By Ms. Maria Santos]: Maria Santos.

Q: Where do you live?

A: 8897 India Road, Avrill Park.

Q: Where were you born?

A: I am a native and citizen of Colombia.

Q: When did you most recently come to the United States?

A: I was admitted to the United States on August 29, 2007, as a nonimmigrant B-2 visitor. I was authorized to stay until February 28, 2008.

Q: Obviously you did not leave.

A: No, on June 29, 2008, I filed this application for asylum.

Q: Why are you seeking asylum?

A: I was politically persecuted by the Revolutionary Armed Forces of Colombia.

Q: Is that the group referred to as the FARC?

A: Yes.

Q: Are you a member of a political party?

A: I have been an active member of the Colombian Liberal Party and various other political and social groups for my entire adult life. I was formerly married to the Colombian ambassador to Peru and often met with Colombian political leaders in Bogotá.

Q: When did this persecution begin?

A: In 2000, while studying law, I joined the New Democratic Force, a group devoted to advancing democratic government in Colombia.

Q: What types of activities did you engage in for this group?

A: I traveled to Mosquera, a town on the outskirts of Bogotá, to speak with teenagers in support of the democratic leadership of Colombia and against joining rebel groups such as FARC.

Q: Anything else?

A: I also raised funds on behalf of impoverished people in Mosquera and assisted in efforts to construct new schools there.

Q: Did you belong to any other groups?

A: In 2004, after completing my law degree, I founded Ayuda Con Amor, which is Help With Love, in English. It is an organization that raised money to assist the poor in Mosquera and other municipalities surrounding Bogotá.

Q: Did you engage in any other activities?

A: By 2005, I was regularly holding meetings with citizens of Mosquera to discuss local political affairs. I also campaigned for the reelection of the mayor of Mosquera, who opposed FARC's presence in the region. It is these activities that made me a political target of FARC.

Q: What do you mean?

A: Soon after I began traveling to Mosquera to hold meetings, I started receiving threats by mail and telephone, warning me that FARC would retaliate if I did not end my political activities.

Q: Did FARC ever confront you in person?

A: In November of 2005, I had my first face-to-face encounter with FARC rebels. I was driving away from my home in Bogotá and three men dressed in camouflage and wearing FARC bracelets stopped my car.

Q: What happened?

A: The men surrounded my vehicle. One of them forced me out of my car by my hair. He threw me face-first onto the ground, and jammed his foot into my back.

Q: Do you know who this person was?

A: He identified himself as Commander Julian from the Fifth Front of the FARC.

Q: Did he say anything?

A: He called me foul names because of my work in support of the Colombian government. He said I was an “enemy of the people,” warned me that I would be killed if I was caught again in Mosquera.

Q: Then what happened?

A: They left and I was taken to the hospital and treated for wounds to my face and back.

Q: Did you do anything else as a result of this confrontation?

A: I moved to my parents’ farm outside of Bogotá for a time and had a bulletproof door installed in my apartment in Bogotá.

Q: Let me show you what has been marked as Petitioner’s Exhibits 1 and 2. Do you recognize them?

A: Exhibit 1 is the bill from the emergency room where I was treated after the confrontation. Exhibit 2 is a receipt for the purchase and installation of the bulletproof door.

Q: Did you stop traveling to Mosquera?

A: No, but I tried to be less visible. For example, I used several different vehicles for transportation and often refrained from speaking publicly.

Q: Were there any other threats?

A: Yes, I received several phone threats at my parents' farm. In July of 2006, I returned to Bogotá to find red graffiti reading “Death to Help With Love” painted on my apartment door. The next time I went to Mosquera, I found similar graffiti threatening the organization I founded painted on the main square.

Q: How did these things make you feel?

A: I was very anxious. I was afraid the FARC rebels would carry out their threats.

Q: How did you deal with your anxiety and fear?

A: I visited a psychiatrist for two months, and in the two months that followed, I left Colombia on at least three occasions to evade detection by FARC rebels, and in part, I guess, to relieve the increasing stresses of my Colombian life.

Q: Where did you go?

A: I traveled to the United States once in August of 2006 and twice in September of 2006.

Q: But you went back to Colombia?

A: Yes, despite the threats I was determined to continue my political and philanthropic activities.

Q: Did the threats resume?

A: Yes. On December 1, 2006, several FARC members showed up at the farm looking for me. I was not there, but the groundskeeper and long-time family friend, Mario, was there alone with his son. They demanded to know where I was.

Q: Did Mario tell them?

A: No. Mario resisted and the men began torturing him. When Mario continued to refuse to disclose my location, the men shot Mario to death in the presence of his son.

Q: What happened next?

A: As the result of Mario's killing, I again sought psychiatric help. My family encouraged me to leave Colombia.

Q: Did you leave?

A: No. I attempted to change my appearance by cutting my hair and dying it black and resolved to continue my work in Mosquera.

Q: Did this work?

A: No. On December 10, 2006, I quietly planned to make a trip to Mosquera with several members of Help With Love to deliver grants to several children in Mosquera. I told no one of our plans. On the way to the meeting, the bus I was riding stopped at a grocery store where I knew the owner.

Q: What happened?

A: I entered the store and found the owner unusually quiet, but nervously attempting to communicate something to me. At that point, a man who had been loitering in the store stepped up and shot the store owner. Then about nine other men appeared. They identified themselves as members of FARC and read aloud a list of four wanted individuals, including me.

Q: Then what happened?

A: One of them said to me, “We've told you not to show yourself again, you bourgeois witch.” The men then took me into the back, forced me onto the ground, and began beating me with the butts of their guns.

Q: And then?

A: Eventually, the men loaded me into a van. One told me that they were going to a camp in the mountains, where I would first meet the local FARC commander and then be killed.

Q: Did you reach this camp?

A: No. After the van traveled about two miles, I heard gunshots, and the van stopped. The FARC men left the van and engaged in a gunfight with the Colombian military. One Colombian soldier ran up to the van and freed me. I was eventually airlifted out by helicopter to a hospital in Bogotá and treated for trauma and wounds to my face and thorax.

Q: Let me show you what has been marked as Petitioner’s Exhibit 3. Do you recognize it?

A: Exhibit 3 is the bill from the emergency room where I was treated after being rescued.

Q: What did you do after this?

A: My anxiety grew worse, so in March of 2007, I left Colombia to spend some time in the United States, but returned to Colombia and stayed for several more months. I continued to receive threatening phone calls.

Q: Did you ever report any of this to the police?

A: On August 1, 2007, I reported everything to the police.

Q: Why did you wait so long?

A: I decided not to report anything to the police on an earlier occasion because I feared that it would lead to more retaliation.

Q: So, how long after did you stay in Colombia?

A: At the strong encouragement of my family, I fled to the United States on August 29, 2007. But FARC continues to look for me. While my mother lay sick in the hospital for an extended time, a FARC rebel telephoned my mother's doctor to determine whether I had visited her.

Q: Do you wish to go back to Colombia?

A: It is my most treasured hope to return to Colombia--particularly to be with my mother. But my fear of being killed by FARC has caused me to remain in the United States.

Q: Thank you. We submit Petitioner's Exhibits 1, 2, and 3 as part of the record.

Cross-Examination

Q [By Mr. Paul Finkelman]: Just so I understand, during the time period described in your testimony, you left Colombia a total of 5 times, correct?

A: [By Santos]: Yes.

Q: Four of those trips were to the United States, correct?

A: Yes.

Q: One trip was to the Dominican Republic?

A: Yes.

Q: On the trip to the Dominican Republic, you stayed at a resort on the beach?

A: Yes.

Q: You don't have family in the Dominican Republic, do you?

A: No.

Q: This was a vacation, correct?

A: As I said, I was under great stress. I needed to get away.

Q: Despite everything you claim occurred, you returned to Colombia after each of these trips?

A: All but the last.

Q: FARC has never threatened your mother, has it?

A: No.

Q: She has never been tortured or threatened for failing to reveal your whereabouts, has she?

A: No.

Q: You consider yourself a philanthropist, correct?

A: Yes.

Q: You raised money to assist the poor?

A: Yes.

Q: You bought food?

A: Yes.

Q: Clothing?

A: Yes.

Q: That was because you cared about the poor?

A: Of course.

Q: Your concern is not about the politics the poor may have, it's about being hungry?

A: Yes.

Q: I assume, just as in the United States, the need to do that work is an embarrassment to people, whether they are the government or other people in power?

A: It is just reality.

Q: Thank you. No further questions. We submit the Government's Exhibit A, the State Department's Colombia Country Reports on Human Rights Practices as part of the record as evidence of, among other things, the improving condition of the political turmoil in Colombia.

Country Reports on Human Rights Practices - 2007
Released by the Bureau of Democracy, Human Rights, and Labor
March 11, 2008

Colombia is a constitutional, multiparty democracy with a population of approximately 44.8 million. In May 2006 independent presidential candidate Alvaro Uribe was reelected in elections that were considered generally free and fair. The 43-year internal armed conflict continued between the government and terrorist organizations, particularly the Revolutionary Armed Forces of Colombia ("FARC"). While civilian authorities generally maintained effective control of the security forces, there were instances in which elements of the security forces acted in violation of state policy.

The FARC committed the following human rights abuses: political killings; killings of off-duty members of the public security forces and local officials; kidnappings and forced disappearances; massive forced displacements; subornation and intimidation of judges, prosecutors, and witnesses; infringement on citizens' privacy rights; restrictions on freedom of movement; widespread recruitment of child soldiers; attacks against human rights activists; and harassment, intimidation, and killings of teachers and trade unionists.

RESPECT FOR HUMAN RIGHTS

Section 1: Respect for the Integrity of the Person, Including Freedom From:

a. Arbitrary or Unlawful Deprivation of Life

Political and unlawful killings remained an extremely serious problem, and there were periodic reports that members of the security forces committed extrajudicial killings during the internal armed conflict.

Guerrillas, notably the FARC, committed unlawful killings. The Jesuit-founded Center for Popular Research and Education, a local human rights

nongovernmental organization, claimed there were at least 238 political and unlawful killings, committed by all actors, during the first six months of the year, 77 more than reported in the same period in 2006.

Some members of government security forces, including enlisted personnel, noncommissioned officers, and senior officials, in violation of orders from the president and the military high command, collaborated with or tolerated the activities of new illegal groups or paramilitary members who refused to demobilize. Such collaboration often facilitated unlawful killings and may have involved direct participation in paramilitary atrocities. Some reports suggested that tacit nonaggression pacts between local military officers and paramilitaries, who refused to demobilize, or new illegal groups existed in certain regions. Reports also indicated that members of the security forces assisted, or sought the assistance of, criminal groups. Impunity for these military personnel remained a problem.

b. Disappearance

Although kidnapping, both for ransom and for political reasons, continued to diminish it remained a serious problem. According to the Presidential Program for Human Rights, there were 289 kidnappings during the first eight months of the year, compared with 476 in the same period in 2006.

c. Use of Excessive Force and Other Abuses in Internal Conflicts

The country's 43-year-long internal armed conflict, involving government forces … terrorist groups, and new illegal groups continued. The conflict and narcotics trafficking, which both fueled and prospered from the conflict, were the central causes of multiple violations of human rights.

FARC guerrillas killed journalists, religious leaders, candidates for public office, local elected officials and politicians, alleged paramilitary collaborators, and members of government security forces.

The FARC also killed persons it suspected of collaborating with government authorities or paramilitary groups. According to the government's tracking system, the FARC killed 130 demobilized paramilitaries during the year.

FARC continued to take hostages for ransom. The FARC also kidnapped politicians, prominent citizens, and members of the security forces to use as pawns in a prisoner exchange. The National Indigenous Organization stated that through July the FARC kidnapped 12 indigenous persons.

Section 2: Respect for Civil Liberties, Including:

a. Freedom of Movement, Internally Displaced Persons, Protection of Refugees, and Stateless Persons

The law provides for freedom of movement within the country, and while the government generally respected these rights in practice, there were exceptions. Military operations and occupation of certain rural areas restricted freedom of movement in conflict areas. Enhanced government security presence along major highways reduced the number of kidnappings.

The internal armed conflict was the major cause of internal displacement. In the first nine months of the year, the government's internal welfare and foreign coordination agency registered 140,183 newly displaced persons, compared with 110,302 during 2006.

* * *

TRANSCRIPT OF ORAL OPINION OF IMMIGRATION JUDGE HARRIET STONEMAN
IN THE MATTER OF MARIA SANTOS

February 23, 2011

BY THE JUDGE: Good afternoon Ms. Santos, Mr. Brescia, Mr. Finkelman. This is an asylum case, in which I have been asked to determine whether Maria Santos, a Colombian lawyer and political activist, was politically persecuted by the Revolutionary Armed Forces of Colombia ("FARC").

While I find her testimony was credible and consistent with her application, I deny the application. Ms. Santos is ineligible for asylum because she failed to establish either past persecution or a well-founded fear of future persecution on account of one of the statutorily protected grounds.

There is no doubt Ms. Santos has suffered. The transcript of the hearing reveals testimony, including repeated death threats, the murder of her friend Mario, and the eventual kidnapping and beating of Petitioner. Ms. Santos did have some injuries that were documented. Nevertheless these events do not amount to persecution in the past as defined by the statute and regulations.

Even assuming she had established past persecution, I find Ms. Santos failed to demonstrate a subjective fear of future persecution. The record is clear that there were numerous instances of Ms. Santos returning to Colombia after receiving threats from FARC, and this undermined her testimony that she feared persecution. The Court understands the explanation that she used to come to the United States many times. Yet, the Court does not understand how it is that the respondent traveled not one, not two, not three, not four, but five times back to her country if she contends that she would be harmed there. The fact of these many departures and reentries to her country significantly undermine any subjective fear of persecution if she were to return at this time.

Even assuming she fears persecution, however, as with her claim of past persecution, she has failed to establish that such fear flows from one of the five enumerated categories as opposed to her charitable work that embarrasses whoever is in power. The application for asylum is therefore DENIED.

FEBRUARY 2011

California
Bar
Examination

Performance Test B

LIBRARY

IN RE SANTOS

LIBRARY

Immigration and Naturalization Act

8 United States Code

§ 1101. Definitions

(a) (42) The term “refugee” means (A) any person who is outside any country of such person's nationality … and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion….

* * *

§ 1158. Asylum

….

(b) Conditions for granting asylum.

(1) In general.

(A) ….

(B) Burden of proof.

(i) In general. The burden of proof is on the applicant to establish that the applicant is a refugee…. To establish that the applicant is a refugee … the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was, or will be, at least one central reason for persecuting the applicant.

(ii) Sustaining burden. The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record….

(iii) Credibility determination. Considering the totality of the circumstances, and all relevant factors, there is no presumption of

credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

Code of Federal Regulations

8 C.F.R. § 208

§ 208.13 Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in the Immigration and Naturalization Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution. That presumption may be rebutted if an immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(2)(iii) of this section, an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion; or

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Immigration Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (A) or (B) above.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, an immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

(3) Reasonableness of internal relocation. For purposes of determinations under this section, immigration judges should consider whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.

Rodriguez v. U.S. Attorney General

United States Court of Appeals, 15th Circuit (2007)

Jesus Julio Rodriguez seeks review of the Board of Immigration Appeals' ("BIA") affirmance of the immigration judge's ("IJ") decision denying his applications for asylum. Rodriguez argues on appeal that he established his eligibility for asylum through his testimony and documentary support that he suffered persecution in Colombia on account of his political opinion.

Rodriguez, a native and citizen of Colombia, entered the United States on February 14, 2002 as a nonimmigrant visitor with authorization to remain until August 13, 2002. Rodriguez remained past his authorized date and the former Immigration and Naturalization Service ("INS")[2] issued him a notice to appear pursuant to the Immigration and Naturalization Act (INA) § 237(a)(1)(B), 8 U.S.C. § 1227(a)(1)(B). In February 2003, Rodriguez filed an application for asylum.

At Rodriguez's hearing before the IJ, he testified that he was a member of the Colombian liberal party and supported the campaign of Noemi Sanin for President. As part of his membership, Rodriguez passed out fliers and drove his car with mounted loudspeakers on top of it. Rodriguez stated that his problems in Colombia and with the Revolutionary Armed Forces of Colombia ("FARC") began in 1998 when the FARC came to his farm and requested an 80 million pesos war tax, which Rodriguez never paid. Rodriguez reported the incident to the police, who instructed him to install telephones at his farm and city apartment.

Rodriguez further testified that, in January 2001, members of the FARC came to his shop and asked him to hide boxes for them in his shop. Rodriguez declined to store the boxes. Thereafter, Rodriguez began receiving threatening phone calls from the FARC,

[2] The INS was abolished on March 1, 2003, and replaced with the Department of Homeland Security ("DHS"). This case, however, was initiated while the INS was still in existence. Therefore, we refer to the INS rather than the DHS as the relevant agency.

in which the FARC told Rodriguez that he was not cooperating with them, that he was their enemy and a war objector, and that he would be killed because he had warned the police. Rodriguez testified that he received approximately two or three calls per day from January until May or June 2001. In May 2001, members of the FARC followed him in his car and caused him to drive into a pothole and flip his car over. Thereafter, Rodriguez left for the United States, but returned to Colombia in December 2001 because he thought the situation had calmed. In January 2002, members of the FARC again followed Rodriguez in his car. Rodriguez believed that the people following him wanted to kill him because he never cooperated with them. Rodriguez also stated that he came to the United States, rather than moving to another Colombian city, because a move to another city would have been difficult for him as he did not know anyone in another city.

On cross-examination, Rodriguez testified that his move to the United States was easier because he has family here. He further stated that his wife and children remain in Colombia and they have not experienced any problems since he left. With regard to the 80 million pesos war tax that the FARC requested, Rodriguez stated that the FARC demanded a war tax from “everybody.”

The IJ denied Rodriguez's application for asylum and ordered Rodriguez removed to Colombia. In an oral decision, the IJ found that Rodriguez's testimony was “vague, general, and lacked specific detail.” The IJ noted that Rodriguez did not indicate where or how often he participated in activities in support of Sanin's campaign or any other political activities, or whether he held any positions with the Liberal Party, of which he claimed he was a member. The IJ further found that Rodriguez did not provide details regarding the incident where the FARC stopped him on the road in 1998 and requested the war tax, specifically, whether Rodriguez was stopped in a roadblock along with other people or whether he had been singled out by the FARC. The IJ also found that Rodriguez provided few details of the incident concerning the storage of the FARC's boxes or the two instances where Rodriguez was followed by FARC members in an automobile.

As to Rodriguez's assertion that the FARC asked him and everyone else in his area to pay the war tax, the IJ found that nothing in the record indicated that the FARC's demand was tied to any of the five enumerated categories of eligibility for asylum. The IJ made the same finding with regard to the FARC's demand for Rodriguez to store their boxes in his shop. The IJ also noted that Rodriguez's wife and children remained in Colombia without incident since he came to the United States, and that Rodriguez did not attempt to relocate within Colombia because he did not know anyone in any other location. The IJ thus concluded that Rodriguez failed to establish that he had a well-founded fear of persecution in Colombia on account of one of the five enumerated factors for asylum.

To establish eligibility for asylum, the petitioner has the burden of proving that he is a “refugee.” If the petitioner establishes past persecution, there is a rebuttable presumption that the petitioner has a well-founded fear of future persecution. However, where the petitioner cannot demonstrate past persecution, he may establish a well-founded fear of future persecution by showing that his fear of persecution is subjectively genuine and objectively reasonable. The subjective component is generally satisfied by the applicant's credible testimony that he or she genuinely fears persecution.

The objective component of an asylum applicant's well-founded fear of persecution does not require proof that persecution is more likely than not; even a one in ten chance of persecution may establish a well-founded fear. Indeed, so long as an objective situation is established by the evidence it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.

However, the petitioner's past persecution or well-founded fear of future persecution must be on account of a protected activity. In order to demonstrate a sufficient connection between future persecution and the protected activity, an alien is required to present specific, detailed facts showing a good reason to fear that he or she will be singled out for persecution on account of such a protected activity. Specifically, it must

be established that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

The IJ's finding that Rodriguez did not suffer past persecution or have a well-founded fear of future persecution on account of his political opinion is supported by substantial evidence in the record. Rodriguez testified that: (1) he participated in the Liberal Party and supported Noemi Sanin for president; (2) members of the FARC demanded that he pay a war tax, which tax Rodriguez acknowledged that the FARC requested from everyone; (3) he sought help from the police after the FARC demanded the tax and the police helped him by instructing him to install a telephone; (4) members of the FARC demanded that Rodriguez store their boxes in his shop and Rodriguez refused; (5) thereafter, he received numerous threatening phone calls from the FARC; and (6) during two separate occasions, people whom Rodriguez believed to be members of the FARC followed him in his car and once caused him to crash.

Similarly, the evidence in the record does not compel the finding that Rodriguez had a well-founded fear of future persecution on account of his political opinion. Rodriguez's testimony did not establish a sufficient connection between his political opinion and his fear that he would suffer future persecution because of that opinion. Moreover, Rodriguez acknowledged that his wife and children still live in Colombia without incident and that he did not attempt to relocate within Colombia. It is not unreasonable to require a refugee who has an internal resettlement alternative in his own country to pursue that option before seeking permanent resettlement in the United States, or at least to establish that such an option is unavailable.

The petition for review is denied.

Mazariegos v. U.S. Attorney General

United States Court of Appeals, 15th Circuit (2001)

This is a petition for review of a decision by the Board of Immigration Appeals ("BIA") of the Immigration and Naturalization Service ("INS") denying an application for asylum. Mazariegos is a Guatemalan citizen who entered the United States on November 29, 1994 without formal admission or parole. On April 18, 1997, Mazariegos applied to the INS for asylum, asserting that if he were returned to Guatemala he would be persecuted by guerrillas retaliating against him for his service in the Guatemalan army.

Before an Immigration Judge ("IJ"), Mazariegos testified that he served in the Guatemalan Armed Forces between 1989 and 1992 as a "soldier first class." During his service, he was in combat against guerrilla forces fighting the Guatemalan government as part of that country's 36-year civil war. He testified that a month after his discharge "about six" men recognized to be guerrillas from a group called Unidad Revolucionario Nacional Guatemala ("URNG") forced entry into his parents' home in a rural area of Guatemala at a time when he was alone. The guerrillas were dressed in green uniforms and carried weapons. The men beat him, causing a laceration to his head requiring eleven stitches as well as a broken nose and fractures to both kneecaps. He said that the guerrillas told him that he "had to leave, and they would give me an opportunity to leave within a year and a half. If I didn't do that they would not only kill me but they would kill my parents also." Mazariegos also said that the guerrillas told him they were attacking him because he "had been involved in military service." When asked by counsel why the guerrillas might have singled him out, Mazariegos said that he, presumably unlike others, "followed the orders that I was given by the officers in my zone."

Mazariegos said that he did not report this incident to the police. Instead, he reported it to his former military commanders who, according to Mazariegos, told him that they could not protect him because he was no longer in the commanders' zone. Mazariegos said that some six months after the incident the guerrillas again came to his parents'

house looking for him. It appears that the guerrillas may have threatened him or his parents on one or more occasions.

Despite these threats, Mazariegos did not leave the area where the incident occurred. Instead, he was able to avoid any further direct contact with the guerrillas by alternately staying at a friend's house and staying with his family. Mazariegos testified that he believed the guerrillas would seek him out and kill him were he to return to Guatemala. When asked why he never tried to relocate to a city or even another rural area in Guatemala, Mazariegos replied: “Well, it's that they, one way or another, are going to seek you out and find where you happen to be.”

A February 1997 U.S. State Department report on human rights conditions in Guatemala during 1996, which was introduced into the administrative record, advised that “[p]eace talks between the Government and [URNG] resulted in a negotiated end of the 36-year-long civil war, with a final peace accord signed in December.” Notwithstanding the report, Mazariegos testified that he believed the peace accord was not for the group with which he had problems.

The IJ denied Mazariegos's requests for asylum. The IJ found that Mazariegos failed to establish that he was a “refugee” within the meaning of the Immigration and Naturalization Act (“INA”). Specifically, the IJ found that Mazariegos “really has not provided his native country an opportunity to protect him from this group.” The IJ noted that Mazariegos failed to report his assault to the police, and did not attempt to relocate to a more urban area “where he could seek the protection of the police.” Thus, the IJ concluded that Mazariegos had failed to establish a well-founded fear of persecution because he offered “no evidence to indicate that the threat in this particular case exists against him countrywide other than his own statements.” The IJ added that “[i]n light of [Mazariegos's] low-level role in the army the Court finds that it's not plausible to believe that the threat exists against him on a countrywide basis in Guatemala.” The IJ also highlighted the State Department report, observing that it indicated a “final peace

accord” in Guatemala as of December 1996 and hence “there is little likelihood of [Mazariegos] facing persecution if he were to return” to Guatemala.

Mazariegos appealed the denial of his asylum request to the BIA. The BIA review of the IJ decision is *de novo*. The appropriate standard of review for this court is different but also well-settled: the BIA's factual determination that Mazariegos is not entitled to asylum must be upheld if it is supported by substantial evidence. We have described the substantial evidence test as deferential, and have emphasized we may not re-weigh the evidence from scratch. Thus, a denial of asylum may be reversed only if the evidence presented by the applicant is so powerful that a reasonable fact finder would have to conclude that the requisite fear of persecution exists.

The issue on appeal is whether the BIA erred by denying Mazariegos's requests for asylum. Mazariegos argues in essence that there is no substantial evidence for the BIA's finding that his persecution was not “on account of” his political opinion. On the record of the present case, we conclude that the BIA did not err by interpreting the INA and the regulations to require that Mazariegos, an alien seeking asylum on the basis of non-governmental persecution, face a threat of persecution country-wide. The statute itself and the regulations speak consistently in terms of the geopolitical unit “country.” Moreover, where the alleged persecutors are not affiliated with the government, it is not unreasonable to require a refugee who has an internal resettlement alternative in his own country to pursue that option before seeking permanent resettlement in the United States or at least to establish that such an option is unavailable.

There is ample evidence supporting the conclusion that the threat of persecution to Mazariegos is limited to one area of Guatemala, if it still exists anywhere in the country. First, Mazariegos has never had any direct contact with the guerrillas except for the single incident that occurred in his parents' home — an incident that occurred over eight years ago. Second, Mazariegos lived unharmed for over two-and-one-half years in the specific area where the incident occurred, without any further contact with the guerrillas. Third, Mazariegos was a fairly low-level soldier who does not appear to have played any

especially notorious role in the war. We cannot say on this record that he is a high-profile target, or that guerrillas outside the vicinity of his home are likely to identify and pursue him. Fourth, Mazariegos himself testified that his father told him that the bulk of the guerrillas' strength was actually outside Guatemala, in the Chiapas region of Mexico. Fifth, Mazariegos has never contacted the local police or national law enforcement authorities to obtain protection from the guerrillas, and therefore cannot argue persuasively that the Guatemalan government is unable or unwilling to protect him. Finally, according to the U.S. State Department, the civil war has long since been resolved, and the Guatemalan government signed a peace accord in 1996 (after Mazariegos fled the country) with the specific rebel group that Mazariegos says attacked him in 1992.

Petition for review denied.

Answer 1 to Performance Test B

DATE: February 24, 2011

TO: Board of Immigration Appeals

FROM: Applicant

RE: Memorandum of Points and Authorities in the matter of "In re Maria Santos"

I. Statement of Facts

Maria Santos, a native and citizen of Colombia, has faced severe persecution and violence in Colombia at the hands of the Revolutionary Armed Forces of Colombia (the "FARC") on account of her political opinion and affiliation with various political organizations. The threats first began in 2005, soon after Ms. Santos began holding meetings with citizens of Mosquera, a town on the outskirts of Bogota, to discuss local political affairs and to campaign for the re-election of the town's mayor, a known opponent of the FARC's presence in the region. Thereafter, Ms. Santos began receiving threats by mail and telephone warning her that FARC would retaliate if she did not end her political activities. The threats escalated into a violent face-to-face encounter in November 2005 when Ms. Santos was captured outside of Bogota by three FARC soldiers who forced her to the ground, physically assaulted and threatened [her] with death if caught again in Mosquera.

Ms. Santos attempted to move from her home in Bogota to her parents' farm, but the FARC discovered she was at the farm and the threats continued, both at the farm and at Ms. Santos' apartment in Bogota. The threats also continued in Mosquera, via menacing graffiti painted on the main square targeting Ms. Santos' organization. The threats erupted into violence on two further occasions: once when FARC members showed up at Ms. Santos' parents' farm and brutally tortured and eventually shot and killed the groundskeeper in front of his son for refusing to disclose Ms. Santos' location; and a second time when Ms. Santos herself was apprehended on a bus and the FARC shot and killed an innocent bystander, brutally beat Ms. Santos and then kidnapped her in a van in order to take her into the mountains to kill her. Ms. Santos was rescued

during the final encounter and airlifted to a hospital for treatment. However, the threats did not end there, but continued throughout 2007, via phone calls directly to Ms. Santos and even to her mother.

As a result of this past persecution, Ms. Santos has twice been treated in the hospital and has twice sought psychiatric help. She has attempted to move from Bogota to other locations, and has even attempted to change her appearance, but the FARC continue to find her, threaten her and violently persecute her for her political actions. Finally, Ms. Santos fled Colombia and arrived in the United States on August 29, 2007. She now seeks asylum because of her brutal past persecution in Colombia and her fear of future persecution if forced to return to Colombia.

II. Ms. Santos is entitled to asylum in the United States because she is a "refugee" as defined in the INA Sec. 1101(a)(42) because she is outside Colombia, her country of nationality, and is unable or unwilling to return to, and is unable or unwilling to avail herself of the protection of, Colombia because of her persecution and well-founded fear of persecution on account of her political opinion.

Ms. Santos is entitled to asylum in the United States because she meets all of the requirements for asylum as stated in the Immigration and Naturalization Act ("INA") and the Code of Federal Regulations ("CFR"). Therefore, the decision of the immigration judge ("IJ") denying Ms. Santos' application of asylum should be reversed by the Board of Immigration Appeals ("BIA"). In Mazariegos, the United States Court of Appeals for the 15th Circuit noted that in reviewing the decision of an IJ, the BIA decides the matter de novo.

Sec. 1101(a)(42) provides five grounds for asylum, one of which being the applicant's political opinion. Pursuant to Sec. 1158 of the INA, the testimony of the applicant may be sufficient to sustain the applicant's burden (without corroboration) of proving that the applicant's political opinion was, or will be, at least one central reason for persecuting

the applicant, so long as the applicant's testimony is credible, persuasive and refers to specific and sufficient facts to demonstrate such showing.

1. Ms. Santos' testimony is credible because no adverse credibility determination has been explicitly made by the IJ

Pursuant [to] Sec. 1158(b)(1)(B)(iii), if no adverse credibility determination is explicitly made, the applicant shall have a rebuttable presumption of credibility on appeal. In Ms. Santos' hearing with Judge Harriet, the IJ who denied her application, no adverse credibility determination was made. In fact, Judge Harriet explicitly stated that she finds her testimony credible and consistent with her application. Therefore, in accordance with CFR Section 208.13(a), Ms. Santos's testimony is sufficient on its own to establish her status as a refugee without the need for corroboration.

2. Ms. Santos has established, by persuasive testimony with reference to specific and sufficient facts, that she has suffered persecution in Colombia in the past by the FARC on account of her political opinion

Sec. 208.13(b)(1) grants an applicant a ground for asylum if she can establish past persecution. Additionally, an applicant who has been found to have established past persecution shall also be presumed to have a well-founded fear of persecution.

In order to demonstrate a sufficient connection between past or future persecution and the protected activity, Rodriguez held that an alien is required to present specific, detailed facts showing a good reason to fear that she will be singled out for persecution on account of such protected activity. There is a four part test to determine if the alien has met this burden, requiring the alien to establish that: (1) She possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment, (2) the persecutor is already aware, or could become aware, that she possesses this belief or characteristic, (3) the persecutor has the capability of punishing her, and (4) the persecutor has the inclination to punish her.

In the present action, Ms. Santos is asserting a claim for asylum based upon her political opinion, a protected activity under INA Sec. 1101(a)(42). Ms. Santos is an active political member in Colombia. She was an active member of the Colombian Liberal Party and various other political and social groups for her entire adult life. She was also married to the Colombian ambassador to Peru and often met with Colombian political leaders in Bogota. As such, she had extensive political connections in Colombia and used these connections to her advantage in her own political goals. In 2000, Ms. Santos joined the New Democratic Force, a group devoted to advancing democratic government in Colombia, and engaged in outreach activities in Mosquera by speaking with teenagers in support of the democratic leadership in Colombia and against joining rebel groups such as FARC. She also regularly held meetings with citizens of Mosquera to discuss local political affairs and campaigned for the re-election of the mayor of Mosquera, a well-known opponent of the FARC. As a result of these activities, Ms. Santos possesses a political belief which the FARC seeks to overcome by means of punishment because they oppose those who oppose them.

The FARC is aware of Ms. Santos' political activities because as a result of her open activism Ms. Santos began receiving violent and deadly threats from members of the FARC. The threats began in 2005 and continued through 2007. Indeed, even though Ms. Santos has fled the country, the FARC continue to look for her today and have repeatedly contacted Ms. Santos' mother's doctor to inquire if Ms. Santos has visited her mother.

The FARC has the capability and inclination to punish Ms. Santos because, on several occasions, the threats ripened in brutal, violent and even deadly encounters involving Ms. Santos and those close to her. Two individuals were killed for attempting to protect or warn Ms. Santos about the FARC, and Ms. Santos herself was violently beaten and threatened on two occasions, and even kidnapped on one occasion.

Therefore, Ms. Santos has established a sufficient connection between her past persecution and her political opinion consistent with the requirements of Rodriguez. Mr.

Finkelman and the IJ found that while Ms. Santos was persecuted in the past, her persecution was not due to her political opinion but rather to her charitable work for the poor. This is an incorrect finding, because Ms. Santos' charitable work was only tangentially related, if at all, to her persecution by the FARC. As an open advocate against the FARC, and open supporter of political candidates who opposed the FARC, Ms. Santos was targeted for her political activism in these areas. The FARC does not target people solely for their charitable work. Therefore, the BIA should reverse the IJ's holding that the events described by Ms. Santos do not amount to persecution in the past as defined in the statute and regulations.

3. Ms. Santos has established, by persuasive testimony with reference to specific and sufficient facts, that she is unable, or at least unwilling to return to, or avail herself of the protection of, Colombia owing to her repeated and brutal incidences of persecution at the hands of the FARC.

Ms. Santos has attempted to return to Colombia on several occasions. She has even attempted to change her appearance and relocate within the country. Despite all of these measures, she has not been able to escape the threats or violence directed towards her by the FARC. On August 1, 2007, she even alerted the police about the threats. The government will contend she should have alerted the police earlier, but Ms. Santos felt she could not do so because it would lead to further retaliation. The Country Conditions Report submitted by the government shows that members of the government of Colombia have collaborated with members of illegal groups and therefore Ms. Santos' fear of further persecution was valid. If Ms. Santos were returned to Colombia, she would suffer additional threats, violence and potentially even death, consistent with her past experiences.

The IJ was incorrect in her finding that the persecution suffered by Ms. Santos does not amount to persecution in the past as defined by the applicable statutes and regulations and therefore the BIA should reverse the IJ's holding.

4. The BIA should not exercise its discretion to deny Ms. Santos' application because of changed circumstances in Colombia because the circumstances have not improved significantly.

The Colombia Country Conditions report shows that political and unlawful killings committed by all actors during the first six months of 2007 increased from 77 in the prior year's period to 238 in 2007. The state contends that the conditions have improved, and while kidnapping is indeed down, there is still ample evidence of violence by all the actors, including the FARC, as well as corruption in the ranks of the government assisting or turning a blind eye to the FARC's activities.

Therefore, contrary to the government's arguments, the conditions have not improved in Colombia and the IJ's decision finding no past persecution should be overturned. The burden is on the Immigration Service to establish this argument by a preponderance of the evidence, and the Immigration Service has failed to do so.

5. The BIA should not exercise its discretion to deny Ms. Santos' application because she could not avoid future persecution by relocating to another part of Colombia.

The Immigration Service has the burden of proving, by a preponderance of the evidence, that Ms. Santos could avoid persecution by relocating to another location in Colombia. The Immigration Service has not even attempted to meet this burden, as it offered no evidence that Ms. Santos could have relocated and avoided persecution.

Even if it had offered evidence, however, Ms. Santos has attempted to relocate from her home in Bogota to her parents' farm outside of Bogota and to her activities in Masquera. Each time, the FARC has found her and threatened or beaten her or those close to her. The facts in Ms. Santos' case are different from those in Mazariegos because Ms. Santos does not have a "low level" role due to her extensive political connections and the organizations she has founded and taken a prominent role in. Additionally, Ms. Santos attempted to relocate, but to no avail.

Therefore, the IJ and the BIA should not exercise its discretion in denying the application on the grounds that Ms. Santos has not established she could avoid persecution by relocating within Colombia.

6. Even if Ms. Santos has not established past persecution, she has established a well-founded fear of future persecution on account of her political opinion because her fear is both subjectively genuine and objectively reasonable given her past experiences with the FARC.

In Rodriguez, the court found that the subjective component of a well-founded fear of future persecution is generally satisfied by the applicant's credible testimony that she genuinely fears persecution. The objective component is established by showing only that persecution is a reasonable possibility.

As has already been discussed, Ms. Santos' testimony has been found to be credible. She has clearly established past persecution at the hands of the FARC due to her political opinion, and has shown that that there is a reasonable possibility that if she was returned to Colombia, she would continue to suffer future persecution since every time she has left Colombia in the past and returned, she has suffered future persecution.

However, the IJ held that since Ms. Santos left Colombia on numerous occasions after facing persecution and decided to return to Colombia on each occasion, her testimony as to her fear of future persecution was undermined. This holding is not justified because Ms. Santos left Colombia on each occasion to escape the severe persecution, and only returned because of her steadfast desire to improve the political situation in her country. The fact is that each time she returned, the persecution got worse until she was finally kidnapped by the FARC, brutally beaten with rifle butts and forced into a van to be taken to the mountains and executed. Had she not been saved by Colombian military forces, she would have surely been killed. Such event was the last straw, and Ms. Santos decided that she had to flee Colombia and could never return.

Therefore, the fact that Ms. Santos left Colombia and returned on several occasions does not diminish her testimony that she has a well-founded fear of future persecution. Quite the contrary, each time Ms. Santos returned, the persecution worsened and her fear was increased until she could no longer bear it.

Therefore, the IJ erred in its holding on this matter and its decision should be reversed.

III. Conclusion

For all of the reasons stated above, the IJ erred in its decision to deny Ms. Santos' application for asylum and the decision should be reversed.

Answer 2 to Performance Test B

Memorandum of Points and Authorities in Support of Asylum for Maria Santos

Statement of Facts

Maria Santos is a Colombian national who has fled her home country to the United States after years of persecution by the Revolutionary Armed Forces of Colombia, or FARC. While Ms. Santos originally entered the United States as a visitor, she filed an application for asylum because of her fear of returning to Colombia. Ms. Santos had a long history of political activism in Colombia. She was married to a Colombian diplomat, the ambassador to Peru, and acquainted with political leaders. She was a member of the Colombian Liberal Party and the New Democratic Force, which advanced democracy in Colombia. When Ms. Santos began taking on more independent political leadership, by engaging in activities that included both substantial philanthropy and the organization of political meeting and campaigns, she began to be the target of FARC. Over the two years prior to her final exit from Colombia, Ms. Santos has received numerous threats by mail and phone that instructed her to end her political activities. When she did not, the attacks against her escalated from threats into physical altercations. She was once forced from her car and beaten by FARC members, who explicitly told her that they were attacking her for her work for the Colombian government. In attempting to continue to make good on their threats, FARC followed her after she moved from the capital to her parent's farm, where they tortured and killed her parent's groundskeeper in front of his son when he would not reveal her location. When they next did find her, Ms. Santos was kidnapped, beaten, and rescued by chance when the kidnappers engaged in an altercation with the Colombian army. After repeated attempts to return to Colombia when she was forced to leave to save herself, Ms. Santos finally realized that she cannot safely return to Colombia, and applied for asylum.

Standard of Review

The Board of Immigration Appeals should review the determination by the IJ *de novo*, upholding the conclusions of the IJ only where they are supported by substantial evidence. While this test is deferential, the denial of asylum can be reversed where the evidence is so powerful that a reasonable fact-finder would have to conclude that the applicant is in fear of persecution. *Mazariegos.* Ms. Santos is also entitled to a presumption of credibility in this appeal. Where no adverse determination of credibility is made, the applicant is entitled to a presumption of credibility on appeal. 8 U.S.C. §1158(b)(1)(B)(iii). Not only did the IJ fail to find that Ms. Santos was credible, but she explicitly found that the testimony given by Ms. Santos was "credible and consistent with her application." Based on this determination, the BIA should presume that Ms. Santos's testimony is credible.

Argument

The opinion of the IJ should be reversed by the BIA because the conclusions leading to denial are not supported by substantial evidence. Even a deferential examination of the conclusions of the IJ will show that Ms. Santos is eligible for asylum under the requirements of 8 C.F.R. § 208.13, based on the facts that she presented. To be eligible for the asylum, an applicant must either have suffered past persecution or have a well-founded fear of future persecution. Ms. Santos will be able to prove both that she was persecuted in the past and that she has a fear of returning to Colombia based on the likelihood of future persecution.

<u>Ms. Santos has demonstrated that she was persecuted by FARC because of her political activities in Mosquera, Columbia.</u>

Facts determined by the IJ show that Ms. Santos did suffer persecution. To show past persecution, an applicant for asylum must establish that she has suffered persecution, that the persecution was on account of one of five enumerated categories, and that she is unable or unwilling to return to the country because of the past persecution.

Ms. Santos gave sufficient evidence to the IJ to meet all of these elements, and the decision of the IJ denying her asylum should be overturned.

The IJ erred in determining that Ms. Santos's injuries do not amount to past persecution.

The IJ opinion claimed that Ms. Santos's significant and demonstrated injuries, including repeated death threats and multiple beatings, as well as the torture and murder of a friend who would not reveal her location, did not amount to persecution as defined by the statute and regulations. However, neither the applicable statute nor the regulations define the conduct that will amount to persecution. Case law shows that a series of threatening phone calls or a single beating were worthy of consideration for past persecution, which may have been found had the applicants in those cases been able to show that those harms were based on one of the enumerated categories necessary for asylum. Here, Ms. Santos can show a significantly more substantial amount of persecution. The threats of retaliation for the political activities she conducted in Mosquera, Colombia began in 2005, and resumed each time she returned to Colombia, continuing until she left for the final time at the end of August, 2009. She was dragged from her car and beaten in 2005, and in 2006 kidnapped, beaten, and threatened with death before her rescue. Ms. Santos gave evidence of these horrific experiences by supplying the court with her emergency room bills. These experiences, in total, should be more than sufficient to show that Ms. Santos was a victim of persecution before she left Colombia.

The IJ's determination that Ms. Santos was not persecuted based on an enumerated category is not supported by substantial evidence.

The IJ erred in rejecting Ms. Santos's showing of past persecution on the grounds that it did not meet one of the five enumerated categories under the regulations. Section 208.13 requires that asylum applicants show that their past persecution was on the basis of race, religion, nationality, membership in a particular social group, or political

opinion. Ms. Santos's credible testimony makes clear that this persecution was due to her political activities in the town of Mosquera. Her persecution is at the hands of the FARC, a group known to the United States as being in conflict with the government of Colombia. *See* Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices - 2007* (hereinafter *Report*). At that time, political killings committed by guerillas, "notably the FARC," were on the rise, with at least 238 political and unlawful killings in the first six months of 2007 alone. Ms. Santos was a target of the FARC because she was urging teenagers to support the democratic government rather than the FARC, holding political affairs discussions with citizens, and campaigning to reelect a politician opposed to the FARC. It was after Ms. Santos's political actions began that FARC began to threaten her, urging her to end all her political activities. In *Rodriguez*, the court required a showing of four factors to prove that the persecution is connected to a protected activity. First, Ms. Santos must show that she possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment. Ms. Santos showed this by discussing her political activities, including urging teens not to join FARC. Second, she must show that the persecutor is aware, or could become aware, that she has this belief or characteristic. The repeated pattern of threats and injuries, as well as FARC's determination to seek Ms. Santos out as an individual, show that they are aware of her beliefs that are contrary to their own. Next, she must show that her persecutor had the capability of punishing her. As her kidnapping in 2006 shows, FARC is able to find her whereabouts, even when she attempts to use disguises, and they are willing to beat, kidnap, and likely kill her to punish her for her views. Without the timely intervention of the Colombian army, Ms. Santos would likely already be dead. Her past experiences also show the fourth factor, that her persecutor is inclined to punish her for her views. Clearly, the FARC is willing to go to any length to stop Ms. Santos from acting on her political beliefs. There is no evidence in the record that FARC's objections to Ms. Santos's activities were based on her charitable work. While this was suggested as a possible motive for her persecution by the cross-examination at her immigration hearing, no evidence with introduced to support the contention.

Ms. Santos did not confirm this suggestion when she was asked, there is little reason to suspect that guerilla fighters like the members of FARC are embarrassed by the need for charitable work. Though FARC has attacked human rights activists, the *Report* details no known abuse of those providing charitable assistance to the people of Colombia by FARC members. On the other hand, FARC members are known to have killed "journalists, religious leaders, candidates for public office, local elected officials and politicians, alleged paramilitary collaborators, and members of governmental security forces." *Report*. All the evidence points to persecution at the hands of a quasi-political paramilitary group who was angered by Ms. Santos's political, rather than charitable, activities. Since there is no evidence to support the determination of the IJ, this BIA should overturn the conclusion of the IJ that Ms. Santos has not suffered past persecution due to a qualifying category.

Ms. Santos is entitled to a presumption of a well-founded fear of future persecution because she has shown past persecution.

Ms. Santos has shown that she was a victim of political persecution in Colombia, and she has stated that she does not want to return to the country because of this persecution. Where an applicant has established past persecution, they "shall also be presumed to have a well-founded fear of persecution." 8 C.F.R. § 208.13(b)(1). This presumption means that Ms. Santos does not bear the burden of establishing that the fear is well-founded, but may simply claim that she is afraid to return to have her application approved. While it is possible to rebut this presumption, this can only happen where there has been a fundamental change of circumstances or the applicant can reasonably live in another part of her home country. In this case, no fundamental changes have occurred. While the *Report* shows that some parts of the conflict in Colombia are diminishing, such as a decrease in kidnappings between 2006 and 2007, there is no evidence of a fundamental change. Even in 2007, there were 289 kidnappings from January to August, showing that the danger is far from over, even if it a substantial decrease from prior years. Ms. Santos is also aware that she is personally still a target of FARC, because they have continued to attempt to track her

whereabouts, even monitoring the visitors to her mother's hospital room to see if she was in the country. While her family may be safe from persecution at the hands of FARC, a factor that the 15th Circuit found relevant in *Rodriguez*, there is proof that Ms. Santos herself is still in danger, which should overcome any implication based on her family's safety. Since there is no proof that there has been a *fundamental* change in the circumstances in Colombia, but at best a slightly lessened danger, the presumption of fear should not be rebutted on these grounds. Neither can Ms. Santos reasonably be expected to return to a different part of Colombia safely. FARC is not a primarily local organization. They have also shown a willingness to follow Ms. Santos as she moved from an apartment in urban Bogota to her parent's rural farm, and continued to try to find her whereabouts. The burden is not on Ms. Santos to show that they would continue to seek her out regardless of her location in the country, yet the evidence strongly suggests that that is the case. Because the presumption of fear has not been rebutted, and because Ms. Santos has proven past persecution because of political activities, she has met the test for asylum on the basis of past persecution under 8 C.F.R. § 208.13(b)(1). The BIA should accordingly overturn the IJ's decision and grant Ms. Santos asylum.

Ms. Santos has also demonstrated a fear of future persecution at the hands of the FARC if she were to return to Colombia.

Even if the BIA fails to find that Ms. Santos was persecuted in the past, she has established a fear of future persecution. A well-founded fear of future persecution can be the basis for asylum where the applicant proves that she has a well-founded fear of persecution on account of the five enumerated factors, there is a reasonable possibility that she will suffer such persecution, and she is unwilling to return to the country.

Ms. Santos has a significant fear of future persecution based on her political views and activities against the FARC movement.

As discussed above, Ms. Santos fears persecution not for her charitable activities or the general danger of living in Colombia, but because she is a specific, visible target based on her political opposition to the FARC. The *Rodriguez* court determined that a showing of fear of future persecution must be subjectively genuine and objectively reasonable. The IJ erred in finding that Ms. Santos did not show a subjective fear because the court should have been satisfied with "the applicant's credible testimony that he or she genuinely fears persecution." *Rodriguez*. Since the IJ not find that Ms. Santos's testimony was generally credible, she was not required to show additional evidence to prove her subjective fear. Instead, the IJ found that her repeated departures from and returns to Colombia showed that Ms. Santos was not objectively fearful. On the contrary, these show that Ms. Santos waited until she was so afraid for safety that she could not return to Colombia before she applied for asylum in the United States. Ms. Santos continued to make every effort to live in her home country, but the threats against her continued after each trip. It was only after repeated, increasing threats on her life, and the lives of those around her, that Ms. Santos finally left the country.

Ms. Santos has easily met the low bar of showing that there is a reasonable possibility that she will be persecuted upon her return to Colombia.

The regulations also require that Ms. Santos show that there is a reasonable possibility that she will suffer persecution if she returns to Colombia. Here, as was made clear in *Rodriguez*, Ms. Santos does not have to show that there will definitely be persecution, or even that persecution is "more likely than not." The court then suggested that "even a one in ten chance of persecution may establish a well-founded fear." Here, Ms. Santos has shown that there is a reasonable, and in fact likely, possibility that she will be harmed. FARC members are still attempting to track her down. At her last face-to-face encounter with them, she was beaten, kidnapped, and told she would be killed before she was rescued by chance by the Colombian army. These threats and continued efforts to find her show that it is at the very least reasonably likely that she will be harmed if she were to return.

Ms. Santos is prevented from returning home by her fear, and only her fear, of reasonable persecution.

Ms. Santos has made clear that she would like to return to Colombia to be with her family, particularly her mother, who has recently been seriously ill. Ms. Santos proved her determination to return to Colombia by continuing to return after she was forced out of the country by her fear, even when her family urged her to stay out of the country to protect her safety. Ms. Santos even returned to the country after she was kidnapped and a family friend was tortured and killed for failing to disclose her location. While the prosecution argues that this is an indication that Ms. Santos does not actually fear for her life, this is in fact proof that if she were not so afraid, she would have no reason to attempt to stay in the United States. Her home, family, and country are suffering, and it is her wish to return to them. However, the repeated attacks to herself and those around her have finally broken her to the point where she feels she must stay away from her home. The BIA should recognize this fear and grant her asylum accordingly.

Ms. Santos cannot relocate within Colombia because FARC members have attempted to follow her around the country.

Finally, the asylum regulations prove that an applicant cannot show a fear of persecution where it would be reasonable for her to move to another part of her country of origin. To determine whether Ms. Santos can reasonably relocate within Colombia, the regulations advise a judge to consider whether she would face serious harm in a place of suggested relocation, whether there is any ongoing civil strife within the country, as well as social and cultural constraints such as familial ties. Ms. Santos has demonstrated all of these. As discussed above, FARC members have persistently tracked Ms. Santos as she moved to various places around Bogota. FARC is a national, rather than local guerrilla movement who is still a powerful force within the country, and there is no reason to suspect that they would be less likely to harm her if she moved to another part of Colombia. There is continuing civil strife in the country. While the *Report* indicates that the problems in Colombia are decreasing, it outlines an

increasing number of killings, still significant number of kidnappings, abuses of force in internal conflicts, and continued exceptions to free movement throughout the country. Finally, Ms. Santos has familial ties in the area around Bogota that she does not have in other parts of the country. There is no logical place within Colombia for Ms. Santos to go and live in peace and safety.

California Bar Examination

Performance Tests And Selected Answers

July 2011

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2011 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the July 2011 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 2011

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE BRENT QUILLEN

FILE

IN RE BRENT QUILLEN
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.

PAVLIK, GRIEGO & ZACKLER
Attorneys-at-Law

Interoffice Memorandum

Date: July 26, 2011

To: Applicant

From: Allan Zackler

Subject: In re Brent Quillen

A few years ago, our client Brent Quillen cosigned a promissory note at the request of his brother-in-law. The note was issued by InterCon, Inc., a start-up high-tech company formed by Mr. Quillen's brother-in-law, Mark Phillips, to a venture capital firm called First Franklin Group ("First Franklin") to secure a line of credit for operating expenses.

After struggling through a few years of operation, InterCon, Inc. was overtaken by technological advances, and the market for its goods collapsed. InterCon, Inc. has filed bankruptcy proceedings, and First Franklin has made demand on Mr. Quillen to pay the balance due on the note.

After talking to Mr. Quillen and reviewing the documents he furnished, I believe he may have a defense that he can assert against First Franklin and possibly some rights against his brother-in-law. Mr. Quillen is coming in for a follow-up meeting next Monday, and I need to be prepared at that time to advise him of his rights vis-à-vis First Franklin and Mark Phillips. You will find the questions he wants answered on the last page of the transcript of my interview with him.

Please draft a memorandum analyzing the issues raised by Mr. Quillen's questions. For each question, be sure to state the likely outcome. There is no need for an introductory statement of facts in your memorandum.

Transcript of Interview with Brent Quillen

July 21, 2011

Allan Zackler: Mr. Quillen – Brent – thanks for coming in. I've looked at the letter from First Franklin and the promissory note you sent me after our phone conversation a few days ago. Let's talk about the details of what happened and where things stand. It sounds like just another example of the truism that no good deed goes unpunished.

Brent Quillen: You've got that right. I cosigned a promissory note as a favor to my sister and her husband, Mark Phillips, to help them get started on a business venture and now it appears that the chickens have come home to roost.

Zackler: From what little you've told me so far, I don't think it looks all that bleak, but let's start at the beginning – tell me the facts.

Quillen: Well, back in 2002, Mark perfected a patent on a computer device that made network interconnectivity much smoother, and he wanted to manufacture and market it. He pitched the idea to a number of venture capital groups and ended up getting a commitment from First Franklin Group. They agreed to put up $3,000,000 to get him started.

Zackler: Did First Franklin make an outright loan to Mark Phillips, or what?

Quillen: No, they insisted that he form a corporation and give them half the stock. So, Mark formed InterCon, Inc., issued stock, and assigned half of it to First Franklin.

Zackler: Who owns the other half of the stock?

Quillen: Mark and his wife, my sister Vivian, jointly own about one-quarter, and the rest was issued as stock options to key employees.

Zackler: All right. Describe the loan arrangement for me.

Quillen: First Franklin deposited $3,000,000 in an escrow fund subject to the joint control of First Franklin and InterCon. In other words, subject to certain controls exercised by First Franklin, InterCon, Inc. was allowed to draw down prescribed amounts to be used for operating expenses. The loan was backed up by a $3,000,000 promissory note.

Zackler: Was it just $3,000,000 and no more?

Quillen: It was limited to $3,000,000, but I suppose that if things had gone well First Franklin might have advanced more.

Zackler: I see there's no due date on the note. It appears to be a "demand" note. Was it an unsecured note?

Quillen: Yes, it is a demand note and no, it was secured in two ways. As part of the deal, InterCon, Inc. gave First Franklin a security interest in all its equipment and inventory so that if InterCon, Inc. ever couldn't pay, First Franklin could foreclose on its security interest – in other words, repossess and sell the equipment and inventory. Mark says First Franklin perfected its security interest by filing a Commercial Code financing statement with the Secretary of State.

Zackler: OK, I'll check to see if and when it was filed. You said the note was secured in *two* ways – what's the second way?

Quillen: By my cosigning the note.

Zackler: How did that come about?

Quillen: I got a call from my sister, Vivian, asking me to please help out. Apparently, First Franklin told Mark it would make the loan only if he, Mark, signed it as an individual and if he would get me to cosign. I've been fairly successful in business, and the principals at First Franklin know me and that I have substantial assets. They suggested that Mark ask me to cosign, so I agreed to do it. I figured that First Franklin wouldn't have put up any money if they didn't believe Mark had a good product, so I took a chance. I know how tough it is to start a business, and it was my sister, after all, asking for help.

Zackler: Did you get any compensation for your agreement to cosign? I mean, what did you expect to get out of it?

Quillen: Well, Mark made some vague statements about me getting some stock if, and when, InterCon, Inc. went public, but I wasn't holding my breath. No, I just did it as a favor to Mark and Vivian.

Zackler: I see from the copy of the note that you sent me that you signed on the back. Right?

Quillen: That's right.

Zackler: I see that it's signed on the front, "InterCon, Inc., by Mark Phillips, Chief Executive Officer" and then just below that, "Mark Phillips, an individual." What's your understanding about why Mark signed the note as "an individual?"

Quillen: That's an interesting question. He says he signed it only as a guarantor – that he would have to pay only if InterCon, Inc. couldn't pay. I think Mark has talked to a lawyer because he's using language that he wouldn't normally use.

Zackler: What do you mean?

Quillen: He says he wasn't a "principal maker." He's calling himself an "accommodation party" and says that he did not get any "direct benefit" from signing the note. I don't know what all that means, but it sounds to me as if he's trying to avoid any liability.

Zackler: Well, words like "principal maker" and "accommodation party" have important meanings under the Commercial Code. For example, based on what you've told me so far, InterCon, Inc. is the principal maker because the loan was made to it. You're an accommodation party. All that means is that you signed the note *as a favor* to InterCon, Inc. and your brother-in-law. In relation to you, InterCon, Inc. is an "accommodated party." You're essentially a guarantor – by signing, you agreed to pay if InterCon, Inc. didn't.

Quillen: What's Mark's status?

Zackler: Well, I'm not sure at this point. If he signed as a "maker" with the intention of being principally liable just like InterCon, Inc., then that's his status. It's also possible that he's just like you – that is, that he signed just as a favor to InterCon, Inc., in which case he'd also be an accommodation party.

Quillen: What difference does that make as far as my liability is concerned?

Zackler: If Mark is principally liable as a maker, then you have certain rights of recourse against him. If he's an accommodation party like you, then a different set of rights kick in. I'll spell it out to you after I do some research.

Quillen: OK. I'll be anxious to hear what the answer is.

Zackler: Do you know whether Mark or Vivian actually received for their own account any of the money from the $3,000,000 loan?

Quillen: I don't think so. Mark was pretty honest and scrupulous about making sure that all the money went toward the company's operating expenses. Maybe he got a benefit indirectly by getting a salary, but I don't think he put any of the First Franklin money directly in his own pocket. He did tell me – and I think it's the truth – that he

drew only a small salary from InterCon, Inc. during the start-up period and that he was looking forward to the day when the company was successful and he could get some "real money" out of it.

Zackler: The letter First Franklin sent you makes demand on you for $2,000,000 plus interest. The letter refers to a bankruptcy – that's why they're demanding payment, right?

Quillen: Right. InterCon, Inc. exhausted the First Franklin line of credit. Then, in mid-2007, it went out and borrowed another $2,000,000 from Columbia National Bank. InterCon, Inc. ran through that money pretty fast, and then two months ago filed for bankruptcy. That left First Franklin holding the bag, so they called the note.

Zackler: Wait a minute, slow down. What do you mean First Franklin got left holding the bag? Didn't they have a security interest in InterCon, Inc.'s equipment and inventory that they could foreclose on?

Quillen: Well**,** I *thought* they did, but it seems that Columbia National Bank beat them to the punch somehow. Mark told me that, in order to get the loan from the bank, InterCon, Inc. also had to give the bank a security interest in the equipment and inventory. Anyway, the bank is the party that repossessed the equipment and whatever inventory was left, sold it, and applied the proceeds toward its loan.

Zackler: That could be very important. If First Franklin somehow impaired the collateral, letting Columbia National get it, it might be a partial defense for you. What was the value of the equipment and inventory at that time?

Quillen: I don't know. I think the equipment was valuable, but I have no idea about the inventory. I'm sure it had *some* value, but what put InterCon, Inc. out of business was the obsolescence of the product.

Zackler: All right**.** I'll have my paralegal check the Commercial Code filings in the Secretary of State's Office and the bankruptcy court records to see what we can find out. What was the balance due on the First Franklin note at the time InterCon, Inc. filed bankruptcy?

Quillen: As far as I know, it was the full $3,000,000.

Zackler: Then why is Franklin demanding only $2,000,000 from you?

Quillen: That's because they settled with Mark Phillips. Mark told me they accepted $1,000,000 from him in full satisfaction of his obligation, gave him a release, and said that they were coming after me for the rest.

Zackler: Can Mark afford to pay $1,000,000?

Quillen: There are a couple of sources he can tap. My sister has a trust fund left to her by my parents and his parents are fairly well off, so I'm guessing they will help. You know, it seems to me that, since First Franklin released Mark, it ought to be a release against me as well. Why should they be able to pick and choose who they want their money from and decide to pick on me?

Zackler: It's definitely something we'll look into.

Quillen: I'll tell you this. I don't know if it's possible, but if I have to pay First Franklin, I certainly want to go after Mark for reimbursement.

Zackler: I understand completely. Anything else you can think of?

Quillen: No, not at the moment.

Zackler: OK. Let me summarize. I need to get back to you on four questions: (1) Can you get reimbursement from Mark? (2) For that matter, can Mark get any recovery from you? (3) Does First Franklin's apparent loss of its security interest in the equipment and inventory reduce any obligation you have and, if so, to what extent? And (4) Does First Franklin's release of Mark act as a release of you to any extent?

Quillen: That sounds right.

Zackler: All right. Give me a few days to dig up further information and do the research. Can you come in next Monday at 10 o'clock? By then, I'll have a handle on what your rights and obligations are, and we can talk about them and what to do next.

Quillen: Terrific. I'll see you then. Thanks.

PAVLIK, GRIEGO & ZACKLER
Attorneys-at-Law

Interoffice Memorandum

Date: July 24, 2011

To: Allan Zackler

From: Barnett Graves, Paralegal

Subject: In re Brent Quillen

Mr. Zackler: Here's the information you asked me to research. I'm fairly confident that it's reliable.

1. Commercial Code Filings: For a security interest in a debtor's inventory and equipment to be perfected under the Commercial Code, the secured party must file a financing statement describing the collateral sufficiently to give public notice that the collateral is subject to the creditor's security interest. The filing must be made in the Secretary of State's Office. I searched that office's computerized records of Commercial Code financing statement filings and received a Secretary of State's certification of the following:

- Financing statement filed by First Franklin Group. It is dated March 1, 2002 and filed on March 4, 2002. It documents a security interest granted to First Franklin Group by InterCon, Inc. in a security agreement dated March 1, 2002 and describes the collateral as "All present and hereafter acquired equipment and inventory of InterCon, Inc."
- Financing statement filed by Columbia National Bank. It is dated June 1, 2007 and filed on June 4, 2007. It documents a security interest granted to Columbia National Bank by InterCon, Inc. in a security agreement dated June 1, 2007 and describes the collateral as "All present and hereafter acquired equipment and inventory of InterCon, Inc."

- There are no continuation statements or other filings reflecting any other security interest in property of InterCon, Inc.

2. Search of Bankruptcy Court records in InterCon, Inc. bankruptcy proceedings: You asked me to search the records regarding claims filed by InterCon, Inc.'s creditors in the Bankruptcy Court, especially claims filed by First Franklin Group and Columbia National Bank. Here is what I discovered:

- First Franklin and Columbia National Bank both filed early claims purporting to be secured creditors, each claiming to have a priority claim to InterCon, Inc.'s equipment and inventory.
  - First Franklin's claim was in the amount of $3,000,000, plus interest, "subject to reduction after repossession and sale of its collateral and application of the proceeds of the sale to promissory note."
  - Columbia National's claim was in the amount of $2,000,000 plus interest, "subject to reduction after repossession and sale of its collateral and application of the proceeds of the sale to promissory note."
- In a hearing before the bankruptcy judge, it was determined that Columbia National Bank had priority and that Columbia National Bank was entitled to take possession and sell the collateral. The ground of the ruling was that First Franklin's security interest had "lapsed."
- Columbia National Bank filed an amended claim as an unsecured creditor after sale of the collateral and application of the proceeds to the amount owed it. That claim shows the following:
  - Initial balance of debt: $2,000,000 plus interest.
  - Net proceeds of sale of equipment applied to the balance: $800,000.
  - Net proceeds of sale of inventory applied to the balance: $400,000.
  - Unsecured remaining balance due: $800,000 plus interest.
- First Franklin filed an amended claim as an unsecured creditor showing the following:

- "Balance due on promissory note signed by InterCon, Inc. and Mark Phillips as principals, and indorsed by Brent Quillen in the amount of $3,000,000, plus interest."
- The claim recited that "First Franklin will file a further amended claim after recovery, if any, on the note from cosigner, Mark Phillips, and indorser Brent Quillen."

- An accounting filed by the Bankruptcy Trustee states that "It is very doubtful that there will be any appreciable distribution to unsecured creditors after liquidation of the bankrupt estate and payment of costs of administration."

3. Use of funds from First Franklin loan: You also asked me to see what I could find out about how the First Franklin funds were used and what Mark Phillips's compensation arrangements as CEO of InterCon, Inc. were. The bankruptcy schedules and report of the Bankruptcy Trustee show the following:

- The only compensation arrangement between InterCon and Phillips was that he was to be paid a salary of $1,500 per month and reimbursement for travel and related business expenses.
- It appears that the only other benefit Phillips received is that the company leased him a mid-sized automobile for his personal use. All cash advances from both the First Franklin and Columbia National loans were used for operating expenses, including payment of salaries and wages of employees, except that it appears that Phillips himself drew his salary only in months when there was a positive cash flow.
- Phillips has filed a claim in the bankruptcy for $18,000 in unpaid wages.

Incidentally, I called First Franklin and spoke with Lance Templar, its managing partner. He confirms that First Franklin and Mark Phillips entered into a release and settlement agreement, but he refused to tell me the details.

Please let me know if there is anything further you want me to do.

FIRST FRANKLIN GROUP, LLP
Venture Capital Investors
One Success Way
Mayfield, Columbia 32459

Telephone: (555) 444-4500
Facsimile: (555) 444-3200

July 11, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Brent Quillen
1251 Bellow Lane
Mayfield, Columbia 32466

Dear Mr. Quillen:

The purpose of this letter is to make a presentment and demand upon you for payment of the balance due on the PROMISSORY NOTE (copy attached) that you signed as an indorser. As you know, InterCon, Inc. is insolvent and is currently in Chapter 7 bankruptcy proceedings. InterCon, Inc. is therefore unable to pay the note.

We call upon you in your capacity as indorser to pay forthwith the sum of $2,000,000 plus accumulated interest, which is the balance due on the note. We will make available to you our accounting records in the event you wish to ascertain the history of advances on the note since its inception in 2002.

We look forward to receiving your remittance within the next 30 days. We will, upon receipt of payment, surrender the signed original of the note to you and assign to you all rights we may have against other parties to the note, including our claim in the bankruptcy proceedings.

Very truly yours,

Lance Templar

Lance Templar
Managing Partner

Copy of Front of Promissory Note

[FRONT]

PROMISSORY NOTE

Date: March 1, 2002
Amount: $3,000,000.00

Maker hereby promises to pay First Franklin Group on demand or to its order the sum of $3,000,000.00 or the balance due at the time of demand, plus accumulated interest at the rate of 10% per annum. Advances up to the face amount of this note shall be made upon request of Maker and upon approval of First Franklin Group and shall be repaid periodically from operating revenues of Maker.

This promissory note is secured by a security interest granted by Maker in its equipment and inventory.

Any failure to make a payment on time shall be deemed to be a default, and the entire remaining balance shall thereupon be immediately due and payable and shall thereafter bear interest at the rate of 10% per annum until paid.

In the event it becomes necessary for First Franklin Group or any transferee of this note to take legal action to collect on this promissory note, First Franklin or said transferee shall be entitled to recover costs incurred, including a reasonable attorney's fee.

InterCon, Inc.

By *Mark Phillips*

Mark Phillips,
Chief Executive Officer

Mark Phillips

Mark Phillips, an individual

Copy of Back of Promissory Note
[BACK]

Brent Quillen

Guarantor

July 2011

California
Bar
Examination

Performance Test A

LIBRARY

IN RE BRENT QUILLEN

LIBRARY

Walker on Negotiable Instruments
by
Professor Ervin E. Walker, University of Columbia School of Law

This treatise is intended as an introduction to Article 3 of the Columbia Commercial Code (the Code) dealing with negotiable instruments. Its purpose is to familiarize lawyers with the basics of the Code and to help them navigate the often dense statutory language.

* * *

Promissory notes: (a) A promissory note is an instrument given for value in a commercial transaction to support an obligation to pay money, usually connected with the extension of credit by a creditor or a loan by a lender. To be negotiable, the note must be an unconditional promise to pay a fixed sum of money at a certain time or upon demand.

* * *

(c) **Definitions: Signatories – Parties to the note:** Persons or entities on whose creditworthiness a creditor will extend credit or make a loan fall into different categories and incur different rights and obligations depending on the capacity in which they sign the note.

- **Maker or Principal Obligor –** A maker or principal obligor – usually the buyer in a credit transaction or the borrower in a loan transaction – is one who signs the note on its face and is primarily liable to pay it according to its terms.
- **Indorser –** A person or entity who signs the note on the back and who undertakes to pay the note according to its terms if the maker does not.
- **Accommodation Party –** A signer of the note who does not receive a direct benefit from the extension of credit or the loan but who signs as a "favor" to the maker. The following example may help to illustrate: Suppose ABC Corp. seeks a loan from Bank to purchase equipment, supplies and inventory. Bank is willing to make the loan but is not totally confident of ABC's creditworthiness. Bank insists that ABC find a responsible, creditworthy "cosigner" or "guarantor" to become obligated on

the note and to pay it if ABC does not. Suppose ABC induces a third party to "cosign." That third party, who does not stand to benefit directly from the proceeds of the loan, becomes an "**accommodation party**," i.e., he or she signed as an accommodation or as a favor to ABC to help ABC obtain the loan.

- An accommodation party can sign on the face of the note, in which case, he or she becomes an **accommodation maker**, or
- That person can sign on the back, in which case he or she becomes an **accommodation indorser.**
- The rights and obligations of an accommodation party differ according to whether he or she signed as a maker or an indorser. Those rights and obligations are spelled out in Article 3 of the Code.

- **Maker (Principal Obligor) v. Accommodation Maker:** As already noted the rights and obligations of a signer differ according to whether he or she is a principal maker or an accommodation party. It is not always easy to tell the difference. Suppose Mr. X signed on the face of a note in the space directly under the signature of the corporation to which a loan has been made. Mr. X can be either a principal obligor or an accommodation maker. The key inquiry is whether and to what extent Mr. X received a direct benefit from the proceeds of the loan. If he did receive a direct benefit, he is probably a maker primarily obligated to pay the note. If not, he is probably an accommodation maker, secondarily obligated to pay the note.
- **Accommodated Party:** An "accommodated party" is the party to whom the credit was extended or the loan was made. That party is "accommodated" in the sense that it was the recipient of the "favor" done by the third party "cosigner" or "guarantor." In the example given above, ABC Corp. is the accommodated party.

Excerpts from Columbia Commercial Code

Section 3415. Obligation of Indorser.

(a) If an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument according to the terms of the instrument at the time it was indorsed. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

Section 3419. Instruments Signed for Accommodation.

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodat**ed** party") and another party to the instrument ("accommodat**ion** party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation."

(b) An accommodation party may sign the instrument as maker . . . or indorser and . . . is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party . . . if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument.

* * *

(e) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

Section 3604. Discharge by Cancellation or Renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act such as surrender of the instrument to the party . . . or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

Section 3605. Discharge of Indorsers and Accommodation Parties.

* * *

(b) Discharge, under Section 3604, of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.

* * *

(e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (1) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (2) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.

* * *

(g) Under subdivision (e), impairing value of an interest in collateral includes (1) failure to obtain or maintain perfection or recordation of the interest in collateral, (2) release of collateral without substitution of collateral of equal value, (3) failure to perform a duty to preserve the value of collateral owed to a debtor or surety or other person secondarily liable, or (4) failure to comply with applicable law in disposing of collateral.

Official Comments to Section 3605

Subsection (e) deals with the discharge of sureties (such as accommodation parties) by impairment of collateral. Subsection (g) states common examples of what is meant by impairment. The surety is discharged to the extent the surety proves that impairment was caused by a person entitled to enforce the instrument. For example, suppose the payee of a secured note fails to perfect a security interest. The collateral is owned by the principal debtor who subsequently files in bankruptcy. As a result of the failure to perfect, the security interest is not enforceable in the bankruptcy. If the payee obtains payment from the surety, the surety is subrogated to the payee's security interest in the collateral. In this case, the value of the security interest is impaired completely because the security interest is unenforceable. If the value of the collateral is as much or more than the amount of the note, there is a complete discharge.

Section 9515. Duration and Effectiveness of Financing Statement; Effect of Lapsed Financing Statement.

(a) A filed financing statement is effective for a period of five years after the date of filing.

(b) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed. Upon lapse, a financing statement ceases to be effective and any security interest that was perfected by the financing statement becomes unperfected. If the security interest becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

Venaglia v. Kropinak
(Columbia Court of Appeal, 2005)

The Appellants, Frank Venaglia, Ann P. Venaglia, and Roy J. Venaglia (the Venaglias), sued Roy M. Kropinak on his guarantee of a $68,000 promissory note issued by Downtown Business Center, Inc. (DBC) and payable to the Venaglias. Kropinak was an officer and shareholder of DBC. The trial court granted Kropinak's motion for summary judgment. The Venaglias appeal, asking that we set aside the summary judgment against them. This appeal requires us to examine the capacities in which the parties signed the promissory note and their consequential suretyship rights and obligations under the Columbia Commercial Code (the CCC).[1]

I. BACKGROUND

DBC agreed to purchase a downtown commercial property from the Venaglias for $470,000, with $90,000 due at closing and the balance payable under a real estate contract. As part of the transaction, DBC gave the Venaglias a promissory note in the amount of $68,000. The note was signed “Robert J. Doucette, President of DBC.” Immediately beneath Doucette's signature was the inscription "GUARANTOR (individually)," under which was the signature of Kropinak. No collateral secured the note.

DBC eventually failed to make the promised payments on the balance owed, and the Venaglias terminated the contract. At the time of termination, the balance due was $340,000. Shortly afterwards, the Venaglias and DBC entered into a settlement and mutual release agreement, under which DBC relinquished the property to the Venaglias. In addition, although acknowledging that DBC had equity in the property, DBC gave up all rights to recoup any such equity. Ron Perea, then president of DBC, signed the settlement agreement for DBC. Kropinak did not sign the settlement agreement.

[1] Unless otherwise noted, all citations in this opinion are to the Columbia Commercial Code.

Nine days later, the Venaglias sold the property to Suzanne Dutcher for $425,000. If DBC had retained the property and sold it for that amount, it would have been more than enough to pay off all the principal and interest that DBC owed on the property, including the $68,000 note that Kropinak had signed as guarantor.

The Venaglias brought this suit against Kropinak to recover on the $68,000 note. Kropinak filed a motion for summary judgment. The motion for summary judgment focused on the validity of defense raised by Kropinak. The district court granted summary judgment to Kropinak, ruling that his defense was meritorious.

We disagree with that ruling. Kropinak's defenses fail as a matter of law. He asserts a defense under the Columbia Commercial Code to the effect that he is fully discharged from his guarantee because the Settlement Agreement between the Venaglias and DBC prejudiced his rights as a guarantor. The gist of his assertion of prejudice is as follows: Although the Settlement Agreement explicitly states that "DBC acknowledges that it has 'equity' in the [P]roperty," DBC relinquished to the Venaglias all its rights in the Property. This left DBC with no assets whatsoever. Thus, if Kropinak were to pay off the Promissory Note in accordance with his guaranty, he would not be able to obtain any reimbursement from DBC. The unfairness of this result is apparent from the fact that a few days after execution of the Settlement Agreement, the Venaglias entered into a contract to sell the Property for a sum that exceeded what DBC owed on the Real Estate Contract and the Promissory Note. In other words, one could say that DBC's "equity" in the Property prior to the Settlement Agreement (the value of the Property less the amount owed on the Real Estate Contract) exceeded the amount owed on the Promissory Note. Hence, if DBC had obtained full value for its interest in the Property, it could have paid off the note guaranteed by Kropinak.

Kropinak contended that, pursuant to CCC Section 3605(b), he was discharged because the Settlement Agreement destroyed his right of recourse against DBC, whose only asset was its interest in the property.

II. DISCUSSION

The principal source of law governing the rights and duties of the parties with respect to a guarantee of a promissory note is Article 3 of the Columbia Commercial Code. To begin our analysis, we observe that Kropinak is an accommodation party with respect to the Promissory Note. As stated in § 3419(a):

> If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation".

Section 3419(c) states in pertinent part:

> A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature . . . is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument.

Kropinak meets the definition of § 3419(a) because it is undisputed that Kropinak signed the Promissory Note as a guarantor, that the purpose of the note was to enable DBC (the promisor on the note) to enter into the Real Estate Contract with the Venaglias, and that Kropinak was not a “direct beneficiary” of the transaction. (See § 3419(a).) Also, the presumption of § 3419(c) applies because Kropinak's signature appears under the heading "GUARANTOR (individually)."

We now turn to Kropinak's defense that he was discharged because DBC’s settlement deprived him of his right of recourse.

Kropinak Was Not Discharged Under Section 3605(b).

Section 3605 addresses the discharge of accommodation parties. Subsection (b) states:

> Discharge . . . of the obligation of a party to pay an instrument does not discharge the obligation of an . . . accommodation party having a right of recourse against the discharged party.

Relying on this language, Kropinak argues essentially as follows: That he was an accommodation party and, as such, would have rights of recourse against DBC (the discharged accommodated party); but he has no effective right of recourse because DBC no longer has any assets; its sole asset was an interest in the Property, and DBC relinquished that interest to the Venaglias in the Settlement Agreement. He argues, therefore, the discharge of DBC also discharges Kropinak.

We reject this argument. The second premise in the syllogism is flawed: Kropinak *does* have a right of recourse against DBC. Kropinak fails to distinguish between (a) the right of recourse against a party and (b) the economic value of that right. One can have a right of recourse against a destitute person. The right may not be worth anything, but it exists.

Here, Kropinak has a right of recourse against DBC to the extent that he makes payment on the Promissory Note. This right of recourse is explicitly provided by § 3419(e), which states:

> An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party.

Although in some, perhaps most, contexts a "worthless" right should be treated as no right at all, such treatment is inappropriate when dealing with accommodation parties. After all, the *very purpose* of procuring an accommodation party is to have a source of payment if the accommodated party is unable to pay in full. When the accommodated party cannot pay in full, the promisee (here, the Venaglias) should be able to collect everything possible from the accommodated party and then proceed against the accommodation party. Collecting from the accommodated party can often be facilitated by the promisee's release of the accommodated party in return for the accommodated party's paying what it can. In general, the accommodation party should have no complaints about such a settlement agreement between the promisee and the

accommodated party because it knew that the promisee would look to it if the accommodated party encountered financial difficulty. The accommodation party should not be entitled to relief on the ground that the accommodated party has no assets from which the accommodation party can obtain recourse because it is precisely the potential of such financial straits of the accommodated party that created the utility of having the accommodation party guarantee the note. As stated in Official Comment 3 to § 3605(b):

> As a practical matter, Bank [the promisee] will not gratuitously release Borrower [the accommodated party]. Discharge of Borrower normally would be part of a settlement with Borrower if Borrower is insolvent or in financial difficulty. If Borrower is unable to pay all creditors, it may be prudent for Bank to take partial payment, but Borrower will normally insist on a release of the obligation. If Bank takes $3,000 and releases Borrower from the $10,000 debt, Accommodation Party is not injured. To the extent of the payment Accommodation Party's obligation to Bank is reduced. The release of Borrower by Bank does not affect the right of Accommodation Party to obtain reimbursement from Borrower if Accommodation Party pays Bank. Section 3419(e). Subsection (b) is designed to allow a creditor to settle with the principal debtor without risk of losing rights against sureties. Settlement is in the interest of sureties as well as the creditor.

In short, § 3605(b) is not intended to protect an accommodation party from a settlement in which the promisee discharges the accommodated party in return for paying all that it can on the note. The accommodation party should expect to be obligated to pay to the extent that the accommodated party does not have the resources to pay.

III. CONCLUSION

We hold that the district court erred in granting Kropinak summary judgment. We reverse and remand for further proceedings consistent with this opinion.

Melandris v. Richter
(Columbia Supreme Court, 2007)

This suit for declaratory relief reaches us on the cross-appeals of parties to a promissory note. David Richter was the founder, President, and Chief Executive Officer of Pharmacopaea, Inc., a Columbia corporation (the Corporation), a wholesaler of perishable pharmacological products. The Corporation's warehouse was equipped with refrigerated facilities where drugs requiring refrigeration were stored.

In 1995, the Corporation borrowed $500,000 from Merchants and Manufacturers Bank (the Bank). The documentation consisted of a loan agreement, a ten-year interest-only promissory note, and a security agreement granting the Bank a security interest in the Corporation's "inventory." The Bank duly filed a financing statement with the Columbia Secretary of State to perfect its security interest and later filed a valid continuation statement to preserve its interest.

The signatures on the face of the promissory note were as follows: "Pharmacopaea, Inc., By David Richter, Chief Executive Officer," and immediately below that signature, "David Richter." On the back of the note appeared the anomalous indorsement of Martina Melandris, a representative of one of the Corporation's principal suppliers[2].

In early 2005, as the result of a disastrous loss in a product liability suit stemming from the Corporation's supplying faulty drugs to retailers, the Corporation was rendered insolvent and filed bankruptcy. The $500,000 balance on the promissory note became due and payable, and the Corporation's insolvency made it impossible for it to pay the note. The Bank immediately took possession of the Corporation's unsold inventory of

[2] Columbia Commercial Code § 3205(d) defines "anomalous indorsement" as "an indorsement made by a person who is not a holder of the instrument." Ordinarily, indorsement of a note accompanies *negotiation* of the note – the indorser signs on the back to pass rights in the note from himself as holder to another holder/taker for value. An *anomalous* indorsement is not made for the purpose of negotiating the note, but simply for accommodation purposes of creating "backup" liability. It is "anomalous" in the sense that it is outside the chain of negotiation.

drugs then valued at about $300,000. The Bank's representatives responsible for preserving the collateral failed to provide adequate refrigerated facilities for the storage of the drugs pending their sale. As a result, the entire inventory spoiled and became valueless.

The Bank then made demand upon David Richter and Martina Melandris for payment of the note. One of the issues in that litigation, which is still pending unresolved is whether, and to what extent, Richter and Melandris are discharged from any obligation to the Bank by reason of the spoliation of the inventory of drugs. Both of them have defended that action by asserting either partial or complete discharge under Columbia Commercial Code (the code) §§ 3605(e) and (g), which provide for discharge of an indorser or accommodation party "to the extent of the impairment" when the secured creditor who is entitled to enforce the note has "[failed] to perform a duty to preserve the value of the collateral." If the Bank in fact failed to protect the repossessed inventory, then, depending on the capacities in which Richter and Melandris signed the note, there will be a discharge "to the extent of the impairment." The extent of the impairment is not before us, but what is before us is the issue of the capacity in which Richter and Melandris signed the note and the consequences that flow therefrom.

Melandris indisputably signed the note as an accommodation party. She asserts that she signed as an accommodation both to the Corporation, which was a significant customer, and Richter, its CEO. None of the proceeds of the Bank's loan inured to Melandris's direct benefit. In this case, she seeks a declaration that (i) Richter is a non-accommodation maker of the note (i.e., that he was an accommodated party) and (ii) that, if she is required to pay the Bank, she is entitled to full reimbursement from Richter. Richter's position is more complicated. He seeks a declaration (i) that he signed the note as an accommodation maker and (ii) that, in any event, irrespective of whether it is ultimately determined that he is an accommodation maker or a non-accommodation maker, he is entitled to contribution (i.e., a recovery of one-half of whatever he pays) from Melandris for any payment he may be required to make to the Bank.

Let us first examine Melandris's contentions. In support of her position that Richter was an accommodated party and therefore principally liable on the note (i.e., that he was not a surety), she points to § 3419(c), which states that "A person signing an instrument is presumed to be an accommodation party . . . if the signature is . . . accompanied by words that the signer is acting as a surety or guarantor with respect to the obligation of another party to the instrument." By inverse reasoning she argues that, since Richter's signature on the face of this note is *unaccompanied* by such words, the presumption works the other way and that he is necessarily an accommodated party principally liable on the note and not a surety.

She then cites § 3419(e) of the Code, which provides that "An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party . . . . An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party." Thus, if Melandris's position is correct – that Richter is an accommodated party – and if she pays the note, she would be entitled to get full reimbursement from him.

However, we do not believe the solution to Richter's status is as simple as Melandris would have it. Her inverse reading of § 3419(c) (*supra*) is flawed. The presumption that Richter would be an accommodation party if he had signed as a "surety or guarantor" is not rebutted merely by showing that he did *not* so sign. He can still be an accommodation party even absent such accompanying words. Nor is it determinative of Richter's status that he signed the note on the face as a maker. (Section 3419(b) provides that "An accommodation party may sign the instrument as maker . . . or indorser . . . .")

We now turn to Richter's contentions. The initial inquiry into whether Richter is an accommodated party or an accommodation party turns on the statutory definitions. Section 3419(a) provides as follows:

> If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability

> on the instrument *without being a direct beneficiary of the value given* for the instrument, the instrument is signed by the accommodation party for accommodation.

Richter relies on the italicized language of the foregoing quotation and asserts that he is an accommodation party because he received no direct benefit from the Bank's loan. In support of that argument, he contends that as one who cosigned a note that was given for a loan to Corporation, he is an accommodation party if no part of the loan was paid to him or for his direct benefit. This, he contends, is true even though he might have received an indirect benefit from the loan because he was employed by the corporation. We do not believe the matter is so simple. Although it is a question of first impression for this court, a court in our sister state of Olympia has had an opportunity to address this point. In *First National Bank v. Rafoth*, the Olympia Supreme Court identified five factors for determining whether one who signed as a maker was or was not an accommodation party:

(i) Corporate capacity/ownership of the signer;

(ii) Location of the signature on the note (i.e., on the face, where a non-surety maker would ordinarily sign, or on the back, where an anomalous indorser would sign);

(iii) The language used in conjunction with the signature;

(iv) Whether the signer received the loan proceeds; and

(v) Intent of the parties.

We are persuaded by the Olympia case that the inquiry goes beyond simply whether the signer directly received the loan proceeds and that the result depends on application of the facts to the enumerated factors. On the record before us, we are unable to make a determination because there is a dearth of facts. The parties relied below on purely legal arguments and did not present the surrounding facts to flesh out the arguments sufficiently. Of the five factors articulated above, the only factors that we are able to answer based on the facts we have are (i) – that Richter was President and CEO of Pharmacopaea, Inc., (ii) – that he signed on the face of the note as a maker, and (iii) – that he signed his name unaccompanied by a modifying adjective.

The remaining factors, (iv) and (v), are likely to be the more influential ones and as to those, we have no clue. Accordingly, we cannot resolve this dispute definitively without further evidentiary proceedings below. We can, however, answer to some extent the contentions of the parties as follows.

As noted, Melandris is unquestionably an accommodation party and therefore obligated to the Bank for the balance due on the note, whatever that balance might be after offset, if any, for impairment of collateral. The ultimate resolution of the dispute presented to us for declaratory relief will turn on whether Richter is an accommodated party (i.e., a non-accommodation maker principally liable on the note) or an accommodation party (i.e., a surety). If he is an accommodated party and Melandris pays any or all of the note, then Melandris as an accommodation party is entitled to full reimbursement from Richter of whatever sum she pays. Richter would not be entitled to contribution from Melandris. (See § 3419(e), *supra*.)

On the other hand, if Richter were ultimately found to be an accommodation party, he also would be independently liable to the Bank for balance due on the note. In that event, Melandris would have no right of recourse – neither reimbursement nor contribution – against Richter.

This follows from the fact that, under the Code, the liability of accommodation parties to an instrument is *separate* and several, not joint and several. The Code makes provision for contribution only among parties jointly and severally liable on an instrument, but not otherwise. Thus, if *both* Melandris and Richter are accommodation parties, they are not jointly and severally liable and therefore will not be as between themselves entitled to contribution from one another. Of course, the Bank would be entitled to recover only once but may pursue one or the other of them at its option. We remand to the trial court for further proceedings.

Answer 1 to Performance Test - A

Pavlik, Griego & Zackler
Attorneys-at-Law
Interoffice Memorandum

Date: July 26, 2011
To: Allan Zackler
From: Applicant
Subject: in re Brent Quillen - issues raised by Quillen interview/documents

Mr. Zackler,

Below is an analysis of the questions you requested stemming from your interview with Mr. Quillen and his questions as to his rights and obligations. Per your instructions, I organized the analysis in the order of the questions as you explained them to Mr. Quillen at the conclusion of your interview. They are answered in the order they were presented to Mr. Quillen. For your convenience, I have summarized the answer to each question briefly (without citations or authority) at the beginning of each response. That summary is followed by an explanation which is cited to the appropriate authority for your review, to help you prepare for your follow-up meeting next Monday. The explanations are subheaded at certain points for your convenience.

1. Can Mr. Quillen get reimbursement from Mr. Phillips?

Answer:

Mr. Quillen's (hereafter Q's) ability to recover from Mr. Phillips (hereafter P) depends on a determination by the court of whether or not Mr. Phillips signed the promissory note as a "maker" or as a "guarantor." If Mr. Phillips signed the note as a maker, Mr. Quillen is entitled to reimbursement on the note from Mr. Phillips. If Mr. Phillips signed the note as a guarantor, Mr. Quillen is not entitled to recovery against Mr. Phillips. The

determination of the capacity in which Mr. Phillips signed the note is made by the court, according to the factors discussed below.

Explanation:

The Columbia Commercial Code (hereafter "CCC") deals with the rights and obligations of parties who enter into agreements in the form of negotiable instruments, as well as what effect the form of the instrument or the signature of the parties affects their rights. CCC 3149(a) explains the roles of two parties in interests that are signed for accommodation. According to the code, a party who signs an agreement intending to incur liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed "for accommodation" by that party. As you discussed with Q, the rights and obligations of a party differ depending on whether or not they sign a note as an accommodation (or "as a favor to") a third party, or whether they are themselves the primary beneficiary of the interest being granted (called "the accommodated party.")

Those particular obligations are spelled out in CCC 3149(e), which specifically describes that an accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and can enforce the instrument against the accommodated party. Practically speaking, this means that if Q is an accommodation party and P is an accommodated party, then Q has a right to reimbursement from P.

Q's status as an accommodation party

First, Q will have to establish under the CCC that he is, in fact, an accommodation party. As you correctly informed Q during your interview, a guarantor is an example of an accommodation party. Specifically, we can be confident that Q is a guarantor because of the provisions of CCC 3419(c), which states that "a person signing an instrument is presumed to be an accommodation party.if the signature is.accompanied by words indicating that the signer is acting as a surety or guarantor with respect to the obligation of another party to the instrument." This language, coupled with the language

of 3419(a) described above, establishes that Q was acting as a guarantor. Case law supports this conclusion, as the Columbia Court of Appeal decided in *Venaglia v. Kropinak* (2005) that a plaintiff who signed a Promissory Note as a guarantor for the primary benefit of allowing a corporation to enter into a contract with a lender met the definition of an "accommodation party." Further, it appears from Q's statements to you that First Franklin wanted Q to sign because of his success in business and the presence of his substantial assets. Finally, as discussed in *Venaglia*, a plaintiff meets the presumption of 3419(c) if his/her signature appears under the heading "GUARANTOR." Here, Q's signature does in fact appear with the word "guarantor" next to it on the signed note. All the evidence points towards a court finding that Q is an accommodation party. The only evidence to the contrary is P's vague statement that Q might get some stock if Intercon Inc ever went public, but since Q never believed this would occur, and because Q signed as a guarantor, Q will be considered an accommodation party.

<u>P's status under the note</u>

The more complicated question is whether or not P will be considered an accommodation party like Q, or whether he will be considered an accommodated party. As discussed above, this determination will have a profound impact on Q's ability to collect from P. If P is a "maker" or "accommodated party," then Q is entitled to reimbursement from P. If P is an accommodation party, Q is not entitled to any reimbursement.

The Columbia Supreme Court addressed this question in *Melandris v. Richter* in 2007. *Melandris* involved a plaintiff who sought reimbursement from defendant under a similar arrangement to the note signed by P and Q. The plaintiff's contention in that case was essentially that because the defendant had not signed the note as a guarantor - his signature was accompanied by no words indicating that he was a surety or a guarantor - he must have necessarily been a "maker" under the note. (*Melandris*) The court rejected this position, holding that sort of "inverse reading" as "flawed." Nor does the position of the signature on the document constitute a determining factor. Q cannot

assert that just because P signed on the front of the document where a maker would sign, he is per se a maker. As noted by the court in *Melandris*, "nor is it determinative of [plaintiff's] status that he signed the note as a maker." (*Melandris* citing 3419(c)). Instead, the Columbia Supreme Court adopted the test articulated by the Olympia Supreme Court in *First National Bank v. Rafoth*, making that test mandatory authority in our state. The *First National* test involves five factors, with factors iv. and v. identified by our Supreme Court as likely the more influential factors. The five factors as applied to our case are discussed below:

i. Corporate capacity/ownership of the signer

Like the defendant in *Melandris*, here P is the Chief Executive Officer of Intercon, Inc, the undisputed beneficiary of the proceeds of the note. This factor supports a finding that the note was for the benefit of P personally, but it is not determinative.

ii. Location of the signature on the note

Again, like the defendant in *Melandris*, here P signed the note on the front, near the bottom, where a maker would typically sign. This factor also supports the conclusion that P benefited personally as an accommodated party, but it is also not determinative. It should be noted that the above factors were also met in *Melandris*, where the case was remanded for further fact-finding as to the following factors.

iii. Language used in conjunction with the signature

Here, P signed the note as "an individual." It appears that, whether to avoid liability or whether out of a good-faith belief that he was an accommodation party, P believed that his signature with the phrase "an individual" indicated that he was not the principal beneficiary of the loan but merely an accommodation party. Without more information about P's intent and the bank's understanding of this modifying phrase, it is difficult to conclude what the legal effect of the word will be. However, the presence of language that differentiates P as "an individual" appears to be some evidence that he signed the note in an accommodation capacity. In *Melandris*, no adjective accompanied the signature.

iv. Whether the signer received the loan proceeds

Here, we have more information than the court had in *Melandris*, and we may be able to forecast the result. As to your interview with Q, you learned that P was "pretty honest and scrupulous" about making sure that all the money went towards the company's operating expenses, that he may have gotten an "indirect" benefit from the money by taking a salary, and that he drew only a small salary from the company. We also have Mr. Graves' findings from his research into the bankruptcy proceedings. Those indicate that P received a modest ($1,500 per month) salary from Intercon only when the company made a profit, that the only use of loan funds by Phillips was to pay wages and salaries to employees and operating expenses, and that the company leased him a car for his personal use. Aside from the use of a personal car, all of the expenses seem to be directly for the benefit of Intercon, except for the marginal value of the personal use of the car.

The Melandris court made no observations about the effects of certain facts under CCC 3419(a) as they related to the fourth factor. However, from the language of the statute itself, we can glean some insight as to how P's use of the money will be viewed by the court. First, 3419(a) states that if a party signs an instrument for the purpose of incurring liability "without being a direct beneficiary of the value given," he/she is signing the instrument as an accommodation party. As further explained by Professor Walker's treatise, the "key inquiry" is whether and to what extent [a party] received a direct benefit from the proceeds of the loan." It appears from the information we have before us that P did not receive a direct benefit from the proceeds of a loan, but that instead the loan proceeds were primarily to the benefit of Intercon. Even totaling the $18,000 in unpaid wages claimed by P in his bankruptcy proceeding and the total value of the car and the salary he drew, the resulting number represents a small fraction of the $3,000,000 extension of capital on behalf of First National to Intercon and P.

v. Intent of the parties

The intent of the parties as to whether P signed the note as a maker or as a guarantor is the final factor of the *Melandris* opinion as adopted from the Olympia Court's *First*

National opinion. The court in *Melandris* had no information with which to discern this intent, so we are left with a case of "first impression" in our state as to the meaning of factor *v.* From P's perspective at the time the note was signed, it appears that he intended to sign the note to escape personal liability as a maker. As evidenced by what Q recounted as "language [P] wouldn't normally use," it appears he viewed himself as not personally benefiting from the note because, as he said at the time, he does not get any "direct benefit" from the loan. We will need more information to determine whether P had a good faith belief that he was not a "maker" or whether he was, as Q suspects, reciting language from his attorney to escape liability.

However, we can discern something about the intent of *First Franklin* from your conversation with Q and from their actions after they sought payment of the note. First, Q indicated that they suggested to P that Q co-sign on the note and request that P sign as an individual. Their knowledge of Q's assets suggests that they considered you a guarantor, and also by implication that they did not place much value in P as a guarantor personally for the note. If P were really signing as an "accommodation" to himself as a corporation, it did not have much practical effect on First Franklin's willingness to enter into the arrangement. This suggests that First Franklin considered the note to be for the benefit of P and considered Q the sole surety. Further, there is no evidence that First Franklin sought repayment from P personally on the note. This is not determinative by itself - *Melandris* makes clear that a bank "may pursue one or the other [of accommodation parties] at its option" - but it is some evidence that First National considered P a "maker" under the original note and not an accommodating party. We also have a statement from First Franklin in its bankruptcy filing distinguishing P as "cosigner" and Q as "indorser." Again, this is inconclusive, but may be some evidence that First Franklin did not consider P an "indorser" or an accommodation party by virtue of its use of distinct terms to describe P and Q.

Based on a review of all five factors, it cannot be determined with certainty how a Columbia Court will view the status of P under this arrangement. It is applicant's suggestion that you advise Q that he may not be entitled to recovery from P, depending

on whether or not the Court views P as an "accommodating party." The factors seem to lean slightly in favor of finding P an accommodating party, based on his use of the money for entirely corporate purposes. Because *Melandris* does not express an opinion of the Columbia Supreme Court as to whether or not factor iv. or v. is the more influential factor, it would be best to counsel Q that recovery is uncertain, and advise him of the facts we need to prove each factor.

Steps for Q to obtain recovery

If the court does find that P is an accommodated party, then Q must first pay his obligation under the note. That amount is likely, as discussed below, to be offset by the amount that FF impaired the financial interest it had in Intercon's equipment. However much Q is responsible for paying, satisfying his obligation as an indorser is a prerequisite to recovering from P as an accommodated party. As *Melandris* makes clear, the indorser is unquestionably obligated to the bank for the balance due on a note. However, if P is an accommodated party, Q can thereafter seek contribution from him for reimbursement.

2. Can Mr. Phillips obtain any recovery from Mr. Quillen?

Answer:

No. P is not entitled to recovery from Q. No matter whether P is determined an accommodation party or an accommodated party, he cannot recover from Q. If he is an accommodated party, Q is entitled to reimbursement from P. If he is an accommodation party, Columbia law makes clear that accommodating parties are not jointly and severally liable, so P cannot recover from Q.

Explanation:

Fortunately for Q, the resolution of the answer to question 1 does not affect P's right to recover from Q. No matter whether the court decides he is an accommodation party or an accommodated party, he cannot recover from Q.

If P is an accommodated party

If P is considered an accommodated party (or a "maker" under the note) the statutory effect is clear. CCC 3419(e) states that "an accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party." Citing this section, *Melandris* confronted this issue and reached the same conclusion - that an accommodated party has no entitlement to contribution from an accommodation party.

If P is an accommodation party

Assuming the court reaches the opposite conclusion and that P is considered a "guarantor" like Q, he still has no right of recovery against Q. *Melandris* decided this question. The court held that the obligations of two parties who are both accommodation parties was separate and several, not joint and several. As explained by the Court, "[t]he Code makes provision for contribution only among parties jointly and severally liable on an instrument, but not otherwise. Thus, if both [parties] are accommodation parties, they are not jointly and severally liable and therefore *will not be as between themselves entitled to contribution from one another*." (emphasis added) In our case, if P and Q are considered accommodation parties, they are only severally liable for the obligation on the original note. As discussed in more detail below, the bank can choose between them as to seeking its recovery, but that party cannot recover from the other accommodation party.

3. Does First Franklin's apparent loss of its security interest in the equipment and inventory reduce any obligation of Mr. Quillen, and, if so, to what extent?

Yes. The CCC protects the obligations of indorsers to the extent that collateral could have been used to recover some of the debt owed by the maker of the note. In this case, First Franklin (FF) did not timely file a continuation statement to the state, causing the interest in the equipment and inventory of Intercon to be seized by another creditor. The CCC identifies lapse as an example of failing to protect an interest. From the bankruptcy statements, it appears Q's obligation will be reduced by $1,200,000.

Explanation:

Section 3605 of the CCC establishes the rights of an accommodation party to discharge from a debt owed based on any secured interest possessed by the lender. Specifically, 3605(e) states that to the extent an obligation held by the person entitled to enforce an instrument is impaired by that party, the obligation of an indorser is discharged to the extent of the impairment. Practically speaking, this means that if Q can show that FF allowed the value of a security interest to be impaired, Q's duty to pay is discharged by that amount. 3605(g) lists some examples of how a party can "impair" an interest, including 1. failure to maintain perfection or recordation of an interest in collateral, 2. release of collateral without substitution, 3. failure to perform a duty to preserve the value of collateral owed to a surety, and 4. failure to comply with applicable law in disposing of collateral. The official comment to 3605 describes the obligation as such: "the surety is discharged to the extent the surety proves the impairment was caused by a person entitled to enforce the instrument."

In our case, FF filed a financing statement in March of 2002. According to CCC 9515, a "filed financing statement is effective for a period of five years after the date of filing." A filing is termed to "lapse" if a continuation statement is not filed sometime before the end of the five year period. Thus, FF should have filed a continuation statement sometime before March of 2007. However, as the bankruptcy records make clear, they did not. Mr. Graves found there were no continuation statements on file. The FF interest lapsed in March of 2007. The consequences of lapse are described in section 9515(b): "Upon lapse, a financing statement ceased to be effective and any security interest that was perfected by the financing statement becomes unperfected." The statute goes on to describe that the interest is deemed never to be effective against a purchaser of the collateral for value.

The consequences for FF and Q are as follows: First, CCC 3605(g)(1) specifically lists "failure to obtain or maintain perfection or recordation of the interest in collateral" as an example of impairing the value of interest in collateral. Second, CCC 9515(b) holds that a subsequent taker of an interest in an unperfected security interest takes free of any

effect that the original financing statement might have had. In other words, Columbia National Bank's interest against the inventory takes priority to FF's. Based on these facts, FF has failed to maintain the value of the interest it had in the inventory and equipment of Intercon. The bankruptcy filings indicate that the equipment and inventory had a net worth of $1,200,000 - $800,000 as to the equipment, and $400,000 as to the inventory. As the Columbia Supreme Court recognized in *Melandris*, CCC sections 3605 e and g provide for discharge of an indorser to the extent that the secured creditor fails to perform a duty to preserve the value of the collateral. By allowing the interest in the equipment and inventory to lapse, FF failed to protect their interest, and their ability to collect from Q will be discharged to the amount of the interest.

4. Does First Franklin's release of Mr. Phillips act as a release of Mr. Quillen to any extent?

Answer:

No. Both case law and statutory law make clear that an accommodation party should expect to be pursued for the amount of debt it agrees to secure without regard for how much the lender is able to secure from the maker. The relationship between maker and indorser is such that a bank can recover as much as it determines possible from the maker, and it may pursue the indorser for the balance.

Explanation:

Q's statements in your interview with him make clear that he is somewhat vexed about the ability of bank to "pick and choose" who they want their money from, especially because they are pursuing $2,000,000 from Q after obtaining only $1,000,000 from P. Unfortunately for Q, the Columbia Court of Appeal addressed this question and fully explained the rights of makers and indorsers, and they include the right of the lender to reach a settlement with the maker and pursue the indorser for the balance.

In *Venaglia v. Kropinak*, the Court of Appeal of our state confronted a case where a defendant claimed that when a settlement leaves a maker without assets, the defendant should not be required to pay the balance of the amount owed, because the lender has

taken all of the assets from the maker, such that it is impossible for the indorser to recover anything in contribution from the maker. Put more simply, if a settlement reduces the assets of the maker to zero, the defendant in *Venaglia* argued that the lender has destroyed his ability to recover in violation of 3605(b), and so he should not have to pay the amount owed.

However, the Court of Appeal rejected this argument, and in doing so fully explained the extent of a right of recourse of a promisee (or, the lender). Although the defendant in *Venaglia* characterized his "right to recovery" against the plaintiff as a "worthless right," the court held that the label was inappropriate in the context of accommodation parties. "After all, the very purpose of procuring an accommodation party is to have a source of payment if the accommodated party is unable to pay in full." (*Venaglia*) In that case, the lender "should be able to collect everything possible from the accommodated party and then proceed against the accommodation party." The court further observed that "[c]ollecting from the accommodated party can often be facilitated by the promisee's release of the accommodated party in return for [that] party paying what it can." Further, the accommodation party should have no complaints, because "it knew that the promisee would look to it if the accommodated party encountered financial difficulty."

In our case, this language resolves the question of FF's ability to pick and choose from whom it attempts to collect. Even if Q asserts that his right of recovery as an accommodation party is a worthless right, because our bankruptcy information indicates that "it is very doubtful that there will be any appreciable distribution to unsecured creditors," Q still has the "right" to recover from Intercon. As discussed by the *Venaglia* court above, this right is not "worthless" because Q, as an indorser, should have realized that FF would perhaps release P's corporation from its obligations in order to obtain what money it could. In our case, that money paid to FF- like the *Venaglia* settlement - is the entirety of Intercon's remaining assets.

However, as the *Venaglia* court noted, that is the very purpose of having an accommodation party sign the form to begin with. FF wanted Q to sign the note

precisely because it was afraid that P or P's corporation would be unable to pay everything that it owes. Q, then, just like the defendant in *Venaglia*, should not be surprised when FF reaches a settlement agreement with Intercon in order to facilitate paying off the amount owed. In accommodation relationships such as the one Q entered into, it is expected that the promisee will reach a settlement agreement with the maker, and then - because an indorsement gives the lender this right - proceed for the balance against the accommodation party. Q's status as accommodation party makes him responsible for the remaining debt, because FF's freedom to pick and choose is contemplated by the form of the original agreement. To paraphrase from *Venaglia*, Q should have known that FF would look to Q if P's corporation encountered financial difficulty. As *Venaglia* concludes, "the accommodation party should expect to be obligated to pay to the extent that the accommodated party does not have the resources to pay."

The statutory language supports this conclusion as well. Section 3604(a) states that a person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument by agreeing not to sue or otherwise renouncing rights against the party. Further, in the introduction to the CCC by Professor Walker, he defines "Indorser" as a person who signs the note on the back - as Q did - and who undertakes to pay the note according to its terms if the maker does not. The use of a settlement to facilitate payment from Intercon to FF does not relieve Q of liability on the note.

Although it may frustrate Q, he is responsible for the amount owed, and the settlement does not act as a release.

Answer 2 to Performance Test - A

Date: July 26, 2011

To: Allan Zackler

From: Applicant

Subject: In re Brent Quillen

This is the memorandum you asked me to write referring to Quillen's rights and obligations on the promissory note he signed for InterCon and Mark Phillips. To answer your first question, I have concluded that Quillen is an accommodation party under the note. This means that he can receive reimbursement from Mark Phillips if Mark is found to be an accommodated party, rather than another accommodation party. However, the court could apply one of two tests to determine Mark's status under the note, which would affect Quillen's ability to collect from him; therefore this may be a close issue, but I believe a court would find Mark to be an accommodated party rather than an accommodation party. In regard to the second question, Mark will not be able to receive any reimbursement from Quillen for his $1 million payment on the note, regardless of whether the court finds him to be an accommodation party or an accommodated party. Third, First Franklin's mishandling of the security interest in the inventory and equipment will reduce the amount Quillen owes on the note by $1.2 million. Fourth and finally, the discharge of Mark will have no effect to discharge Quillen's obligations as an indorser of the note.

1. Can Quillen receive reimbursement from Mark Phillips?

Whether or not Quillen can receive a reimbursement from Phillips turns on their status in regards to the promissory note, whether either or both are accommodation parties or accommodated parties. An accommodation party is one who signs an instrument

without being a direct beneficiary of the loan. An accommodated party, on the other hand, is the party who receives the value of the instrument. Walker on Negotiables; CCC 3419.

Quillen's status

An accommodation party is a party who signs the promissory note instrument for accommodation. CCC Section 3419. This means that this party signed the instrument without being a direct beneficiary of the loan or value given for the instrument. Id. Generally one who signs on the back of the instrument is an accommodation indorser. Walker on Negotiable Instruments. In *Venaglia*, the court found that when a party signs a note as a guarantor, and the purpose of the note is to benefit another party, and when the party who signed is not a direct beneficiary of the transaction, this presumptively showed under section 3419a that the party was an accommodation party.

Here, Quillen signed the note on the back, thus giving rise to the presumption that he is an accommodation indorser. Walker. Moreover, Quillen signed the note and received no consideration for his signing the note. See interview. In fact, Quillen stated that he signed the note only as a personal favor to his sister and brother in law. Id. The note was also for the purpose of helping Mark and his corporation, InterCon, and conveyed no direct benefit to Quillen. Finally, Quillen signed the note as a guarantor. Therefore, this meets the definition under CCC 3419a of an accommodation party and accords with the *Venaglia* court's interpretation of an accommodation party.

Moreover, CCC 3419(c) states that a person signing an instrument will be presumed to be an accommodation party if the signature is an anomalous indorsement or accompanied by words indicating that the party is acting as a guarantor.

Here, Quillen signed the note as a "guarantor," which would be sufficient to give rise to the presumption that he is an accommodation party. The other fact giving rise to a presumption, of an anomalous signature, will likely not apply to Quillen. The court in

Melandris, in a footnote, explained that a signature is anomalous if it takes place outside of the chain of negotiation. Quillen's interview, however, stated that his indorsement was a vital part of securing the loan as First Franklin would not give Mark the loan without another security. However, because Quillen signed on the back as a guarantor and received no direct benefit from the note and signed instead as a favor, he will likely be deemed an accommodation party.

Quillen's obligations and rights regarding payment and reimbursement

An accommodation party who is an indorser has certain obligations. If the instrument is dishonored, an indorser becomes obligated to pay the amount due on the instrument. CCC Section 3415. Even though an accommodation party does not receive consideration, this does not relieve him of his obligations to pay.

However, an accommodation party can receive reimbursement and is in fact entitled to reimbursement from the accommodated party to the instrument. Thus, it must be determined whether Mark is an accommodation party or an accommodated party to determine whether Quillen has a right to reimbursement.

Mark's status

One who signs on the face of the note is a maker. Walker on Negotiable Instruments. However, a maker can be construed as a principal obligor or an accommodation maker. If a party is a principal obligor, this means he receives the benefit of the loan, and it is for his benefit that an accommodation party signs the loan. Id. Thus a principal obligor is an accommodated party. However, a maker can also be an accommodation maker, which means he did not receive the benefit of the loan and is merely accommodating the principal maker. There are several ways to determine whether a maker is a principal obligor or an accommodation maker.

Test from Walker on Negotiable Instruments:

Walker on Negotiable Instruments provides that the key inquiry to determine whether a party is a maker or an accommodation party is to what extent that party received a direct benefit from the proceeds of the loan. Here, the interview with Quillen shows that Mark himself did not receive much of a direct benefit. He did not take much more than a minimal salary, and in fact the bankruptcy court has a claim from him for $18,000 in unpaid salary. Most of the loan went toward operating expenses of the corporation and the only benefit Mark received was the use of a car.

However, the initial negotiations for the loan were as a personal loan to Mark for his patent. The corporation of InterCon was only formed during negotiations for this loan. This fact could be used to show that Mark did directly benefit from the loan because it allowed him to form a corporation for his patent. However, because InterCon is a separate entity and was the principal obligor on this transaction, the main borrower in this loan transaction, it is primarily liable and it will be deemed to have received the most direct benefit. This may be a good argument, however, as the facts of this case as distinct from a normal transaction where a CEO signs for his company, as the loan was given so that Mark could form this company, so that his capacity in signing the note could be construed differently.

Test from *Melandris*

The Columbia Supreme Court in *Melandris*, however, has provided another test to use to determine whether a party who signed as a maker was or was not an accommodation party. This five factor test comes from the Olympia Supreme Court case *First National Bank v. Rafoth*. Under this test, to determine whether one who signed as a maker was or was not an accommodation party, the court needs to examine a series of factors. These include: 1) the corporate capacity/ownership of the signer; 2) the location of the signature on the note; 3) the language used in conjunction with the signature; 4) whether the signer received the loan proceeds; and 5) the intent of the parties.

In *Melandris*, the court in dicta explained that the last two factors, 4 and 5, would likely be the most influential ones.

Here, under the first factor, Mark was the CEO of the corporation and therefore this factor would go in favor of him being the principal obligor. Moreover, as stated above, this case is slightly different from *Melandris* in that Mark signed the loan so that he could start his corporation. This could be distinguishable from *Melandris* where the party who signed was the CEO and President could have been viewed to have a greater disconnect between himself and the company's obligations.

Second, Mark signed the note on the face or the front of the note. This suggests, according to the court, that he is a non-surety maker, meaning he would more likely be construed as a maker and not an accommodation party.

Third, the language used in conjunction with the signature here was that of Mark as "an individual." In *Melandris*, one party argued that because the signature did not have accompanying words that suggested the party signed as "surety" or "guarantor," that the absence of these words implied that the party was an accommodated party and not an accommodation party. Here, we could make the same argument and assert that because Mark's signature does not explicitly state he is a guarantor or other similar language, that this could tend to imply he is a principal obligor. However, as the court stated in *Melandris,* this would not be a dispositive factor. But this would swing in our favor in conjunction with the other factors.

Fourth, it is not clear exactly how much of the proceeds Mark received and therefore how much of a benefit he received from the loan directly. As stated above, we could argue that because the loan was originally for Mark and it was only suggested he form a corporation in order to better secure the loan, that he alone truly received the benefit of this loan. However, Mark will argue that he did not receive any direct benefit because he took very little salary and spent most of the loan toward operating costs of the corporation. This will likely be sufficient to show that Mark did not receive enough

benefit from the loan to be construed as a principal maker. But, as I stated above, we could argue that these facts are distinguishable from a normal situation where the corporation secures a loan and the CEO signs as well because of Mark's personal interest in starting the corporation. It is important that we gather as many facts on this issue as possible as it is likely a future court would weigh this factor heavily.

Fifth, the intent of Quillen in entering this transaction was to do a favor for Mark personally, and not for the corporation. In *Melandris*, the accommodation party was principally signing as a favor to the corporation. In our situation, however, we could argue that Quillen had no previous business relationship with the corporation, and only signed with the intent to benefit Mark. Moreover, Mark likely viewed the loan as a benefit to him personally as it allowed him to begin his commercial venture and pursue his patent. The bank in this case, First Franklin, began negotiations with Mark as an individual and only later suggested that he form a corporation to better secure the loan. This could show an intent that the bank did not wish to give the loan to Mark personally and intended the loan to go his corporation, which would go against our argument that the intent was to benefit Mark alone. Moreover, Barnett Graves's research uncovered First Franklin's amended claim, wherein it refers to InterCon and Mark Phillips as principals under the loan, but then goes on to refer to Mark as a cosigner. This first statement shows First Franklin's intent under the loan that Mark would be a principal obligor and not an accommodation party. But, the next reference to him as a cosigner tends toward the view that it believed him to be an accommodation party instead. Again, this is a factor the court would likely weigh heavily, and could be dispositive of this issue. We could argue that the first reference should be used to show its intent, and that the second reference was First Franklin using its language imprecisely and did not imply that Mark was an indorser or an accommodation party, but only that he also signed the loan as a principal.

Overall, under this test, it could be reasonably be argued that Mark was a principal obligor and not an accommodation party and I believe we could prevail in this showing that Mark was actually an accommodated party and not an accommodation party.

Quillen's rights against Mark if Mark is an accommodation party

If the court determines that Mark is in fact an accommodation party, based on the fact that he arguably did not receive a direct benefit, then Quillen would have no right to recover from Mark. According to *Melandris*, an accommodation party is independently liable on the note, and the liability of accommodation parties is separate and several and not joint and several. This means that the bank, or whoever is enforcing the obligation, has the option to choose from whom it will collect and neither party would have the right of reimbursement from the other. Therefore, if Mark is an accommodation party, then First Franklin would have the right to recover as much as it wants from Mark and then move to recover from the other accommodation party, and Quillen would have no recourse against Mark.

Quillen's rights against Mark if Mark is an accommodated party

If we can succeed in proving that Mark is in fact an accommodated party, an outcome that would be much more beneficial to our client, then Quillen will have the right to reimbursement. An accommodation party who pays for a note is entitled to receive reimbursement from the accommodated party. CCC 3419(e).

In conclusion on this issue, if we can succeed in showing that Mark, when he signed as an individual, was signing as a principal obligor maker and not as an accommodation maker, then Quillen will be entitled to recover whatever he pays on the note from Mark.

2. Can Mark Phillips recover anything from Quillen?

Once more, Mark's rights against Quillen turn on the definition of the parties. As analyzed above, Quillen is likely and almost assuredly an accommodation party because he received no benefit under the loan, signed as an indorser, and signed the back of the note.

By knowing with certainty that Quillen is an accommodation party, we can know with certainty Mark's rights against Quillen.

An accommodated party under the loan never has an entitlement to contribution from an accommodating party nor has any recourse against an accommodation party. Melandris; CCC section 3419(e). Here, if Mark is an accommodated party, he would have no right to recover from Quillen any contribution from Mark's payment on the note.

An accommodation party similarly has no rights against another accommodation party. As analyzed above, an accommodation party has separate liability and not joint liability, according to the Columbia Supreme Court in *Melandris*. This liability is separate and several rather than joint and several, so that neither is entitled to contribution from the other, but the bank may pursue either for its claim.

Therefore, regardless of Mark's status as an accommodation or accommodated party, he would not be able to personally receive any contribution from Quillen for his $1,000,000 payment on the note.

3. Does First Franklin's loss of security interest reduce any obligation Quillen has, and if so, to what extent?

When an obligation is secured by collateral and a person entitled to enforce the obligation impairs the value of the interest in collateral, the obligation of an accommodation party is discharged to the extent of this impairment. CCC Section 3605(e). This discharge will occur when the creditor who is entitled to enforce the note fails to perform a duty to preserve the value of the collateral. CCC 3605(e). This principle was exemplified in *Melandris*. There, the bank who had the right to enforce the note had a security interest in the form of the corporation's inventory. However, the bank mismanaged and destroyed the value of this collateral while collecting the loan. The court found that because the bank failed to protect the inventory from destruction,

this breach of duty discharged the amount due to the extent of the impairment of the security interest.

Here, First Franklin had a valid security interest in InterCon's equipment and inventory. Therefore, if it is found to have breached a duty and impaired the value of that security interest, then Quillen's obligations would be reduced by that amount.

In this case, we could argue that because First Franklin lost the security interest to another bank, the amount of that loss should reduce the amount Quillen would owe. Here, First Franklin failed to maintain perfection and recordation of the security interest in the collateral. This is given as an explicit example of a failure to preserve the value of collateral in CCC section 3605 (g), which would give rise to a decrease in obligation of an accommodation party.

The Columbia Code explains that a financing statement is only effective for a period of five years. If the statement is not continued with a continuation statement, it will lapse. This lapse causes the security interest to become unperfected. CCC Section 9515.

Here, after an investigation by Barnett Graves, we were able to look at First Franklin's filings under the commercial code. First Franklin did file its financing statement that documented its security interest in the equipment and inventory of InterCon in 2002, when the note was first given. However, a little more than five years later, Columbia National Bank filed a financing statement expressing a security interest in the same equipment and inventory. There is no indication that First Franklin filed any continuation statement, as required under the CCC to maintain a perfect security interest. Therefore, First Franklin is at fault in the loss of this security interest.

Graves also was able to uncover the amount of the security interest based on Columbia National Bank's bankruptcy proceedings. There, the equipment and inventory were found to have a total value of approximately $1.2 million. Here, First Franklin is requesting $2 million from Quillen. If the value of the security interest (the equipment

and inventory) had been deemed greater than the amount of obligation Quillen owed, then his obligation would have been totally discharged. However, because it is less than the remaining amount on the note, Quillen could still be obligated to pay at least $800,000, or the remaining balance due on the $3 million note after Mark's payment of $1 million and the decrease from the value of the lost security interest of $1.2 million.

4. Does First Franklin's release of Mark have any effect to release Quillen?

CCC Section 3605 provides that the discharge of the obligation of a party to pay a note does not discharge the obligation of an indorser or accommodation party. CCC Section 3605(b). The Columbia Court of Appeal echoed this sentiment in the *Venaglia* case. There, the party who had indorsed the note argued that by discharging the principal obligor of his obligation and taking its property that could have relieved the indorser of his liability, that this in effect should discharge his obligation as an accommodation party. The court, however, rejected this defense and found that the release of the principal did not release the accommodation party of his obligation, and that the accommodation party still had his right to seek reimbursement from the principal, even if that right was effectively worthless because the principal had no assets.

Here, Quillen would like to argue that by releasing Mark from his obligations, he should also be discharged from his obligations because the release of InterCon and Mark left little if any estate from which Quillen could recover, thereby effectively taking away his right of contribution. See Graves' memo on First Franklin's bankruptcy claim. However, it appears that this argument has no merit. The *Venaglia* case specifically states that the discharge of the obligor has no effect to discharge the accommodation party. It goes on to reason that this would defeat the purpose of having an indorser on a note, if that indorser's obligations would be discharged as soon as the obligor could no longer pay, when in fact the point of the indorser is to have someone there to pay the note if the principal obligor cannot.

Here, First Franklin was entitled to take what it could from InterCon and from Mark, and then go after Quillen for the rest. If Mark is found to be an accommodated party, Quillen will still have his rights to seek reimbursement from Mark and from InterCon. Even if this right turns out to be worthless because of the potential insolvency of Mark and InterCon, his right is still intact. Therefore, a court would not release Quillen just based on the fact that Mark was released.

Furthermore, in the *Melandris* decision, the court stated that the bank has the right to collect from either accommodation party in order to collect the full amount. Therefore, even if Mark is found to be an accommodation party rather than an accommodated party, his release still would have no effect on Quillen as the bank is free to pursue either until it collects the full amount due.

Therefore, Quillen would still be liable and First Franklin can still collect from him based on his status as an accommodation party, but Quillen will still be able to seek reimbursement from Mark (if Mark is an accommodated party) regardless of Mark's release.

I hope that this helps in your meeting with Quillen. Please let me know if I can provide further assistance in this matter.

July 2011

California Bar Examination

Performance Test B
INSTRUCTIONS AND FILE

DAVID v. SOVEREIGN AUTO STORE, INC.

FILE

DAVID v. SOVEREIGN AUTO STORE, 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.
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.

The Law Firm of Rogers and Snider
7533 Morningside Drive
Shepard, Columbia

DATE: July 28, 2011

TO: Applicant

FROM: Martin Snider, Partner

RE: David v. Sovereign Auto Store, Inc.

We represent Joe David, a low-income client whose case we have taken pro bono, in an action against a car dealership that charged him more than twice the retail value of a used car. He was unable to afford the payments and the car was repossessed. The dealership has not yet taken legal action to collect on the balance of the loan. Because the dealership cheated him, we filed an action against it.

After serving the Complaint, I got a letter from opposing counsel demanding that we submit the claim to arbitration. I find a number of problems with the arbitration clause and want to refuse to arbitrate and to oppose the motion she intends to file.

Please draft a memorandum of points and authorities opposing counsel's expected motion to compel arbitration. Follow the firm's guidelines for persuasive memos that is attached.

The Purchase Agreement contains boilerplate language but we are only concerned here with the arbitration provisions in paragraphs 4 and 5. Don't spend your time now on any other issues. I want your help only with the issue of whether the mandatory arbitration clause is enforceable.

The Law Firm of Rogers and Snider
7533 Morningside Drive
Shepard, Columbia

MEMORANDUM

TO: Attorneys

FROM: Martin Snider

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.

Memo to File

Notes from interview with Joe David, May 30, 2011

Client Joe David was referred to us from The State Bar of Columbia Pro Bono Project for consumer debt problem regarding an automobile repossession. Client is a 25 year-old single father of three children (ages 1, 3 and 11). He drives a school bus for the Bryant Board of Education.

He bought a used car, a 2005 Mazda Tribute, at Sovereign Auto Store (SAS). He went to SAS because they advertise heavily on TV about good reliable used cars for low monthly payments. He also drives by the dealership while driving to work in the morning. His old car was having mechanical problems plus he wanted an SUV. In July 2009, his car wouldn't start and he had to get a jump start. That day he drove to SAS and was greeted by a saleswoman, "Ann." He said she was very likeable and she asked him what he was looking for. He said that he wanted to buy an SUV and that the most he could afford was $200 a month. Ann asked if he had a copy of his paystub and he gave her his last two and she said she would check with the credit department. She came back about 15 minutes later and told him she had "good news." She said that he qualified for a loan of $389 a month and that she had a perfect car for him at that price.

Client remembers repeating that he could only afford $200 but the saleswoman said that they had run the numbers and he could afford more and that he at least ought to look at what that amount of money would buy. She led him into the showroom at the back of the building and the Mazda was sitting there, "clean and shiny." He said that he liked everything about it and that he testdrove it with her seated next to him the whole way. He told her that he wanted to buy the car. He doesn't remember her saying the total price until she brought the papers to him to sign.

I asked him if he tried to negotiate the price of the car. He said that he didn't know that you were supposed to do that. He seemed embarrassed by the question and said that he trusted Ann to give him the right price. I asked him if he had ever bought a car before and he said that his first car was his uncle's car and that he gave it to him about 7 years ago. He traded it in when he bought this car.

I asked him if he read the contract before signing it and he said that it was full of tiny print so he did not and the saleswoman told him that this was the paper that everyone had to sign to buy a car. He thinks they gave him a copy but he left it in the glove compartment of the car and now the car has been repossessed.

The letter he brought in from the bank that financed the car said that they charged him $19,955 for the car. Mr. David made all of the payments until he could no longer work because his doctor advised him to temporarily stop working, due to an unrelated health issue.

It is unclear how many months Mr. David eventually fell behind. He attempted to pay his house payment one month and the car payment the next. Mr. David believes he was only two months behind when he was contacted about his delinquency. Mr. David then attempted to refinance the car because the payments were too high. His credit union informed him that they could not refinance the car because its value was only $8,800. SAS has demanded more than $13,000 from him to repay the loan.

I researched the Kelly Blue Book value for the 2005 Mazda Tribute at the time that Mr. David purchased the car — it was $9,775. I think they really took advantage of him.

His current finances are as follows:

Income:

Monthly take home pay	$1,725

Expenses:

Mortgage Payment per month	$ 715
Utilities (average)	$ 250
Daycare	$ 295
Food (varies)	$ 200
Transportation	$ 100
Cell phone	$ 55
Total:	**$1,615**

IN THE SUPERIOR COURT OF BRYANT
CIVIL DIVISION

JOE DAVID, Plaintiff	)	
v.	)	Civil Case No. 2011-12073
SOVEREIGN AUTO STORE, INC., Defendant	)	**COMPLAINT**

Plaintiff, Joe David, respectfully states:

STATEMENT OF THE CASE

Defendant Sovereign Auto Store, Inc. (SAS) took advantage of Plaintiff Joe David, an unsophisticated consumer, by fraudulently selling him a car for more than twice its fair market value.

PARTIES

1. Plaintiff Joe David resides at 502 Maple Street, Bryant, Columbia. Plaintiff purchased a used car from Defendant SAS.
2. Defendant SAS is a Columbia corporation, located at 1105 Albemarle Road, Bryant, Columbia.

FACTUAL ALLEGATIONS

3. On or about July 28, 2009, Plaintiff went to the SAS in Bryant, Columbia with the intent to purchase a used car.
4. Plaintiff told the SAS salesperson he could only afford a vehicle with payments of $200 per month or less based on his then-current income and expenses.
5. Plaintiff showed the SAS salesperson his pay stubs demonstrating his current income.
6. The SAS salesperson then calculated the total loan amount he was eligible to borrow.
7. Based upon Plaintiff's desire to purchase an SUV, the SAS salesperson showed him a 2005 Mazda Tribute.

8. The SAS salesperson knew the actual fair market value of the car but withheld that information from Plaintiff.

9. Instead, the SAS salesperson told him the price was $389 per month, for a total of $19,955.00, which was at least twice the value of the car.

10. In 2005, the base price for a brand new top model 2005 Mazda Tribute was $23,025.00.

11. Plaintiff, an unsophisticated consumer, is a high-school educated public school bus driver.

12. Plaintiff trusted the SAS salesperson and was led to believe that the car was equivalent in value to its purchase price and thus relied on the representation by SAS. Plaintiff would not have purchased the car had he known that its value was less than half of the SAS sales price.

13. Plaintiff purchased the car sold by SAS, a used 2005 Mazda Tribute, for the purchase price of $19,955.00.

14. Plaintiff financed the car through SAS or its agents. The terms of the loan required the Plaintiff to pay monthly installments of $389 for 72 months.

15. Between September 2009 and July 2010, Plaintiff made regular loan payments in accordance with the aforesaid loan agreement.

16. Unable to afford the high monthly payments on his limited income, Plaintiff fell behind in one payment for the months of July through November 2010. Plaintiff was unable to make regular payments after November 2010.

17. Defendant repossessed Plaintiff's car in December 2010. Defendant allegedly sold the car at auction for $6,125 and subsequently demanded payment of $13,368.95 in a letter dated May 15, 2011.

18. As a result of Defendants' actions, Plaintiff suffered loss of money and diminished credit rating.

FIRST CAUSE OF ACTION

UNLAWFUL TRADE PRACTICES

19. Defendants violated Columbia Consumer Protection Procedures Act (CCPPA), specifically the Unfair Trade Practices Act, by charging an unconscionable price and by knowingly taking advantage of Plaintiff's

inability to reasonably protect his interests. Specifically, Defendants charged an exorbitant price far exceeding the car's retail value.

20. Plaintiff suffered damages as a result, as iterated in paragraph 18.

SECOND CAUSE OF ACTION

FRAUDULENT MISREPRESENTATION

21. Defendant committed the common law tort of fraudulent misrepresentation under the law of the State of Columbia. Defendant SAS made a false representation to Plaintiff by knowingly withholding the fair market value of the car from Plaintiff and led Plaintiff to believe the price charged was reasonably proportionate to the car's value.

22. This was a misrepresentation of a material fact that Defendant knew and intentionally did not disclose.

23. Plaintiff relied on the misrepresentation to his detriment, suffering injury as a result, as iterated in paragraph 18.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court find Defendant SAS liable for violation of Columbia consumer protection statutes, and fraud or misrepresentation. Plaintiff requests the following:

1. The original sales installment contract for the purchase of the car be deemed as null and void and all remaining alleged debt relating to the car be released.
2. The Defendant be required to pay the Plaintiff compensatory damages of $5,483, a sum equal to a refund of payments made, plus other expenses associated with repair and repossession.
3. The Defendant be required to pay Plaintiff treble damages pursuant to the Columbia Consumer Protection Code.
4. The Defendant be required to pay court costs.
5. The Defendant be required to pay punitive damages.
6. That the court grant costs, attorney fees and any further relief as it may deem to be necessary and proper.

//

//

JURY TRIAL DEMAND

Plaintiff demands a trial by jury.

Dated: July 8, 2011

Martin Snider

Martin Snider, Attorney
7533 Morningside Drive
Shepard, Columbia

Burke and Rice
Attorneys-at-Law
1201 Diego Road
Bryant, Columbia
(555)274-4141

July 26, 2011

Mr. Martin Snider, Esq.
The Law Firm of Rogers and Snider
7533 Morningside Drive
Shepard, Columbia

RE: David v. Sovereign Auto Store, Inc.
Superior Court of Bryant Case No.: CA 2011-12073

Dear Mr. Snider:

On behalf of my client, Sovereign Auto Store, Inc. (SAS), I seek your consent to submit this case to arbitration, as required by the contract between the parties. If you do not agree, it is my intention to file a Motion to Dismiss and Compel Arbitration with the court. As you know, I am required by court rule to seek your consent prior to filing any motion and thus will inform the court if you do not do so.

Your client's Complaint arises from his purchase of a 2005 Mazda Tribute from SAS's dealership located here in Bryant. The Purchase Agreement contains a mandatory arbitration clause that covers the situation alleged in your Complaint. In essence, this action involves belated claims by a disgruntled purchaser of a used car. Your client concedes that after discussions with the salesperson, he voluntarily agreed to purchase the vehicle, yet now claims that SAS committed fraud, engaged in unlawful trade practices and violated the common law by entering into an unconscionable contract because the negotiated purchase price he agreed to pay for the vehicle was too high and the salesperson "knew the actual fair market value of the car but withheld that information from him." This is precisely the kind of claim that is subject to arbitration under the terms of the contract.

In case you do not have it, I have attached a copy of the Purchase Agreement entered into some two years ago. As you will note, it is a standard contract that my client

uses for every used car sale. I call your attention to Paragraph 5 for the terms of the arbitration agreement, which is located above your client's signature. Paragraph 5 states:

> **"5. YOU ACKNOWLEDGE THAT THIS PURCHASE AGREEMENT CONTAINS AN AGREEMENT TO ARBITRATE DISPUTES, AND THAT YOU HAVE READ THE ARBITRATION PROVISION, AND THAT YOU AGREE TO ITS TERMS."**

I am sure you will agree that this clause is unambiguous. In my experience, arbitration is an expeditious way of resolving disputes. As his share of the costs of arbitration, your client will have to pay a $250 filing fee to initiate arbitration and a minimum deposit of $1,500 covering two days of proceedings at $750 per day. Please let me know within three (3) days whether you will agree to submit this case to arbitration and I will move quickly to propose an arbitrator to you.

Sincerely,

Paula Burke

Paula Burke
Attorney-at-Law

Purchase Agreement for Used Car

July 28, 2009
Date

Sovereign Auto Store, Inc.
1105 Albemarle Road
Bryant, Columbia 90000
Tel: (555)555-1701

Joe David
Purchaser
502 Maple Street
Address
Bryant, Columbia 90002
City, State, Zip Code
(555)871-2629
Phone numbers

Mileage: 68,333
Please enter my order for the following used vehicle:
2005 Mazda Tribute LX 4 DR SUV, Tan Serial 4F2CUP18ZHR2566KM52057
Salesperson: Ann Anthony

Cash Delivered Price of Vehicle:	$19,955.00
Used Car Trade-In Value:	$ 200.00
Subtotal:	$19,775.00
Sales Tax:	$ 1,186.50
Tags and Registration Fee:	$ 145.00
Total:	**$21,106.50**

1. This purchase agreement (Agreement) contains the full and final agreement between the parties concerning the purchase of the Vehicle and supersedes and replaces all prior or contemporaneous agreement between the parties.
2. If any provision of the Agreement, or the application of such provision to any person or circumstance, shall be held to be invalid, the remainder of this Agreement shall not be affected.
3. Warranty Limitations - DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.
4. Arbitration Terms - The parties agree that all disputes, claims or controversies arising from or relating to the Purchaser's purchase of the Vehicle, including all Disputes arising under case law, statutory law, and all other laws, shall be resolved by binding

arbitration by one arbitrator located in the State of Columbia selected by the Dealer with the consent of the Purchaser. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right or opportunity to litigate disputes through a Court, but that they prefer to resolve their disputes through arbitration, except that the Dealer may proceed with Court action in the event the Purchaser fails to pay any sums due under the Agreement. THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO JURY TRIAL EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION. The parties agree that the cost of arbitration shall be borne equally between the parties provided, however, that the arbitrator may, in the interests of justice, order that the losing party pay the prevailing party's costs. A Dispute is any allegation concerning a violation of state or federal statute that may be the subject of binding arbitration, any purely monetary claim greater than $1,000.00 in the aggregate. Provided, however, that your failure to provide consideration to be paid by you (including your failure to pay a note, a dishonored check, or failure to provide a trade title) as well as our right to retake possession of the vehicle pursuant to this Purchase Agreement shall not be considered a Dispute and shall not be subject to arbitration. The parties agree that to the extent damages are awarded, they shall be limited to the total amount paid by the Purchaser for the Vehicle plus other provable economic loss as determined in the sole discretion of the arbitrator.

5. YOU ACKNOWLEDGE THAT THIS PURCHASE AGREEMENT CONTAINS AN AGREEMENT TO ARBITRATE DISPUTES, AND THAT YOU HAVE READ THE ARBITRATION PROVISION, AND YOU AGREE TO ITS TERMS.

Date: July 28, 2009

Joe David

Purchaser

Date: July 28, 2009

Ann Anthony

Dealer's Representative

July 2011

California
Bar
Examination
Performance Test B

LIBRARY

DAVID v. SOVEREIGN AUTO STORE, INC.

LIBRARY

Medina, et al. v. Core Healthcare Services
Supreme Court of Columbia (2000)

Mary Medina and Bonita Orate (the employees) filed a complaint for wrongful termination against their former employer, Core Healthcare Services (the employer). We consider the validity of an agreement imposed on a prospective or current employee as a condition of employment to arbitrate wrongful termination or employment discrimination claims rather than file suit in court. We conclude that antidiscrimination claims brought under the Columbia Fair Employment Act (CFEA) are arbitrable only if the arbitration permits an employee to vindicate his or her statutory rights. We also find the mandatory arbitration clause's limitation on damages and its unilateral obligation to arbitrate contrary to public policy unconscionable. The trial court refused to enforce the arbitration agreement, but the Court of Appeal enforced the agreement minus the provision it found unconscionable. We conclude that the arbitration agreement is unenforceable and reverse the Court of Appeal's judgment.

Both employees had signed employment application forms including an arbitration clause pertaining to any future claim of wrongful termination. The clause states in full:

> "I agree that, as a condition of my employment, in the event my employment is terminated and I contend that such termination was wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, I will submit any such matter to binding arbitration. I further agree that, in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy, at law or in equity, including but not limited to reinstatement and/or injunctive relief."

The Columbia Arbitration Act (CAA), like federal law, favors enforcement of valid arbitration agreements, including agreements to arbitrate statutory rights. Arbitration agreements are valid, irrevocable, and enforceable and may be invalidated only for the same reasons as other contracts. The CAA contains no exemption for employment contracts.

The inquiry under the CAA is: Do general contract law principles provide reasons for refusing to enforce the present arbitration agreement? The answer turns on whether and to what extent the arbitration agreement is contrary to public policy or unconscionable.

Arbitration of CFEA Claims

Litigants, in arbitrating a statutory claim, do not forgo the substantive rights afforded by the statute but only submit them to resolution through arbitration; thus, arbitration agreements and practices that compel claimants to forfeit certain statutory rights are unenforceable. While some statutory rights can be waived, arbitration agreements that encompass *unwaivable* statutory rights require great scrutiny based on two principles of public policy. First, contracts exempting anyone from responsibility for fraud or willful injury to another, or from violation of law, are against public policy and may not be enforced. Second, anyone may waive the advantage of a law intended solely for his benefit, but a law established for a public reason cannot be contravened by a private agreement.

The statutory rights of the CFEA serve important public purposes: safeguarding the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, sexual orientation, marital status, sex or age. The public policy against sex discrimination and sexual harassment in employment inures to the benefit of the public, not just a particular employer or employee. An employment contract that requires employees to waive their rights under the CFEA to redress sexual harassment or discrimination is contrary to public policy and unlawful. An arbitration agreement cannot serve as a vehicle for the waiver of statutory rights created by the CFEA.

In determining whether arbitration is an adequate forum for securing rights under CFEA, we note the differences involved in arbitrating employees' statutory rights and disputes arising from collective bargaining agreements. The fundamental distinction between contractual rights which are created, defined, and subject to modification by the parties, and statutory rights which are created, defined, and subject to modification only by the legislature and the courts, suggests the need for a public rather than private

mechanism of enforcement. The beneficiaries of public statutes are entitled to the rights and protections provided by the law.

We identify three minimum requirements for the arbitration of such rights pursuant to a mandatory employment arbitration agreement. It must provide for: (1) neutral arbitrators; (2) all types of relief available in court; and (3) it must not require employees to pay arbitrator's fees or expenses that make a forum inaccessible. The only issue in this case is the limitation on remedies.

Limitation of Remedies

An arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees. This arbitration agreement imposes exclusive remedies limited to wages earned from the discharge date until the date of the arbitration award. The agreement compels arbitration of statutory claims without affording the full range of statutory remedies, including punitive damages and attorney fees. This damages limitation is contrary to public policy and unlawful.

Unconscionability of the Arbitration Agreement

1. *General Principles of Unconscionability*

We now consider objections to mandatory arbitration that apply to any type of claim. These objections fall under the rubric of unconscionability. Unconscionability has both procedural and substantive elements, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. For a court to refuse to enforce a contract or clause, both procedural and substantive unconscionability must be present, but not in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required and vice versa.

Because unconscionability applies to contracts generally, a court can refuse to enforce an arbitration agreement under the CAA, which provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

2. *Unconscionability and Mandatory Employment Arbitration*

We find that this arbitration agreement is procedurally unconscionable. It was imposed as a condition of employment and the employees had no opportunity to negotiate.

Arbitration is favored in Columbia as a voluntary means of resolving disputes, and this voluntariness is its bedrock justification. Given the lack of choice and the disadvantages of even a fair arbitration system for employees, we are particularly vigilant when employers with superior bargaining power impose one-sided, substantively unconscionable terms in the arbitration clause.

The agreement is also substantively unconscionable because it requires only employees but not the employer to arbitrate claims. The party required to submit claims to arbitration forgoes many rights and benefits associated with a judicial forum, while the party requiring waiver retains all the benefits and protections. The unilateral obligation is so one-sided as to be substantively unconscionable.

3. *Severability of Unconscionable Provisions*

When a court finds unconscionability, it may refuse to enforce the contract or enforce the remainder of the contract without the unconscionable clause, or it may limit the application of any unconscionable clause to avoid an unconscionable result. The former course is appropriate when an agreement is permeated by unconscionability. Two reasons favor severing or restricting unconscionable terms. The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment from voiding the agreement. Second, severance attempts to conserve a contractual relationship if to do so does not condone an illegal scheme. The overarching inquiry is whether severance furthers the interests of justice.

In this case, two factors weigh against severance of the unlawful provisions in the arbitration agreement. First, the arbitration agreement contains more than one unlawful provision -- an unlawful damages provision and an unconscionable unilateral arbitration clause. Multiple defects indicate a systematic effort to impose arbitration not as an alternative to litigation but to gain advantage. Second, permeation appears from the fact that there is no single provision a court can strike or restrict to remove the unconscionable taint from the arbitration agreement. The court would have to reform the contract by

substituting terms. When a court is unable to cure unconscionability through severance or restriction, voiding the arbitration agreement may serve the interests of justice. Here, the various provisions that are unconscionable and contrary to public policy make the mandatory arbitration agreement unenforceable as a whole.

The approach described above is consistent with our case of *Marshall v. Fermby* (1981) Col. Sup. Ct., in which we found an arbitration agreement unconscionable because it provided for an arbitrator likely to be biased in favor of the party imposing the agreement. Relying on the methods for appointing an arbitrator provided in the CAA when the arbitration agreement does not provide a method for appointing an arbitrator, the court remanded and instructed the trial court to follow the procedures of the CAA. Thus, an arbitration clause providing for a less-than-neutral arbitration forum is severable because the arbitration statute itself gave the court the power to reform the agreement. No comparable provision in the arbitration statute enables the court to reform the defects here.

Reversed and remanded to the Court of Appeal with directions to affirm the judgment of the trial court.

Fillman v. Cornado Homes, Inc.
State of Columbia, Court of Appeal (2001)

Heidi Fillman (Fillman), proceeding *in forma pauperis*, brings this action against Cornado Homes, Inc. (Cornado) for damages arising out of Fillman's purchase of a manufactured home under a retail installment contract. Fillman alleges violations of the Truth in Lending Act (TILA), Columbia's Uniform Commercial Code, and common law trespass. Cornado filed a motion to compel arbitration. Finding that the contract's arbitration clause precludes Fillman from vindicating her statutory rights under the TILA because the arbitral forum is financially inaccessible, the court denies Cornado's motion.

Fillman executed a retail installment contract, effective March 31, 2000, with Cornado for the installment purchase of a manufactured home for herself and her three young children. The contract was a pre-printed form provided by Cornado and contained an arbitration clause that provides, in pertinent part, as follows:

> **ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL:** Any controversy or claim between you and me or our assignees arising out of or relating to the contract or any agreements or instruments relating to or delivered in connection with this contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration. **YOU AND I AGREE AND UNDERSTAND THAT WE ARE GIVING UP THE RIGHT TO TRIAL BY JURY, THERE SHALL BE NO JURY AND THE CONTROVERSY OR CLAIM WILL BE DECIDED BY ARBITRATION.**

The arbitration clause does not mention the costs of arbitration or which party is responsible for paying them. However, the contract provides that "the Commercial Rules of the American Arbitration Association . . . apply" to any arbitration arising from the contract.

Fillman brought this suit on March 28, 2001. On the same day, the court granted Fillman's application to proceed *in forma pauperis*, thereby exempting her from the court's $150 filing fee. On May 25, 2001, Cornado moved to compel arbitration, which Fillman opposed arguing, in part, that the arbitration provision interferes with vindication

of her statutory rights under the TILA and is unconscionable because the fees associated with the arbitration prohibit her access to the arbitral forum.

The parties stipulate to the following facts: According to the Commercial Arbitration Rules of the American Arbitration Association (AAA), a party initiating a claim the size of Fillman's (between $75,000 and $150,000) must pay an initial filing fee of $1,250, and, after a scheduling conference, a case fee of $750. If the initiating party ultimately prevails, the arbitrator may award those fees to her in the final disposition of the case. The initiating party may apply for a waiver, reduction, or deferral (complete or partial) of these fees due to extreme hardship. The AAA's accounting department determines which claimants receive extreme hardship status. No formal standards govern the accounting department's determination. In practice, the complete waiver of a fee is extremely rare; partial deferral is the usual response. The arbitrator may assess the losing party the deferred fee as part of the final award.

After a party initiates a claim with the AAA, the parties may not proceed until they pay the arbitrator's fee and expenses. Each party is responsible for half those costs. The arbitrator selected by the parties sets the arbitration fee, which typically ranges between $100 and $300 per hour, for a minimum of one full day for hearings, plus the arbitrator's additional preparation and research time before and after the hearing. Arbitrators customarily charge their hourly rate for travel time. Thus, the arbitration will not proceed until both parties pay their half of the arbitrator's fees. Fillman suggests that the total amount of an arbitrator's fees will likely range between $1,200 (assuming $100 hourly fees for one hearing plus time for preparation and resolution without travel or other expenses) and $8000 (assuming $300 hourly fees for 24 hours of hearings, preparation, resolution, and travel, plus accommodation expenses).

On July 26, 2001, Fillman filed a declaration of her financial condition, stating that she provides sole support for herself and her three children. Though entitled to child support amounting to $600 per year, she rarely is able to collect payments. Fillman works as a waitress at a local restaurant where she earns an average weekly income, including tips, of $300 and attends Community College part-time. She owes $14,125 in old student loans which have been deferred until she finishes school. Due to her limited

income, her family shares a house with another family. Her share of those expenses consists of the following monthly amounts: electricity, including heat and well pump, $60-75; telephone, $20; food, $430. She is solely responsible for the following monthly expenses: daughter's drug prescriptions, $40; car payments, $260; car insurance, $128; gasoline, $100; and occasional expenses for clothes and other needs. She expects to spend about $300 for back-to-school clothes and supplies for her young children, for whom she shops at thrift stores. Fillman cannot afford health insurance, and she currently owes Community Hospital $445. Fillman declares that she cannot afford to pay costs associated with the adjudication of her dispute.

To decide whether statutory claims may be arbitrated, a court must resolve a threshold issue. The court must determine whether the parties agreed to submit their claims to arbitration. The court finds that the parties agreed to arbitrate the claims. Fillman voluntarily signed the contract. She alleges that Cornado did not provide her an opportunity to read the contract before signing it. The failure to provide such an opportunity is of no consequence. A party to a written contract is responsible for informing herself of its contents before executing it, and in the absence of fraud or overreaching she cannot impeach the effect of the instrument by showing that she was ignorant of its contents or failed to read it.

However, in Medina, the Supreme Court held that a mandatory arbitration agreement may not require employees to pay arbitrators fees or expenses that make the forum inaccessible. Therefore, the court must determine whether Fillman has demonstrated that the arbitration clause at issue prevents her from vindicating her rights under the TILA because the costs of arbitration make that forum inaccessible.

The court finds that Fillman has adequately demonstrated that the arbitral forum provided for in the contract is financially inaccessible to her; and therefore, fails to ensure that she can vindicate her statutory rights under the TILA. Here, Fillman has presented substantial evidence that the costs of arbitrating her claims would preclude her from vindicating her statutory rights.

The arbitration clause does not indicate directly which party will be responsible for the costs of initiating arbitration. Under the Commercial Rules of the AAA, Fillman

must pay an initial filing fee of $1,250 and a $750 case fee shortly thereafter. Fillman could not recover those fees, unless she ultimately prevailed on her claim. Even if she prevailed, Fillman does not have $2,000 to pay the fees in the first place, and she has no collateral with which to obtain a sufficient loan. Though Fillman may apply for fee deferral or reduction due to "extreme hardship," waiver of fees is extremely rare. The AAA does not provide standards for granting hardship, an issue determined by its accounting department.

Even if the initial $2000 in administrative fees were waived or deferred, Fillman has demonstrated that the additional costs of the arbitration process amount to an insurmountable financial barrier. To proceed, Fillman would be responsible for paying one-half of the anticipated fee and expenses of the arbitrator stated above. These fees are not subject to waiver or deferral for extreme hardship. In acknowledgment of Fillman's strained financial condition, this court found her unable to pay the $150 filing fee normally required to initiate the claim it now considers. In view of these facts, the court finds that Fillman's limited income affords no margin for expenses of the magnitude required to pay an arbitrator to consider her claim.

Fillman has demonstrated that the arbitration clause precludes her from vindicating the rights afforded by the TILA because the arbitral forum is financially inaccessible. The court concludes that the arbitration clause is unenforceable and denies Cornado's motion.

Marshall v. Fermby
Supreme Court of Columbia (1981)

Bill Marshall appeals from a judgment confirming an award by an arbitrator. We reverse and direct the trial court to vacate its order compelling arbitration.

Marshall is an experienced promoter and producer of musical concerts. Leon Fermby is a successful performer and recording artist. He is also a member of the American Federation of Musicians (AFM). Early in 1973, Fermby requested Marshall, who had promoted a number of Fermby concerts, to structure a tour. Four contracts were prepared. Marshall signed all four contracts; Fermby signed only those relating to the Windsor and Beachland concerts, which were to occur on July 29 and August 5, 1973.

The four contracts were all prepared on an identical form known in the industry as an AFM form B contract. Aside from matters such as date and time, they differed from one another in only two areas -- the hours of employment and wage. The latter provided payment of 85% percent of the gross receipts after expenses and taxes.

The contracts did not state who would bear any eventual net losses. The forms also provided: "In accordance with the Rules and Regulations of the AFM, the parties will submit every claim, dispute, or controversy involving the musical services arising out of or connected with this contract and the engagement covered thereby for determination by the International Executive Board of the AFM or a similar board of an appropriate local thereof and such determination shall be conclusive, final and binding upon the parties."

The Windsor concert occurred as scheduled and had gross receipts of $173,000 with expenses of $236,000, resulting in a net loss of $63,000. The Beachland concert resulted in a net profit of $98,000. Following this concert, a dispute arose over who was to bear the loss sustained in the Windsor concert and whether that loss could be offset against the profits of the Beachland concert. Fermby said that under the contract Marshall was to bear all losses from any concert without offset. Marshall urged that, under standard industry practice and custom relating to 85/15 contracts, such losses

should accrue to Fermby without offset. With this dispute unresolved, Fermby declined to execute the contracts for the Long Island and Philadelphia concerts.

In October 1973, Marshall filed an action for breach of contract, declaratory relief, and rescission against Fermby. Fermby responded with a petition to compel arbitration. After ordering arbitration, the trial court granted reconsideration to permit discovery limited to the issues of whether an agreement to arbitrate was entered into and whether grounds existed to rescind such agreement.[3] Following discovery, including depositions, the court granted the petition and ordered arbitration.

On October 29, 1976, a hearing was held at the union's western office before a referee appointed by the union president. The referee was a former executive officer and a long-time member of the union who had been a hearing officer in previous union matters. Marshall produced considerable evidence that, under common custom and practice in the industry, the promoter under an 85/15 contract was understood to bear no risk of loss because his share of the profits was considerably smaller than under the normal contract, under which the promoter takes a larger percentage of the profits but is understood to bear the risk of loss. Fermby offered no contrary evidence.

In his report to the union's international executive board, the referee recommended that Marshall be ordered to pay Fermby the amount he claimed (some $53,000) at the arbitration. On February 22, 1977, the union's international executive board made its award in conformity with the recommendation of the referee.

The superior court denied Marshall’s petition to vacate the award. Marshall appeals.

Marshall contends that the order was in error because, insofar as the underlying agreement required arbitration of disputes before the AFM, it was unenforceable because of unconscionability. Two separate questions are thus presented: (1) Is this procedurally unconscionable? (2) Is it substantively unconscionable?

[3] The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate. Col. Arbitration Act § 2(b).

Procedural unconscionability signifies a standard contract, which, when imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to or reject the contract. While not lacking in social advantages, they bear the danger of oppression and overreaching. With this tension between social advantage and the danger of oppression, courts and legislatures have sometimes acted to prevent abuses.

The contract in question, in light of all of the circumstances, is procedurally unconscionable. Although Fermby insists that Marshall's prominence and success in the promotion of popular music concerts afforded him considerable bargaining strength, the record establishes that he, for all his stature in the industry, was reduced to the humble role of adherent. Marshall, whatever his asserted prominence in the industry, was required by the realities of his business to sign AFM form contracts with *any* concert artist and that he, wishing to promote the Fermby concerts, had the nonnegotiable option to accept the contracts on an 85/15 basis or not at all.

The Columbia Arbitration Act seems to contemplate complete contractual autonomy in the choice of an arbitrator. The Columbia Arbitration Act (CAA) § 29(a) provides that “if the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails."

The CAA does not preclude parties from designating as arbitrator an entity or person who, by reason of relationship to a party, can be expected not to adopt a "neutral" stance. However, when as here the contract is adhesive, the possibility of overreaching looms large; we scrutinize contracts concluded in such circumstances to insure that the party of lesser bargaining power has a realistic and fair opportunity to prevail. Contracts must operate within a minimum level of integrity.

Courts must determine on a case-by-case basis this minimum level of integrity. Arbitration requires a *tribunal*, an entity or body that hears and decides disputes. An entity that is incapable of deciding based on what it has heard cannot act as a tribunal; one of the principal parties to the contract does not qualify.

The contract we here consider, insofar as it requires the arbitration of all disputes before the AFM, is substantively unconscionable. The minimum level of integrity

required for a contractual arrangement for the nonjudicial resolution of disputes is not achieved when the agreement designates the union of one of the parties as the arbitrator of disputes.

A contract provision designating a contractual party to serve as arbitrator is substantively unconscionable. The same result follows, and for the same reasons, when one whose interests are so allied with those of the party that, for all practical purposes, he is subject to the same disabilities. A contract is substantively unconscionable if it is overly harsh and one-sided.

We conclude that a contract provision designating the union of one of the parties as the arbitrator of disputes arising thereunder does not achieve the minimum level of integrity required of a contractually structured substitute for judicial proceedings. However, in light of the strong public policy of this state favoring resolving disputes by arbitration, the parties should not be precluded from using nonjudicial means of settling their differences. The parties have agreed to arbitrate but have named as arbitrator an entity that we cannot permit to serve in that capacity. In these circumstances, the parties should not be precluded from attempting to agree on an arbitrator. Upon remand, the trial court should afford the parties the opportunity to agree on a suitable arbitrator pursuant to § 29(a). In the absence of an agreement or petition to appoint, the court should proceed to a judicial determination.

We reverse and remand.

Unfair Trade Practices Act
Columbia Consumer Protection Code

§ 1. Purposes.

(a) The purposes of this chapter are to:

(1) assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices;

(2) promote, through effective enforcement, fair business practices throughout the community; and

(3) educate consumers to demand high standards and seek proper redress of grievances.

(b) This chapter shall be construed and applied liberally to promote its purposes.

* * * *

§ 4. Unlawful trade practices.

It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to:

(a) misrepresent as to a material fact that has a tendency to mislead;

(b) fail to state a material fact if such failure tends to mislead;

(c) make or enforce unconscionable terms or provisions of sales or leases;

* * * *

§ 7. Remedies.

(a) The remedies provided in this section may not be waived.

(b) A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the State of Columbia seeking relief from the use by any person of a trade practice in violation of a law of Columbia.

(c) A person may recover or obtain the following remedies:

(1) treble damages, or $ 1,500 per violation, whichever is greater, payable to the consumer;

(2) reasonable attorney's fees;

(3) punitive damages;

(4) an injunction against the use of the unlawful trade practice;

(5) in representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

(6) any other relief which the court deems proper.

§ 26. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

* * * *

§ 28. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

* * * *

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

§ 29. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

Answer 1 to Performance Test – B

IN THE SUPERIOR COURT OF BRYANT

CIVIL DIVISION

Joe David, Plaintiff	)	
	)	Civil Case No. 2011-12073
v.	)	
Sovereign Auto Store, Inc., Defendant	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION

STATEMENT OF FACTS

Plaintiff Joe David (Mr. David) has brought suit against Defendant Sovereign Auto Store (SAS), alleging unlawful trade practices in violation of the Unfair Trade Practices Act as well as fraudulent misrepresentation, in connection with the July 28, 2009 purchase of a used car. Mr. David is a 25 year-old single father of three children - aged one, three and eleven - who drives a school bus to make a living. In July 2009, his car was having mechanical problems. After it wouldn't start, he decided to head to SAS to look for a new car. Upon arriving at the dealership, he was greeted by a saleswoman, "Ann." He informed the saleswoman that the most he could afford for a new car was $200 a month. She examined his paystubs, and told him that he was qualified for a loan of $389 a month. Mr. David repeated that he could only afford $200 a month, but the saleswoman insisted that he should look at what he could receive at a

higher price. Ann led Mr. David to a used 2005 Mazda Tribune, which had a blue book value of $9,775 at the time. After taking it for a test drive, Ann brought Mr. David the papers to sign to purchase the car. Ann informed Mr. David that he had to sign the paper in order to buy the car. There was no negotiation over the price, which was $19,995. Mr. David signed the contract, obligating him to pay $389 for 72 months. Between September 2009 and July 2010, he made the payments regularly. He fell behind for one month from July to November 2010. Finally, he was unable to make regular payments after November 2010, because his doctor advised him to cease working temporarily due to a health issue. SAS repossessed the car in December 2010, sold it at auction for $6,125, and subsequently demanded payment of $13,368.95 in a letter dated May 15, 2011. Mr. David filed suit against SAS on July 8, 2011. SAS subsequently filed a motion to compel arbitration, requesting that this court enforce the arbitration provision located in paragraph 4 of the agreement between Mr. David and SAS.

ARGUMENT

The Supreme Court of Columbia, in Medina v. Core Healthcare Services (2000), articulated a comprehensive framework for determining when agreements to arbitrate are enforceable. When the agreement seeks to compel arbitration of "statutory rights" that "serve important public purposes," such agreements must, at a minimum, "provide for: (1) neutral arbitrators; (2) all types of relief available in court; and (3) must not require [parties] to pay arbitrator's fees or expenses that make a forum inaccessible." In addition all arbitration agreements - including those that do not involve statutory rights that serve important public purpose - are unenforceable if they are unconscionable.

The arbitration agreement at issue fails under almost every part of the Medina test. The arbitration agreement requires arbitration of rights that serve important public purposes, but does not provide all relief that is available in court, requires Mr. David to pay fees and expenses that make the arbitral forum inaccessible, and is unconscionable. While it does provide for neutral arbitrators, because Mr. David must

consent to the selection of the arbitrator, the agreements failing on every other portion of the Medina test renders it unenforceable. As a result, this court should rescind the arbitration agreement.

I. The Arbitration Provision Of The Purchase Agreement Between Mr. David And SAS Is Unenforceable Because It Violates Public Policy By Limiting The Available Remedies Guaranteed By The Unfair Trade Practices Act, Including Treble Damages, Attorney's Fees, Punitive Damages, And Injunctive Relief.

A. The Claims Advanced In Mr. David's Complaint Encompasses Unwaivable Statutory Rights That Serve An Important Public Purpose, Because They Are Designed To Protect The Public From Deceptive Commercial Practices.

The Columbia Arbitration Act provides that "[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or inequity for the revocation of the contract." Columbia Arbitration Act (CAA) § 26(a). The Columbia Supreme Court has clarified that in agreeing to arbitrate a statutory claim, litigants do not forgo their substantive rights, but rather only submit them to resolution through arbitration. Medina v. Core Healthcare Services (2000). As a result, agreements that "compel claimants to forfeit certain statutory rights are unenforceable." Medina. Specifically, where arbitration agreements encompass "unwaivable" statutory rights are at issue they are subject to "great scrutiny." This is so for two reasons. First, contracts exempting anyone from responsibility for "fraud" or for a violation of law are against public policy. Medina. Second, statutory rights that "serve important public purposes" may not be waived via an arbitration agreement. If the statute provides unwaivable rights, there are "three minimum requirements" for the enforceability of such an arbitration agreement - the agreement must "provide for: (1) neutral arbitrators; (2) all types of relief available in court; and (3) must not require [parties] to pay arbitrator's fees or expenses that make a forum inaccessible." Medina

Here, Mr. David's complaint asserts an unwaivable statutory right, designed to prevent fraud, that is serves an important public interest. As a result, the arbitration agreement must meet the three requirements outlined in Medina or it is unenforceable.

First, Mr. David's complaint raises a claim designed to prevent parties from engaging in fraud. The first cause of action contained in Mr. David's complaint arises under the Unfair Trade Practices Act (UTPA). This Act makes it unlawful for any person to "fail to state a material fact if such failure tends to mislead" or to "make or enforce unconscionable terms or provisions of sales of leases." UTPA § 4(b)-(c). As a result, the UTPA clearly is designed to protect consumers from fraud, subjecting it to the three-prong test created by Medina.

Second, Mr. David's statutory remedy is unwaivable. In the remedies section, the Act provides that "[t]he remedies provided in this section may not be waived." UTPA § 7(a). While this section by its terms applies only to the remedy, rather than the underlying right, it clearly indicates the importance of the UTPA remedies to consumers, and thus strongly indicates that the UTPA should be construed as an unwaivable statutory right. This is particularly so given that the UTPA is to be "construed and applied liberally to promote its purposes" of consumer protect. UTPA § 1(b).

Third, Mr. David's claim advances an important public interest. The UTPA provides that its purposes including promoting, "through effective enforcement, fair business practices throughout the community," and assuring that a "just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices." UTPA § 1(a)(2)-(3). Like the Columbia Fair Employment Act (CFEA) at issue in Medina, the UTPA is designed to ensure protection of important public rights. The Medina court explained that the CFEA's prohibition on discrimination in connection with employment "inures to the benefit of the public, nor just a particular employer or employee." Similarly, the UTPA, as is explained in the purposes provision, is designed to ensure that consumers are not subject to unfair and deceptive trade practices. Allowing Mr. David to pursue his claim will not simply benefit Mr. David, but will help to

deter future conduct on the part of those transacting with consumers, and will help ensure fair business practices. As a result, Mr. David's claim advances an important public interest.

In sum, then, the rights protected by the UTPA are equivalent to those advanced in Medina, such that the three-pronged Medina test ought to apply. As a result, if the agreement does not provide for neutral arbitrators and all types of relief available in court, or if the agreement does require the parties to pay arbitrators fees that render a forum inaccessible, the agreement is invalid.

B. Because The Claims Advanced In Mr. David's Complaint Encompass Unwaivable Statutory Rights That Serve An Important Public Purpose, The Limitation of Remedies Required By The Arbitration Provision of The Purchase Agreement Renders It Unenforceable.

"An arbitration agreement may not limit statutory imposed remedies such as punitive damages and attorney fees." Medina. Here, the arbitration agreement limits a wide variety of remedies guaranteed by the UTPA.

The UTPA provides for six separate remedies, which may not be waived: (1) treble damages, or $ 1,500 per violation, which is greater, (2) reasonable attorney's fees, (3) punitive damages, (4) an injunction against the use of the unlawful trade practices, (5) additional relief in representative actions and (6) any other relief which the court deems proper. UTPA § 7(c).

The arbitration agreement, by contrast, provides only a limited set of remedies for Mr. David. First, it provides that "to the extent damages are awarded, they shall be limited to the total amount paid by the Purchaser for the Vehicle plus other provable economic losses as determined in the sole discretion of the arbitrator." Second, it provides that the arbitrator may "order that the losing party pay the prevailing party's costs."

The relief in the agreement does not provide close to matching that of the statute. Damages are limited to the total amount paid by the purchaser, which in this case consisted of 13 months of payments between September 2009 and November 2010 (with one month not being paid), at the rate of 389 a month, plus any other "provable economic losses." This is a far cry from the treble damages, or $1,500 per violation, as well as punitive damages, which Mr. David might be able to acquire under the UTPA. Moreover, while the agreement does provide that the arbitrator may order payment of "costs," it is unclear whether this encompasses attorney's fees, which are required under the UTPA. Finally, the agreement does not allow for any injunctive relief, nor any additional relief that the court may deem proper, as provided for in the UTPA.

As a result, the arbitration agreement does not provide "the full range of statutory remedies, including punitive damages and attorney fees." Medina. Thus, just as in Medina, "[t]his damages limitation is contrary to public policy and unlawful." Medina. The appropriate relief in such a circumstance depends on whether additional problems are present in the arbitration agreement; the Medina court noted that severance of the unlawful provisions might be proper if they are isolated and easily severable. In this case, however, as is discussed in Part IV, infra, the numerous illegalities present in the agreement make it proper to rescind the agreement entirely.

II. The Arbitration Provision Of The Purchase Agreement Between Mr. David And SAS Is Unenforceable Because It Violates Public Policy To Require Mr. David To Pay Fees And Expenses That Render The Arbitral Forum Unavailable.

The Medina court also articulated that arbitration agreements, in cases involving unwaivable public rights, must "not require [parties] to pay arbitrator's fees or expenses that make a forum inaccessible." Here, the requirements of the arbitration agreement, when compared to the financial status of Mr. David, render the forum inaccessible.

The arbitration agreement requires the parties to pay an equal amount of the costs, although the arbitrator has the discretion to order that the losing party pays the

costs. As applied in this case, it would cost Mr. David a $250 filing fee to initiate arbitration and a *minimum* deposit of $1,500 covering two days of proceedings.

Mr. David drives a school bus for a living. His take home pay is only $1,725 a month, and he has three young children for which he is the provider. His family expenses are $1,615 a month, leaving him with $110 in discretionary income each month. In light of his financial circumstances, the State Bar Association referred his case to us, and we accepted it pro-bono. Requiring Mr. David to pay a total of $1,750 to secure two days of proceedings, with potentially increased costs should the proceedings last for more than two days, renders the forum inaccessible to Mr. David. The minimum cost is more than Mr. David makes in a month, and is equally to roughly 17 months worth of his discretionary income. Mr. David should not be forced to choose between spending a year and a half of his discretionary income on arbitral proceedings, or being unable to secure any relief for the unfair and deceptive practices of SAS.

The situation here is analogous to that of Fillman v. Cornado Homes, Inc., where the Columbia Court of Appeals held that the arbitration agreement rendered the arbitral forum financially inaccessible. There, the minimum fee to initiate proceedings was $2,000, and the parties were to split the arbitration fees, which were projected to range between $1,200 and $8,000. Thus, Ms. Fillman might have been required to pay between $2,600 and $6,000. Here, the initial fee is lower, as it is $250, but the two days of proceedings will cost Mr. David $1,500. Moreover, in Fillman it was possible to appeal for a waiver, reduction or deferral in the fees; a possibility that is not present in the text of the present arbitration agreement. Here, the cost could be $1,750 or more for Mr. David, with little possibility for reduction. While it would potentially be possible for Mr. David to obtain costs under the agreement, the same obtained in Fillman, and did not render the forum financially accessible.

In both cases, the parties had little disposable income. In Fillman, the plaintiff was the provider for three children, just as is the case here. Ms. Fillman only earned $1,200 a month, which was spent almost entirely on household expenses; the same is

true of Mr. David's $1,725 monthly income. The court in Fillman found it relevant that Ms. Fillman could not pay the $150 filing fee present in that court; in this case, due to Mr. David's financial condition, he is being represented pro bono.

It is true that the plaintiff in Fillman had a more dire financial situation than the plaintiff here. Fillman earned only $300 a week, for a total of $1,200 a month; she was entitled to an additional $600 a month in child support, but was rarely able to collect it. She owed $14,125 in student loans, and $445 for health insurance. Mr. David does earn somewhat more per month than the Fillman plaintiff, and does not have any debts. Moreover, it is also true that the initial fee was higher in the Fillman case than it is here. Nevertheless, his marginally improved situation does not justify a different result. First, the plaintiff in Fillman could have received a waiver of fees, a possibility that does not appear to be present here. Second, Mr. David might be required to pay more than the Fillman plaintiff - Ms. Fillman might have been able to pay as little as $600, even without receiving a fee reduction, to have her claims arbitration. Finally, as an objective matter, Mr. David is teetering on the brink of financial sustainability. His disposable income, as discussed above, is miniscule. This is not because he is spending his funds on frivolous things, but rather because of the cost of raising three children.

As a result, the situation in Fillman is not sufficiently distinguishable from the situation here to warrant a different result. The bottom line is that, in both cases, requiring the parties to submit to arbitration would be fundamentally unfair, because the financial status of the plaintiff would prevent vindication of statutory rights. As the court in Fillman concluded, "Fillman's limited income affords no margin for the expenses of the magnitude required to pay an arbitrator to consider h[is] claim." The same obtains here. As a result, the arbitration agreement is unenforceable, because the costs of arbitration render the forum inaccessible.

III. The Arbitration Provision Of The Purchase Agreement Between Mr. David And SAS Is Unenforceable Because It Is Procedurally and Substantively Unconscionable, As A Result Of The Oppressive Bargaining Process, The Disproportionate Value Of The Car To The Payments Required, And SAS's One-Sided Ability To Proceed Against Mr. David Without Utilizing Arbitration.

The Medina court explained that an agreement to arbitrate "any type of claim," not just a claim involving unwaivable statutory rights, could be unenforceable because it is unconscionable. The court explained that unconscionability has two elements: procedural, and substantive. Procedural unconscionability focuses "on oppression or surprise due to unequal bargaining power," while substantive unconscionability focuses on "overly harsh or one-sided results." Medina. To render a contract unenforceable, "both must be present, but not in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required and vice versa." Here, the contract is both procedurally and substantively unconscionable, and thus enforceable.

The agreement between Mr. David and SAS was procedurally unconscionable. Mr. David is not a sophisticated consumer: he has never bought a car before. SAS took advantage of his inexperience from the moment he set foot in the dealership. When Mr. David entered the auto dealership, he told the saleswoman that he could only afford $200 a month, but she insisted he could afford $389 a month. The saleswoman persisted in saying he could afford it, even when Mr. David again stated that he could only pay $200 a month. The saleswoman then took Mr. David to look at the car, which appeared to be "clean and shiny," despite the fact that it was a four year old used vehicle. She took him for a test drive, and then brought him the papers to buy the car. Mr. David was not informed of the total price until he was given those papers. He was unaware of the ability to negotiate over the price, and instead trusted the saleswoman to give him the correct price. The saleswoman gave him a contract, and stated that he had to sign it to get the car. SAS apparently uses this "standard contract" for every used car sale.

This clearly satisfies the requirements for procedural unconscionability. There was "no opportunity to negotiate," as required by the Medina court. Indeed, the Columbia Supreme Court has found procedural unconscionability in far less egregious situations. In Marshall v. Fermby (1981) the court found a contract procedurally unconscionable even in the case of a prominent promoter of music concerts, because the promoter was "reduced to the humble role of adherent" to the contract. There, the promoter was "required by the realities of his business" to sign the form contracts. Marshall. The same obtains here, except that Mr. David had even less opportunity to negotiate and bargaining power. Mr. David was nothing more than an adherent to the contract, who was provided with no opportunity whatsoever to negotiate, and who had virtually no bargaining power.

It is true that Mr. David was not explicitly prohibited from negotiating. It is also true that the contract provided, in paragraph 5, a statement that he knew he was agreeing to arbitrate disputes, and that he agreed to the terms. Neither of these resolve the problem of procedural unconscionability, however. While Mr. David was not explicitly prohibited from negotiating, the course of events, with the papers being pressed upon him and the saleswoman telling him he had to sign to purchase the car, did not give him a functional ability to negotiate. Moreover, Mr. David found the contract to be full of tiny print, and did not fully appreciate its consequences. As a result, the negotiating and bargaining process, taken as a whole, was still procedurally unconscionable.

The contract is also substantively unconscionable. Mr. David purchased a used 2005 Mazda Tribute for $19,955, plus taxes and fees. Its actual value at the time it was purchased was $9,775. Mr. David was required to pay more than double the actual value of the car. The Marshall court explained that a contract is substantively unconscionable if it is "overly harsh and one-sided." This is clearly the case when someone is required to pay so much more than an item is actually worth.

Moreover, the arbitration agreement here is one-sided. It requires Mr. David to submit all claims to arbitration if they are valued for more than $1,000 in the aggregate. However, according to the arbitration agreement, Mr. David's "failure to provide consideration" as well as SAS's "right to retake possession of the vehicle" "shall not be subject to the arbitration." The agreement also provides that "the Dealer may proceed with Court action in the event the Purchaser fails to pay any sums due under the Agreement." Essentially, the agreement requires Mr. David to submit his claims to arbitration, but does not require SAS to submit any claim to arbitration if it is related to Mr. David's (1) failure to pay or (2) the dealership's right to posses. These are the two most likely reasons that SAS would have to bring a claim against Mr. David, and they need not be brought to arbitration. The Medina court made clear that only requiring one party but not the other to arbitrate claims is substantively unconscionable. The court explained that this "unilateral obligation is so one-sided as to be substantively unconscionable," because only one party is required to waive the benefits and protections of a judicial forum.

As a result, the arbitration agreement is procedurally and substantively unconscionable. There was no real opportunity for bargaining over the terms, the price was excessive in light of the value of the vehicle, and the arbitration agreement is entirely one-sided. Even if Mr. David is unable to show that it is entirely procedurally and substantively unconscionable, that is not his burden: as the Medina court explained, while both elements must be present, a stronger showing on one reduces the need for a strong showing on the other element. Here, Mr. David has made a strong showing on both prongs, and thus this court should find the agreement to be substantively and procedurally unconscionable, and thus unenforceable.

IV. Because The Arbitration Provision Of The Purchase Agreement Between Mr. David And SAS Is Permeated With Unconscionability, The Appropriate Relief Is Rescission Of The Entire Arbitration Provision.

The arbitration provision is unlawful because it (1) limits statutorily provided, unwaivable remedies, (2) renders relief inaccessible given the financial condition of Mr. David and (3) is substantively and procedurally unconscionable. The only remaining question is whether this court should strike down the arbitration provision in whole (i.e. strike the entirety of paragraph 4 from the agreement), or attempt to sever the invalid portions and allow the arbitration to proceed. Here, the only proper relief is to entirely rescind the arbitration portions of the purchase agreement, for several reasons.

First, as the Medina court explained, when an agreement is "permeated" by unconscionability, the appropriate relief is refusing to of the entire arbitration provision. Here, as is explained above, the agreement was both procedurally and substantively unconscionable.

Second, the Medina court identified two factors than weigh against limited severance. If the agreement contains more than one unlawful provision, this weighs in favor of invalidating the entire arbitration provision. Here, the agreement contains not only an unconscionable arbitration provision, but one that also unlawfully limits remedies and renders relief fiscally inaccessible. Just as in Medina, more than simple unconscionability is present: two additional public policy violations exist. In Medina, the court found it sufficient that unconscionability exist and that the agreement limit remedies. The same obtains here, with the additional unlawful aspect of rendering the arbitral forum inaccessible.

Moreover, the Medina court explained that if there is no single provision a court can strike to remove the unconscionable taint, the court should strike the entire arbitral provision because it should not reform the contract. Here, the unconscionable provisions pervade the arbitration agreement: the one-sided nature of the agreement is

present in multiple sentences of the arbitration provision, and the limitation on remedies is also present here. The court would essentially have to rewrite paragraph 4 of the purchase agreement, which the Medina court explained is impermissible in a case of unconscionability.

Third, the Medina court identified two factors that would weigh against rescinding the entire arbitration agreement: preventing parties from gaining an undeserved benefit, and attempting to conserve a contractual relationship if doing so does not condone an illegal scheme. Here, neither of these factors is present. Mr. David would not gain an undeserved benefit: he was pressured into signing a clearly unfair contract; it would provide SAS with an undeserved benefit if it were able to enforce the arbitration provision, even with its illegal components excised. Moreover, attempting to conserve a contractual relationship would preserve an illegal scheme - SAS's fraudulent and deceptive practices in connection with the sale of used vehicles, in violation of the UTPA.

Ultimately, as the Medina court explained, "[t]he overarching inquiry is whether severance furthers the interests of justice." Here, limited severance would not further the interests of justice. The entire arbitration portion of the agreement has been tainted by numerous illegalities, and should be stricken as a whole. Mr. David's claims should be heard by a court, rather than an arbitrator.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendant's Motion to Compel Arbitration and allow Plaintiff's case to proceed in the Bryant Superior Court. In the alternative, Plaintiff requests that this Court sever the illegal portions of the arbitration agreement, including those limiting plaintiff's remedies, allowing Defendant to proceed outside of arbitration, and requiring Plaintiff to pay half of the arbitration costs.

Answer 2 to Performance Test - B

To: Martin Snider, Partner
From: Applicant
Re: David v. Sovereign Auto Store, Inc.
Date: July 28, 2011

Memorandum of Points and Authorities Opposing the Motion to Compel

I. Statement of Facts

Joe David is a 25-year-old single father of three children, ages 1, 3, and 11. He has a high school education and works as a school bus driver in the Bryant Board of Education. On July 28, 2009, Joe David went to the Sovereign Auto Store (SAS) in Bryant, with the intention of buying an SUV. When he was greeted by the salesperson, Mr. David told her that he could only afford to buy a car that would cost him $200 per month, because of his relatively low wages as a bus driver. Upon hearing this news, the salesperson did a credit check on Mr. David and concluded that he could qualify for a loan allowing him to afford a car costing $389 per month. Again, Mr. David stated that he could only afford a $200 car. Mr. David has never made a car purchase before this one. The only car he ever owned before purchasing the car from SAS was an old car that his uncle had given him as a gift.

The salesperson showed Mr. David a used 2005 Mazda Tribute. After test-driving the car, Mr. David decided that he wanted to purchase it. He doesn't remember the salesperson telling him the total cost of the car until the salesperson brought him some papers to sign in order to finish the transaction.

To complete the purchase, Mr. David was presented with a contract to sign. The contract that Mr. David signed was filled with tiny print and contained an arbitration clause.

After purchasing the car, Mr. David made payments of $389 per month. The terms of the agreement required Mr. David to pay monthly payments of $389 per month for 72 months. Mr. David made the payments between September 2009 and July 2010, but he eventually could not afford to make them any longer. After his doctor recommended that he stop working because of an injury. Mr. David also had to pay his house bill one month and his car bill the next month because of his lack of money.

After missing two payments, SAS repossessed the car from Mr. David in December 2010. SAS then apparently sold the car at an auction for $6,125. SAS then demanded that Mr. David pay an amount equal to $13,368.95.

At the time that SAS sold the car to Mr. David, the Kelley Blue Book value of the 2005 Mazda Tribute was $9,775. However, SAS sold the car to Mr. David for $19,995 -- double the blue book value. Mr. David has stated that he thought that he was purchasing the car for its value, and if he had known that he was paying twice the actual value, he never would have purchased the car.

Pursuant to the arbitration clause in the agreement signed by the parties, SAS wishes to compel David to submit his claim to arbitration. This memorandum in opposition of the motion to compel follows.

II. Argument

A. A mandatory arbitration agreement that compels a party to forfeit statutory rights under the Unfair Trade Practices Act, and which limits the remedies available to the party under that act, is unenforceable because it is contrary to public policy.

Arbitration agreements that force parties to forfeit certain statutory rights are unenforceable. Medina. While some statutory rights may be waived, arbitration agreements that force participants to waive unwaivable statutory rights will be void because they violate public policy. Medina. In fact, a law that is established for a public reason cannot be contravened by a private agreement, and any arbitration that would cause a person to forfeit unwaivable rights under such a law will not be enforced. Medina.

In Medina, the court held that a mandatory arbitration agreement that would compel employees to submit to arbitration any claims arising under the Columbia Fair Employment Act was unconscionable and unenforceable because the statutory protections under CFEA were designed to serve important public purposes. According to the Medina court, there was a public policy against sex discrimination and the law was designed to create a benefit that inured to the benefit of the public, not just the individual employee or employees. As such, the specific statutory rights that were granted under the CFEA were created, defined, and subject to modification only by the legislature and the courts, suggesting the need for a public rather than private means of enforcement. Medina. Because of the important public policy considerations at issue, the mandatory arbitration agreement was unenforceable unless it allowed the person to vindicate the statutory rights. Medina.

Here, a similar public policy consideration governs the dispute between David and SAS. David has sued for relief under the Unfair Trade Practices Act (UTPA) of the Columbia Consumer Protection Code. According to section 1 of the UTPA, the stated purposes are to "(1) assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices; (2) promote, through effective enforcement, fair business practices throughout the community; and (3) educate consumers to demand high standards and seek proper redress of grievances." In section 7, which deals with remedies, the UTPA states that the remedies in the section may not be waived. Moreover, it allows for the following remedies: treble damages, reasonable attorney's fees, punitive damages, injunction against the use of unlawful

trade practices, additional relief as may be necessary to restore to the consumer money or property, and any other relief which the court deems proper. Section 7 of UTPA.

Clearly, like the statute at issue in Medina, the Unfair Trade Practices Act protects important public policy concerns. Such a statute is necessary to make sure that consumers are protected against persons who make misrepresentations as to material fact that has a tendency to mislead, fail to state a material fact if such failure tends to mislead, or make or enforce unconscionable terms or provisions of sales or leases. Section 4 of UTPA. The statute aims to protect consumers against unfair business practices and also serves to deter future conduct by bad actors. By providing consumers who have been deceived by misrepresentations or unfair business practices, the statute serves important public policy goals that cannot be contravened by a contract between public parties.

Moreover, the statute itself states that the remedies under the Act cannot be waived. Thus, any contract that attempts to waive them should be deemed unenforceable, or at least subject to great scrutiny under the Medina decision. Under Medina, a mandatory arbitration agreement that causes a person to forfeit statutory rights must meet 3 requirements: 1) neutral arbitrators; 2) all types of relief available in court; 3) it must not require persons to pay arbitrator's fees or expenses that make a forum inaccessible.

Here, the mandatory agreement that was signed by David states that "the parties agree that to the extent damages are awarded, they shall be limited to the total amount paid by the Purchaser for the Vehicle plus other provable economic loss as determined the sole discretion of the arbitrator." Thus, it eliminates certain remedies that were deemed unwaivable under the UTPA. As such, under Medina it can only be enforced if it meets the 3-part test set forth by that Court. As stated below, the agreement here must not be enforced.

1. Although the agreement allows David to approve the arbitrator chosen by Dealer, when there is an adhesive contract, and fraud and overreaching are present, the court will closely scrutinize the choice of arbitrator.

"The Columbia Arbitration Act seems to contemplate complete contractual autonomy in the choice of an arbitrator." Marshall. Section 29(a) of the CAA allows the parties to set a method for the selection of the arbitrator and states that the method will be followed unless it fails. However, in the case of contracts of adhesion, there is a greater possibility of overreaching and fraud and the court will more closely scrutinize the choice of arbitrator. Here, the agreement provides that Dealer will select the arbitrator, subject to approval by David. In Marshall, the court found that an agreement where the chosen arbitrator was so one sided that they could not be relied upon to remain neutral, the court would not allow the person to serve as an arbitrator. Clearly, if the court believes that there is doubt that the arbitrator will be able to neutrally decide the case, the court may stray from the parties' method even though the CAA generally gives deference to the parties' agreement in this area.

That case is distinguishable from this case because in that case the arbitrator was a member of the union to which the choosing party belonged. There, there was no doubt that the arbitrator would not be able to maintain fairness to the parties. Here, the arbitrator will be chosen by Dealer, and must be approved by David. The fact that David has approval of the choice may protect David. However, the agreement will not meet the other 2 requirements of the Medina test, as explained. Thus, the court must reject the motion to compel arbitration for the reasons stated below.

2. An arbitration agreement that limits the statutory remedies allowed under the Unfair Trade Practices Act is not enforceable because it is contrary to public policy.

In Medina, the court struck down the arbitration agreement because it limited the remedies available under the applicable statute. The court stated, "an arbitration

agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees." Medina. Such an agreement would compel arbitration of statutory claims without affording the full range of statutory remedies, and it would be contrary to public policy and unlawful. Medina.

Here, the UTPA allows for treble damages, reasonable attorney's fees, punitive damages, an injunction against the unlawful trade practice, additional relief as necessary to restore to the consumer money or property which may have been acquired by means of the unlawful trade practice, and any other relief which the court deems proper. However, the mandatory arbitration agreement in this case limits the remedies available to the total amount paid by the Purchaser to the Vehicle plus other provable economic loss. Mr. David has sued SAS under the Unfair Trade Practices Act, and has asked for punitive damages. Mr. David has also requested that SAS be required to pay treble damages pursuant to the UTPA. He has also asked for reasonable attorney fees and any other remedy that the court deems proper. In essence, David is seeking to vindicate his rights that are statutorily given to him under the UTPA. Forcing David to participate in mandatory arbitration, and disallowing the remedies that the statute has provided, would be unconscionable, under the Medina decision. Thus, the court cannot grant the motion to compel.

3. A mandatory arbitration agreement that would require an indigent party to pay arbitration costs that the party cannot afford would make the forum inaccessible and would prevent the person from vindicating their statutory rights.

In Fillman, the court struck down a arbitration agreement when it would cause the plaintiff to essentially forfeit any path to remedy because of the expensive costs of arbitration. In that case, the plaintiff was a single mother who was earning a low income. The mandatory arbitration agreement at issue would require her to pay half the costs of the arbitration fees. The court found that such fees are not subject to waiver or deferral even for extreme hardship, and if they are, such waiver would rarely be granted. Because the plaintiff was making very little money, the costs of arbitration

were impossible for her to afford. Because the dispute at issue concerned important statutorily created rights, the court held that an arbitration agreement which the plaintiff could not afford amounted to preventing the plaintiff from vindicating those statutory rights. Fillman.

Here, there is a very similar situation to that in the Fillman case. As in Fillman, there is a statute which contains nonwaivable, statutory rights. Also, as in Fillman, Mr. David has very little money. His current monthly take home pay is only $1,725. His various expenses, which include mortgage, utilities, daycare for his children, food and transportation, amount to $1,615. This leaves very little money left over to afford the costs of arbitration. Mr. David was even forced to give up work for a period of time because of his injuries. He was not able to afford the car payments on his Mazda. The arbitration expenses for David would be an initial filing fee of $250 and a minimum deposit of $1,500 which would cover two days of proceedings. As David's finances indicate, he is unable to pay such a large sum. Just like the plaintiff in Fillman, David's finances preclude him from pursuing arbitration. And a mandatory arbitration agreement would preclude him from vindicating his rights. As such, the court must deny the motion to compel.

B. A mandatory arbitration agreement which is imposed by a party of superior bargaining strength, and which contains a unilateral obligation to arbitrate contains elements of both procedural and substantive unconscionability, and it is unenforceable as a matter of public policy.

"Unconscionability has both procedural and substantive elements, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results. For a court to refuse to enforce a contract or clause, both procedural and substantive unconscionability must be present, but not in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability, and vice versa." Medina.

Moreover, because unconscionability applies to contracts in general, the court can refuse to enforce an arbitration agreement under CAA, "which provides that arbitration agreements are valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract." Medina; CAA.

Here, the arbitration agreement contains elements of both Procedural and Substantive unconscionabiltiy, and as such, it is unenforceable.

1. The agreement is procedurally unconscionable because SAS is a party with superior bargaining power and David was relegated to the choice of either adhering to or rejecting the contract.

Procedural unconscionability exists when a standard contract is imposed and drafted by a party with superior bargaining strength, and the weaker party has only the option to adhere to or reject the contract. Marshall. Such contracts contain dangers that overreaching and oppression will be employed, and courts will sometimes step in to avoid abuse. Marshall. In Marshall, a contract was procedurally unconscionable when the court found that a party was forced to sign the contract when his stature in the music industry and the realities of his business required him to sign the contract, or sign no contract at all.

Here, David's economic realities and lack of experience, when compared with SAS's business savvy, makes this contract procedurally unconscionable. SAS certainly has superior bargaining strength in this relationship. David is a man who has had very little experience in buying cars. He knows very little about commercial transactions and has never purchased a car. Moreover, he relied on the assurances of the salesperson who told him that he could afford the car. Moreover, it is clear that SAS sold him a car for twice its actual value. SAS has experience selling cars, and knows the value of the cars that it is selling.

Furthermore, David's economic realities and situation made him a weak party in this transaction. He was forced to purchase a car after his car broke down. He has 3 children and he is responsible for their care and well-being. He has very little money and told the salesperson that he was only able to afford a certain amount each month.

Although Medina stated that "a party to a written contract is responsible for informing herself of its contents before executing it, and in the absence of fraud or overreaching she cannot impeach the effect of the instrument by showing that she was ignorant of its contents of failed to read it," here, there are elements of overreaching and fraud. Although David states that he did not read the agreement, and thus didn't know about the arbitration clause, he also states that he believed that the salesperson was giving him a good deal. Moreover, the salesperson was engaging in overreaching because she knew that David wanted a car for $200, but she insisted that he look at cars that were double his budget. There is also evidence of fraud. As stated above, the vehicle that SAS sold to David was worth less than $10,000 at the time of the sale, but the dealership sold it to David for almost $20,000.

In light of these facts, it is clear that David voluntarily signed the agreement. However, because of the presence of overreaching and fraud, the clause is unenforceable.

2. A mandatory arbitration agreement that contains a unilateral obligation to arbitrate is so one-sided as to be unconscionable.

In Medina, the court stated that the agreement contained a requirement that the employee arbitrate, but the employer was not required to arbitrate. The court stated that this clause required the party who was injured to forfeit claims, while allowing the party who required waiver of those rights to be allowed to retain the benefits and protection of the statute. This agreement was held by the court to be so one-sided as to be unconscionable, and the court refused to enforce it.

Here, a similar problem exists. The mandatory arbitration agreement between SAS and David provides that David must arbitrate any claim he has against SAS. However, it also provides that SAS may proceed with court action in the event that David fails to pay any sums due under the agreement. Clearly, this agreement falls into the same category as the one struck down in Medina because it forced David to give up his statutory rights under the UTPA, and yet it allows the Dealer (SAS) to begin a court action against David. This essentially allows SAS to pull all the strings in the situation, and this is contrary to public policy, especially in light of the fact that SAS has likely been engaging in unfair trade practices under the UTPA.

3. When an arbitration agreement is permeated with unconscionability and it is impossible to remove the taint of unconscionability, the court should render the arbitration agreement unenforceable.

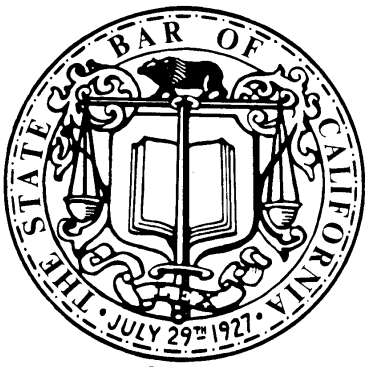
When a court finds an unconscionable provision, it may enforce the remainder of the contract without the unconscionable term. When deciding whether to do so, the overriding concern will be what the interests of justice require. Medina. If the court finds that there is no single provision that the court can strike in order to remove the unconscionable taint from the agreement, the court should decide that the agreement is unenforceable in its entirety. If the agreement contains more than one unlawful provision, for example an unlawful damages provision and an unconscionable unilateral arbitration agreement, this weighs in favor of calling the agreement unenforceable. Medina. Multiple defects in the agreement suggest that there was a systematic intent to impose arbitration on the other party. Also, if there is no single provision that the court can strike to remove the unconscionability, then the court should render the agreement unenforceable.

Here, there are multiple defects in the agreement. As explained above, there are unlawful damages provisions because the agreement takes away David's right to attain punitive, treble damages, as well as attorney's fees or injuntion. Furthermore, there is a unilateral arbration which the Medina court plainly stated amounted to substantive

unconscionability. As a result of these defects, it is clear that SAS wishes to impose arbitration upon David as a means of controlling the outcome, rather than as an alternative to litigation. Because the unconscionabiltiy truly permeates the agreement as a whole, it would be impossible for the court to sever the agreement so as to make it enforceable. As the Medina court states, "the various provisions that are unconscionable and contrary to public policy make the mandatory arbitration agreement unenforceable as a whole." Thus, the court must deny the motion to compel arbitration.

III. Conclusion

The court should refuse to grant the motion to compel. The mandatory arbitration agreement would cause David to forfeit statutory rights and this would result in a violation of public policy. Moreover, the agreement has elements of procedural and substantive unconscionability. Because the agreement is permeated throughout with the taint of unconscionability, it will be impossible for the court to remove the taint of the agreement without rendering the agreement unenforceable. For these reasons, we ask that you deny SAS's motion to compel arbitration.



California Bar Examination

Performance Tests and Selected Answers

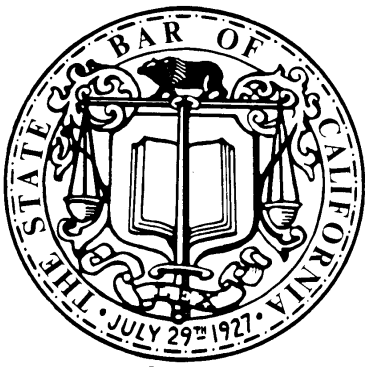
February 2012

PERFORMANCE TESTS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2012 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



Performance Test A
INSTRUCTIONS AND FILE

IN RE SWAYNE

FILE

IN RE SWAYNE

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

Arbuckle Baines, LLP
Attorneys at Law
Walkerville, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant

FROM: Roger Arbuckle

DATE: February 28, 2012
SUBJECT: Law Offices of Richard Swayne – Business Plan

Our client, Richard Swayne, is a lawyer who practices law here in Walkerville as a solo practitioner. A college classmate of his, Ann Moulton, has proposed that she and Mr. Swayne enter into a business arrangement, which would be to publish and market a series of legal forms for use by individuals and small business entities wishing to represent themselves rather than retain counsel.

Ms. Moulton has presented Mr. Swayne with a business plan that spells out the scope and contours of the proposed business arrangement. He has some concerns about the legal ethics of entering into such an arrangement and has asked us to advise him on that aspect of the venture.

Please draft a two-part memorandum to prepare me for my upcoming meeting with Mr. Swayne.

In Part 1, explain what specific ethical problems the following parts of the Business Plan present under the Columbia Rules of Professional Conduct and the Professions Code:

1. Each of the duties of the "receptionist" listed in the "helpline" service section of the plan.
2. The revenue sharing arrangements described in the plan.
3. The partnership nature of the venture.

In Part 2, explain the following:

4. Whether Swayne's drafting the forms and instructions constitute "law-related services" and, if so, what Swayne's ethical obligations are to the users of the forms.
5. What obligation, if any, Swayne might have to supervise the "receptionist."

There are several other ethical issues that I have assigned to another associate to explore. You should focus only on the ones I've listed above.

Transcript of Interview with Richard ("Dick") Swayne

February 27, 2012

*** * ***

Roger Arbuckle: Hi, Dick. I'm glad you could come in to talk about that business plan you told me about over the phone yesterday. Did you bring it with you?

Richard Swayne: Yeah, I did. Here it is.

Arbuckle: Great. I'll take a close look at it later, but let's talk so you can at least give me the highlights.

Swayne: OK. It's a business venture I'd really like to do, but I want to be sure I don't run into any ethical problems. Basically, Ann Moulton – she's a college acquaintance of mine – did some market research and found that there are lots of individuals and small business owners who don't want to spend the money on an attorney to handle relatively minor legal problems. She came up with the idea of putting together sets of legal forms that litigants can buy and use to do the work themselves. I'd draft the forms and the instructions. Ann would handle the marketing and sales, mainly over the Internet.

Arbuckle: Describe your existing practice for me.

Swayne: It's a small but busy practice, mostly plaintiff's personal injury cases – car accidents, product liability, slip-and-falls – that sort of thing. I also represent debtors against creditors' claims and small business owners in commercial disputes. Probably about one-fifth of my work involves estate matters – wills, probate, uncomplicated estate planning. I'm a solo practitioner, so on larger, complicated matters, I usually associate co-counsel with special expertise.

Arbuckle: What sort of business association would you operate this new venture under?

Swayne: We'd form a limited liability partnership. Ann would be the general partner responsible for running the day-to-day operations, and I'd be the limited partner. We'd share the profits and losses 50-50.

Arbuckle: I see. Well, do you think there's enough money in such a venture to make it worth your while?

Swayne: I *think* so. We're estimating that it will begin generating profits in the fourth or fifth year, but there are some immediate side advantages to me.

Arbuckle: Like what?

Swayne: Well, first of all, I own the building on Center Street, and my law offices now occupy only half of it. The new LLP would lease the other half from me. Second, aside from my share from the sales of the forms, I'd get a lot of referrals and client leads that I could follow up on and use to develop my law business. Of course, as you can see in the plan, I'd have to share with the LLP some of the referral fees. But, all told, it would represent a nice piece of change.

Arbuckle: I'd want to take a very close look at those aspects of the deal before you agree to any of that.

Swayne: Why? Those are the parts of the deal that make it worthwhile to me.

Arbuckle: Because I think some of that comes pretty close to crossing the ethical line. Would any of your office staff be involved in running the LLP?

Swayne: No, not really. The LLP would hire its own staff, including the receptionist, who would be the main contact point for those who email or call in by phone. Although I guess I'd be available to answer any questions if a user of the forms wanted to contact me.

Arbuckle: Give me an example of what kinds of questions you're talking about.

Swayne: Well, I mean things that don't involve my professional judgment, like where to file, how many copies, what are the filing fees, and so forth.

Arbuckle: What exactly would be the receptionist's duties?

Swayne: That person's duties are pretty well spelled out in the business plan, at least insofar as they relate to the LLP. But that person would also direct clients of mine who come in for appointments or consultations to me. And, I guess, if a user of the forms called in or walked in and had a question for me, the receptionist would direct that person to me as well. The business plan has a provision that would allow the users of the forms to refer questions to me and to contact me for limited free consultations.

Arbuckle: What do you mean "limited?"

Swayne: I'm not quite sure. I'd answer simple questions for free, but if it got beyond simple information, for example into issues of liability or strategy that require my professional judgment, I'd handle the person as a regular client of my firm and bill him or her as usual for my services.

Arbuckle: Is there going to be just a single phone number so that all calls for both you and the LLP will be routed through the receptionist?

Swayne: No. I'll have my own phone number for my law office, and calls related to my law practice will be routed directly to me.

Arbuckle: I'd want to take a close look at those things too. Would you have any supervisory role or authority over the receptionist?

Swayne: Not if I could help it. I just don't want to divert my energies to running the LLP and being held to the duties of a general partner. As far as I'm concerned, Ann alone will be supervising the receptionist. As you know, under the LLP laws, the general partner is completely responsible and liable, unless a limited partner gets involved in managing the day-to-day affairs.

Arbuckle: That's right, but, as *you* know, that doesn't preclude the application of the Rules of Professional Conduct to you. But tell me a little bit about what your role would be in creating the forms and instructions for their use.

Swayne: Well, it would be the usual range of forms used in commencing litigation and responding to litigation already commenced – summons, complaints, answers, discovery documents, motions, and the like. Then, I'd draft the instructions on what forms to use for specific purposes.

Arbuckle: Would these instructions contain any directions or suggestions about what language the user should employ to fill in spaces on the forms where narrative statements are required?

Swayne: No. The instructions would simply tell them what boxes to check and spaces to fill out, without telling them what language to use. They would also explain the filing requirements. I wouldn't want it to appear that I am giving legal advice to the users of the forms by telling them what language to use. I'd leave that part of it up to the receptionist when users contact him or her for assistance.

Arbuckle: Anything else that I should be aware of?

Swayne: No**.** Ann and I have discussed the various ways we can structure this. For example, in the original draft of the business plan, in my capacity as a lawyer – not as a member of the LLP – I would have been retained as the lawyer for the LLP to handle any legal matters and claims against the partnership, and I'd charge the LLP my usual rates. I rejected that idea. I want a cleaner relationship and one with greater financial potential. I want to be a partner of an LLP, not an employee, consultant, independent contractor, or anything else.

Arbuckle: OK. I hope that can be accomplished under the rules, but maybe not. By the way, do you want advice or help from me on the technicalities of formation of the LLP?

Swayne: No. I can take care of that myself.

Arbuckle: All right, then. Give me a few days to do the research, and I'll get back to you.

Swayne: Thanks, Roger. I'll be anxious to hear from you.

Business Plan

Self-Help Legal Enterprise Project, LLP

OVERVIEW: Research shows that there are many small business entities and individuals in the State of Columbia and elsewhere who choose to represent themselves in litigation and related legal matters rather than retain counsel. There is a need for legal forms that conform to the rules of the courts of the State of Columbia, such as will enable such persons to comply with filing and pleading requirements. The undertaking proposed in this Plan will fill that need and, at the same time, serve as a business development vehicle for both the sale of such forms and the law practice of participating lawyers.

Form of the undertaking: This Plan contemplates the creation of a limited liability partnership named Self-Help Legal Enterprise Project, LLP (SHLEP).

General Partner: Ann Moulton, BS, MBA, University of Columbia, will be the managing partner and will manage the day-to-day operations of the partnership. Ms. Moulton was formerly employed as Regional Vice President and Sales Manager of Manifold Business Forms, Inc., a nationwide producer and supplier of business forms. As such, Ms. Moulton has an existing business network that will facilitate production and marketing of SHLEP's legal forms.

Limited Partner**:** Richard Swayne, BA, JD, University of Columbia, will be the sole limited partner. Mr. Swayne has been a practicing lawyer in the City of Walkerville, Columbia for 15 years. He is a solo practitioner. He has familiarity with the court system and the requisites necessary to ensure that the forms will comply with court rules.

Office Facilities: The current law offices of Richard Swayne are located in a building at 42 Center Street owned by Mr. Swayne. Swayne and his staff are currently the sole occupants of the building. This Plan contemplates that the west wing of the building, which is currently vacant, would be leased from Swayne and occupied by SHLEP and its staff at a rental amount to be determined and paid to Swayne. The east wing would continue to be occupied by The Law Offices of Richard Swayne.

Contribution of Capital and Division of Profits and Losses: Ann Moulton and Richard Swayne shall each contribute $100,000 in cash at the inception of SHLEP and,

thereafter, their skill and labor and such other amounts of capital as shall be necessary. Ms. Moulton and Mr. Swayne shall share profits and losses equally.

Method of Operation: To the extent permitted by law, SHLEP and The Law Offices of Richard Swayne shall work cooperatively to maximize the sale and use of the legal forms produced and marketed by SHLEP. There shall be the following division of labor between the two entities.

Production of Legal Forms: Mr. Swayne shall be primarily responsible for determining the types of forms that are necessary and the design thereof to ensure compliance with the rules of the courts of the State of Columbia. He shall also be responsible for drafting instructions for the use and purposes of the forms in any advertising and marketing media utilized by SHLEP.

Ms. Moulton shall be primarily responsible for contracting with printers for printing, packaging, and purchasing paper forms, taking orders for, and shipping forms to purchasers who wish to use hard copy rather than online features, and for designing and implementing website access for online completion of the forms and court filing.

Marketing and Sales: The principal means of marketing and utilizing the forms will be via a SHLEP website on the Internet and advertising in legal publications. Ms. Moulton, as general partner of SHLEP, shall be responsible for such advertising and the creation and maintenance of a SHLEP website. All costs of advertising, marketing, and sales shall be borne by SHLEP. The advertising and website shall promote use of the forms and shall contain the following features:

- Descriptions of the various forms and their uses, emphasizing that they are accompanied by a complete set of written instructions for completion and filing of the forms.
- Representations that the forms and instructions were created by Richard Swayne, an experienced attorney licensed in the State of Columbia, including assurances that the forms, if properly filled out and filed, will comply with court rules.
- A schedule showing the cost of the forms and quantity discounts.
- A mechanism for online ordering and paying for the forms, requiring the potential purchaser to provide name, address, and telephone number and offering the option of paying by credit card.

- Emphasis on the security and confidentiality of the website and "online" capabilities for completion and filing of the forms with the courts.
- A "helpline" telephone number that purchasers of the forms can call for free-of-charge assistance in completing the forms and directions for filing them.
- Email capability for users to attach completed forms to be checked by the receptionist for completeness and to ask and get responses to questions.
- A link to the court system for online, electronic filing and service of the forms with the courts.
- A representation that Mr. Swayne is available for free limited consultation to any user of SHLEP's forms.
- An email link, which the caller can click and use to send a question or other inquiry to SHLEP and/or Mr. Swayne.

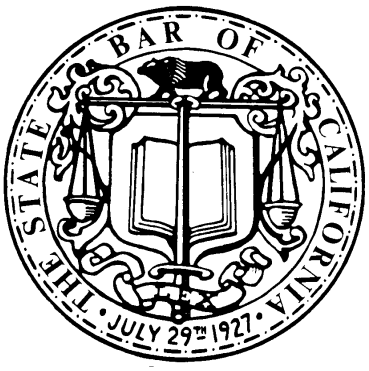
Free "Helpline" Service: SHLEP shall hire a receptionist. The duties of the receptionist shall include the following:

- The receptionist will answer telephones and greet customers of SHLEP.
- The receptionist will take all "helpline" calls and assist the callers in filling out the forms by answering their questions, telling them which boxes to check, and helping to formulate language to be inserted in various parts of the forms.
- The receptionist will respond to all email inquiries received from users of the forms.
- The receptionist shall also screen all callers and make an initial determination whether the caller needs legal assistance beyond mere help in filling out the forms. If so, the receptionist shall so inform the caller and tell the caller that Mr. Swayne is available for immediate consultation for $250. If the caller agrees to pay for a consultation, the receptionist shall transfer the call to Mr. Swayne.
- The receptionist shall maintain records of the names, addresses, and telephone numbers of all "helpline" callers and, monthly, shall furnish said records to The Law Offices of Richard Swayne as "leads" Mr. Swayne may wish to pursue for client development purposes.

Books of Account and Sharing of Revenues: SHLEP and The Law Offices of Richard Swayne shall in all respects maintain separate financial records, books of account, payroll, accounts receivable and payable, and bank accounts and, with the following exceptions, shall each bear its own expenses and costs of operation.

- SHLEP and The Law Offices of Richard Swayne shall pay equally all costs of utilities, telephone and high-speed Internet services.
- SHLEP shall pay Richard Swayne from the revenues of SHLEP the agreed-upon lease rental for the office facilities on Center Street.
- Mr. Swayne shall remit to SHLEP 50% of all consultation fees he receives from callers referred to him by the receptionist.
- The Law Offices of Richard Swayne shall remit to SHLEP 10% of all fees earned from “leads” obtained from the receptionist.
- Mr. Swayne shall reimburse one-half of the cost of health insurance and other fringe benefits provided to the receptionist.

[Financial Projections Omitted]



Performance Test A
LIBRARY

IN RE SWAYNE

LIBRARY

Selected Provisions of Columbia Rules of Professional Conduct

Rule 1-100. Rules of Professional Conduct, in General: The Columbia Rules, together with any standards adopted by the Board of Governors pursuant to these rules, shall be binding upon all lawyers admitted to practice by the State Bar of Columbia.

Lawyers are also bound by the applicable case law and the provisions of the Columbia Professions Code. Although not binding, opinions of ethics committees in Columbia and other jurisdictions and bar associations should be consulted by lawyers for guidance on proper professional conduct.

* * *

Rule 1-120. Assisting, Soliciting, or Inducing Violations: A lawyer shall not knowingly assist in, solicit, or induce any violation of these rules or the Columbia Professions Code.

* * *

Rule 1-300. Unauthorized Practice of Law: A lawyer shall not aid any person or entity in the unauthorized practice of law.

* * *

Rule 1-310. Forming a Partnership with a Non-Lawyer: A lawyer shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion: Rule 1-310 is not intended to govern lawyers' activities that cannot be considered to constitute the practice of law. It is intended solely to preclude a lawyer from being involved in the practice of law with a person who is not a lawyer.

* * *

Rule 1-320. Financial Arrangements with Non-Lawyers: (A) Neither a lawyer nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer.

(B) A lawyer shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client.

* * *

Rule 1-400. Solicitation: For purposes of this rule, a "solicitation" means any communication concerning the availability for professional employment of a lawyer or a law firm in which a significant motive is pecuniary gain and that is delivered in person or by telephone. A solicitation shall not be made by or on behalf of a lawyer or law firm to a prospective client with whom the lawyer or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of Columbia.

* * *

Rule 1-500. Responsibilities Regarding Non-Lawyer Assistants: With respect to a non-lawyer employed or retained by or associated with a lawyer:

(A) A lawyer who possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(B) A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

* * *

Discussion: Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether

employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

* * *

Rule 1-600. Responsibilities Regarding Law-Related Services: (A) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

(B) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (A), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

Discussion: “Law–related services” and “legal services” are two distinct things. Rule 1-600 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and regardless of whether the law-related services are performed through a law firm or a separate entity. The conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to

lawyer conduct, regardless of whether the conduct involves the provision of legal services.

If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The lawyer must take reasonable measures to communicate a clear, understandable disclaimer to assure that the recipient of the law-related services knows that the services are not legal services and the protections of the client-lawyer relationship do not apply.

Selected Provisions of Columbia Professions Code

Section 25. **Practice of Law:** The practice of law is the provision of legal services. It includes, but is not limited to, giving any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies. No person shall practice law in Columbia unless the person is an active lawyer of the State Bar.

* * *

Section 51. **Runner or Capper:** As used in this article:

A runner or capper is any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney-at-law or law firm, whether the attorney or any lawyer of the law firm is admitted in Columbia or any other jurisdiction, in the solicitation or procurement of business for the attorney-at-law or law firm as provided in this article. An agent is one who represents another in dealings with one or more third persons.

Section 52. **Prohibited Solicitations by Runner or Capper:** (a) It is unlawful for:
Any person, in an individual capacity or in a capacity as a public or private employee, or for any firm, corporation, partnership or association to act as a runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts, or in any public institution or in any public place or upon any public street or highway.

* * *

Section 64. Self-Help Services Provided by Legal Document Assistants:
(a) **" Legal document assistant"** means any person, corporation, partnership, association, or other entity that provides, or assists in providing, or offers to provide, or offers to assist in providing, for compensation, any self-help service to a member of the public who is representing himself or herself in a legal matter, or who holds himself or

herself out as someone who offers that service or has that authority. This paragraph does not apply to any individual whose assistance consists merely of secretarial or receptionist services.

(b) **"Self-help service"** means all of the following:

(1) Completing legal documents in a ministerial manner, selected by a person who is representing himself or herself in a legal matter, by typing or otherwise completing the documents at the person's specific direction.

(2) Providing general published factual information that has been written or approved by an attorney, pertaining to legal procedures, rights, or obligations to a person who is representing himself or herself in a legal matter, to assist the person in representing himself or herself. Merely publishing such factual information shall not require registration as a legal document assistant.

(3) Making published legal documents available to a person who is representing himself or herself in a legal matter.

(4) Filing and serving legal forms and documents at the specific direction of a person who is representing himself or herself in a legal matter.

(c) **A legal document assistant**, including any legal document assistant employed by a partnership or corporation, may not provide any self-help service for compensation, unless the legal document assistant is registered in the county in which his or her principal place of business is located and in any other county in which he or she performs acts for which registration is required.

Section 65. Registration: A legal document assistant shall be registered pursuant to this chapter by the county clerk in the county in which his or her principal place of business is located and in any other county in which he or she performs acts for which registration is required.

Section 66. Solicitation Requirements: (a) It is unlawful for any legal document assistant in the first in-person or telephonic solicitation of or response to a prospective client of legal document services to enter into a contract or agreement for services or accept any compensation unless the legal document assistant states orally, clearly,

affirmatively and expressly all of the following, before making any other statement, except a greeting, or asking the prospective client any questions:

(1) The identity of the person making the solicitation or response to a caller.

(2) The trade name of the person represented by the person making the solicitation or response to the caller.

(3) The kind of services being offered for sale.

(4) The statement: "I am not an attorney" and, if the person offering legal document assistant services is a partnership or a corporation, or uses a fictitious business name, "(name) is not a law firm. I/we cannot represent you in court, advise you about your legal rights or the law, or select legal forms for you."

Section 67. Prohibited Acts for Legal Document Assistant: It is unlawful for any person engaged in the business or acting in the capacity of a legal document assistant to do any of the following:

(a) Provide any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies. A legal document assistant shall complete documents only in the manner prescribed in section 64(b).

(b) Engage in the unauthorized practice of law, including, but not limited to, giving any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies.

THE STATE BAR OF COLUMBIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT

FORMAL OPINION NO. 1995-141

INTRODUCTION

This opinion addresses the ethical responsibilities of lawyers who render law-related services to a client either directly, through a non-lawyer, or through an entity in which the lawyer or the lawyer's firm has an ownership interest. "Law-related services" are services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

Examples of law-related services that might be performed by a non-lawyer are such things as family counseling by a social worker, rendering tax advice by an accountant or a tax-preparer, providing financial services by a stockbroker, giving advice regarding testamentary disposition by a charity, and the like. The characteristic that such undertakings have in common is that they all present the problem that providers of such services have the opportunity to identify and refer persons using their services to lawyers, who would, of course, receive such referrals for “pecuniary gain.”

Concerns frequently arise in situations where the law-related services are rendered either by an entity owned by a lawyer or a law firm, individually or with others, or by a non-lawyer employed by the lawyer or the lawyer's firm.

These practices raise ethical concerns in the areas of improper solicitation of clients and financial relationships between a lawyer and non-lawyers. This opinion addresses these concerns.

DISCUSSION

Applicability of the Rules of Professional Conduct to a Lawyer's Performance of Law-Related Services: Lawyers have historically been allowed to practice law and to pursue other business activities at the same time. Although the current Columbia Rules of Professional Conduct do not contain specific restrictions on dual practices, ethics opinions have warned dual practitioners that the rules place constraints on their activities in other businesses and professions.

A lawyer's ethical obligations are not limited to activities undertaken in the course of rendering pure legal services. Any act involving moral turpitude, dishonesty or corruption by an attorney, whether the act is committed in the course of the practice of law or in the pursuit of other business activities, constitutes grounds for discipline.

Improper Solicitation of Clients: A lawyer or law firm's performance of legal and law-related services may not involve the referral of business between the two areas of service. For example, where a lawyer offers law-related services through a person or entity in which the lawyer has an interest, whether ownership, management, or control, the lawyer may not use or encourage persons in that entity to channel or otherwise direct users of those law-related services to the lawyer if the purpose of such a practice is to attract the users as potential clients of the lawyer's law practice.

Such practices raise issues under rule 1-400, which governs lawyer solicitation. Rule 1-400 bans solicitations and prohibits in-person or telephonic communications that suggest the availability of professional services if a significant purpose of the communications is for pecuniary gain. It does not, however, bar solicitations and communications regarding the availability of purely non-legal professional services.

The ban on solicitations applies when legal employment is solicited of someone with whom the lawyer or firm does not have an existing or prior lawyer-client relationship. Thus, the rule applies when such solicitations occur in the course of rendering law-related services.

Rule 1-400 applies to solicitations and communications made on behalf of a lawyer or law firm by a non-lawyer employee or a lawyer or law firm owned, managed, or controlled entity. Thus, the rule prohibits solicitations and communications regarding the availability of legal services, which are made by a lawyer or a non-lawyer employee on behalf of the lawyer in the course of rendering law-related services.

Financial Relationships Between Lawyers and Non-Lawyers: A lawyer providing law-related services through non-lawyer employees or business entities in which non-lawyers also have an interest must also comply with the Columbia Rules of Professional Conduct governing the financial relationships between lawyers and non-lawyers. First, a lawyer shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Second, non-lawyers cannot share in the profits of a law practice. Rule 1-320 prevents a lawyer from directly or indirectly sharing legal fees with a non-lawyer.

Together, these rules require that both the structure of the business relationship and the division of income from law-related services be separate and distinct from the lawyer's law practice. The entity owned by the lawyer and non-lawyer cannot engage in the practice of law. The two cannot share the legal fees from the lawyer's practice.

Another area of concern is where a non-lawyer in a business relationship with a lawyer to provide law-related services seeks to influence the conduct of a lawyer's legal practice through the referral of business or imposing other profit-related concerns on the legal practice. A lawyer cannot compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the lawyer or the lawyer's firm by a client under the rule. The rule encompasses situations in which a lawyer gives any financial benefit or compensation in exchange for the referral of business.

CONCLUSION

As the preceding discussion demonstrates, the rendering of non-legal services by lawyers, law firms or entities in which either has an ownership interest raises a number of ethical concerns that must be carefully evaluated. Lawyers engaged in rendering such services must not only be aware of the ethical issues raised in this opinion, but must also watch for other ethical issues that may arise in the course of providing the service.

PT – A

ANSWER 1

MEMORANDUM

TO: Roger Arbuckle
FROM: Applicant
DATE: February 28, 2012
SUBJECT: Law Offices of Richard Swayne — Business Plan

PART I.

Pursuant to the Columbia Rules of Professional Conduct (CRPC) and the Professions Code (PC), specific ethical problems relating [to] the following parts of the Business Plan are as follows:

Issue No. 1: Duties of the "receptionist" listed in the "helpline" service section of the plan.

The Free "Helpline" Service section of the Business Plan provides for the duties of the receptionist, which includes the following:

- The receptionist will answer telephones and greet customers of SHLEP.
- The receptionist will take all "helpline" calls and assist the callers in filling out the forms by answering their questions, telling them which boxes to check, and helping to formulate language to be inserted in various parts of the forms.
- The receptionist will respond to all email inquiries received from users of the forms.
- The receptionist shall also screen all callers and make an initial determination whether the caller needs legal assistance beyond mere help in filling out the forms. If so, the receptionist shall so inform the caller and tell the caller that Mr.

Swayne is available for immediate consultation for $250. If the caller agrees to pay for a consultation, the receptionist shall transfer the call to Mr. Swayne.

- The receptionist shall maintain records of the names, addresses, and telephone numbers of all "helpline" callers and, monthly, shall furnish said records to The Law Offices of Richard Swayne as "leads" Mr. Swayne may wish to pursue for client development purposes.

See Business Plan, Method of Operation, Free "Helpline" Service. However, each of the duties denotes a potential ethical problem as provided by the CRPC and PC. An analysis of each duty provided by the Business Plan is further provided below.

Answering telephones and greeting customers of SHLEP.

A receptionist is generally required to answer telephones and greet customers. As such, there are no ethical problems that can be seen at this time, relating to this particular duty.

Taking "helpline" calls and assisting callers in filling out the forms (i.e., answering questions, telling them which boxes to check, and helping to formulate language to be inserted in various parts of the forms.

Having a receptionist provide assistance to callers in filling out forms, including answering questions, telling them which boxes to check, and helping to formulate language to be inserted in various parts of the forms is an ethical violation. Specifically, as a lawyer, Swayne should not aid a person or entity in the unauthorized practice of law. CRPC, Rule 1-300. By allowing the receptionist to provide assistance to callers by the specifically stated means, Swayne is essentially allowing the receptionist to provide legal services to the callers. In fact, Swayne is aware that providing callers with what language to use is providing legal advice. See Swayne Interview Transcript, 6:22-25. As such, this duty is an ethical problem, and may be seen as the assisting [of] a non-lawyer in the unauthorized practice of law.

Responding to all email inquiries received from users of the forms.

A receptionist may have a duty in responding to all email inquiries received from users of the forms. However, it would depend on what question the user of the form has in determining whether the receptionist is providing legal services, which would be an ethical problem. As such, this duty may have an ethical problem and should be drafted to be more specific as to the types of emails the receptionist may or may not respond to, and/or how to respond to the emails if legal advice/services are requested.

Screening all callers and make an initial determination whether the caller needs legal assistance beyond mere help in filling out the forms.

Having the receptionist screen all calls and make an initial determination whether the caller needs legal assistance does not necessarily cause an ethical concern; however, if the receptionist determines that the caller does need legal assistance, having he/she tell the caller that Mr. Swayne is available for immediate consultation for $250 and then transferring the call to Swayne if the caller agrees may be an ethical problem.

CRPC Rule 1-400 states in pertinent part, "[a] solicitation shall not be made . . . on behalf of a lawyer or law firm to a prospective client with whom the lawyer or law firm has no family or prior professional relationship . . ." Specifically, a lawyer or law firm's performance of legal and law-related services may not involve the referral of business between the two areas of service. See Formal Op. No. 1995-141, Improper Solicitation of Clients. The example the Formal Opinion provides is exactly on point: "where a lawyer offers law-related services through a person or entity in which the lawyer has an interest . . . the lawyer may not use or encourage persons in that entity to channel or otherwise direct users of those law-related services to the lawyer if the purpose of such a practice is to attract the users as potential clients of the lawyer's law practice."
Here, Swayne is a limited partner of SHLEP, and has an interest in the LLP. By having the receptionist inform the caller that Swayne is available for immediate consultation in his individual capacity as a lawyer and not to answer questions relating to law-related services, where he would receive separate compensation in the amount of $250, this

will likely be considered to be improper solicitation, in violation of CRPC Rule 1-400. Formal Op.1995-141. As a result, this receptionist duty is an ethical concern and is improper solicitation.

Maintaining records of the names, addresses, and telephone numbers of all "helpline" callers.

Similar to the last duty, maintaining records of the names, addresses, and telephone numbers of all "helpline" callers may not raise any ethical concerns as it may be a duty of a receptionist to keep a client list; however, requiring her to furnished [sic] the records on a monthly basis to The Law Offices of Richard Swayne as "leads" Mr. Swayne may wish to pursue for client development purposes is an ethical concern. Specifically, CRPC Rule 1-400 bans solitications and prohibits in-person or telephonic communications that suggest the availability of professional services if a significant purpose of the communications is for pecuniary gain. Formal Op. 1995-141. The ban on solicitations applies when legal employment is solicited of someone with whom the lawyer/firm does not have an existing or prior lawyer-client relationship. Accordingly, since SHLEP is providing non-legal services, there is no lawyer-client relationship between Swayne and SHLEP's clients. Id.

Furthermore, this duty potentially may violate CPC, Section 52, if any of SHLEP's clients are in the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts, or in any public institution or in any public place or upon any public street or highway.

As such, it would be unethical for him to contact SHLEP clients to determine whether they wish to also be his law firm's clients, and allowing the receptionist to provide him with a client record to do this is an ethical concern.

Issue No. 2: The revenue sharing arrangements described in the plan.

The Business Plan further provides a specific provision titled "Books of Account and Sharing of Revenues". Specifically, with regard to "Sharing of Revenue", the Business Plan states as follows:

SHLEP and The Law Offices of Richard Swayne shall pay equally all costs of utilities, telephone and high-speed internet services.
SHLEP shall pay Richard Swayne from the revenues of SHLEP the agreed-upon lease rental for the office facilities on Center Street.
Mr. Swayne shall remit to SHLEP 50% of all consultation fees he receives from callers referred to him by the receptionist.
The Law Offices of Richard Swayne shall remit to SHLEP 10% of all fees earned from "leads" obtained from the receptionist.
Mr. Swayne shall reimburse one-half of the cost of health insurance and other fringe benefits provided to the receptionist.

The revenue sharing arrangement is likely to be an ethical concern. Swayne, being a lawyer providing law-related services through non-lawyer employees/business entities in which non-lawyers also have an interest must comply with the CRPC. Formal Op. 1995-141. Rule 1-320 prevents a lawyer from directly or indirectly sharing legal fees with a non-lawyer. Accordingly, by providing that Swayne will remit to SHLEP 50% of consultation fees, and 10% of all fees earned from "leads" - Rule 1-320 is in violation. Ann has 50% of SHLEP. As such, she would receive a portion of those fee percentages for the referrals provided to Swayne. Also, a lawyer cannot compensate, give, or promise anything of value to any entity for the purpose of recommending or securing employment of the lawyer/law firm by a client under this rule. Rule 1-320 also encompasses situation[s] in which a lawyer gives any financial benefit or compensation in exchange for the referral of business. To that end, the revenue sharing arrangements described in the plan may be in violation of CRPC Rule 1-320.

Issue No. 3: The partnership nature of the venture.

The Business Plan is contemplating the creation of a limited liability partnership (SHLEP), with the following partners:

General Partner: Ann Mouton - non-lawyer
Limited Partner: Richard Swayne - lawyer
Office Facilities: Renting out the west wing of the building where the current Law Offices of Richard Swayne are located. The rental amount is to be determined and paid to Mr. Swayne, who is the owner of the building.

Rule 1-310 states that "[a] lawyer shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consists in the practice of law." Here, Ann is a non-lawyer. Although Swayne would argue that SHLEP does not partake in the practice of law, there are aspects of SHLEP as seen in the Business Plan that indicate participation in the practice of law. For instance, the Business Plan provides that the receptionist would provide callers language to put in the form. This could be seen as providing legal advice. Furthermore, consultations with Swayne may be seen as providing legal advice. The callers would be unaware as to whether he was contacting them in his capacity as a partner of SHLEP or in his capacity as a lawyer. As such, the partnership nature of the venture is likely to be in violation of Rule 1-310, unless the Business Plan is revised to clarify that no legal services will be rendered by SHLEP.

PART II.

Issue No. 4: Whether Swayne's drafting the forms and instructions constitute "law-related services" and, if so, what Swayne's ethical obligations are to the users of the forms.

Law-Related Services Analysis.

As provided by the Business Plan, Production of Legal Forms section, Mr. Swayne will be responsible for determining the types of forms that are necessary and the design therefore to ensure compliance with the rules of the courts of the State of Columbia. He will also be responsible for drafting instructions for use and purposes of the forms in any advertising and marketing media utilized by SHLEP. *See* Business Plan, Production of Legal Forms (emphasis added).

Pursuant to CRPC, Rule 1-600, "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal service and that are not prohibited as unauthorized practice of law when provided by a non-lawyer. Moreover, the CPC, Section 25 provides that the practice of law is the provision of legal services and includes, but is not limited to, giving any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategy.

Accordingly, even though Mr. Swayne is responsible for designing the forms to be in compliance with the state rules, he is also responsible for drafting instructions for use and drafting the purposes of the forms in advertising and marketing media. In essence, one could argue that he is providing an explanation and/or recommendation to consumers about their possible legal rights and/or selection of forms, which may constitute legal services. However, if a non-lawyer is able to draft forms and instructions, then those responsibilities will constitute as "law-related services".

Formal Opinion No. 1995-141 provides examples of law-related services that may be performed by non-lawyers including family counseling by a social worker, rendering tax advice by an accountant or a tax-preparer, providing financial services by a stockbroker, and giving advice regarding testamentary disposition by a charity. See Formal Op. No. 1995-141, Introduction. The characteristic that each example has in common is that the undertakings all present the problem that providers of such services have the opportunity to identify and refer persons using their services to lawyers, who would, of course, receive such referrals for "pecuniary gain". *Id*.

Here, Swayne's drafting of forms and instructions allows the consumer to determine what form he/she needs by reading the instructions relating to the use and purposes of the forms that he drafted. If the consumer has any questions and contacts the helpline, the receptionist should refer the consumer to a lawyer, Mr. Swayne. To that end, it is likely that drafting of the forms and instructions will constitute "law-related services".

Swayne's Ethical Obligation to the Users of the Forms.

Nonetheless, even if drafting of the forms and instructions constitute "law-related services", Rule 1-600 further applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed regardless of whether the law-related services are performed through a law firm or separate entity. CRPC, Rule 1-600, Discussion.

Since Mr. Swayne, in his capacity of limited partner for SHLEP, will be drafting the forms and instructions (i.e., law-related services), and because he is a lawyer, it is irrelevant whether he provides any legal services to a SHLEP caller. Mr. Swayne's conduct involved in the provision of law-related services is subject to the Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. CRPC, Rule 1-600, Discussion.

Accordingly, Mr. Swayne would need to take reasonable measures to assure that each person using SHLEP's services that the services provided are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. *Id*. Furthermore, regardless of the sophistication of potential recipients of law-related services, Mr. Swayne will need to take special care to keep the separate provision of law-related services and legal services in order to minimize the risk that the recipient will assume that the law related-services are legal services. *Id*. Mr. Swayne must take reasonable measures to communicate a clear, understandable disclaimer to assure that the recipient of the law-related services knows that the services are not legal services and the protections of the client-lawyer relationship do not apply. *Id*.

Issue No. 5: What obligation, if any, Swayne might have to supervise the "receptionist".

As previously discussed, the responsibilities of the receptionist, as outlined above, encompass more than simply receptionist duties and responsibilities. Specifically, the receptionist for SHLEP is not only required to answer telephones and greet customers of SHLEP, but is also required to assist callers in filling out the forms by answering their questions, telling them which boxes to check, and helping to formulate language to be inserted in various parts of the forms, respond to all email inquiries received from users of the forms, screen all callers and make an initial determination whether the caller needs legal assistance beyond mere help in filling out the forms, inform the caller that Mr. Swayne is available for immediate consultation for $250, and maintain records of the names, addresses, and telephone numbers of all "helpline" callers and, monthly, shall furnish said records to The Law Offices of Richard Swayne as "leads" Mr. Swayne may wish to pursue for client development purposes.

Furthermore, Mr. Swayne himself believes that the receptionist would also direct clients of his who come in for appointments or consultations with him. See Swayne Interview, 5:22-23. Accordingly, the "receptionist" for SHLEP would also be working for Mr. Swayne in his capacity as a lawyer of The Law Offices of Richard Swayne, and therefore, Mr. Swayne has an obligation to supervise the receptionist pursuant to CRPC, Rule 1-500.

Mr. Swayne will need to provide the receptionist with appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product. See CRPC, Rule 1-500, Discussion. He will need to provide for measures, taking into account that the receptionist does not have legal training and is not subject to professional discipline. This is especially relevant since the receptionist speaks to all helpline callers and maintains records of the names, addresses, and telephone numbers of all helpline callers.

Furthermore, the receptionist is contemplated with being provided with the responsibility of assisting callers [to] fill out forms, telling them which boxes to check, and helping them formulate language to be inserted in various parts of the forms. Thus, Mr. Swayne has an obligation to provide the receptionist with appropriate instruction and supervision in ensuring that he/she does not provide legal advice.

PT – A

ANSWER 2

To: Roger Arbuckle
From: Applicant
Date: 2/28/12
RE: Law Offices of Richard Swayne - Business Plan

You have asked me to draft a two-part memorandum preparing you for your upcoming meeting with our client, Richard Swayne ("RS"). RS has provided us with a business plan (the "Plan") that calls for him to join forces with an old college roommate of his, Ann Moulton ("AM"), in a limited liability partnership called Self-Help Legal Enterprise Project, LLP ("SHLEP"). SHLEP's Plan, as well as RS's existing legal practice as a solo practitioner, raises a number of ethical concerns that you asked me to research.

Part 1 of this memorandum deals with the specific ethical problems that certain parts of the Plan present under the Columbia Rules of Professional Conduct ("Rules") and the Columbia Professions Code ("Code"). As well, reference is made to the State Bar of Columbia Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1995-141 (the "Opinion"). Part 2 outlines whether Swayne's activities under the Plan are law-related services, if so, whether he has any ethical obligations to customers of SHLEP, and finally whether he has any obligations to supervise the receptionist that SHLEP will hire under the Plan.

Part I: Ethical Problems Created by the Plan

Subpart (A): Ethical Issues Regarding the Duties of the Receptionist Listed in the Helpline Service Section of the Plan

The Plan calls for the receptionist to engage in a number of tasks while operating "free Helpline services", including:
(1) Answering telephones and greeting SHLEP's customers;

(2) Assisting callers in filling out legal forms by answering questions, telling them which boxes to check, and helping formulate language to be inserted into various parts of the forms;
(3) Responding to email inquiries;
(4) Screening callers and making an initial determination whether the caller needs legal assistance; if so, informing the caller that RS is available for a $250 fee, and transferring the caller to RS if he or she agrees to pay the fee; and
(5) Maintaining records of each caller's address, name, and telephone number, and monthly furnishing all of said information to RS's legal practice as "leads" for him to pursue via client development.

Each of these implicates grave ethical concerns under both the Code and the Rules, as well as the Opinion, all of which are analyzed more fully below.

Unauthorized Practice of Law

Rule 1-300 proscribes any attorney from aiding any person or entity in the unauthorized practice of law. Code Section 25 defines the practice of law as giving any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies. Further, Code Section 67(b) provides that it is illegal for a legal document assistant to engage in the unauthorized practice of law, including ". . . giving any kind of advice . . . to a consumer about . . . selection of forms or strategies."

Arguably, the receptionist is engaged in the unauthorized practice of law in violation of Code Sections 25 and 67(b), and thus RS is aiding him or her in the unauthorized practice of law in violation of Rule 1-300. The receptionist is responsible for answering questions from callers about which boxes to check, and formulating language to be inserted into the various legal forms. The receptionist is also making the initial determination of whether a caller needs legal help. This is likely giving advice about the selection of forms under Code Section 67(b), and thus the receptionist would need to be licensed pursuant to Code Section 25. Furthermore, as a partner of SHLEP and

acquiescing to the Plan, RS is thus aiding the receptionist in the acts called for by the Helpline Services. Thus, you should advise RS that any discretionary decision-making by the receptionist in terms of the forms selected or the language inserted into such forms is the unauthorized practice of law, and thus a violation of the Code and the Rules.

Impermissible Solicitation

Rule 1-400 proscribes any solicitation "made by or on behalf of a lawyer . . . to a prospective client with whom the lawyer or the law firm has no family or prior professional relationship" unless otherwise protected by Columbia law. Under the rule, solicitation is "any communication concerning availability for professional employment of a lawyer. . . in which a significant motive is pecuniary gain and that is delivered in person or by telephone." Furthermore, the Opinion states that a "lawyer may not use or encourage persons in [a non-legal] entity to channel or otherwise direct users of those law-related services to the lawyer if the purpose of such a practice is to attract the users as potential clients of the lawyer's law practice."

Here, the Plan calls for the receptionist to make impermissible solicitations. First, the Plan requires the receptionist to inform callers that RS is available for a $250 fee, and transfer the caller to RS if he or she agrees to pay that fee. This is a solicitation under Rule 1-400 because it is made on behalf of RS (he pays half of the receptionist's salary and the arrangement is detailed in the Plan), and there is [sic] no facts showing a prior business or family relationship with SHLEP's customers. Furthermore, the motive is pecuniary gain under 1-400 because RS wants clients for business development and it is delivered over the telephone by the receptionist. Thus, the receptionist is making a solicitation for SHLEP to direct services to RS's law practice in contravention of the Opinion's proscription of the same. You should advise RS that the receptionist may not divert business to his legal practice under the Code, the Rules, and the Opinion.

Registration as a Legal Document Assistant

Code Sections 64(c) and 65 provide that a legal document assistant may not provide any self-help service for compensation unless he or she is registered with the county in which the help is given. A legal document assistant under Section 64(a) is any person . . . that provides . . . , for compensation, any self-help service to a member of the public who is representing himself in a legal matter." However, "merely secretarial or receptionist services" do not qualify, as provided by Section 64(b).

Here, the receptionist is arguably a legal document assistant under the Code, and thus must register with the County before engaging in such services. Although 64(a) provides an exemption for purely secretarial or receptionist services, 64(b) defines a self-help service as completing legal documents in a ministerial manner or providing general published factual information that has been written or approved by an attorney, to a person who is representing himself or herself. Under the Plan, the receptionist must assist callers in filling out forms by answering questions, telling them which boxes to check, and helping them formulate language to be inserted into the parts of the forms. Although it's not clear whether the receptionist may fill out the forms himself or herself, the likely act of telling the customers which box to check qualifies as "completing legal documents in a ministerial manner." This is a self-help service. Furthermore, it is done for consideration, as the customer pays for the right to use the form and receive help. Finally, as called for by the Plan, the customer is representing himself or herself in a legal matter, and thus the elements of Section 64 and 65 are met. You should advise RS that the receptionist needs to register under Code Section 65 as a legal document assistant in the county in which the office is located and any other counties where SHLEP may do business.

Disclaimer on All Solicitation from a Legal Document Assistant

Code Section 66 requires a legal document assistant, during telephonic solicitation, to make an oral, clear, affirmative, and express disclaimer with the following information: his or her identity, the trade name of the business he or she represents, the kind of

services offered for sale, the statement that he or she is not an attorney, and that there is no attorney-client relationship from the services.

Here, the receptionist is likely in violation of Section 66. The Plan's duties under the Helpline Service do not require any disclaimer that there is no attorney-client relationship, and further does not require any statement that he or she is not an attorney. As argued above, the receptionist is also a legal document assistant, qualifying for treatment under Section 66. Thus, the receptionist is in violation of Section 66's disclaimer requirements. Accordingly, you should advise RS that he needs to have the receptionist read off the proper disclaimer under Section 66, including a statement that he or she is not an attorney and that there exists no attorney-client relationship.

Impermissible Fee Sharing and/or Payments to the Receptionist for "Leads" that Act as Referrals

Rule 1-320 prohibits a lawyer from compensating "any person . . . for the purpose of recommending or securing employment of the lawyer . . . or as a reward for having made a recommendation resulting in employment of the lawyer." Furthermore, the Opinion affirms that a "lawyer cannot compensate . . . any person . . . for the purpose of recommending or securing" a lawyer under Rule 1-320.

Here, the receptionist is likely in violation of Rule 1-320. RS reimburses one-half of the cost of health insurance and fringe benefits for the receptionist, as well as remitting 50% of all consultation fees and 10% of all fees from leads that the Plan calls for the receptionist to forward to RS on a monthly basis. Thus, he is compensating the receptionist, albeit indirectly, as a reward for having recommending [sic] clients to his law practice. More directly, the receptionist also forwards callers to RS's legal office provided they agree to pay his $250 consultation fee. This is impermissible payment for referrals under Rule 1-320, and you should advise RS that he may not pay any compensation to the receptionist, nor reimburse SHLEP for referral fees from the receptionist's work.

Subpart (B): Ethical Issues Regarding the Plan's Revenue Sharing Arrangements

Rule 1-320 proscribes a lawyer from "directly or indirectly shar[ing] legal fees with a person who is not a lawyer." The Opinion affirms this rule by stating that "non-lawyers cannot share in the profits of a law practice."

Here, however, the Plan's terms call for a violation of Rule 1-320 and the Opinion. The Plan suggests that RS shall pay SHLEP 50% of his consultation fees from callers referred by the receptionist, as well as 10% of the leads. This is directly sharing legal fees with a person, AM, who is not a lawyer. RS recognizes that these fees are necessary because SHLEP would "refer a lot" of customers to RS's practice and also provide "client leads". Thus, he would need to "share with the LLP some of the referral fees." Although RS's law practice and SHLEP will keep separate financial records and books, the sharing of this percentage of his fees is enough to run afoul of Rule 1-320 and the Opinion. Thus, you should advise RS that the fee sharing arrangements are a violation of the Rules and the Code.

Subpart (C): Ethical Issues Regarding the Partnership Nature of the Venture

Rule 1-310 prohibits a lawyer from forming "a partnership with a person who is not a lawyer if any of the activities that the partnership consists of the practice of law." The Opinion affirms the same. Furthermore, sections of the Code and Rules, referenced above, are incorporated herein to define the practice of law.

The partnership agreement likely runs afoul of Rule 1-310. Here, as discussed above, the receptionist's activities of advising customers what blanks to fill in and what boxes to check are likely the practice of law. Additionally, RS's own interview showed that he will have a role in creating the forms and instructions for use of the forms, cindlugin [sic] what forms to use for specific purposes. In fact, the Plan calls for the website to advertise that the forms were created by RS, an experienced attorney in Columbia. This is the practice of law, and as a component of SHLEP's services, it means that RS and AM formed a partnership where at least some activities are the practice of law.

Because AM is not an attorney and RS is an attorney, the partnership is in violation of Rule 1-310. You should advise RS that the partnership is not permissible under the Rules.

Part II: Swayne's Activities as Law-Related Services, His Ethical Obligations to Customers of SHLEP, and His Duties to Supervise the Receptionist

Subpart (A): Whether Swayne's Drafting of the Forms and Instructions Constitute Law-Related Services

Rule 1-600 defines law-related services as those "that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer." The comments to the Rules suggest that a lawyer may be providing law-related services even when he or she does so through an entity that is not a law firm. The Opinion further clarifies that law-related services may include, by way of example, family counseling, tax advice, financial services, or advising on a testamentary disposition by a charity. Those situations encumber "the opportunity to identify and refer persons" to closely-related lawyer, who could gain financially from such referrals.

Arguably, RS is involved in something beyond merely providing law-related services. Rule 1-600 seems to suggest that law-related services are merely ancillary to the actual practice of law, and the key facet of the rule is that law-related services would not be prohibited as the unauthorized practice of law if done by a non-lawyer. The Opinion's examples solidify this. Family counseling is the usual province of a family therapist, tax advice of an accountant, and financial services of a financial investment specialist. Here, however, RS admitted in his interview that he would provide limited free consultations over the phone, including answering simple questions for free. Furthermore, he would create pleading forms such as summons, complaints, answers, discovery documents, motions, and the like. Furthermore, he would draft instructions on what forms to use for SPECIFIC purposes. The Plan also emphasizes RS's role in the forms, and the website provides various descriptions of forms and their uses and filing instructions. Any of these would likely be the practice of law (i.e. Code Section 25

suggests the practice of law includes giving advice about "selection of forms" to use in litigation) if done by a non-lawyer, an[d] all activities are the province not of non-lawyers, but of existing lawyers. Thus, it is unlikely that RS is performing law-related services; instead he is likely practicing law by performing his role under the Plan.

Subpart (B): RS's Ethical Obligations to SHLEP Customers If He is Providing Law-Related Services

By way of a complete analysis, assuming that RS is performing law-related services, he has certain ethical obligations to SHLEP's customers under the Rules, the Code, and the Opinion. Rule 1-600(B) provides that a lawyer will be liable under the Code if the law-related services are provided by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to the client; or if the services are provided by an entity controlled by the lawyer, he or she fails to take reasonable measures to ensure that the person obtaining the law-related services knows that the services are not legal services and the attorney-client privilege does not exist for those services.

The Rule's comments further add that regardless of the customer's sophistication, the lawyer should take special care to separate the legal services from those that are merely law-related services, which an attorney satisfies by taking "reasonable measures to communicate a clear, understandable disclaimer to assure that the customer of law-related services knows that they are not legal services and that the protections of the attorney-client relationship do not exist."

Here, RS will be subject to the Rules for these law-related services on either prong of 1-600(B). As to the first prong, the circumstances of his services are not distinct from his provision of legal services. First, his law practice and SHLEP share the same building. Second, SHLEP's website indicates that the forms are specifically provided by RS and list his credentials as an attorney. Third, the receptionist transfers all callers that are interested in RS's services to his law office for a consultation, including an agreement up-front about his consultation fee. Although RS did admit in his interview that he has his own phone number for the law office, nor does he think he has any control over the

receptionist, the Plan and SHLEP's website to [sic] not "distinctly" separate RS's role in SHLEP from his law practice. Thus, under the first prong, he must comply with Rule 1-600.

Even assuming he does not qualify for treatment under the first prong, he does control an entity, SHLEP, under the second prong and there do not appear to be any reasonable measures to assure that customer knows that he or she is not receiving legal advice and that no attorney-client relationship exists. First, RS owns 50% of SHLEP, and he shares equally in the profit and losses. Second, he pays the fringe benefits and health insurance of the receptionist, suggesting that he has control over the entity. Second, there are no reasonable measures on our facts. Neither the website nor the receptionist warns that there is no attorney-client relationship or that the services are not legal services. Accordingly, RS fails under the terms of Rule 1-600 for law-related services, and thus you should advise that he needs to include a clear disclaimer that he is not providing legal services for SHLEP and that there is no attorney-client relationship for customers of SHLEP.

Subpart (C): RS's Obligations to Supervise the Receptionist

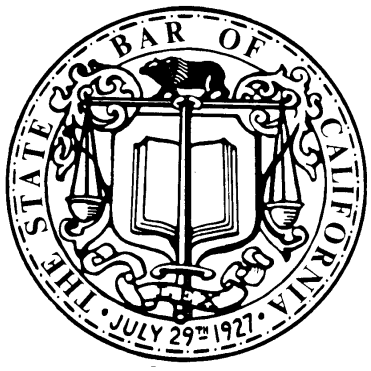
Rule 1-500 provides that a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. The comments to Rule 1-500 note that a lawyer must give assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product. The Opinion further notes that Rule 1-400 applies to solicitations and communications made on behalf of a lawyer or law firm by a non-lawyer employee or a lawyer or law-firm owned, managed, or controlled entity.

Here, it is a close call whether RS has any obligations to supervise the receptionist; however, because ethical concerns are involved and the Opinion warns that "rules place constraints on [dual practictioners] activities in other businesses and professions," the

best view is that RS does have ethical obligations to supervise the receptionist. First, RS, in his interview, argued that he would not have any supervisory role or authority over the receptionist. He suggested AM "alone would be supervising the receptionist." This suggests that he does not have any "direct supervisory authority" over the receptionist. However, he also noted that he would own 50% of SHLEP, and that the receptionist's duties would be to direct clients who come in for appointments or consultations to his office. Furthermore, if a person had a question for RS, he admitted that the receptionist would "direct that person" to him as well. The Plan's terms also provide that RS will pay for one-half of the receptionist's fringe benefits and health insurance, and that he or she will maintain records of SHLEP customers and provide them each month to RS's law practice for further client development. Also, the Plan notes that SHLEP would be hiring the receptionist, and that RS would contribute $100,000 in start-up money to SHLEP to help start the business. Finally, although RS is a limited partner in SHLEP, much of the partnership activity is designed to funnel money to RS's law practice, as he admitted in his interview. On the sum of these facts, RS likely has some supervisory authority over the receptionist, and thus he has an obligation under Rule 1-500 to give him or her appropriate instruction and supervision concerning the ethical aspects on the employment.

Conclusion

The Plan, as drafted and as described by RS during his interview, likely violates a number of provisions under the Code and the Rules, as well as running afoul of the Opinion. Furthermore, SHLEP likely requires RS to take on additional supervisory duties over the receptionist, as well as the business activities of SHLEP. You should give a strong warning to RS about these matters, and encourage him to revise the Plan accordingly to stay on the proper side of his ethical obligations as an attorney. And of course, should he wish to revise the Plan, our services are available to him to achieve ethical compliance with the Code and Rules while still entertaining his novel business opportunity.



Performance Test B
INSTRUCTIONS AND FILE

STATE v. DOLAN

FILE

STATE v. DOLAN
INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

State's Attorney's Office
County of Greene
3472 Route 9
Ulster, Columbia

Richard Parsons
State's Attorney

Date: March 1, 2012

To: Applicant
From: Richard Parsons
Re: State v. Dolan

As you may know, this office is prosecuting Bruce Dolan. Mr. Dolan is charged with 1) possession of methamphetamine and marijuana, 2) possession with intent to distribute methamphetamine and marijuana, and 3) conspiracy to distribute methamphetamine and marijuana.

The nonjury bench trial was completed yesterday and closing arguments were scheduled for this morning. Unfortunately, Barbara Jordan, the Assistant State's Attorney trying the case, has gone into the hospital for an emergency appendectomy. The court has given us an extension of time until tomorrow to present closing arguments. I will present the closing argument, but I want you to prepare a draft of that closing argument for my review.

Please write out the argument exactly as you would give it if you were presenting it. It might be helpful to read the Library first. You need to understand the elements of each charge in order to understand how each witness' testimony establishes the facts necessary to support our argument that each of the elements has been proven beyond a reasonable doubt.

Follow the guidelines contained in the office memo on Closing Arguments: Bench Trials.

State's Attorney's Office
County of Greene
3472 Route 9
Ulster, Columbia

Richard Parsons
State's Attorney

Date: September 1, 2011

To: Assistant State's Attorneys
From: Richard Parsons
Re: Closing Arguments: Bench Trials

Your closing argument should begin with an understanding of the elements of the crime that will be applied to the facts in the case. In jury trials, you will have jury instructions. In bench trials, however, you must rely on your analysis of legal authority (statutes and case law) during closing argument. The legal authorities in bench trials (just as the instructions in jury trials) will give you the framework for your closing argument. The argument must show how the evidence admitted during the trial meets the required elements established by the statutes and case law. While in a jury trial you do not ordinarily discuss or make reference to the legal authorities, in a bench trial you have more latitude in referring to the legal authority. Indeed, in the absence of jury instructions, you may find it necessary to explain to the court finer points of the law. But, you must not lose sight of the fact that a closing argument is not a legal memo or an essay. The argument is based on the evidence presented, not histrionics or personal opinion.

Your job is to help the judge understand how the law relates to the facts presented, and to persuade the judge that he or she has no choice but to find as you have advocated. Do the following:

-- Address each charge separately.
-- For each charge state the elements that are required to get a conviction.
-- Argue that the evidence establishes each element beyond a reasonable doubt.
-- Draw reasonable inferences from the evidence to support your position.

-- Never hold back any argument assuming you will have a second opportunity to make it in rebuttal.

Organization and persuasiveness are very important. If you immerse the judge in a sea of unconnected details, he or she will not have a coherent point of view.

TRIAL TRANSCRIPT

STATE v. DOLAN

EXAMINATION OF RODNEY MACK

Rodney Mack, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

Q: Would you tell us your name?

A: Rodney Mack.

Q: Where do you work?

A: I am unemployed.

Q: Where do you live?

A: I am a guest of the county, at the jail.

Q: What were you arrested for?

A: Possession of controlled substances.

Q: Drugs?

A: Yes.

. . .

Q: Are you familiar with the defendant Bruce Dolan?

A: We went to high school together and we did a little business on the side.

Q: What business?

A: Dolly would sell me drugs that I would then resell.

Q: By Dolly you mean the defendant.

A: Yeah; all his friends called him by the nickname “Dolly.”

Q: What was the time frame during which you had this relationship?

A: Must have been basically June 2008 through September or October 2010.

Q: Were you the only person the defendant supplied?

A: No; he sold to a close-knit group of friends and neighbors.

Q: Who?

A: Me, Lynette Rogers, Will Gardner, Tom Cord.

Q: Did these people have anything in common other than buying drugs?

A: Actually we all went to high school together and some are related in one way or another.

Q: What exactly are the family relations?

A: My daughter married and had a child with Lynette Rogers' son.

Q: What type of drugs would you purchase?

A: Methamphetamine and marijuana.

Q: Did the defendant ever tell you where he obtained the drugs he sold to you?

A: He never actually said; he only told me that he got the drugs, buried and stored them on his property, and had friends come to his property to obtain and use drugs.

Q: Was this a rural setting?

A: He lived in rural Montour, Columbia, along the Columbia River, in a one room shack, on property that used to be a Boy Scout camp.

Q: Other than his friends, did he sell the drugs directly to users?

A: He told me he used his friends to actually distribute the drugs.

Q: Specifically, what drugs did you buy from the defendant?

A: Meth.

Q: How much did you buy?

A: One-quarter pound at a time.

Q: Where did you buy the drugs?

A: He had really strict rules. A couple of us could buy at his house, but others would have to meet him in Tama and the casino.

Q: Where did *you* buy?

A: It really depended. Both places really.

Q: What types of arrangements were made about the price?

A: Again, he was very rigid; cash only, nothing larger than $20 bills. No negotiation on price. Strictly take it or leave it.

Q: What did you do with the drugs?

A: I sold the drugs to others in the Kellogg and Newton, Columbia areas.

Q: Who did you sell it to?

A: I broke it into ounces to sell to at least four people. Richard Crutchfield. I can't remember who the others were.

. . .

CROSS-EXAMINATION BY MS. MAYER

Q: You have been charged with possession of meth with intent to distribute, haven't you?

A: Yes.

Q: In fact, haven't you cut a deal with the prosecutor in this case that if you testify against Mr. Dolan, he will let you plead to a reduced crime?

A: Yes.

Q: You remain close to Mr. Dolan, don't you?

A: Not any more.

Q: Let's try this, then. Weren't you a friend of Mr. Dolan for a long time?

A: Since high school.

Q: You hung out together?

A: Yes.

Q: Drank together?

A: Some.

Q: Actually, you were arrested once together, weren't you?

BY MS. JORDAN: Objection.

BY THE COURT: Overruled.

Q: You have been convicted of a felony yourself, haven't you?

A: Yes.

Q: That was three years ago?

A: I think that's right.

Q: The conviction was for sale of narcotics, is that right?

A: I believe that's what they called it.

Q: You spent 18 months in prison, correct?

A: Yes.

Q: I assume it was unpleasant in prison.

A: Not a great experience.

Q: You don't want to go back, do you?

A: Not particularly.

. . .

EXAMINATION OF RICHARD CRUTCHFIELD

Richard Crutchfield, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

Q: Would you tell us your name?

A: Richard Crutchfield.

Q: Where do you work?

A: I am currently unemployed.

Q: Where do you live?

A: I am currently in jail.

Q: What were you arrested for?

A: Possession of meth.

. . .

Q: Have you ever purchased methamphetamine?

A: Yes.

Q: From whom?

A: From both Tom Cord and Rodney Mack. When one of them was not available, I would purchase methamphetamine from the other.

Q: Did you ever have occasion to go to the Tama casino with Mr. Mack?

A: Yeah; he and I went to the casino in Tama and Mack would leave the casino to pick up methamphetamine.

CROSS-EXAMINATION BY MS. MAYER

Q: You have been charged with possession of meth with intent to distribute, haven't you?

A: Yes.

Q: In fact, haven't you cut a deal with the prosecutor in this case that if you testify against Mr. Dolan, he will let you plead to a reduced crime?

A: Yes.

Q: You've known Mr. Dolan for almost 10 years, correct?

A: Yes.

. . .

EXAMINATION OF TOM CORD

Tom Cord, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

. . .

Q: Are you familiar with the defendant Bruce Dolan?

A: We went to high school together.

Q: Did you do any business together?

A: Yes.

Q: What business?

A: He would sell me drugs that I would then resell.

Q: What was the time frame during which you had this relationship?

A: From around June of 2009 through December of 2010.

Q: How much did you purchase during this period?

A: Maybe a couple of pounds of methamphetamine a month at most.

Q: Where did you buy the drugs?

A: Always at his house or I would have to meet him in Tama at the casino.

Q: What types of arrangements were made about the price?

A: Cash only, nothing larger than $20 bills. He would get really angry if you tried to negotiate the price. He always said “take it or leave it.”

Q: Are you familiar with Rodney Mack?

A: Yes. We went to high school together.

Q: Have you remained close?

A: Yes.

CROSS-EXAMINATION BY MS. MAYER

Q: You have been charged with possession of meth with intent to distribute, haven’t you?

A: Yes.

Q: In fact, haven’t you cut a deal with the prosecutor in this case that if you testify against Mr. Dolan, he will let you plead to a reduced crime?

A: Yes.

REDIRECT EXAMINATION BY MS. JORDAN

Q: You remain close to Mr. Mack, don't you?

A: Yes.

Q: When you finished a violator program in Altaville, Columbia, Rodney Mack picked you up?

A: Yes.

Q: Indeed, you met your girlfriend, Stacey Carroll Black, through Rodney and Renee Mack?

A: Yes.

EXAMINATION OF LYNETTE ROGERS

Lynette Rogers, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

. . .

Q: Did you ever buy drugs from the defendant, Bruce Dolan?

A: He would sell drugs to my brother, Will Gardner. Will would then resell the drugs.

Q: When did this take place?

A: It was around October 2009. I began taking my brother to defendant's residence to obtain marijuana and methamphetamine to sell to others.

Q: If it was your brother who was buying, why did you take him?

A: Will was quadriplegic. He needed to earn some quick money for medical bills, and for one month, I helped him sell controlled substances.

Q: Did you just show up at the defendant's home and ask to buy it?

A: No; I arranged by phone for Will to buy methamphetamine from defendant.

Q: Did you know the defendant before you made the call?

A: I knew the defendant through my boyfriend, Billy Purvis. Billy had gotten one-half ounce to one-ounce quantities of methamphetamine from Rodney Mack and told me that Rodney got it from Dolly.

Q: How much did you buy from the defendant in total?

A: Had to be somewhere between twelve to fourteen ounces of methamphetamine.

Q: Did you buy it all at once?

A: No, no. Will usually bought two ounces of methamphetamine at a time from defendant, and sold most of it to Todd Bram.

Q: Where did you buy the drugs?

A: At his house, sometimes in Tama, at the casino.

Q: What types of arrangements were made about the price?

A: He would only accept $20 bills.

Q: Did you negotiate the price?

A: Absolutely not. He was very clear he would not do that.

Q: Your Honor, at this point, I ask the court to take judicial notice of the fact that defendant's home phone number as published in the directory is 555-555-2345.

BY THE COURT: So noted.

Q: Showing you what has been marked as State's Exhibit 50, do you recognize it?

A: Yes.

Q: What is it?

A: It's my cell phone bill from October 19, 2009, to December 15, 2009.

Q: Does it show any calls to the defendant's phone number?

A: It shows three calls to the defendant's residence.

CROSS-EXAMINATION BY MS. MAYER

Q: Your brother is dead, isn't he?

BY MS. JORDAN: Objection, irrelevant.

BY MS. MAYER: Goes to bias, Your Honor.

BY THE COURT: Overruled.

Q: Again, your brother is dead, isn't he?

A: Yes.

Q: He died from an overdose of meth, is that correct?

A: Yes.

EXAMINATION OF TODD BRAM

Todd Bram, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

. . .

Q: Have you ever purchased meth?

A: Yes.

Q: When and from whom?

A: I purchased an ounce of methamphetamine from Will Gardner once or twice a week for three to four months between October and December 2009.

Q: Where did the sales take place?

A: Usually at the casino in Tama.

Q: How did you come to identify Mr. Gardner as a source?

A: I had heard that Dolly was dealing and I approached him. Dolly told me he didn't do retail, that I should check out someone like Will Gardner.

….

EXAMINATION OF STACEY BLACK

Stacey Black, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

….

Q: Have you ever been to the defendant's home?

A: Yes, though I have never seen him there.

Q: Why were you there?

A: I went twice, with Tom Cord.

Q: Why?

A: The first time I did not realize Tom was buying drugs. I only found out when we arrived. Tom made me wait in the car.

Q: How do you know he got drugs?

A: Easy. We were driving back and Tom was arrested by the police after a traffic stop.

Q: What happened?

A: Tom's car was impounded. Tom whispered to me that the car contained an ounce of marijuana and one-quarter pound of methamphetamine that he had just picked up from defendant.

Q: What did you do?

A: I got the drugs while the car was impounded and returned them to Tom.

Q: If the car was impounded, how did you get the drugs?

A: Just a second set of keys. The car was just sitting there in the police station parking lot.

Q: When was the second trip to the defendant's?

A: Sometime after the first stop.

Q: Did Tom drive?

A: No. I drove because Tom was too tweaked out to drive. Tom had been awake too long, needed sleep, and was nervous about driving back to defendant's residence after the arrest after the traffic stop.

Q: Did Tom buy drugs?

A: Yes, I saw him bring about one-quarter pound of methamphetamine and an ounce of marijuana out of the house.

. . .

CROSS-EXAMINATION BY MS. MAYER

. . .

EXAMINATION OF B. J. ATWOOD

B.J. Atwood, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

Q: Would you tell us your name?

A: B.J. Atwood.

Q: Where do you work?

A: I am a Detective with the Columbia Drug Enforcement Administration.

Q: How long have you worked with the CDEA?

A: Fifteen years.

Q: Do you have a specific assignment with the CDEA?

A: I head up the meth task force for the southern part of the state.

Q: How long have you had that assignment?

A: Five years.

. . .

Q: Did you have occasion to search the home of Mr. Rodney Mack?

A: Yes. I and other law enforcement officers went to Rodney Mack's residence in Kellogg, Columbia, to execute a search warrant.

Q: Did you find anything?

A: Yes. We found one-quarter pound of methamphetamine inside a vehicle and seized methamphetamine, marijuana, drug records, cash, and drug paraphernalia from the house.

Q: Did you have occasion to search the home of Mr. Tom Cord?

A: Law enforcement officers executed a search warrant at Cord's residence in Newton, Columbia.

Q: Was anything seized?

A: Officers seized one-quarter pound of methamphetamine from the residence.

Q: Did you ask Mr. Cord about this?

A: Yes. He said he paid defendant $4,200 for the one-quarter pound of methamphetamine.

Q: Did you find anything else?

A: We found a piece of paper with the name “Dolly” and defendant's phone number on it. Cord said he had received the paper from Rodney Mack. Mack gave Cord defendant's phone number so that Cord would always have a way to get in touch with Dolan.

Q: Did you have occasion to search the defendant’s home?

A: Yes. A few days later law enforcement officers executed a search warrant at defendant's residence.

Q: What did you find?

A: Twelve firearms — four handguns and eight long guns — were seized from defendant's residence. All twelve firearms were manufactured outside of Columbia. Subsequent investigation showed that the Remington 12-gauge shotgun seized at one time belonged to Rodney Mack.

Q: Was anything else seized?

A: Yes. Officers also seized 40 grams of methamphetamine from defendant's property.

Q: Where did you find this meth?

A: The methamphetamine was wrapped up and lying beside an ammunition can outside on defendant's property alongside a driveway or lane 150 yards from defendant's house.

Q: Did you seize anything else?

A: Some of the meth was laid out in a line next to a snort tube and a baggie containing meth residue with a rubber band around it.

Q: Anything else?

A: Officers also seized around 73 pounds of marijuana. The majority of the marijuana was in six large black garbage bags inside a locked 55-gallon drum. The drum was buried on defendant's property. Also in the drum was a PVC pipe containing finely manicured or processed marijuana. The drum was locked with a padlock and the key to it was seized from the kitchen area of defendant's residence.

Q: And tell me about the key.

A: The key was not in the lock. Obviously, we wouldn't have used bolt cutters if it had been. The key was secured from inside Mr. Dolan's residence a little bit later.

. . .

Q: Showing you what is marked as State's Exhibit 1, do you recognize it?

A: Yes.

Q: How do you recognize it?

. . .

Q: Showing you what is marked as State's Exhibit 18, do you recognize it?

A: Yes.

Q: How do you recognize it?

. . .

Q: Your Honor, having laid the foundation with Officer Atwood, at this point the state would like to introduce into evidence State's Exhibits 1 through 18, specifically Exhibits 1-12, weapons seized from defendant's residence; Exhibit 13, 40 grams of methamphetamine seized from defendant's property; Exhibit 14, a snort tube and a baggie containing meth residue; Exhibit 15, the rubber band with which the baggie was covered; Exhibit 16, 73 pounds of marijuana seized from the defendant's property; Exhibit 17, the PVC pipe containing processed marijuana seized from the defendant's property; and Exhibit 18, the key to the marijuana drum that was seized from the kitchen area of defendant's residence.

BY THE COURT: They are so admitted.

. . .

BY MS. JORDAN: Detective Atwood, referring to State's Exhibit 13, how is meth usually sold on the street?

A: Methamphetamine is generally sold in rock or powder form.

Q: What would be a typical sale in terms of amount sold for personal use?

A: Usually it will be sold in quarter-gram units for $35.00 a unit.

Q: Would 40 grams be for personal use?

A: Absolutely not.

Q: Typically, what would be the quality of the meth sold on the street, what level of purity?

A: It is usually in the range of 10 to 15% pure.

. . .

Q: Would 73 pounds of marijuana be for personal use?

A: Absolutely not. Personal use is three or four ounces.

CROSS-EXAMINATION BY MS. MAYER

Q: You interviewed Mr. Cord, correct?

A: Yes.

Q: You took a statement from him, didn't you?

A: Yes.

Q: In that statement Mr. Cord insisted he did not have any agreement with Mr. Dolan, did he not?

A: That's correct.

. . .

Q: Isn't it true that the methamphetamine was approximately 150 yards from defendant's house?

A: Yes.

. . .

Q: The marijuana that was seized was water damaged, correct?

A: Some of it.

Q: The water damage meant that that particular marijuana was not marketable, correct?

A: Yes.

REDIRECT EXAMINATION

Q: The meth that was found 150 yards from the defendant's house, where precisely was it?

A: Alongside defendant's driveway or lane.

Q: What about the marijuana, where was it found?

A: The marijuana was found less than 100 yards from the residence.

Q: Where did you find the key?

A: The key to the marijuana was found in defendant's residence.

Q: How much of the marijuana was water damaged?

A: About 20 percent.

Q: Was the other 80 percent marketable?

A: Yes.

EXAMINATION OF ANNETTE KAHLER

Annette Kahler, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

Q: Would you tell us your name?

A: Annette Kahler.

Q: Where do you work?

A: I am a forensic chemist with the Columbia Drug Enforcement Administration.

Q: How long have you worked with CDEA?

A: Twenty years.

. . .

Q: Showing you what has been marked as State's Exhibit 13, do you recognize it?

A: Yes, it is the meth seized in this case that I tested.

Q: What results did your testing reveal?

A: I analyzed the substance and found it weighed slightly more than 40 grams and contained 40% pure methamphetamine.

. . .

BY MS. JORDAN: The defense has no questions for Ms. Kahler.

BY MS. MAYER: The state rests its case-in-chief, Your Honor.

EXAMINATION OF BRUCE DOLAN

Bruce Dolan, a witness called by the Defendant, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. MAYER

Q: Would you tell us your name?

A: Bruce Dolan.

. . .

Q: Were you aware of the drugs that were found in this case?

A: I had no idea they were there.

Q: How is that possible?

A: Look, a bunch of that stuff was obviously hidden. This is a rural area. I can only imagine someone was using it as a hiding place. I'm out all day working, get home after dark. I guess someone just took advantage of my absence.

Q: What about the key?

A: You know, I have given that a lot of thought. I hate to say it, but it kind of makes me think it was Will Gardner and his sister that were hiding the stuff. They certainly kept coming out to the house and bugging me. I never locked the place up, so who knows, they probably decided to leave the key there just for convenience.

Q: Anything else lead you to that conclusion?

A: Well, from what I've heard here, Will and his sister were obviously dealing.

Q: How about all the guns?

A: I like to hunt. Like I said, it's rural.

. . .

CROSS-EXAMINATION BY MS. JORDAN

Q: Mr. Dolan, this isn't the first time you have been arrested, is it?

A: No.

Q: In fact, isn't it true that you were charged with selling marijuana to a minor?

BY MS. MAYER: Objection, Your Honor. Use of an arrest is improper impeachment. Likewise, the sale of marijuana charge led to a plea of guilty by Mr. Dolan to a misdemeanor of endangerment of a minor and hence, even the conviction is improper impeachment under Columbia Rule of Evidence 609.

BY MS. JORDAN: Your Honor, this is not going to impeachment. Rather it is relevant to prove motive, opportunity, intent, plan, etc., under Columbia Rule of Evidence 404(b).

BY THE COURT: Objection overruled. Go ahead.

BY MS. JORDAN: Isn't it true that you were charged with selling marijuana to a minor?

A: Yes.

Q: You pleaded guilty to endangerment of a minor, correct?

A: Yes.

Q: An element of the crime you were charged with was intent to distribute?

A: Don't know about that.

Q: When you pleaded guilty to endangerment, you admitted you sold marijuana to a minor, didn't you?

A: My lawyer just told me to plead guilty so I could go home.

Q: But the judge, before accepting your plea, asked you about the circumstances of the crime, correct?

BY MS. MAYER: Objection, Your Honor. I renew my previous objection and now object to the introduction of the conviction. This is improper impeachment under 609.

BY MS. JORDAN: Your Honor, this is not going to impeachment. The evidence is relevant under 404(b).

BY THE COURT: I'll overrule the objection.

BY MS. JORDAN: Mr. Dolan, let me ask again, the judge, before accepting your plea, asked you about the circumstances of the crime, correct?

A: I don't remember.

Q: But certainly after this incident, you knew marijuana was illegal, correct?

A: Of course.

Q: Just like I'm sure you know possession of meth was illegal, correct?

A: You'd have to be pretty stupid not to know that, right?

Q: You don't consider yourself stupid, I assume?

A: No, I don't.

. . .

BY MS. MAYER: Your Honor, the defense rests.

BY MS. JORDAN: The State has no other witnesses.

BY THE COURT: Thank you. Given the late hour, I think we will recess until tomorrow at 9:30 a.m. At that point I will hear closing arguments. Good afternoon.

FEBRUARY 2012

California
Bar
Examination

Performance Test B
LIBRARY

STATE v. DOLAN

LIBRARY

Selected Provisions of the Columbia Penal Code

§ 200 General requirements of culpability

a. *Minimum requirements of culpability*. Except as provided in subsection c.(3) of this section, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

b. *Kinds of culpability defined*.

(1) *Purposely*. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

(2) *Knowingly*. A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.

* * * * *

§ 840 Possession

Except as authorized by this subchapter, it shall be unlawful for any person knowingly to possess a controlled substance as defined in § 875.

§ 841(a) Possession with intent to distribute

Except as authorized by this subchapter, it shall be unlawful for any person knowingly — (1) to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance as defined in § 875.

….

* * * * *

§ 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

* * * * *

§ 875 Controlled substances

Controlled substances include:

….
(13) Marijuana.
….
(38) Methamphetamine.

State v. Jones

Columbia Supreme Court (1995)

Mark Jones, Jimmy Don Winemiller, Jr., Keith Gunter, and Barbara Whitehead appeal their convictions for various drug-related offenses. Winemiller and Gunter also appeal their sentences. We affirm all convictions and sentences, except for Winemiller's conviction for possession with the intent to distribute methamphetamine in violation of Columbia Penal Code § 841(a)(1). As to that conviction, we reverse and remand for entry of judgment and resentencing for possession of methamphetamine in violation of Columbia Penal Code § 840.

To support a conspiracy conviction, the government must show that: a conspiracy existed for an illegal purpose; the defendant knew of the conspiracy; and the defendant knowingly joined in it. Whitehead, Jones, Gunter and Winemiller argue there was insufficient evidence supporting their conspiracy convictions; Whitehead also claims insufficient evidence in regard to her possession conviction. They assert that the basis for the jury verdicts was Jones' testimony and that his testimony was incredible because he was a paid informant, had been granted immunity, had trouble remembering some dates, and psychological testing indicated that he had a poor memory. The jury, however, was aware of these things, and it was for the jury, not this court, to weigh Jones' credibility. Moreover, as the court noted in denying the motions for judgments of acquittal, although Jones' testimony had some inconsistencies, his testimony was not so incredible when weighed with other corroborating evidence produced by the government.

We find merit, however, to Winemiller's challenge to the sufficiency of the evidence supporting his conviction for possession with the intent to distribute methamphetamine. Winemiller does not contest the fact that Drug Enforcement Administration Agent Bryant testified that a four-gram quantity of methamphetamine was a distributable amount, but argues that the government failed to present testimony that the methamphetamine weighed four grams or other evidence demonstrating his intent to distribute. At oral argument, the government noted that at sentencing Winemiller stipulated that the

methamphetamine weighed 4.1 grams, but conceded that it "dropped the ball" because it failed to present testimony at trial concerning the weight of the methamphetamine. The government, however, argued there was sufficient evidence before the jury based on the testimony that the methamphetamine was 47% pure as compared to methamphetamine found on the street, which was generally in the range of 10-15% pure.

We disagree with the government. It is true that intent to distribute may be established by circumstantial evidence, including such things as quantity and purity and the presence of firearms, cash, packaging material, or other distribution paraphernalia. Moreover, we recognize that intent to distribute may be inferred solely from the possession of large quantities of narcotics. Proof, however, of possession of a small amount of a controlled substance, standing alone, is an insufficient basis from which an intent to distribute may be inferred.

Assuming, without deciding, that intent can also be inferred solely from the purity of a drug, we do not believe that 47% pure, standing alone, is sufficient to prove beyond a reasonable doubt that Winemiller intended to distribute the methamphetamine. Moreover, even if evidence of weight had been before the jury, the facts here do not bring into play the doctrine that possession of large quantities of drugs justifies the inference that the drugs are for distribution and not for personal use. Although Bryant testified that a four-gram quantity was not for personal use, he admitted that personal use varied among individuals and that his opinion was based on a comparison to a $25.00 quarter-gram unit, which was the starting dose for methamphetamine sold on the street. This case is unlike *People v. Ojeda,* in which this court held that an inference of intent to distribute could be drawn from possession of 7.1 kilograms of 88 to 91% pure methamphetamine.

Rather, this case is similar to *People v. White* and *People v. Franklin*. In *White*, this court found that 7.54 grams of cocaine, which would make 75 to 80 dosage units, was insufficient, standing alone, to support a conviction for possession with intent to distribute, even though as little as five grams has been held to be a distributable

amount. In *Franklin*, this court found that 35 grams of 42% pure cocaine, standing alone, was insufficient evidence from which a jury could infer intent to distribute.

In both cases, because quantity or quantity and purity combined were insufficient to support a reasonable inference of intent to distribute, the courts looked to additional circumstances or evidence consistent with intent to distribute narcotics.

In *White*, this court found sufficient additional evidence because the cocaine was packaged in multiple packages and the defendant had wired a large amount of cash and had a revolver.

In contrast, in *Franklin* the court reversed convictions for possession with the intent to distribute because of the lack of additional evidence of intent. In *Franklin*, the cocaine was not packaged in a manner consistent with distribution and the government offered no evidence of distribution paraphernalia, amounts of cash, weapons, or other indicia of narcotics distribution.

In this case, we conclude that the government failed to produce sufficient additional evidence from which a jury could draw a reasonable inference that Winemiller intended to distribute the methamphetamine. As in *Franklin*, the drug was not packaged for resale, and the government did not introduce evidence of a large amount of unexplained cash or other distribution paraphernalia. We are aware that a rifle and a shotgun were found in the trunk of Winemiller's car. Further, because a firearm is generally considered a tool of the trade for drug dealers it is also evidence of intent to distribute. We do not believe, however, that a reasonable jury could infer that the unloaded rifle and shotgun found in the trunk of the car along with camping gear, which included duck calls and waders, were “tools” of the drug trade. Indeed, the searching officer testified that the rifle was sitting “on top of all kinds of camping gear as if [Winemiller] was out camping or hunting with the weapon.”

Winemiller, however, does not go free. The common elements of all drug possession offenses are: (1) a specified controlled substance, in a sufficient quantity, and in a

usable form; (2) possession, which may be physical or constructive, exclusive or joint; and (3) knowledge of the fact of possession and of the illegal character of the substance. Each of these elements may be established circumstantially. Because the jury found Winemiller guilty of possession with the intent to distribute, the jury necessarily found all the elements of simple possession in violation of Columbia Penal Code § 840. We thus reverse and remand for the entry of judgment accordingly and for resentencing on this lesser included offense, but otherwise affirm.

State v. Hach

Columbia Supreme Court (1998)

Francis “Butch” Hach (“Butch”) was involved in cocaine use and dealing in Cooksville, Columbia, from the late 1980's until his arrest in 1997. He was indicted for conspiracy to distribute cocaine along with Anthony and Nicholas LaCorcia and his own son Carl Hach (“Carl”).

Butch was tried and convicted by a jury in January 1998, and was sentenced to 240 months imprisonment. He raises a bevy of issues on appeal, asking that his conviction be reversed, or in the alternative, that his sentence be vacated or remanded. Carl pleaded guilty to the conspiracy and was sentenced to 188 months imprisonment.

The Haches lived in Cooksville, Columbia at the Cooksville Blacksmith Shop, which Butch owned. Beginning sometime in the late 1980's Butch and Carl began to purchase cocaine, first from Mark LaCorcia (now deceased), then from Nick LaCorcia, and after Nick was incarcerated, from the third LaCorcia brother, Tony. The LaCorcias also had a partner, Tom Sajenko, who frequently couriered drugs and money to and from the Haches.

The defendants received their cocaine at the Blacksmith Shop. The cocaine was weighed on Carl's scale, and delivered to the defendants in their respective bedrooms. The Haches sometimes resold the cocaine they obtained from the LaCorcias and Sajenko. Tony LaCorcia continued delivering cocaine to the Haches until May 1997, when law enforcement authorities executed a search warrant on the Blacksmith Shop. At that time, Carl agreed to cooperate with law enforcement. Due to Carl's cooperation, Tony LaCorcia was arrested by the authorities.

At the defendants' separate sentencing hearings, the trial court made factual findings concerning the amount of drugs attributable to the conspiracy and to Butch and Carl individually. The trial court attributed between 5.4 and 8.3 kilograms of cocaine to the

conspiracy. It also held that based on the joint participation of the defendants, each was accountable for the entire amount.

Butch contends that the trial court erred in denying his motion for a judgment of acquittal. When a defendant avers a lack of sufficient evidence, the question both the trial court and this Court ask is whether evidence exists from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

To sustain a conspiracy conviction, the record must contain evidence showing that a conspiracy to distribute cocaine existed, and that Butch Hach knowingly participated in it. Butch maintains that while he bought, consumed and sold cocaine, he had no agreement with the LaCorcias and Sajenko to distribute what they sold him. If he is correct, his conviction must be reversed, because, as we have held, to demonstrate a conspiracy, the government must show proof of an agreement to commit a crime other than the crime that consists of the sale of cocaine itself. A simple agreement between a buyer and seller to exchange something of value for cocaine cannot alone constitute a conspiracy because such an agreement is itself the substantive crime.

Butch argues that his relationship with his suppliers — the LaCorcias and Tom Sajenko, and his son Carl — was just this type of arm’s-length buyer-seller arrangement. Butch argues that his dealers never directed him to sell the cocaine they had sold him. He seeks to bolster his case by contending, for example, that Tom Sajenko never said to him “Butch, here's some cocaine. If you can't sell it, you don't have to pay for it.” According to Butch, the absence of such facts indicates the absence of a conspiracy.

We may, however, look beyond the lack of explicit agreements and direct evidence to circumstantial evidence which tends to establish the conspiracy to distribute cocaine. In reviewing the record, we look for evidence of a prolonged and actively pursued course of sales coupled with the seller's actual knowledge and a shared stake in the buyer's illegal venture. We have identified four factors as particularly salient in determining whether a conspiracy existed, and whether a defendant knowingly participated in it: (1) the length of affiliation, (2) the established method of payment, (3) the extent to

which transactions were standardized, and (4) the demonstrated level of mutual trust. Although none of these factors is dispositive, if enough are present and point to a concrete, interlocking interest beyond individual buy-sell transactions, we will not disturb the fact-finder's inference that, at some point, the buyer-seller relationship developed into a cooperative venture.

The record shows that each of these factors existed in the relationship between Butch and his coconspirators, and that in the aggregate, the facts denote the concrete and interlocked interest. As to the length of affiliation, Butch bought cocaine from the LaCorcias and Tom Sajenko for seven years. In that time, the LaCorcias and Sajenko provided Butch with cocaine on a steady basis, sometimes providing amounts fit for more than personal consumption. When one of the sellers was incarcerated or indisposed, another in the group picked up the slack.

The transactions were also standardized; nearly every sale had certain hallmarks. Deliveries were made almost exclusively to the upstairs bedrooms at the Blacksmith Shop; they were routinely made on Wednesdays or Thursdays. Each time, the cocaine was measured out and weighed in Carl's bedroom on Carl's scale, whether he was present or not. The payments were sometimes made at the time of delivery, and sometimes made a few days later. Sajenko testified that on occasion, if Butch did not have enough cash, Sajenko would still give him the cocaine and would return for full remuneration later. Frequent and repeated transactions with an attendant established method of payment that includes a rudimentary form of credit can support a conspiracy conviction.

These routinized deliveries indicate the fourth factor, demonstrated level of mutual trust. Butch and Carl permitted Tom Sajenko free, unencumbered access into their living area at the Blacksmith Shop, where he was allowed to use Carl's scale to weigh the cocaine. After apportioning the drugs, Sajenko waited for Carl and Butch to join him so he could deliver them their drugs. The arrangement advanced all parties' interests — the sellers had a safe place to distribute their cocaine, and the buyers (Butch and Carl) literally had

bedroom service. Immediately upon receiving the cocaine in the confines of their home, Butch and Carl either used it themselves, or cut it and repackaged it for sale.

The length of affiliation, established method of payment and routinized transactions present here also underscore this demonstrated level of mutual trust. When Nick LaCorcia was about to go to prison, he arranged for his brother Tony to continue an uninterrupted flow of cocaine to Butch. This saved Butch from having to find an alternative source and worry about problems attendant to creating a new buyer-supplier relationship. He maintained a continuous source of drugs for himself and his clients. Sajenko and the LaCorcias benefitted from having such reliable customers even in the face of the turnover in their operation.

Viewing the evidence in total, it is clear that the factors we have found salient for determining whether a conspiracy existed are present here. For the foregoing reasons, the judgment of the trial court is affirmed.

PT – B

ANSWER 1

Closing Argument: State v. Dolan
Presented by Richard Parsons, State's Attorney

INTRODUCTION:

Good morning, Your Honor. The State has charged Mr. Dolan with three crimes. (1) The possession of methamphetamine and marijuana; (2) the possession with intent to distribute methamphetamine and marijuana; and (3) conspiracy to distribute methamphetamine and marijuana. The State must prove each element of these three charges beyond a reasonable doubt. After hearing the presentation of evidence and the examination of nine witnesses, including the Defendant Mr. Dolan, the State contends that it has met its burden of proof for each element of each of the three crimes. The State will address each charge in turn and reiterate the evidence that supports each element of each charge beyond a reasonable doubt.

Count 1: Possession of Methamphetamine and Marijuana

As to the possession of methamphetamine and marijuana, the state must show that the Defendant knowingly possessed a controlled substance. As the Court knows, marijuana and methamphetamine are classified as controlled substances under §875 of the Columbia Penal Code. "Knowingly" means that Mr. Dolan must have been aware that his conduct, the possession of methamphetamine and marijuana, or that he was aware of a high probability that he was in possession of controlled substances in the form of methamphetamine and marijuana.

The crime of possession can be broken down into two elements that Mr. Dolan must have knowingly satisfied. The first is being aware of the possession or being aware of the high risk of possession of the substances. The second is being aware of the high probability the substances are of a controlled nature.

I will address the second element first because it can be proven beyond a reasonable doubt from Mr. Dolan's own testimony that he knew marijuana and methamphetamines to be a controlled substance sic]. Mr. Dolan testified that after he was arrested for selling marijuana to a minor that he "of course" knew marijuana to be illegal. Similarly, when asked whether he knew that the possession of meth was illegal, Mr. Dolan answered, "You'd have to be pretty stupid not to know that, right?" and maintained that he did not consider himself stupid. Thus, Mr. Dolan has admitted knowledge that both marijuana and methamphetamine are illegal drugs, or controlled substances. His knowledge of the illegal nature of the drugs has been proven beyond a reasonable doubt.

The Columbia Supreme Court, in State v. Jones, has added the additional requirement to the knowledge that the substance is [sic] possessed is a controlled substance. That requirement is that the substance be in sufficient and usable form. Here, the quantity of marijuana and methamphetamine is beyond a reasonable doubt sufficient to constitute possession. 40 grams of methamphetamine and 73 pounds of marijuana were discovered. This is no trace amount and is sufficient quantity for the purposes of mere possession. Additionally, the usability of the controlled substance was testified to in the testimony of B.J. Atwood, a Detective with the Columbia Drug Enforcement Administration. Mr. Atwood conceded that while 20% of the marijuana found had sustained water damage and was therefore unmarketable and unusable; however, the remaining 80% of the marijuana, some 58.4 pounds of marijuana, remained marketable and therefore usable. The methamphetamine sustained no damage and was usable. The State has established beyond a reasonable doubt that the marijuana and methamphetamine discovered in this instance was of sufficient and usable quantity.

The first element of possession, that of being aware that one is in possession of the controlled substance or that one has a high probability of being in possession of the controlled substance has also been proven beyond a reasonable doubt. The Columbia Supreme Court in State v. Jones states that that possession may be constructive, exclusive or joint and that proof of such possession may be established circumstantially. The methamphetamine was discovered 150 yards from the Defendant's house and the

marijuana was discovered less than 100 yards from the Defendant's residence according to the testimony of B.J. Atwood. The methamphetamine was found alongside a driveway on the defendant's property. The marijuana was discovered inside a drum on the defendant's property. That the drugs were found on the defendant's property goes to the defendant's constructive possession of the controlled substance.

Further bolstering the constructive possession of the marijuana is the fact that the marijuana was discovered buried in a locked drum, the key to which was inside the defendant's house. The marijuana found on the defendant's property is thus linked to the defendant's residence through the presence of the key in the defendant's home. Mr. Dolan maintains that the key must have been left there by Will Gardner and his sister, whom he also blames for the presence of the substantial quantity of marijuana found on his property. However, Mr. Dolan presents no convincing testimony as to why Will Gardner and his sister would choose to store marijuana on his property or leave the key to the vessel containing the marijuana in his residence other than he heard they were "obviously dealing." Mr. Dolan presents no evidence as to why the methamphetamine would be on his property, along is [sic] driveway, presumably in plain view. His testimony is unconvincing and uncorroborated. In fact, Mr. Dolan's testimony is directly contradicted by Lynette Rogers, Will Gardner's sister. Ms. Rogers testified that she and her brother frequently visited Mr. Dolan's residence to purchase drugs and Ms. Rogers' phone record shows that she made three calls to Mr. Dolan's home phone during a three-month period in late 2009. If Ms. Rogers and her brother were "obviously dealing," they were doing so with drugs obtained from Mr. Dolan on Mr. Dolan's property, a point that will be flushed out when we arrive at the count of conspiracy.

For now, the evidence has born[e] out that Mr. Dolan knew beyond a reasonable doubt that methamphetamine and marijuana were controlled substances and that Mr. Dolan had methamphetamine of sufficient quantity and usability to satisfy a charge of possession. Additionally, knowing possession has been establismed through Mr. Dolan's constructive possession of the marijuana and methamphetamine on his property, both in plain view in the case of the methamphetamine and in a locked container to which Mr. Dolan kept the key in his home in the case of the marijuana.

Count 2: Possession with intent to distribute methamphetamine and marijuana

The Columbia Supreme Court has stated in State v. Jones that intent to distribute may be established by circumstantial evidence, including such things as quantity and purity and the presence of firearms, cash, packaging material, or other distribution paraphernalia. The State has shown beyond a reasonable doubt that circumstantial evidence supporting a finding of intent to distribute is present in this case, including a PVC pipe containing finely manicured or processed marijuana, a snort tube and baggie containing meth residue, a rubber band with which that baggie was covered, and twelve firearms including four handguns and eight long guns, all produced outside the state of Columbia and one of which at one time belonged to Rodney Mack, a man who you heard testify to reselling the drugs Mr. Dolan sold to him.

The Columbia Supreme Court stated in Jones that intent to distribute can be inferred solely from the possession of large quantities of narcotics. Here, 40 grams of methamphetamine were seized on Mr. Dolan's property and 73 pounds of marijuana were seized on Mr. Dolan's property. The Columbia Supreme Court held in Jones that 4.1 grams of methamphetamine, standing alone, was insufficient to infer an intent to distribute. In People v. White, the Columbia Supreme Court found that 7.54 grams of cocaine, standing alone, was insufficient to infer an intent to distribute, and in People v. Franklin the court found that 35 grams of cocaine, standing alone, did not support an intent to distribute.

While cocaine is a drug separate and apart from methamphetamine and marijuana, the quantities deemed sufficient to infer an intent to distribute cocaine is informative to infer such an intent in this case. The 73 pounds of marijuana far exceeds any of the quantities deemed insufficient in Jones, White, or Franklin and is beyond a reasonable doubt a large enough quantity of marijuana to infer that Mr. Dolan was not keeping the marijuana on his property for personal use. Jones, White, and Franklin also permit evidence other than quantity to be considered when finding an intent to distribute. With regard to the marijuana, beyond the large quantity discovered, the court should also consider the PVC pipe that contained processed marijuana. That the defendant was

processing marijuana from bulk quantities indicates an intent to distribute. Moreover, the fact that the marijuana was kept in bulk, in 6 large garbage bags, buried under Mr. Dolan's property, also indicates that the marijuana was not on hand merely for personal use. It was being kept in the ground to await processing by Mr. Dolan for distribution. The quantity and supplemental evidence are enough to show beyond a reasonable doubt that the marijuana possessed by Mr. Dolan was intended for distribution.

As to the methamphetamine, the 40 grams of methamphetamine far exceeds the 4.1 grams and 7.54 grams of cocaine deemed insufficient in Jones and White. However, given the finding in Franklin that 35 grams was insufficient, standing alone, to find an intent to distribute, this court must look to other evidence outside of quantity to determine that Defendant had an intent to distribute methamphetamine. The court may look to the purity of the controlled substance. The methamphetamine discovered on Mr. Dolan's property was 40%, as testified to by Annette Kahler of the Columbia Drug Enforcement Administration. Mr. Atwood testified that methamphetamine for distribution was around 10 to 15% pure, indicating that the methamphetamine possessed by Defendant was intended to be processed and broken down, not intended for personal use but rather for distribution. However, the Court in Franklin found that 42% purity in cocaine found in a 35 gram quantity was insufficient to show an intent to distribute.

The court then must look to other evidence to supplement the large quantity and high purity of the methamphetamine found on Mr. Dolan's property in order to make a finding of intent to distribute beyond a reasonable doubt. Mr. Dolan had in his possession a snort tube and baggie containing meth residue covered in a rubber band as well as 12 firearms. The snort tube and baggie may be evidence of Mr. Dolan's personal usage, but they are also evidence that Mr. Dolan had methamphetamine at one time that was of a usable purity, indicating that Mr. Dolan had in fact broken down the high purity methamphetamine he possessed so much of for personal usage. In addition, the baggie and rubber band indicate that Mr. Dolan was packaging the usable methamphetamine, and packaging, as the court in White held, is indicative of distribution.

Perhaps most damning is the presence of the 12 firearms. The Court in State v. Jones found that an unloaded rifle and shotgun found in the trunk of a car alongside camping gear and hunting paraphernalia could not be classified as "tools" of the drug trade. Mr. Dolan contends that his firearms were also used for hunting and pointed to his rural residence as evidence of his hunting hobby. However, beyond being located in a rural area, Mr. Dolan presents no evidence that he engages in recreational hunting. Unlike in Jones, Mr. Dolan's firearms were not found among duck callers and camping gear. Additionally, Mr. Dolan possessed four handguns, which are not used in recreational hunting. The sheer quantity of the firearms Mr. Dolan possessed, when found alongside such large quantities of drugs, support the inference that Mr. Dolan possessed his firearms as "tools of the drug trade." To further prove this point, none of the firearms were manufactured inside the state of Columbia. Why would Mr. Dolan be in possession of so many out-of-state firearms, including handguns, and have such large quantities of controlled substances if he were not involved in the business of distributing drugs?

The large quantity, high purity, unprocessed nature of the drugs found on Mr. Dolan's property, along with the firearms, packaging materials, and drug paraphernalia support a finding beyond a reasonable doubt that Mr. Dolan was involved in the trade of drugs and the finding that Mr. Dolan possessed methamphetamine and marijuana with an intent to distribute.

Count 3: Conspiracy to distribute methamphetamine and marijuana

As to the count of conspiracy to distribute methamphetamine and marijuana, the State must prove beyond a reasonable doubt the elements of conspiracy laid out in the Columbia Supreme Court case State v. Jones. The State contends that it has proven the foregoing elements from State v. Jones beyond a reasonable doubt. (1) A conspiracy existed for an illegal purpose; (2) the Defendant, Mr. Dolan, knew of the conspiracy; and (3) the Defendant, Mr. Jones, knowingly joined in it.

To prove each of these elements, the State must first show beyond a reasonable doubt that a conspiracy in fact existed.

While the Columbia Supreme Court stated in State v. Hach that "a simple agreement between buyer and seller to exchange something of value for cocaine cannot alone constitute a conspiracy," the State has shown beyond a reasonable doubt that Mr. Dolan's drug transactions were more expansive than individual agreements and were in fact a conspiracy.

As the Court stated in State v. Hach, a conspiracy agreement can be shown by circumstantial evidence, including evidence of a prolonged and actively pursued course of sales coupled with the seller's actual knowledge and a shared stake in the buyer's illegal venture. The four factors the Court establishes in Hach to prove the existence of a conspiracy are: (1) the length of the affiliation; (2) the established method of payment; (3) the extent to which transactions were standardized; and (4) the demonstrated level of mutual trust. Evidence presented at trial has proven each of these conspiracy elements beyond a reasonable doubt.

With regard to the length of the affiliation, Rodney Mack testified that he bought drugs from Mr. Dolan for over two years between the period of June 2008 and October 2010 and has known Mr. Dolan since high school. In fact, Mr. Dolan and Mr. Mack were close friends in high school, hanging out together, drinking together, even being arrested together. Mr. Crutchfield testified that he has known Mr. Dolan for 10 years. Mr. Cord has known Mr. Dolan for 10 years, also from high school, and contends that he bought drugs from Mr. Dolan for resale for over a year, between June 2009 and December 2010. The affiliation between the Defendant and these men has existed since for ten plus years, as far back as high school, and the period of drug sale for resale between Mr. Dolan and these men was between one and two years. Without a doubt, there is a close affiliation between these three men that has continued for a lengthy period of time.

As to the established method of payment, you hear Mr. Mack testify that Mr. Dolan was "very rigid" in his payment methods: "cash only, nothing larger than $20 bills. No negotiation on price. Strictly take it or leave it." Mr. Cord echoed this payment method to a T, testifying that the method was "Cash only, nothing larger than $20 bills. He would get really angry is [sic] you tried to negotiate the price. He always said, "Take it or leave it." Ms. Rogers also testified to this transaction method, stating "He would only accept $20 bills," and he was "very clear" he would not negotiate on price. This corroborating testimony from three separate witnesses establishes beyond a reasonable doubt that Mr. Dolan had an established method of payment.

As to the standardization of the transactions, evidence has been presented that demonstrates that these transactions were extremely standardized. Mr. Mack testified that Mr. Dolan "had really strict rules" about the transactions and would only sell at his house or in the Tama casino. Mr. Crutchfield testified that he accompanied Mr. Mack to the Tama casino to pick up methamphetamines, corroborating Mr. Mack's testimony. Mr. Cord testified that he would purchase from Mr. Dolan at his house or at the Tama casino. Ms. Rogers testified to buying from Mr. Dolan at his residence or the Tama casino and Ms. Black testified that she accompanied Mr. Cord to Mr. Mack's house to buy drugs, corroborating Mr. Cord's testimony. Every witness called against Mr. Dolan who was involved in a drug transaction having to do with Mr. Dolan testifies to this transaction. It is beyond a reasonable doubt an extremely standardized transaction method.

Finally, the State must show that there was mutual trust between the parties to establish the presence of a conspiracy. Beyond the mere fact that each individual involved in these transactions knew of Mr. Dolan's link to the sale of drugs and each affectionately knew of Mr. Dolan's nickname, Dolly, other evidence exists to show that mutual trust between the parties existed beyond a reasonable doubt. Mr. Dolan primarily sold Mr. Mack and Mr. Cord drugs for them to resell, per their testimony, for a two year and a one year period respectively, a steady basis that State. v. Hach classifies as an indication of a conspiracy. These parties testified to knowing Mr. Dolan since high school, with Mr. Mack being particularly close friends with Mr. Dolan and Mr. Cord,

continuing to be close friends with Mr. Mack. There exists a mutuality of trust between these friends. Mr. Dolan was even found to be in possession of one of Mr. Mack's old guns, another demonstration of the trust between these two men. Although Mr. Cord told Detective Atwood that he had no agreement with Mr. Dolan for the resale of drugs, the two continued their relationship, per Mr. Cord's testimony, under the understanding that Mr. Dolan "used his friends to actually distribute drugs." Mr. Crutchfield even testified that when either Mr. Cord or Mr. Mack was not available to sell drugs, he would just purchase drugs from the other. This "picking up the slack" between parties to drug transactions is cited by State v. Hach as evidence of a conspiracy.

Mr. Dolan also sold drugs to Mr. Gardner for redistribution according to the testimony of Ms. Rogers, Mr. Gardner's sister. Mr. Dolan himself corroborates that Mr. Gardner and his sister were in the business of selling drugs, noting that Will and his sister were "obviously drug dealing." Mr. Dolan himself indicates the level of trust he had with Mr. Gardner and his sister, noting that the pair would keep "coming out to the house and bugging me," and that he "never locked the place up." In State v. Hach, the court found that "free, unencumbered access to living areas" was evidence of mutual trust. That Mr. Dolan would invite drug buyers to his house which he admits he never locks up is a testament to his trust for the individuals to whom he sold.

The above demonstrations standardized payment, standardized transactions, longevity, and mutual trust between a group of people that Mr. Mack testified to being "a close-knit group of friends and neighbors," all "related in one way or another," is evidence beyond a reasonable doubt under the elements set forth in State v. Hach that a conspiracy existed beyond a reasonable doubt.

Mr. Dolan voluntarily engaged in the sale of drugs to this network of individuals, and as the above evidence has established that this network of transactions constitutes a conspiracy, Mr. Dolan was beyond a reasonable doubt voluntarily involved and in agreement with that conspiracy.

CONCLUSION:

The State has shown beyond a reasonable doubt that Mr. Dolan knowingly possessed controlled substances in satisfaction of the possession charge. The State has also shown beyond a reasonable doubt by use of circumstantial evidence that Mr. Dolan intended to distribute these controlled substances. He had large, unprocessed quantities of the substances as well as drug and packaging paraphernalia and 12 firearms consistent with "tools of the drug trade." Finally, the State has established the existence of a conspiracy by proving beyond a reasonable doubt that such a conspiracy existed given the longevity of the relationships between those involved, the established method of payment, the standardization of the transaction, and the demonstrated level of mutual trust between the participants.

The defense will offer no evidence to shed any doubt on the above proofs. In fact, all the defense can maintain is that the witnesses testifying against Mr. Dolan are biased. Biased because they have cut deals with the prosecutor to reduce their sentence for their own party in Mr. Dolan's drug conspiracy or biased because a close relative has died as a result of drug use. However, taken in their totality, the testimonies of these witnesses are corroborative and persuasive. Each echoes the story of the other to such an extent that any bias that may exist may be ignored. Bias does not cause witnesses to echo one another's stories so precisely. Bias does not alter the length and quality of the relationships between those testifying and Mr. Dolan.

Possession has been established. Intent to distribute has been established. Conspiracy has been established. All three charges and each of their individual elements have been established beyond a reasonable doubt. The State has met its burden of proof and Mr. Dolan should be convicted of possession, intent to distribute, and conspiracy.

Thank you.

PT – B

ANSWER 2

Draft of Closing Argument - State v. Dolan

Your Honor, based on the evidence presented in this trial, the State has proven beyond a reasonable doubt that the Defendant, Bruce Dolan, should be convicted of: (1) possession of methamphetamine and marijuana under Section 840 of the Columbia Penal Code; (2) possession with intent to distribute methamphetamine and marijuana under Section 841(a) of the Columbia Penal Code; and (3) conspiracy to distribute methamphetamine and marijuana under Section 846 of the Columbia Penal Code. The overwhelming evidence against Mr. Dolan that has been presented -- including, without limitation, the uncovering of 40 grams of 40% pure methamphetamine and 73 pounds of marijuana on defendant's property and the testimony of multiple witnesses that Mr. Dolan has distributed methamphetamine and marijuana over a period of years -- establishes each element of the above charges beyond a reasonable doubt.

First, the State has proven that Mr. Dolan should be convicted of possession of methamphetamine and marijuana.

In order for Mr. Dolan to be convicted of possession of methamphetamine and marijuana under Section 840 of the Columbia Penal Code, it must be shown that Mr. Dolan knowingly possessed a controlled substance as defined in Section 875 of the Columbia Penal Code. The Columbia Supreme Court in State v. Jones has expanded upon these elements, such that the following showing is required: (1) a specified controlled substance, in a sufficient quantity, and in a useable form; (2) possession, which may be physical or constructive, exclusive or joint; and (3) knowledge of the possession and of the illegal character of the substance. Per the Jones decision, each of these elements may be established circumstantially. Under the Columbia Penal Code, a person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or if such circumstances exist, or he is aware of a high probability of their existence.

First, this case involves the possession of controlled substances, as per statute, Section 875 of the Columbia Penal Code provides that both marijuana and methamphetamine are controlled substances. This is confirmed by the testimony of Annette Kahler, a forensic chemist with the Columbia Drug Enforcement Administration, who testified that the substances found on Defendant's property comprised 40 grams of methamphetamine. Further, Detective Atwood testified that 73 pounds of marijuana was contained in a drum that was buried on Defendant's property. These are both in a sufficient quantity, as the statute does not provide any specific quantity is required -- thus, the mere possession of any amount of the controlled substances suffices. Further, both the methamphetamine and marijuana was [sic] in a useable form. Defendant's counsel may make the argument that part of the marijuana was water damaged; however, the majority of the marijuana, 80%, was marketable according to the testimony of Detective Atwood. Thus, the first element of possession is clearly established with respect to both methamphetamine and marijuana.

Second, it is clear that Defendant possessed the methamphetamine and marijuana. According to the Jones decision, possession may be physical or constructive, exclusive or joint. This element is satisfied to the extent that both methamphetamine and marijuana were stored and contained on Defendant's property. The methamphetamine was found wrapped up on Defendant's property approximately 150 yards from Defendant's house. The marijuana was located in a buried drum on Defendant's property, which was locked with a padlock with the key to the padlock located in the kitchen of Defendant's residence.

Third, it is clear that the Defendant has knowledge of the possession and illegal character of the methamphetamine and marijuana. It is no surprise that these drugs were located at Defendant's premises, as multiple witnesses testified that they purchased drugs at Defendant's house. Rodney Mack testified that he purchased methamphetamine at Defendant's house for over a two-year period from June 2008 through September or October 2010. Tom Cord also testified that he purchased drugs from the Defendant at Defendant's residence. Tom Cord's testimony was confirmed by Stacey Black's testimony, as she testified that Tom purchased drugs at Defendant's

house on two occasions, and witnessed the drugs first-hand. Further, Lynette Rogers testified that methamphetamine was purchased at the Defendant's house. Thus, while Defendant has purported that Will Gardner and his sister, Lynette Rogers, were hiding the drugs at his residence, there is no evidence whatsoever to back up his position. In addition, Defendant may wish to assert that a conviction may not be sustained on the basis of testimony of being granted that Rodney Mack and Tom Cord stand to receive reduced sentences in connection with their testimony in the present case. However, we note that other witnesses who are not receiving a similar incentive are testifying to the same fact that drugs have been purchased in the past at Defendant's house. Moreover, Jones stands for the proposition that it is the role of the fact-finder to weigh credibility, and based on the other corroborating evidence and witness testimony, the overwhelming evidence shows that Defendant knew that methamphetamine and marijuana was [sic] located on his premises.

Finally, it is clear that Defendant knew that methamphetamine and marijuana were illegal substances, as he admitted such during cross-examination.

Thus, the elements of possession have been satisfied, and Mr. Dolan should clearly be convicted of possession of methamphetamine and marijuana.

Next, Mr. Dolan should also be convicted of possession with intent to distribute methamphetamine and marijuana.

A conviction for possession for intent to distribute methamphetamine and marijuana must meet the elements of Section 841(a) of the Columbia Penal Code, such that it shall be unlawful for any person knowingly to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance as defined in Section 875 of the Columbia Penal Code. Note that simple possession is required for conviction of an intent to distribute, which was previously discussed. In Jones, the Columbia Supreme Court held that the intent to distribute may be established by circumstantial evidence, including such things as quantity and purity of the controlled substance, the presence of firearms, cash, packaging material, or other

distribution paraphernalia. In addition, the Jones court held that intent to distribute may be inferred solely from the possession of large quantities of narcotics.

First, it is clear in this case that the storing of 73 pounds of marijuana satisfies the requirement that intent to distribute may be inferred solely from the large amount that Defendant was storing. Further to the testimony of Detective Atwood, personal use of marijuana is typically three to four ounces. Intent to distribute is also supported by the PVC pipe containing processed marijuana, evincing an intent to distribute rather than for personal use. Finally, Defendant was charged in the past with selling marijuana to a minor, and Defendant pleaded guilty to a lesser charge of endangerment of a minor where Defendant likely admitted selling marijuana to a minor. Thus, the mere quantity of marijuana alone is sufficient to support a reasonable inference of intent to distribute.

With respect to the methamphetamine, a number of factors support the position that Defendant had the intent to distribute the methamphetamine. First, we note that the holding in Jones provides that 4.1 grams of 47% pure methamphetamine, standing alone, is insufficient to prove intent to distribute methamphetamine. However, this case is distinguishable, to the extent that approximately 10 times the amount of methamphetamine is present in this case -- over 40 grams -- at a similar level of purity (40%). Thus, this case is more analogous to People v. Ojeda, in which the Columbia Supreme Court held that an inference of intent to distribute could be drawn from a possession of 7.1 kilograms of 88 to 91% pure methamphetamine. However, even if the court does not agree that such an inference should be drawn, the Jones court stated that, where the amount and purity of the drug were insufficient to support intent to distribute, the courts look to additional factors or circumstances consistent to intent to distribute. There are multiple factors here to support intent to distribute methamphetamine. First, there is a large amount of methamphetamine at a purity level approximately three to four times greater than what is sold on the street. Second, there is a common scheme and method of operation of past instances where the Defendant distributed methamphetamine in the past, both at his house and at the casino in Tama. Thus, it is reasonable to assume that Defendant would also distribute this methamphetamine. Third, there is a huge volume of marijuana, suggesting a common

plan to distribute both drugs. Finally, there is the presence of 12 firearms seized from the Defendant's residence, which are tools of the drug trade. Defendant may purport that he uses these weapons for hunting; however, there is no evidence that Defendant presented demonstrating other hunting gear to support this fanciful position, and the fact that there were 4 handguns in addition to 8 long guns makes it implausible that the guns were all being used for hunting purposes, but rather as protection for his drug venture.

Thus, based on the overwhelming evidence, the State has proven beyond a reasonable doubt that Mr. Dolan should be convicted of possession with intent to distribute methamphetamine and marijuana.

Finally, Mr. Dolan should be convicted of conspiracy to distribute methamphetamine and marijuana.

Pursuant to the Columbia Supreme Court's decision in Jones, a conviction for conspiracy requires the government to show that: (1) a conspiracy existed for an illegal purpose; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly joined in it. In turn, in a later Columbia Supreme Court decision, State v. Hach, the Columbia Supreme Court stated that a conspiracy conviction shall be sustained where the record contains evidence showing that a conspiracy existed, and that the defendant knowingly participated in it. Further, the Hach court stated that the government must show proof of an agreement to commit a crime other than the crime that consists of the sale of a controlled substance itself; however, an explicit agreement or direct evidence is not required to show that a conspiracy existed, and circumstantial information may be used, such as a prolonged and actively pursued course of sales, along with the seller's actual knowledge and a shared stake in the illegal venture. Four factors are used to determine whether there is a conspiracy: (a) the length of affiliation between the parties involved; (b) whether there is an established method of payment; (c) the extent to which the transactions were standardized; and (d) the demonstrated level of mutual trust. In Hach, the court viewed all the evidence in total, and found that these factors supported a finding of a conspiracy.

Similar to Hach, we have analogous factors in our case to support a finding of a conspiracy to distribute methamphetamine and marijuana. At the outset, per the testimony of Todd Bram, Mr. Bram stated that the Defendant knew that there was a plan to resell the drugs by Will Gardner, and that Defendant told Todd that "he did not do retail," and that he should buy the drugs from Will Gardner. This evidences directly that the Defendant knowingly joined in the conspiracy to have drugs resold on the retail market to his suppliers. This is further supported by the fact that Lynette Rogers got to know the Defendant through her boyfriend, Billy Purvis, who purchased methamphetamine from Rodney Mack, and knew that he acquired the methamphetamine from Defendant.

With respect to the Defendant's coconspirators, there was an established length of affiliation between the parties. In the case of Rodney Mack, there were sales for over two years, from June 2008 through September or October 2010. In the case of Tom Cord, he purchased drugs from the Defendant over a one-and-a-half year period from June 2009 through December 2010. Lynette Rogers also testified to a similar scheme where drugs were purchased at multiple times, supported by cell phone records showing calls to the Defendant's residence to support this position.

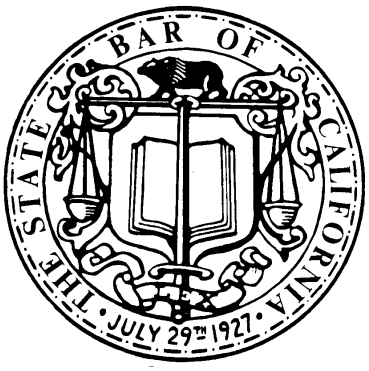
Next, there was also an established method of payment between the Defendant and his purchasers. Multiple witnesses testified that the Defendant accepted cash only, in bill amounts no greater than $20, and that the price was non-negotiable, and that Defendant made clear that these were strict rules that his purchasers needed to follow.

Third, there were standardized transactions. All of the transactions were made at Defendant's home or at the Tama casino. Defendant's knowledge and acceptance of the conspiracy is further supported by the testimony of Richard Crutchfield, who stated that he purchased methamphetamine from Tom Cord and Rodney Mack at the Tama casino, and Mr. Mack would leave the casino to pick up the methamphetamine, which Mr. Mack testified came from the Defendant.

Finally, there was a demonstrated level of mutual trust between Defendant and his purchasers who resold the drugs. All of these people had long-standing relationships with Defendant, and referred to him by a nickname, "Dolly," the name he was known by his friends. Per the testimony of Mr. Mack, Defendant only sold to a close-knit group of friends and neighbors, which primarily consisted of persons with whom Defendant went to high school. In sum, the arrangement advanced all the participants' interests -- Defendant could keep a role as a wholesaler of the drugs, while his close friends would resell the drugs on the open market.

Thus, in light of the Hach decision and the above factors, Mr. Dolan should be convicted of conspiracy.

Based on the foregoing, Your Honor, the State respectfully requests that you find the Defendant, Bruce Dolan, guilty of possession, intent to distribute, and conspiracy to distribute methamphetamine and marijuana.



California Bar Examination

Performance Tests and Selected Answers

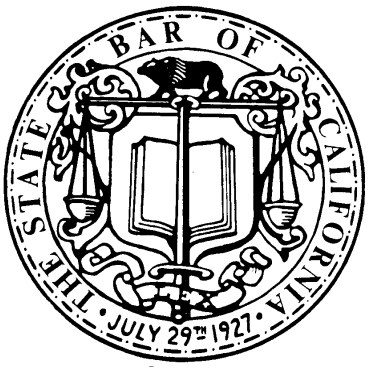
July 2012

PERFORMANCE TESTS AND SELECTED ANSWERS
JULY 2012
CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2012 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



Performance Test A

INSTRUCTIONS AND FILE

IN RE CLEF, INC.

IN RE CLEF, 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.

CRESPI, DONOHO and WAN, PA

9800 Commercial Boulevard

Suite 1000

Cooper City, Columbia 55155

CDWLaw@homepage.com

TO: Applicant

FROM: Luan Wan

RE: CLEF, Inc. – Corporate Governance Review

David Conway, a law school classmate, recently became the Chief Executive Officer (CEO) of the College Loan Equity Fund, Inc. (CLEF), a nonprofit corporation organized under the Columbia Nonprofit Corporation Act. As his first task, Conway is reviewing CLEF's corporate governance practices. He had become concerned about CLEF's practices in the course of interviewing for his new position. His concern has been heightened by a recent Columbia Supreme Court decision dissolving a high-profile nonprofit and by an even more recent announcement by the Columbia Attorney General of an intent to propose legislation to apply principles from the federal Sarbanes-Oxley Act to Columbia nonprofits. On behalf of CLEF, Conway has engaged our firm to conduct an analysis of certain aspects of the company's corporate governance procedures in light of the Smith case and the Attorney General's proposed legislation and, if warranted, suggest modifications to current practices.

Please prepare a memo that presents an objective analysis of whether the following actions violate Columbia law or the Attorney General's proposed requirements:

1. Engagement of an outside accountant;
2. Execution of a lease of corporate facilities;
3. Purchase of corporate insurance;
4. Guaranty of the mortgage of the former CEO; and
5. Failure to share an internal report with the Board of Directors and with loan fund
6. investors.

Excerpt from CLEF's Web Site

http://www.CLEF.org/home/history

What is College Loan Equity Fund?

College Loan Equity Fund, better known as CLEF, is a nonprofit student loan program. The mission of other lenders is to generate equity for their shareholders; ours is to provide education financing to the broadest range of eligible undergraduate students. Our sole charge is to ensure that students have access to affordable funding for their education. We focus on the Humanist Group of colleges that constitute our membership and hundreds of non-member undergraduate schools.

Our History

CLEF, Inc. was formed by Melvin Metzger in 1997 and funded by a $10 million gift from the Metzger Family Foundation. CLEF's initial goal was to make low interest loans to needy undergraduate students who attended one of the 33 small, liberal arts colleges that make up the Humanist Group. These member colleges agreed to extend tuition and attendance discounts for students who qualified for CLEF loans.

CLEF is now a $5 billion nonprofit corporation with virtually all of its assets in the form of promissory notes on the loans it has made to thousands of undergraduate students. Although it has become the largest not-for-profit in the student loan field, CLEF's goal is still the same: to provide greater access to affordable undergraduate financing, and greater access to the information that can help students borrow wisely, manage debt responsibly, and repay their student loans successfully. And CLEF continues to make those below-market-rate loans to especially needy students who attend a Humanist Group college.

INTERVIEW: DAVID CONWAY, CEO, CLEF, INC.

LUAN WAN: David! It's great to see you. What's it been, eight years or so?

DAVID CONWAY: About that, Luan. It was our fifth law school reunion. I missed the tenth.

WAN: It's great to have you back in the area. Tell me about your new position with CLEF.

CONWAY: Well, it's a real opportunity. As you know, I took over as CEO after spending nine years with United American National Bank, initially as Associate General Counsel for its student loan division and then as VP of the division's operations. United American is one of the top lenders to undergraduate students, right behind Sallie Mae and CitiBank. CLEF, on the other hand, is the fastest growing lender in the undergraduate market and number one among the nonprofits in the field. Even so, with a shade over 100 employees, we're a small operation in comparison to the major players in the student loan industry.

WAN: What can we do to be of assistance? By the way, do you mind if we tape this session?

CONWAY: Of course not; go right ahead. As the new CEO I'm feeling my way around, poking into things to learn more about the company. When the Columbia Supreme Court came down with the Smith decision last month it caused me to review the operation of our Board of Directors. Then last week the Attorney General (AG) announced that he intended to propose legislation that will apply key principles of the federal Sarbanes-Oxley Act to Columbia nonprofits. I'm now worried that some of CLEF's long-time Board practices are out of sync with present Columbia law and the new regulations will be even tighter if, as is expected, the legislature adopts the AG's proposal.

WAN: Our firm does a lot of work for Columbia corporations so we have a good handle on local law. We don't do much with nonprofits but I know the Columbia Nonprofit Corporation Code tracks the State's for-profit corporate principles.

CONWAY: That's what I thought. It also makes sense for us to anticipate how current Board procedures fit with the Attorney General's efforts to extend key rules from the

federal Sarbanes-Oxley law to Columbia nonprofits. As I see it, up-front planning is critical.

WAN: I thought that Sarbanes-Oxley only applies to for-profit public corporations?

CONWAY: You're correct; most SOX provisions are limited to for-profits. But the chatter among corporate counsel and the nonprofit community is about extending SOX 'best practices' to the nonprofit world.

WAN: SOX and 'best practices'?

CONWAY: Oh, sorry. SOX is short for Sarbanes-Oxley and 'best practices' means that the new federal governance and auditing rules have established a standard that many believe nonprofits should or will be forced to adopt. That appears to be the motivation of the Columbia AG — to prevent the possibility of an Enron-type scandal in the nonprofit sector by applying selected SOX principles.

WAN: OK, let's focus on your concerns about CLEF's existing Board practices. I read background info on the company's homepage so I know a bit more about CLEF and its operations. Pretty impressive — a $5 billion nonprofit company.

CONWAY: Yeah, it is amazing that CLEF began as a 'Mom and Pop' lender and has grown up to be a player in the tough student loan business. However, certain holdover governance practices from its small time roots are worrying me. For example, it's a strange Board of Directors. Of the 15 directors, five of them are effectively permanent. Although the company founder, Melvin Metzger, and four of his close personal and business friends technically serve three-year terms, they've been on the Board since the company was created about 15 years ago. With unlimited terms, they keep getting reelected by the corporation's members, the presidents of the Humanist colleges. Five directors come from the college financial aid community and the final five are college presidents, at least three of whom must be from the Humanist Group of colleges. The financial aid directors and the presidents serve single staggered terms of three years.

WAN: What's the problem?

CONWAY: Two things. First, there's a high turnover among the members who come from the academic community. The financial aspects of the student loan business are very complicated. There's a steep learning curve so by the time the financial aid types and the college presidents have caught on, they're rotating off the Board. This means

they often defer to the five 'permanent' Board directors on key questions. Second, the Board composition means we don't have any truly sophisticated financial types, no one from investment banking or the consumer credit field. These are serious handicaps in today's complex and competitive student loan business.

WAN: Hmmm. I can see the problem.

CONWAY: I'm very concerned this will only get worse unless we do something. Even the most naive new director asks how much Directors and Officers Insurance we provide in case the directors get sued. But in a post-Enron environment, new directors with investment banking or other sophisticated experience in consumer finance certainly will insist on broader and more expensive coverage.

WAN: I see.

CONWAY: Deferral to the permanent directors and the lack of financial sophistication has led to what I believe are some questionable governance traditions at the Board level. For example, CLEF has used a local CPA firm, Metzger Associates, to conduct its financial oversight since the early days of the company.

WAN: Metzger Associates? Any relationship to…?

CONWAY: Yup, Sue Metzger, the principal in Metzger Associates, is Melvin's first cousin. However, if we bring in a national accounting firm and conduct rigorous, in-depth SOX-type audits, it will cost the company twice what we pay Metzger.

WAN: Uh oh, that could create cost-control questions. Anything else?

CONWAY: Two years ago when CLEF added a loan servicing division the number of employees doubled, from about 50 to over 100. The company was forced to find larger quarters and it signed a long-term lease for a vacant department store that was remodeled to accommodate the expanded operations. Bernie Baugh, a member of the CLEF Board and Melvin Metzger's college classmate, is a partner in Center City Realty, the company that owns the property and served as the general contractor for the renovation of the facilities.

WAN: Wasn't that an issue in the Smith decision, questions about 'insider' transactions?

CONWAY: That's one of the reasons I became nervous. In digging around, I also came across a recent internal report authored by the director of strategic planning that

forecasts changes in the student loan market that could affect the company's liquidity. The report never was sent to the Board by my predecessor and it wasn't disclosed to potential investors in the last investment offering.

WAN: Can you provide me documentation of these incidents you just described?

CONWAY: I'll fax over a memo I've been working on that outlines what I've found so far. I'm still feeling my way and there may be more. I'd appreciate your analysis about how these actions jibe with Columbia law.

WAN: We'll get something back to you as quickly as possible.

CONWAY: Thanks. I also need your assistance in anticipating the impact of the Attorney General's sketchy proposal to apply some SOX-like rules on Columbia nonprofits. With $5 billion in assets and $150 million in annual revenue, CLEF is exactly the type of nonprofit that is the target of his legislation. Given the somewhat loose governance practices followed in the past, there's no question in my mind that CLEF needs to be alert to the likely stricter financial accountability standards the AG is proposing.

WAN: That seems to make sense, but why do you need us? You're an excellent lawyer and have years of experience in the for-profit student loan field with an organization that is subject to Sarbanes-Oxley. Why don't you review the AG's proposal and make your recommendations directly to the Board?

CONWAY: First, I'm the CEO and I shouldn't act as the company's legal advisor. And, frankly, the situation is fairly delicate. The company has been run like a family foundation pursuing its philanthropic mission. Melvin Metzger, the founder and Board chairman since the company's inception, is passionate about providing financial support to young people seeking an education. He had the financial resources to begin the nonprofit company and the business acumen to alter its operations several times to keep CLEF afloat and greatly expand its reach beyond the original group of students. Unfortunately, Melvin has a very proprietary attitude toward the Company and doesn't recognize that Board practices do not seem to have kept pace with CLEF's rapid transformation from a private foundation to a minor marketing company to a full-fledged financial institution that attracts major international investors and manages a significant loan portfolio. I am committed to making CLEF the model student loan company – profit

or nonprofit – by adhering to the highest standards of Board governance and financial operations. But I have to be careful in communicating any criticism about current practices. Sound advice from a qualified objective source, such as your firm, will be better received by Melvin and the Board.

WAN: While I understand you're new and Metzger apparently is set in his ways, isn't it clear to everyone that avoiding potential liability is in the interest of the company and the Board? Assuming good faith on the part of the directors, how can they object to your call for high standards?

CONWAY: Well, the problem in transitioning the company to its new financial and business reality is cultural as much as anything. I'm worried about straining long-standing positive personal relationships among Board members.

WAN: OK, let me take a look at the Columbia Nonprofit Corporation Code, the case handed down by the Supreme Court and the Attorney General's announcement about his intended legislative proposal before making any recommendations for you to take to the CLEF Board. You send me the memo you mentioned and we'll do our very best.

CONWAY: Thanks, Luan.

College Loan Equity Fund, Inc.

Affordable Funding for Undergraduate Education

Box 2004 Cooper City, Columbia 55354

MEMO -- July 18, 2012

TO: Luan Wan, Crespi, Donoho & Wan, P.A.

FROM: David Conway, CEO

RE: CLEF Corporate Governance

As a follow-up to our conversation, the following is information I have gleaned from various CLEF sources. I have attached what I believe to be relevant excerpts from CLEF Board Minutes over the last six years (Attachment A) and the Executive Summary from an internal CLEF report prepared by our Director of Strategic Planning dated six months ago and prior to CLEF's most recent investment offering (Attachment B).

Audit and Financial Issues:

CLEF receives an annual accounting report from Metzger Associates but it doesn't conform to Generally Accepted Accounting Principles (GAAP standards) used by national accounting firms when performing traditional audits of many financial institutions. Although the accounting approach used by Metzger is common when reviewing small and medium size businesses, it does not go into the depth of analysis sophisticated financial institutions usually demand and expect, especially those who regularly seek significant funding from international investors. The Board doesn't have a separate audit committee. In fact, it functions as a committee of the whole for all of its work. For example, an informal executive committee, now composed of Melvin Metzger, Bernie Baugh and Jane Cross but not created by formal Board action, functions on behalf of the Board in the interim between the quarterly meetings.

As I mentioned when we met, CLEF doesn't have a well-balanced and diverse board with a lot of financial savvy. I am concerned the Board doesn't have the expertise to understand complex finance and macroeconomic projections, evaluate accounting recommendations and make generally sound financial decisions to fulfill its fiduciary responsibilities. CLEF's chief financial officer (CFO) leads a generally passive Board through all reviews of Metzger's accounting advice and the complex financial documents the Board has to approve for the annual investor offering process. The CLEF CFO and CEO are always present when Metzger presents any type of report to the Board.

Certification:

The only annual report of a financial nature generated by CLEF is IRS Form 990. Nonprofits under 501(c)(3) do not pay taxes but they must report revenue and expenditures (and any fundraising activity). CLEF's CEO signs off on this report but it doesn't come to the Board for review. My predecessor, Curtis Johnson, the former VP for Financial Aid at Bond College, knew financial aid and student loans but he didn't have an accounting or finance background.

Conflicts of Interest:

CLEF needs to adopt a conflict of interest policy with disclosure standards to guide the board and staff in independent decision-making. Given several of the transactions of the CLEF Board memorialized in the attached Minutes, this is an area about which I have great concern and seek your advice and guidance.

Attachment A

Excerpts from CLEF Board Minutes

October 5, 2011:

Mr. Morgan moved and Ms. Gilmore seconded the reappointment of Metzger Associates as CLEF's certified public accountants. Mr. Morgan noted that this would be the 13th year CLEF has used Metzger Associates as its accounting firm. He mentioned that literally and figuratively Sue Metzger, the cousin of Board Chair Metzger, is a long-standing member of "the CLEF family" and she understands the Company's culture and goals. The motion was adopted unanimously without discussion.

April 14, 2009:

The Board discussed the need to build or lease new facilities to accommodate the expected growth in employees due to the impending creation of a loan servicing division. The CEO and the Board Chairman reported their judgment that the vacant Pomeroy's Department Store in West Cooper City was ideal. With 80,000 square feet and a large parking lot, the property will meet short and long-term projected needs for space. CLEF has been offered $10 per square foot in annual rent for a ten-year term with an option to purchase the property or renew the lease for an additional five years. Renovation estimates run between $800,000 and $1 million, including all furniture. Ms. Metzger from Metzger Associates reported that these figures were within the facilities budget earlier adopted by the Board. On the motion of Ms. Cross, seconded by Mr. Baugh, the Board unanimously (1) approved the lease with Center City Realty; and (2) approved engaging Center City Realty's construction division to serve as the general contractor for the necessary renovations.

October 19, 2007:

The Board took up the matter of the appointment of Curtis Johnson, the VP for Financial Aid at Bond College, as CLEF's CEO for a term of five years. Board Chairman Metzger reported that negotiations were almost complete. One issue remaining was Johnson's need for a mortgage in the amount of $420,000 to purchase a house in Cooper City. Board member Anthony Niedwicki, Executive Vice President of Cooper City Savings, indicated that his bank would make the loan if CLEF would sign as a guarantor. On the motion of Ms. Gilmore, seconded by Mr. Morgan, the Board agreed to guaranty Mr. Johnson's mortgage.

June 15, 2006:

The Board discussed the rising costs associated with various insurance policies required to operate the business. Mr. Metzger reported it would cost almost $95,000 to renew the insurance package with Intercontinental Insurers for the next fiscal year.

Board member John Morgan, a principal in the Cooper City Insurance Consortium, stated he could provide the company with identical coverage at a price at least 10-percent below that quoted for renewal. The Board adopted Ms. Maurer's motion to purchase the necessary insurance from the Cooper City Insurance Consortium.

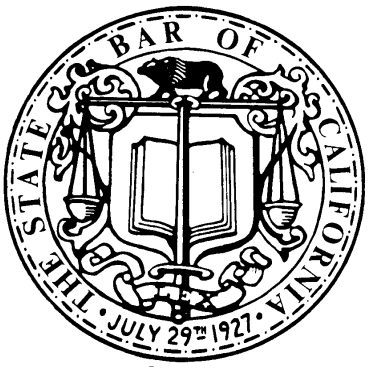
Attachment B

Excerpt from CLEF Internal Report:

January 21, 2012

TO: Senior Management
FROM: Wendy Sims, Director of Strategic Planning
SUBJECT: Challenges to CLEF's Cash Flow

Executive Summary: Combining the Chief Financial Officer's most recent Company projections and my analysis of the U.S. business climate and college enrollment, I perceive two obstacles to CLEF's short and long-term revenue estimates. First, continued weakness in the white-collar job market nationwide means that fewer college graduates are being employed in high salaried positions. Accepting lower paying jobs means that some graduates will earn less and will have greater difficulty in servicing their loans. Based on CLEF's accumulated data, I estimate that our student loan defaults will slowly rise from six to thirteen percent of the annual loan volume. Complicating the consideration of cash flow is the sharp rise in college graduates entering professional and graduate schools. Medicine, dentistry, law and business are experiencing record applications. A significant shift by college graduates away from the work force and into postgraduate study will mean that undergraduate loans will be deferred for the duration of graduate work. This is likely to result in a dip in CLEF's expected revenue for up to four years. Such a change in revenue may negatively affect our ability to attract investors in our next offering.



Performance Test A

LIBRARY

IN RE CLEF, INC.

LIBRARY

Selected Provisions of Columbia Nonprofit Corporation Code

§ 4830. Performance of Duties by Director of a Nonprofit Corporation; Liability

(1) A director shall perform the duties of a director in good faith, in a manner such director believes to be in the best interests of the nonprofit corporation and its members and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(2) So long as a director acts in good faith, after reasonable inquiry when the need is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the following:

(a) Officers or employees of the corporation the director believes to be reliable and competent in the matters presented;

(b) Counsel, independent accountants or other persons as to matters the director believes to be within such person's professional or expert competence; or

(c) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence.

(3) A person who performs the duties of a director in accordance with subdivisions (1) and (2) shall have no liability based upon any alleged failure to discharge the person's obligations as a director.

§ 4832. Conflict of Interest Transactions

(1) A conflict of interest transaction is a transaction with the corporation in which a director or officer of the corporation has a direct or indirect interest.

(2) A director or officer has a conflict of interest if, but not only if, another entity in which the director or officer has a material interest is a party to the transaction or another entity of which the director or officer is a director, officer, or trustee is a party to the transaction.

(3) Any conflict of interest transaction is voidable by the corporation, and may be the basis for liability of a director or officer, unless the transaction was fair at the time it was entered into or is approved in accordance with subdivision (4).

(4) A conflict of interest transaction may be approved if:

(a) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board of directors or a committee consisting entirely of members of the board of directors and the board of directors or such committee authorized, approved, or ratified the transaction;

(b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the members and they authorized, approved, or ratified the transaction; or

(c) Approval is obtained from:

(i) The attorney general; or

(ii) A court of record having equity jurisdiction in an action in which the attorney general is joined as a party.

(d) Approval by the board requires the affirmative vote of a majority of the directors who have no direct or indirect interest in the transaction, but no such transaction may be approved by a single member of the board.

(e) Approval meeting the requirements of subdivisions (c) and (d) removes the voidability of the transaction by the corporation and personal liability for directors and officers, but directors so approving must comply with their fiduciary duties in deciding whether to approve.

(f) A director who votes for, assents to or ratifies a transaction made in violation of the Nonprofit Corporation Code and does not comply with standards of conduct established in § 4830 is personally liable to the corporation.

SMITH v. COLUMBIA CHILDREN & FAMILY SERVICES, INC.
Columbia Supreme Court (2012)

The Attorney General filed suit pursuant to Columbia Nonprofit Corporation Code ("Code") to dissolve a nonprofit corporation, Columbia Children and Family Services, Inc. (CCFS). The trial court granted summary judgment for the Attorney General, finding that CCFS had abandoned its charitable purpose and devoted itself to private purposes, and ordered the appointment of a receiver to preserve the remaining corporate assets. CCFS appealed.

The Attorney General maintained that CCFS, a nonprofit, tax-exempt corporation, repeatedly violated the Columbia Nonprofit Corporation Code by: (1) renting property owned by Emily Madison, the sometimes executive director and chairperson of the CCFS board of directors; (2) investing CCFS funds in a local bank in which board members had an interest; and (3) approving transactions that inured to the benefit of the board chairperson and her family and friends.

CCFS's charter of incorporation lists as its purpose: "to provide comprehensive social service for young people who are teenage mothers, handicapped children, underachievers in school and special-problem children." As a nonprofit corporation, CCFS is authorized "to seek public and private funds" to achieve its goals. As it turns out, the Columbia Department of Human Services (DHS) provided almost all of CCFS's funds.[1]

In general terms, a nonprofit is an organization in which no part of the income is distributable to its members, directors or officers. A nonprofit corporation is not prohibited from conducting enterprises for income or from accumulating earnings. However, such revenues must be used for the purposes set forth in the charter. No pecuniary gain can inure to directors or officers and there can be no direct or indirect

[1] According to the trial court's finding, more than ninety-nine percent of CCFS's revenue came from DHS. In the three years preceding the Attorney General's action, DHS provided the company with $3.1 million in 2007; $6.8 million in 2008; and $4.9 million in 2009.

distribution of income or profits to them. For example, under § 4858 of the Code, nonprofits are specifically prohibited from lending money to, or guaranteeing the obligation of, a director or officer of the corporation. The bargain made with the government, the taxpayers, and the public in return for benefits such as tax exemption is that the nonprofit will operate for the public good and not for the enrichment of those running it.

Directors and officers of nonprofits, like their for-profit counterparts, owe two basic fiduciary duties to the corporation: the duty of care and the duty of loyalty.

The duty of care imposed on corporate nonprofit directors by the Code constitutes a mandate that directors must in appropriate circumstances make such reasonable inquiry as ordinary prudent persons would make under similar conditions and directors may not close their eyes to what is going on about them.

Because the missions of for-profit and nonprofit corporations are different, the duty of loyalty is defined somewhat differently. The officers and directors of a for-profit entity are guided by their duty to maximize long-term profit for the benefit of the corporation and the shareholders. A nonprofit's reason for existence, however, is not to generate a profit. Thus, a director's duty of loyalty lies in pursuing or ensuring pursuit of the public or charitable purpose that is the corporation's mission.

As part of the duties of care and loyalty, certain transactions, called conflict of interest transactions, between the company and a director or officer are subject to close scrutiny. A conflict of interest transaction is defined as a transaction with the corporation in which a director or officer of the corporation has a direct or indirect interest. A director or officer has such an interest if, for example, another entity in which the director or officer has a material interest is a party to the transaction or another entity of which the director or officer is a director or officer is a party to the transaction. A conflict of interest transaction is voidable by the corporation, and may be the basis for liability of a director

or officer, unless the transaction was fair at the time it was entered into or is approved in accordance with Code § 4832 (4):

> "A conflict of interest transaction may be approved if:
>
> (a) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board of directors and the board of directors authorized, approved, or ratified the transaction;[2] or
>
> (b) Approval is obtained from:
>
> (i) The attorney general; or
>
> (ii) A court of record having equity jurisdiction in an action in which the attorney general is joined as a party."

Code § 4832 also provides that a director who votes for, assents to or ratifies a transaction made in violation of the nonprofit corporation statutes and does not comply with standards of conduct established in § 4830 is personally liable to the corporation. Where corporate officers and directors, contrary to their fiduciary duties, do not advance the nonprofit corporation's goals, protect its assets, and ensure that its resources are used to achieve the corporation's purposes, other remedies exist. For example, Code § 4831(a)(2) authorizes dissolution of a nonprofit corporation in a proceeding brought by a percentage of voting members upon proof of one of several grounds, including where "the corporate assets are being wasted or misapplied" or where "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent."

Columbia has long recognized the right of members of a nonprofit corporation to bring the equivalent of a shareholder derivative action against the directors and officers for wasting corporate assets and using corporate assets for personal gain. In *Bourne v. Williams* (Col. Ct. App. 1981), the court held "that members of nonprofit corporations have the same rights in this regard as stockholders of corporations for profit." This right, however, is not effective where, as here, a nonprofit corporation has no members.

[2] Under the Revised Model Nonprofit Corporation Act, the approval by the disinterested, informed board of directors of a nonprofit corporation must be made in advance of the transaction. However, Columbia did not adopt the "in advance" language.

Consequently, statutory authority has been given to the Attorney General to act in the public good in enforcing the requirements applicable to nonprofit corporations. The rationale for the statutory authority is that nonprofit corporations, which usually have no participants with a sufficient economic interest to assure oversight, can only be made accountable for their use of assets if there are broad powers of regulation in a state officer. In addition to the provision authorizing an action to dissolve a nonprofit corporation, pursuant to Code § 4811, the Attorney General may bring an action to remove a director who is "engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation."

Thus, the Attorney General, acting in the public interest, has authority to seek dissolution of a nonprofit corporation that fails to devote its assets to a public, rather than a private interest. Where such a corporation is operated for the private benefit of an individual in contravention of the principles governing nonprofit status, or where the corporation has abandoned its public or charitable purpose, action by the Attorney General and the courts is warranted.

The trial court correctly recognized the central issue in this case: whether CCFS complied with the requirements that a nonprofit corporation fulfill a nonprofit purpose and not be operated for private financial gain. To the extent CCFS was operated for private gain, its assets were misapplied. Thus, the question is whether the undisputed facts demonstrate that CCFS was operated for the private benefit of Ms. Madison, her family, or other corporate insiders.

The Undisputed Facts

Our review of the record leads to the inescapable conclusion that this “nonprofit” was operated for the private gain of Ms. Madison, her family, and other individuals in control of the corporation. The facts demonstrate a consistent pattern of disregard of CCFS as a separate entity from Ms. Madison and of the fundamental nature of a nonprofit corporation.

Even based on the figures provided by the corporation, although they are not entirely reconcilable, Ms. Madison not only was paid a substantial salary, but also was regularly awarded bonuses of 50% or more of that salary. Corporate records and corporate memory are ambiguous about the exact amounts so paid, although it is clear several $50,000 bonuses were awarded to her. The corporation's inexact records on this issue simply demonstrate the inattention paid to distributions to Ms. Madison. Although the board attempts to justify her salary and the large bonuses as merited by the success of the program, including the financial success, that argument misses the point. The goal of a nonprofit corporation is not to generate profit; neither is it to reduce its "profit" or excess revenues by increasing operating expenses that enrich corporate insiders. Excess revenue is to be used to further the public or charitable mission of the corporation. We do not imply that a nonprofit corporation cannot reward its officers or board members with salary increases or other compensation if that compensation is reasonable. Although CCFS argues vehemently that it proved that Ms. Madison's salary was reasonable, we find no evidence to support an argument that regular yearly grants of additional compensation of 50% or more of her salary was reasonable. In any event, it is not a question of whether any particular amount was proven to be reasonable or unreasonable. Rather, the cavalier manner in which the corporate board regularly gave its creator, acting executive director and sometime board chair significant "additional compensation" demonstrates to us that CCFS's assets were treated as a ready source of economic benefit to an individual.

Another example of the manner in which the corporate resources were used involves payment for personal expenses. Ms. Madison freely used corporate funds for personal expenses for herself and her family, such as travel to London and Hawaii. In those instances, no one in the corporation apparently questioned the original payment of the expenses by the corporation, and the corporation was never repaid, even though there is no dispute that the trips had no business purpose.

The use of nonprofit corporate revenue for private gain is dramatically exemplified in the real estate and leasing transactions. Twice Ms. Madison informed the board that CCFS

needed additional space, then purchased real property meeting that need, and leased that real property to the corporation. She made the second purchase of property later leased to the corporation shortly after CCFS paid her $437,000 in "prorated back rent" on the initial leased property. The “back rent” was based on an inflated number of square feet at a higher rate per square foot than CCFS originally had contracted to pay and after the rate per square foot had already been increased during the term of the lease. Members of the board who approved this payment were unable to explain how this payment could have been in the corporation's interest.

The leasing by the corporation of space owned by Ms. Madison raises significant questions because the record does not indicate any attempt by the board to inquire about other space or compare rental amounts or ascertain Madison’s interest in the properties. The increases in rent during the terms of the leases are difficult to justify as being in the interest of CCFS and are totally unjustified in the record before us. Even these decisions, however, pale in comparison to the remarkable act of giving Ms. Madison $437,000 on the basis of "prorated back rent" for which the corporation was clearly not liable. There is no better example of the total disregard exhibited toward the interests of CCFS and the furtherance of its public benefit mission.

The investment of substantial sums in a bank in which Ms. Madison, her family, and a CCFS board member had significant financial interest, and on whose board Ms. Madison and the board member sat, also demonstrates a disregard of the requirements for such transactions. The requirements exist to protect the nonprofit corporation's assets and to avoid insider economic benefit. Once again, those in control of CCFS abandoned their duty to see that these assets were used to further the corporation’s public benefit mission.[3]

[3] One board member testified he saw nothing wrong with such transactions: “If board members were giving their time serving as volunteers, I think it would be unkind if they had a business and you needed something they had and then not to purchase from them.”

These circumstances as well as others demonstrate a failure of those in control of CCFS to ensure adherence to the basic requirement of a nonprofit entity: that it be operated exclusively to serve public rather than private interests, and that its income or assets not be distributed to individuals in control of the entity. CCFS fails the test of whether it was operated as a true nonprofit corporation. The trial court determined that the corporation had abandoned any public or charitable purposes and had pursued private interests. Our independent review of the record fully supports that conclusion.

Business Judgment Rule as a Defense

CCFS argues that the directors' judgment with respect to the challenged financial transactions was insulated from "second-guessing" by the “business judgment rule.” Essentially, the corporation argues that decisions by the Board regarding compensation, payment of expenses, investment and leasing are committed to the sound discretion of the board and should not be reviewed by the courts.

Columbia courts, recognizing the business judgment rule in certain circumstances, have followed a noninterventionist policy with regard to most internal corporate matters and have acknowledged that directors have broad management discretion. Where it applies, the business judgment rule is a presumption that corporate directors, when making a business decision, act on an informed basis, in good faith, and with the honest belief that their decision is in the corporation's best interest. The rule does not apply, however, when the director or officer has an interest in the decision, did not actually make a decision, or made an uninformed decision. Based on these criteria, the Attorney General has argued that the actions by the CCFS board in approving various challenged transactions do not qualify for the protection of the business judgment rule.

The rule does not apply to decisions that breach the duty of loyalty. The business judgment rule was developed by the courts concurrently with the duty of care to protect corporate management from liability for mistakes in business judgment. Thus, the duty of care is implicated, not the duty of loyalty. Simply stated, the business judgment rule holds that directors and officers are not liable for honest mistakes or negligent

judgment. Directors and officers incur liability only for gross negligence and are not liable simply because their decisions result in an unfavorable outcome for the corporation. Developed to analyze duty of care issues, the business judgment rule is no shelter for directors and officers who breach the duty of loyalty. As explained earlier, a director's duty to ensure that a nonprofit corporation operates to further its public purpose is part of the duty of loyalty.

The business judgment rule is a potential defense in two situations: (1) where officers or directors face personal liability; and (2) where the corporation (generally in a derivative action) seeks to void a decision of or transaction approved by the board. Neither situation is present here. The Attorney General does not seek monetary damages from any member of the board for breach of fiduciary duties. Neither does he seek to set aside or invalidate any particular transaction. Instead, this action is maintained under the Code provision that authorizes the Attorney General to act in the public interest to ensure that a nonprofit corporation is not operated for private gain. Although the business judgment rule is applicable to nonprofit corporations, it has no application to this case. While the rule reflects a sound judicial policy of declining to substitute a court's judgment for that of a corporation's directors when they have acted in good faith and in furtherance of corporate purposes, that policy has no application to CCFS when it abandoned its purpose and pursued private, rather than public, interests.

Conclusion

After careful consideration of the record, we have determined that the trial court was correct in granting summary judgment for the Attorney General, appointing a receiver, and ordering the dissolution of CCFS. Therefore, we affirm the decision of the trial court and remand the case for further proceedings consistent with this opinion.

OFFICE OF THE ATTORNEY GENERAL OF COLUMBIA

NEWS RELEASE NO. 16-2012, JULY 12

ATTORNEY GENERAL ANNOUNCES INTENT TO PROPOSE COLUMBIA NONPROFIT CORPORATION LEGISLATION

Springfield — Attorney General of Columbia Michael Allen O'Pake today announced his intent to propose legislation relating to Columbia nonprofit corporations.

Background

The American Competitiveness and Corporate Accountability Act of 2002, commonly known as the Sarbanes-Oxley Act, was passed by Congress in response to the corporate and accounting scandals of Enron, World Com, Arthur Andersen, and others. The law, whose purpose is to rebuild public trust in America's corporate sector, requires that publicly traded companies adhere to new governance standards that increase board members' roles in overseeing financial transactions and auditing procedures.

Virtually untouched by Sarbanes-Oxley is the fastest growing sector of the corporate culture, the nonprofit corporation. Explosive growth of the nonprofit sector along with significant expansion into commercial activities have transformed the typical not-for-profit from a charity managing a modest perpetual fund into a modern enterprise subject to the management demands and market forces of a complex business. Columbia, home to thousands of nonprofits, has more than 3,500 with annual revenue in excess of $1 million. The revenue sources of Columbia nonprofits in 2008 were 48% fees and charges, 34% philanthropy, and 18% public funds.

Nonprofits account for a significant portion of the Columbia economy and many of our citizens are dependent on these public mutual benefit organizations. Maintaining the financial strength of these corporations is critical to the State. Financial integrity is essential to the financial soundness of nonprofits. Critch Rating recently wrote, "Nonprofit companies found to have exceptionally weak corporate governance or disclosure practices could face a downgrade in their tax-exempt bond rating or other

negative financial rating action, while those with very strong practices might warrant a special or favorable mention in the credit analysis."

Key Provisions

The Columbia Nonprofit Accountability Act is a comprehensive plan for nonprofits with $3 million in assets or $1 million in gross revenue per year. The legislation addresses the certification of financial information; the creation of executive and audit committees; and controls on business transactions with directors and officers.

Certification of Financial Information

The key officers of affected nonprofits (the CEO and CFO) will be required to verify the annual report and related documents. In addition to certifying the financial report is fairly presented, these officers must verify that there are no material omissions or misstatements in the annual report; that they personally have reviewed the nonprofit's internal controls and found them effective; and that any concerns about misstatements, fraud or the internal controls have been disclosed to the nonprofit's audit committee and the external auditors.

Executive and Audit Committees

A nonprofit corporation with a board of directors consisting of 15 or more members will be required to establish an executive committee consisting of at least three directors to facilitate the exercise of effective board oversight.

The required audit committee will be directly responsible for appointment, compensation and oversight of the nonprofit's external and independent accountant who will prepare the annual audit and related financial reports. The audit committee also will be required to establish procedures to receive and review complaints about financial and related affairs, including anonymous complaints from the staff of the nonprofit corporation. The audit committee must include at least one independent director with financial expertise.

The audit committee must meet annually with the external and independent auditor outside the presence of the nonprofit corporation's officers. Finally, the lead partner of the company's auditing firm must be changed at least every five years.

Each member of a nonprofit corporation's audit committee will be required to be an "independent" director. Independence will be defined as not being a member of management and not receiving compensation from the company as a consultant for other professional services (although service on the board may be compensated). A company also will be required to disclose if it has a "financial expert" on the audit committee. If the committee does not have such an expert the company must provide an explanation for its decision. While a company's directors have the right to establish specific qualifications for a "financial expert," the Act will set forth that a company should look to an individual's education and experience as a public accountant, auditor, or principal accounting officer. Key responsibilities of the audit committee are direct control of hiring, setting the compensation for and overseeing the activities of the company's outside auditing firm.

Business Transactions with Directors and Officers

Current Columbia law allows nonprofit corporations to enter into business or financial transactions with directors or officers as long as the transactions are fair and reasonable to the company. Such transactions still will be permitted. However, the Attorney General will have express authority to challenge such transactions, and the burden will be on the corporation to establish fairness and reasonableness based on several factors, including cost and the quality of the services or products being provided.

This rule will apply to transactions with individual directors and officers and to transactions with any entity if a director or officer of the nonprofit corporation is also a director or officer of the other entity. Any director who approves a transaction that is determined not to be fair and reasonable, as well as the director or officer who enters into the transaction with the corporation, will be subject to financial penalties.

A transaction will be presumed to be fair and reasonable if (1) it is approved in advance by the board of directors; (2) all terms of the deal are disclosed to the board in advance; (3) comparability data is obtained and relied upon; and (4) the basis for the board's decision is documented.

For more information, please contact Gary Dimmick at 555.659.5959.

- # -

PT - A

ANSWER 1

To: Luan Wan

From: Applicant

RE: CLEF, Inc. - Corporative Governance Review

Summary

College Loan Equity Fund (CLEF) is a nonprofit student loan organization, whose mission is to help finance the education of a broad range of students. CLEF has a special commitment to providing loans to students in financial need. Although CLEF began as a small family business, it has grown considerably in size and now holds assets of $5 billion. However, its practices have not evolved to keep pace with its growth.

The new CEO is concerned that the five specific practices enumerated below may expose individual directors and the corporation itself to liability. This memo will consider potential liability of individual officers and directors as well as the corporation itself under both existing and proposed law, and suggest modifications that will protect all parties from liability should the new law go into effect. These modifications will try to take into account the CEO's concern that the current culture of the Board may itself be an impediment to compliance. It is likely that the best way to present such changes to avoid resistance from current management will be to frame them in the context of the recent changes to CLEF and recent developments in the law.

1. Engagement of an outside accountant

CLEF currently receives an annual accounting report from Metzger Associates. The principal in Metzger Associates is Sue Metzger, the first cousin of Melvin Metzger who is the founder of CLEF and currently sits on its Board. Metzger Associates has served

as CLEF's accountant for the past 13 years. Metzger Associates only charges half as much as a larger accounting firm would, but the reports it provides do not comply with GAAP standards and are not as in-depth as those that financial institutions usually obtain.

In addition, the Board lacks a separate audit committee. It contains no financial experts. Five of the Board members (Metzger and four of his closest friends) are effectively permanent because there is no limit on the number of terms they may serve and they keep being reelected. Three of the Board members must be Presidents of the Humanist Group of Colleges, whose students are a target of CLEF's lending. The rotating directors tend to defer to the directors that have been there longer.

Problems with this practice under existing law

Duty of Loyalty

Directors owe a duty of loyalty to the corporation under current law. Section 4832 of the Columbia Nonprofit Corporation Code prohibits transactions in which a director or officer of the corporation has a direct or indirect interest. Such a transaction can be voided by the corporation and expose the director to liability unless it was fair at the time it was entered into or it was approved by the Board or a committee thereof after a full disclosure of the material facts. In order to approve a conflict of interest transaction, a majority of the directors who have no direct or indirect interest in the transaction must affirmatively vote to approve it. Such a vote removes the voidability and personal liability for the transaction. However, directors must comply with their fiduciary duties in voting. A director who votes in violation of § 4830 (Duty of Care, discussed below) is personally liable to the corporation.

Here, a conflict exists because Melvin's first cousin, Sue, has been benefitting from serving as CLEF's accountant for the past 13 years. This exposes Melvin to liability for

approving this transaction and means that the Board can void this year's agreement with her.

Melvin will argue that the transaction is fair because Sue's firm charges much less than a major national firm would. He will also argue that the Board of Directors approved it unanimously at the October 5, 2011 meeting, based on the fact that Sue understands CLEF's culture and goals. He will say that the Board knew that Sue was his cousin when it approved this transaction and it knew the quality of her work because of the history of dealing between the two entities.

This situation is not unlike that in Smith where the company invested substantial sums in a bank in which Emily Madison (the Director and Board Chair of a nonprofit), her family, and another member of the Board had an interest. There, the court held that the transaction demonstrated a disregard for the need to protect the nonprofit's assets and to avoid benefitting insiders. One of the Board members testified that it would have been "unkind" for the nonprofit not to patronize the business of a Board member who was giving her time as a volunteer. However, this logic misses the point highlighted in Smith, which is that the purpose of a nonprofit is not to benefit the individual directors but to accomplish the nonprofit's public purpose.

It is impossible to determine whether this transaction is fair because it does not seem that the Board investigated any other options. It just approved hiring Sue again without discussion. The fact that the Metzger Associate reports are not as detailed or in-depth as what would generally be provided to an entity like CLEF is also a matter of concern. The statement that Sue is "part of the family" suggests that the deal was made to benefit someone that the Board members like, and not because it was in the interest of the organization's mission. Thus, this transaction exposes Melvin Metzger to liability for a conflict of interest and may be voided by the Board, unless the Board voted to approve it.

Here, the Board voted unanimously to approve it. Only Melvin is interested, and thus a disinterested majority approved the transaction. This means that the transaction is

probably not voidable and Melvin is not subject to personal liability for a violation of the Duty of Loyalty. However, if the directors approved this transaction in violation of their Duty of Care, they may still be held personally liable, as discussed below.

Duty of Care

Directors of nonprofits owe a duty to the corporation to perform their duties in good faith and in a manner they believe to be in the best interest of the corporation, exercising the care and reasonable inquiry that an ordinarily prudent person would use in a similar situation. If directors exercise such care, then the Business Judgment Rule insulates them from liability for good faith mistakes of judgment or decisions that turn out poorly through no fault of their own. If they are acting in good faith, they may rely on reasonable reports of officers, employees, counsel, or committee of the Board in making their decisions.

In Smith, the court held that the directors violated their duty of care when they leased space from Emily Madison without making any attempt to inquire about other space or compare rental amounts. Again, that situation was more extreme because Ms. Madison changed the lease terms and kept increasing the amount of space being leased. However, the principle is the same: failing to inquire sufficiently into the background and fairness of a transaction can expose directors to personal liability.

Here, it seems that the directors did not live up to their duty of care because they did not consider any alternatives when deciding to retain Metzger Associates once again. The motion was made, Sue's personal qualities were highlighted, and the motion was unanimously approved without discussion. No reports or materials from employees or committees were consulted. In addition, in his interview, Mr. Conway stated that the five directors from academia tend in general to defer to the five directors who have been on the Board longer because the new directors lack the necessary expertise. It is possible that this is an example of such behavior, which would be a violation of the directors' duty of care.

The directors would argue that they should be protected by the Business Judgment Rule because they were acting in good faith in the best interest of CLEF by retaining someone who had loyally served for 12 years as their accountant and whose work they knew. They will say they have no obligation under current law to investigate other alternatives if they are pleased with how things stand.

However, this argument is unlikely to hold up in case of litigation. The court held in Smith that the Business Judgment Rule does not apply where directors have an interest in the transaction or made an uninformed decision. Both factors are true here: Metzger had an interest in the decision and the other directors were uninformed and did not discuss at all the merits of the decision. As stated in § 4832, approving a conflict of interest transaction without fully complying with the duty to make a reasonable inquiry as required by the circumstances is a violation of the Duty of Care and exposes a director to personal liability.

In sum, the directors have acted unreasonably by failing for over a decade to even consider whether Metzger Associates is providing adequate accounting services. The needs of CLEF have changed drastically over time. The directors' duties are not to be kind to Sue but to make sure that its accounting complies with best practices and provides the investors the information they need. It is likely the directors have breached their duty of care. This means they are personally liable to the corporation for damages.

Potential problems under the proposed Columbia Nonprofit Accountability Act

The Columbia Nonprofit Accountability Act will apply to nonprofits with assets of $3 million, and thus CLEF will fall within its purview. Under the proposed CNAA, a nonprofit with a board of 15 or more members must have an audit committee of at least 3 independent directors (i.e. directors with no management role at the corporation or compensated consulting position). It must also include at least one independent director with financial expertise, which should be based on education and experience in the field of accounting. The audit committee will be responsible for hiring an external accounting

firm with whom it will meet separate from the rest of the Board at least once a year. It must also have a procedure for receiving complaints about the corporation's finances. Finally, the lead partner of the company's auditing firm must change every five years.

CLEF is clearly not in compliance with any of the required provisions under the proposed CNAA.

Suggested Changes

It seems that CLEF cannot void its contract with Metzger Associates. It could consider breaking its contract and paying damages, but that is probably not in its best interest. However, when the contract is up for renegotiation, the Board should give serious consideration to finding a new accounting firm. The Board should use due care to examine all the options for other firms it could hire and contract with a firm to obtain a full, in-depth analysis of its finances in compliance with GAAP.

Breaking its ties with Metzger Associates will doubtless be difficult and might cause a rift in the Board. One way to approach this is by suggesting that CLEF come into compliance with CNAA now, since the legislation is likely to pass. That provides a more neutral explanation for the need to find a new firm. By setting up an audit committee of independent directors, including a financial expert, CLEF will be able to meet its Duty of Care. It will also benefit from having a financial expert on the Board.

2. Execution of a lease of corporate facilities

Currently, CLEF is leasing space from Center City Realty (CCR), one of whose partners is a Board member of CLEF (as well as a college classmate of Melvin). CLEF also hired Center City to be the general contractor for renovating the facilities.

Problems with this practice under existing law

Duty of Loyalty

Same rule as above.

This also appears to be a conflict of interest transaction under § 4832 because one of the CLEF Board members is a partner of the CCR.

In Smith, the court held that the Duty of Loyalty was breached when a Director purchased property and then leased it back to the corporation. This transaction was particularly problematic because the director charged the corporation "prorated back rent" that it clearly did not owe. In addition, the court noted that Board members could not explain how this transaction was in the corporation's best interest, suggesting that it was truly unfair.

Here, we do not have enough information to evaluate whether or not the transaction is fair, since we do not know how much real estate would have cost if purchased elsewhere. However, the motion was seconded by the interested director (Bernie Baugh). Although the Board then unanimously approved it, this approval is only valid if all the material facts were disclosed, and there is no evidence that they were. If they were, then the transaction will not be voidable since it was approved by a disinterested majority of the Board. If not, then Mr. Baugh would be subject to liability for the transaction and the corporation could void it.

Duty of Care
Same rule as above.

As in Smith, leasing property from a director (or a director's company) without making any attempt to inquire about the rate of property generally or whether other contractors are available to do the work shows a lack of care on the part of the directors. Here, the only information that the Board considered was a Metzger report that this amount was within the facilities budget. This might be evidence of fairness but it is not conclusive. It

is still possible that there were much better spaces out there that were cheaper or more suited to CLEF's needs.

In addition, the Business Judgment Rule will provide no protection for the same reasons discussed with respect to point (1).
In conclusion, the failure to make any inquiry into the existence of such spaces constitutes a breach of the Duty of Care that would expose all the directors that approved the transaction in violation of this duty to personal liability.

Potential problems under the proposed Columbia Nonprofit Accountability Act

Under the NCAA, the Attorney General will have the authority to challenge transactions between corporations and their officers and directors, and the burden will be on the corporation to establish fairness and reasonableness based on the cost and quality of services or goods being provided. This rule will apply when a director or officer of a nonprofit is also the director or officer of another entity with which the nonprofit is transacting. Any director who approves an unfair transaction will be subject to financial penalties. Obtaining comparability data is necessary to prevent liability, and the Board must document the basis for its decision.

This transaction would not meet the above requirements because the Board did not obtain comparability data and did not document its decision.
Suggested Changes

This is a long-term lease (ten years), and if the corporation cannot void it, it can consider breaking the lease. Again, however, this might not be in its best interest.

Once the lease expires, however, it should consider all its options before it decides to renew. The Board should thoroughly investigate other available space and consider their cost and suitability to CLEF's needs. It should document all of its findings, disclose

all of the findings to the Board, and then the Board should approve the transaction in advance on the basis of the findings.

Again, Bernie may be offended if the corporation decides not to renew its lease. However, presenting this change as a formal necessity under the new law should smooth the transition. It is possible that the lease from Bernie is entirely fair and in the corporation's best interest; but that can only be determined by doing a full investigation into the available options.

3. Purchase of corporate insurance

The CLEF Board just adopted a motion to purchase insurance from a company of which a CLEF Board member is a principal. The insurance will cost 10% less than the premium it would have to pay to renew with its current provider.

Problems with this practice under existing law

Duty of Loyalty

Same rule as above.

This situation is similar to that discussed above, where the company is leasing property from a Board member's company.

Since a director has an interest in the insurance company, the transaction is only permissible if it’s fair or if the Board approves it in advance based on full disclosure of the material information.

Here, there is a stronger case that it is fair, because the director is offering a 10% discount for identical coverage. The Board adopted the provision after he stated that offer. It is less likely that this decision will expose the directors to liability because the

new policy represents a substantial discount from the previous one. In addition, the motion was approved by the Board after hearing the facts. Although we don't have the numbers of who voted for and against it, it was probably approved by a disinterested majority, since only Mr. Morgan had an interest in it.

Thus, it is unlikely that the Board or CLEF will be liable for this transaction; even though it is a transaction with an insider, it appears to be substantively fair and was adopted after the facts were disclosed to the Board.

Duty of Care

Same rule as above.

Here, the directors at least know that they would be getting the same coverage for less money than their current policy. They can thus make a decent argument that a reasonable person in their circumstances would accept the director's offer to buy identical coverage for 10% less.

In Smith, there is no indication that the directors considered any other options before leasing real estate from a director and investing in her bank.

In contrast, here CLEF had a policy with one insurer and the rates are becoming quite expensive. In response, it has adopted the same coverage at a lower rate. That does not seem to be a breach of the duty of care.

It is unlikely that this decision would expose CLEF or its directors to liability.

Potential problems under the proposed Columbia Nonprofit Accountability Act

This decision would nonetheless be vulnerable under the higher standards of the NCAA. That legislation would require the Board to obtain comparability data and

document the basis of its decision, since one of its directors is a principal of the insurance corporation.

Here, although the Board did compare the price of its current policy, it's not clear that constitutes "comparability data." The Attorney General might intend something more robust, such as charts or tables of the standard rate across the industry. In addition, the only documentation of this decision is the Board minutes -- there are no other reports that were put together.

To be safe, the Board should consider obtaining additional data to support this decision and documenting its decision-making process more fully.

4. Guaranty of the mortgage of the former CEO

The Board agreed to guaranty the mortgage of its former CEO, which was made by a bank that one of the Board members is the Vice President of.

Problems with this practice under existing law

Violation of § 4858

Under § 4858, nonprofits are specifically prohibited from guaranteeing the obligation of a director or officer of the corporation. That is because the tax exemptions and other benefits received from the government are to be used only to advance the public purpose of the corporation and not to accrue to the personal benefit of its officers and directors. (Smith)

Here, guaranteeing Mr. Johnson's mortgage is in direct conflict with this provision. Thus, the corporation and the directors that approved it are liable for this transaction.

Duty of Loyalty

Same rule as above.

Here, this transaction is problematic in two ways: first, the Board is guaranteeing the personal loan of a new officer. This seems like a benefit that is accruing solely to a private individual, which is not in line with CLEF's mission. In addition, it might be problematic that the loan is being made by a bank where one of the Board members is Vice President.
In Smith, the court held the company liable for Ms. Madison's practice of using corporate funds for personal expenses for herself and her family, such as vacations to London and Hawaii. Ms. Madison never repaid the company, even though she did not conduct business on these trips.

Here, the directors would argue that the situation is different than in Smith, because CLEF is not just giving money to the new CEO, it is merely lending it to him, and it is doing so in order for him to be able to come and work at CLEF. It will argue that this is part of the package it is negotiating with him and a reasonable form of compensation. Housing is expensive and it is hard to get a mortgage in this climate. If Mr. Johnson cannot find housing, he cannot come and work for CLEF. And in any case, CLEF is unlikely to have to pay any money on the loan -- it is merely serving as a guarantor.

Further, Mr. Johnson will argue that he was not involved in making this decision. The Board decided this in his absence, in order to secure his appointment. He did not make this decision as an interested board member.

In addition, Mr. Niedwicki will argue that there is no conflict of interest because his bank is not engaged in a transaction with CLEF, but with Mr. Johnson, and CLEF was merely a guarantor.

However, as the court stressed in Smith, the bedrock inquiry is whether the nonprofit was operated for a public purpose or rather for private benefit of corporate insiders.

Although it was surely important for the company to secure the appointment of Mr. Johnson, it is hard to see how it was in the company's best interests to guarantee his personal mortgage. This seems like it provided for a large benefit for Mr. Johnson but there is no evidence that this was necessary to secure his appointment or that he was the person most qualified for the job. The fact that Mr. Niedwicki also had an interest in the transaction clouds matters further. The Board also approved this transaction without any information about Mr. Johnson's financial history or the likelihood that he would default on his mortgage.

Thus, it is likely that this transaction constituted a breach of the duty of loyalty by Mr. Johnson (who should have rejected the agreement), Mr. Niedwicki, and the other Board members who approved it.

Duty of Care

Same rule as above.

As stated above, the directors approved this without considering Mr. Johnson's credit history or other factors that would help determine whether this transaction was really in the interest of the company. A reasonable director acting in their circumstances would be unlikely to approve this kind of compensation for a new CEO because it exposed the corporation to liability that did not advance its mission of financing student education.

Thus, it is also likely a breach of the duty of care.

Potential problems under the proposed Columbia Nonprofit Accountability Act

Under the NCAA, the corporation would have to show that this transaction was fair and reasonable. It is unlikely that it would be able to do so, in part because there is no comparability data or documentation of the decision, but also because it is unclear how

this decision advanced the corporation's mission to provide funding for student education.

Suggested changes

It is unclear whether CLEF is still the guarantor of Mr. Johnson's mortgage or if the mortgage has been paid off. However, since this transaction violated the directors' duties of loyalty and care, the corporation likely has the power to unwind this transaction under § 4832. If so, it should pursue this option so that the corporation is no longer liable for Mr. Johnson' personal debt, especially since he is no longer the CEO of the corporation and so the corporation is receiving absolutely no benefit from maintaining this liability.

5. Failure to share an internal report with the Board of Directors and with loan fund investors

The Director of Strategic Planning (Wendy Sims) prepared an internal report showing that lucrative white-collar employment is declining and more college graduates are entering secondary and professional school instead. Because of these changes, the default rate for student loans is likely to rise from six percent to thirteen percent of CLEF's portfolio over time, and the loans that are paid back may be in deferral for a longer period of time before being repaid. These changes will alter CLEF's expected revenue in the next few years, which will in turn hinder CLEF's ability to attract investors.

Mr. Johnson (the former CEO) never sent this report to the Board and the report was not disclosed to investors during the last investment offering.

Problems with this practice under existing law

Duty of Care

Same rule as above.

Mr. Johnson likely violated his duty of care to the corporation by failing to share this with the Board. He might argue that this information would be harmful to the business and would decrease investment, and that CLEF needs to keep lending to students to fulfill its mission and thus can't afford to lose investment dollars.

However, by withholding this information from the Board, the CEO was not acting in the corporation's best interest. He was preventing the Board from making fully informed decisions about the health and prospects of CLEF.

He is likely to be personally liable to the corporation for the breach of this duty.

Potential problems under the proposed Columbia Nonprofit Accountability Act
Under the CNAA, the CEO and CFO of a nonprofit will be required to verify the annual report and related publications. This certification must mean that there are no material omissions or misstatements, that the officers have personally reviewed the internal controls, and that any concerns have been disclosed to the audit committee and the external auditors.

Suggested Changes

In order to comply with this provision, Mr. Conway should start by disclosing this information to the Board, especially the independent audit committee. In addition, Mr. Conway must review the current financial statements to ensure that they reflect the information in this report, since it is material to investors. The fact that it is material is evident from the concern expressed at the end of the report that widespread knowledge of this information would prompt disinvestment in CLEF.

Mr. Conway should also take steps to insure that there are internal controls in place to prevent information like this from being covered up such that the corporation releases financial statements to investors that contain material omissions.

Conclusion

A number of current practices, including the retention of an accounting firm that does not comply with GAAP and that is run by the first cousin of a Board member; leasing space from a Board member's company; buying insurance from a Board member's company; and guaranteeing the mortgage of a former CEO; as well as withholding potentially material information from investors, are at least potential violations of certain directors' duties of care and loyalty. Directors may be individually liable for such violations, especially where they voted to approve transactions without using due diligence to evaluate their fairness in advance.

Even where these transactions have been approved by a Board vote relieving individual directors of liability for their conflicts of interest, the tendency of the Board to rubber-stamp so many of these transactions without making significant inquiry into them suggests that the corporation is being run more for the benefit of the insiders than to advance its underlying mission of funding higher education. This mission will be especially ill-served if CLEF continues to withhold important financial information from investors, hindering their ability to make informed decisions about investing in the corporation. Continuing these practices expose the corporation to the possibility that the Attorney General will bring an action to dissolve it based on a finding that it has abandoned its charitable purpose, as in Smith.

Furthermore, if the proposed CNAA is passed, the composition of the Board will have to be altered to include an audit committee, the CEO will have to certify the financial results, and the Board will have to use comparability data and document its decisions whenever there is a conflict of interest transaction.

The corporation should begin making these changes now so that it will be in full compliance when the CNAA is passed.

PT - A

ANSWER 2

To: Luan Wan

From: Applicant:

Re: CLEF Inc.-- Corporate Governance Review

You have asked me to prepare an objective memo to determine whether the following actions of College Loan Equity Fund (CLEF) violate Columbia Law or the Attorney General's proposed requirements:

1. Engagement of an outside accountant;
2. Execution of a lease of corporate facilities;
3. Purchase of corporate insurance;
4. Guaranty of the mortgage of the former CEO; and
5. Failure to share an internal report with the Board of Directors and with loan fund investors.

Each action will be analyzed separately below.

Engagement of an outside accountant

The appointment of Metzger Associates as CLEF's accounting firm may violate the Columbia Nonprofit Corporation Code Section 4832. A conflict of interest transaction is a transaction with the corporation in which a director or officer of the corporation has a direct or indirect interest.

Conflict of Interest

According to Conway, CLEF has used a local CPA firm, Metzger Associates, to conduct its financial oversight since close to the inception of the company. The Founder of CLEF, Melville Metzger, is the cousin of the principal for the CPA firm, Sue Metzger. Thus, Melville likely has an indirect conflict of interest as CLEF's transaction with this

accounting firm gives him an indirect benefit due to his familial relationship with the principal of the company.

Any conflict of interest transaction is voidable by the corporation and may be the basis for liability of a director of officer, unless the transaction was fair at the time it was entered into or is approved. To be approved, the material facts of the transaction and the director's interest must have been disclosed or known to the board of directors and the board must have authorized, approved or ratified the transaction. Approval by the board requires the affirmative vote of a majority of the directors who have no direct or indirect interest in the transaction. The AG plan would require the approval to occur before the transaction was entered into.

Here, the Board member nominating the renewal of the contract was not Melville. Furthermore, the entire board was aware of Melville's relationship with Sue as the mover stated as much and no objections were made as to the motion and was approved unanimously. It is not clear from the Board Minutes whether Melville voted on this motion. If he did, then he violated his duty of loyalty and can be personally liable under the Columbia Law.

Duty of Care

The Columbia Nonprofit Corporation Code section 4830 requires that directors perform their duties in good faith and in a manner such that she believes to be in the best interests of the nonprofit corporation and its members. This duty requires them to make reasonable inquiries that an ordinarily prudent person in a like position would use under the circumstances.

It appears that the Board of Directors may be in violation of this section of Columbia law by continuing to employ Metzger Associates when they know that the company does not perform the type of audits a corporation like CLEF requires. Indeed, if a national accounting firm is brought in and the company conducts rigorous in-depth SOX type-

audits, CLEF will have to pay almost twice of what it is currently paying Metzger. This differential in price should give the Directors notice that they may not be receiving proper services. Further, Metzger Associates does not conform to the Generally Accepted Accounting principles when performing traditional audits. If the accounting firm is not performing appropriate audits then it may be leaving the entity financially exposed to undetected liabilities. On October 2011, the board adopted a motion to reappoint Metzger Associates as CLEF's public accountants for the 13th year. This adoption is likely a breach of their duty of care.

Business Judgment Rule

The Board may be able to assert the Business Judgment Rule as a defense to allegations of breaches of Duty of Care. The Business judgment rule is a presumption that corporate directors, when making a business decision, act on an informed basis, in good faith, and with the honest belief that their decision is in the corporation's best interest. Thus, the directors could argue that they believed to be acting in good faith as they were saving the nonprofit a lot of money by choosing to hire Metzger Accounting. Indeed, the movant of the renewal informed the board that the Accounting firm's principal understood the goals and values of CLEF, and thus they could argue that they believed the company was the best suited for the job, especially since they had employed it for the past 12 years.

However, the rule does not apply when the director or officer has an interest in the decision or did not actually make a decision, or made an uninformed decision. There are concerns that ten of the board members defer to Melville and his friends on the Board when making decisions. If this occurred here, then it is likely that the Business Judgment rule would not apply to protect them because they did not make an informed decision by deferring judgment to possibly interested parties.

Further, the Business Judgment Rule would only apply where the officers or directors face personal liability or where the corporation seeks to void a decision of or transaction

approved by the board. Thus, if the Attorney General was suing to dissolve the corporation based on this action, then the Business Judgment rule would be of no defense because it would be inapplicable.

Duty of Care in Relying on Metzger Accounting

Furthermore, the directors may also be liable for passively accepting Metzger's recommendations without inquiry.

So long as the director acts in good faith, after reasonable inquiry when need is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted, a director shall be entitled to rely on information, opinion, reports or statements, including financial statements presented by independent accountants as to matters the director believes to be within such person's professional or expert competence.

Since there is reason to suspect that Metzger's services are not reliable or based on expert competence as they do not perform traditional accounting measures nor do they use the appropriate accounting methods for an entity the size of CLEF, the CFO and CEO cannot reasonably rely on the accounting firm's statements. Furthermore, while the CFO and the CEO are always present when Metzger presents any report to the Board, according to Cowan the CFO is generally passive in reviewing Metzger's accounting advice. Simply signing off on the accounting firm's advice will subject the CEO, CFO, and Directors to liability because the firm's competence is questionable and thus they may be failing to exercise due care.

Thus, if CLEF continues to employ them and not question or request a change in their practices, they may be liable for choosing an inadequate accounting firm and relying on the firm's recommendations.

Other recommendations regarding finances and accounting

According to the Attorney General's announcement, his proposed regulations would affect nonprofit's with $3 million in assets or $1 million in gross revenue per year. Since CLEF is a multibillion dollar company, the proposal will affect it. The proposal requires a nonprofit with a board consisting of 15 or more members to have an executive committee consisting of at least three directors to facilitate the exercise of effective board oversight. This audit committee would be directly responsible for appointing, compensating, and overseeing the nonprofit's external and independent accountant. The audit committee must include at least one independent director with financial expertise. And the lead partner of the company's auditing firm must be changed at least every five years. Each of its members must be an independent director.

CLEF has a fifteen member board of directors. But, CLEF has no separate audit committee. Thus, per the Attorney General's announcement CLEF will have to create one. Although an informal executive committee composed of Melvin Metzger, Bernie Baugh, and Jane Cross function on behalf of the Board in the interim between quarterly meetings, the committee must be selected by the board. Further, the committee would be directly responsible for the independent accounting firm. Since the firm selected is that owned by Melvin's cousin, he would not be able to serve on the committee because all members must be independent directors. Furthermore, the committee must have at least one member with financial expertise. Currently, the Board does not have many members with financial expertise if any. And those in the de facto auditing committee do not have such experience either. If the Attorney General's proposal is implemented, then CLEF will have to create an auditing committee with new members. Furthermore, the company's auditing team must be changed at least every five years. Thus, Melvin will not be able to stay on the committee every year in perpetuity.

Execution of a lease of corporate facilities

Conflict of interest transactions are subject to close scrutiny. Smith. A director or officer has such an interest if another entity in which the director or officer has a material interest is a party of the transaction of which the director or officer is a director or officer in the party to the transaction.

After expanding its services, CLEF doubled its employee numbers and thus found a larger space. CLEF signed a long-term lease for a vacant department store that was remodeled to accommodate the operations of CLEF. A member of the CLEF Board, Bernie Baugh, is a partner in Center City Realty, the company that owns the property and served as the general contractor for the renovation of the facilities. As a partner in Center City Realty, Bernie Baugh has a material interest in the entity and thus has a conflict of interest in the transaction.

The transaction is voidable by the corporation and may be the basis for liability of a director or officer, unless the transaction was fair at the time it was entered into or was approved in accordance with Section 4832. In Smith, the Court looked into whether the record indicates any attempt by the board to inquire about other space or compare rental amounts to ascertain whether the transaction would be fair. The lease and renovation was estimated to cost between $800,000 and 1 million, including all furniture, for a 80,000 square feet and large parking area property. There is no indication that the rates charged for the lease and renovation fall within the market value or that the rates were actually fair.

Here, it appears as though the material facts of the transaction were disclosed but the interests were not disclosed or known to the board of directors who authorized the transaction. Indeed, the board was notified that the property was vacant, had 80,000 square feet, and would cost $10 per square foot, and what the renovation costs were expected to be. The material terms were known by the Board. However, the Board minutes do not indicate that the Board was informed of Baugh's interest in Center City Realty. Thus, it was not validly adopted.

Even if the transaction were fair and was adopted by the nonprofit, Bernie Baugh has violated the Columbia law in that he voted for a transaction in which he had a direct conflict of interest. He seconded MS.Cross's motion to choose the Center City realty's

property as CLEF's new space and contractor. Thus, he is personally liable to the corporation.

Duty of Care

Under Columbia Law, The directors must exercise reasonable care that a prudent person in their position would exercise given the circumstances. A failure to act in the best interest of the nonprofit is a violation of Columbia law and subjects the directors to personal liability.

Here, the lease and renovation was estimated to cost between $800,000 and $1 million, including all furniture, for a 80,000 square feet and large parking area property. In Smith, the Court looked into whether the record indicates any attempt by the board to inquire about other space or compare rental amounts to ascertain whether the transaction would be fair. According to their accounting firm, the figures were within the facilities budget adopted earlier by the Board. However, there was no assessment regarding the market value for the property or whether the renovation costs were reasonable. Whether the costs fall within their budget does not help in that the real cost of the property may be substantially lower than the budgeted amount. Since there is no indicating that the directors attempted to inquire as to the fairness of the transaction, the directors may have all breached their duty of care. As mentioned above, the business judgment rule would not protect them as they made the decision uninformed and thus could not have acted in good faith or in best interest of the company. Therefore, this transaction violated Columbia Law.

Attorney General's potential challenge

Furthermore, under the Attorney General's plan, even if the transactions are fair and reasonable, the Attorney General will have express authority to challenge it. Such a challenge will place the burden on the corporation to establish fairness and reasonableness based on several factors, including costs and quality of the services

that Cooper City Insurance Consortium will provide. A transaction will be presumed to be fair and reasonable if (1) it is approved in advance by the board of directors; (2) all terms of the deal are disclosed to the board in advance; (3) comparability data is obtained and relied upon; and (4) the basis of the board's decision is documented.

Here, the directors will be unable to meet the presumption because the conflict was not disclosed, no comparability data was obtained and relied upon and the documentation of the vote does not evidence the basis of the decision. Indeed, the motion passed unanimously with no discussions or questions. Thus, if the Attorney general challenges this transaction, the Board will have a heavy burden in showing that the transaction was fair and reasonable. If they fail to meet the burden of proof, then each Director who voted for the transaction will be personally liable to the nonprofit.

Purchase of corporate insurance

Conflict of interest transactions are subject to close scrutiny. Smith. A director or officer has such an interest if another entity in which the director or officer has a material interest is a party of the transaction of which the director or officer is a director or officer in the party to the transaction. The transaction will be valid if all material terms and interest were disclosed to the board and the transaction is fair.

Here, the conversation regarding the insurance premium occurred in front of the entire board. The board was considering renewing their existing insurance policy. Board member John Morgan, a principal in the Cooper City Insurance Consortium, stated he could provide the company with coverage at a price at least 10 percent below the amount quoted for renewal of CLEF's insurance with Intercontinental Insurers. John Morgan has a material interest in the transaction as he was a principal in the Cooper City Insurance Consortium. However, this interest was disclosed to the Directors when he proposed the use of his insurance company. The material terms were disclosed as he said that he could provide the same insurance for at least ten percent below the amount quoted. If the insurance company can in fact provide that amount and did so in

fact provide that discounted insurance rate, then the transaction is likely fair as it saves the CLEF money.

The Board's adoption of this insurance policy likely meets Columbia's law requirements to validly adopt a transaction that has a conflict of interest.

However, under the Attorney General's plan, even if the transactions are fair and reasonable, the Attorney General will have express authority to challenge it. Such a challenge will place the burden on the corporation to establish fairness and reasonableness based on several factors, including costs and quality of the services that Cooper City Insurance Consortium will provide. A transaction will be presumed to be fair and reasonable if (1) it is approved in advance by the board of directors; (2) all terms of the deal are disclosed to the board in advance; (3) comparability data is obtained and relied upon; and (4) the basis of the board's decision is documented.

Here, the directors will be unable to meet the presumption because while it was approved by a majority of the board, no comparability data was obtained and relied on. They made the decision based on what John Morgan said the company was willing to do. Thus, the Directors must be able to show that the terms of the contract are fair and reasonable and that the Cooper City Insurance policy is not inferior to the insurance they had with their other provider.

Guaranty of the mortgage of the former CEO

In Smith, the Columbia Supreme Court held that no pecuniary gain can inure to directors or officers of a nonprofit and there can be no direct or indirect distribution of income or profits to them. Under section 4858 of the Code, nonprofits are specifically prohibited from lending money to orguaranteeing the obligation of an officer of the corporation.

On October 19, 2007, Curtis Johnson, the individual CLEF sought as its CEO, requested a mortgage in the amount of $420,000 to purchase a house in Cooper City. Board Member Anthony Niedwicki, Executive Vice President of Cooper City Savings indicated that his bank would make the loan if CLEF would sign as a guarantor. The Board agreed to guaranty Mr. Johnson's mortgage. This guaranty was in direct violation of section 4858 of the code. Further, the guaranty on Johnson's home mortgage is likely an indirect distribution of income in that Johnson would not have accepted the position unless CLEF's securing a mortgage for him was a part of his offer of employment. Officers of nonprofits cannot receive an indirect distribution of income. Thus, the agreement guaranty of the mortgage violated Columbia law.

Furthermore, Code section 4831 (A) (2) authorizes dissolution of a nonprofit corporation in a proceeding brought by a percentage of voting members upon proof that the corporate assets are being wasted or misapplied. If Johnson defaults on his mortgage and CLEF must pay for it, then its voting members may file suit to dissolve CLEF because a payment on suretyship contract would be a waste of the nonprofit's assets.

Failure to share an internal report with the Board of Directors and with loan fund investors

An officer owes the nonprofit a duty of care under Columbia Code section 4830. The director must perform his duties in good faith and in a manner such director believes to be in the best interests of the nonprofit corporation and its members and with such care as an ordinarily prudent person in a like position would use under similar circumstances. Conway found an internal report authored by the director of strategic planning that forecasts changes in the student loan market that could affect the company's liquidity. According to Conway, the report was never sent to the Board by his predecessor and it was not disclosed to potential investors in the last investment offering. This report indicated that the weakness in the white-collar job market nationwide would likely result in CLEF's student loan defaults rising from six to thirteen percent of the annual loan volume. Further, the increase in students applying for graduate school would mean

more undergraduate loans would be deferred for the duration of their graduate work, which would lead to a dip in the expected revenue for up to four years. The internal report specifically warns that "such a change in revenue may negatively affect our ability to attract investors in [CLEF's] next offerings." This information is of substantial importance to the Directors and loan fund investors as it will materially affect the decisions they make on behalf of the corporation.

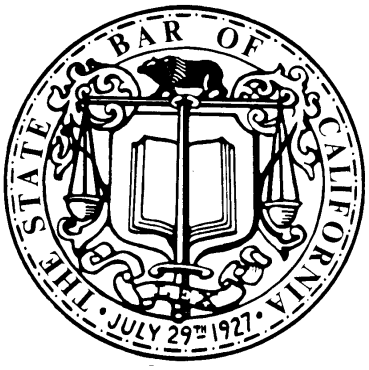
A reasonable officer would have disclosed this information to the board and to the loan fund investors to ensure candor and informed operations of the business. It is likely that the predecessor was interested in keeping this information away from the board and the investors because it hurts the outlook of CLEF's economy. While the former officer would argue that he was acting in his best interest of the nonprofit because the report was speculative or because publication of the report's contents would decrease investor support, these arguments would fail. In Smith, the court unequivocally states that the operation of a nonprofit is for the public good and not for the enrichment of those running it. By ignoring the information and not disclosing it to protect CLEF from losing investors or losing its creditworthiness or other economic credibility, the officer was acting against the main purpose of the nonprofit, which is to serve its public and thus breached his duty of care.

Attorney General Requirements of Reporting

Furthermore, the attorney general's proposal requires that key officers of affected nonprofits (the CEO and CFO) verify the annual report and related documents. The officers must certify that the financial report is fairly presented and that there are no material omission or misstatements in the annual reports. They must also verify that they have personally reviewed the nonprofit's internal controls and found them effective. Any concerns about misstatements or fraud must be disclosed to the nonprofit's audit committee and external auditors.

Here, Cowan's predecessor's actions would be in violation of the attorney general's proposal in that the statement contained a material omission or misstatement in the annual report because it did not include the projections of deferments and defaults that will affect CLEF's cash flow and the information was not disclosed to the Directors.

Going forward, if the Attorney General's proposal is adopted and enforced, the CEO and CFO must verify the annual reports and related documents. They must also certify the fair presentation of the documents. Failure to do so will subject the CFOs and CEOs to personal liability. Since CLEF currently has a deficiency in financial knowledge among its Directors and Officers, it is imperative that the CEO or CFO have such knowledge in order to properly review the financial reports and that a member of the auditing committee have.



Performance Test B

INSTRUCTIONS AND FILE

FLORES V. FALK

FILE

FLORES v. FALK

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.

Acri and Adams
Methuselah, Columbia

To: Applicant

From: Armond Acri

Date: July 26, 2012

Re: Dalia Flores v. Gary A. Falk

We have filed a legal malpractice action against attorney Gary Falk on behalf of our client Dalia Flores. Falk has filed a demurrer, claiming that the complaint fails to state a cause of action because Dalia was not his client and thus he owed her no duty.

Dalia's mother, María, had requested that Falk prepare a deed making Dalia the joint tenant in María's house. The deed was prepared by Falk and signed by María, but Falk did not record the deed for almost a year. María died before the deed was recorded. Dalia's brother challenged the validity of the deed in the probate of María's estate.

At the conclusion of the probate court proceeding, the court issued a tentative ruling, concluding that the circumstances did not establish that María had an immediate intent to convey the house to Dalia. Falk's failure to record the deed did not itself invalidate the deed. The probate court, however, concluded that Falk did not record the deed because Falk had doubts about Maria's intention to convey title to Dalia.

After the tentative ruling, we settled to avoid a final adverse decision on the merits, and there is no issue of collateral estoppel or issue preclusion. In the settlement, Dalia dropped her claim to exclusive title to the house, but was allowed to stay in the house for two years.

In this case we claim that Falk's professional negligence forced Dalia into settling the case and losing the property.

Please prepare our proposed memorandum of points and authorities in opposition to the demurrer following our attached guidelines. In anticipation of a demurrer, we incorporated into the complaint all the facts indicating professional malpractice. We have nothing to add. Thus, do not argue that we should be given leave to amend the complaint in order to make additional allegations.

LAW OFFICES OF
ACRI AND ADAMS

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 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 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 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.

SUPERIOR COURT OF THE STATE OF COLUMBIA

FOR THE COUNTY OF ANGELES

_____

Case No. 88888

DALIA FLORES, Plaintiff, COMPLAINT FOR

vs. LEGAL MALPRACTICE

GARY A. FALK, Defendant

_____

Plaintiff Dalia Flores alleges for cause of action against Defendant as follows:

1. Plaintiff is a resident of the County of Angeles, and the daughter of Maria Flores, deceased.

2. Defendant Gary A. Falk is and was an attorney licensed to practice law in Columbia and was practicing law in Angeles County, Columbia.

3. On or about October 1, 2007, Defendant was employed by Maria Flores to prepare and record a deed granting to Plaintiff present joint title to certain real property then owned in fee simple by Maria Flores. The property in question was the real property and house located in Angeles County.

4. Defendant undertook the engagement and represented that he possesses and would exercise that standard of skill, prudence, and diligence that members of the legal profession commonly possess and exercise.

5. Defendant owed a duty to Plaintiff to exercise said standard of skill, prudence, and diligence by reason of the fact that Plaintiff was the intended beneficiary of the undertaking Defendant agreed to carry out for Maria Flores.

6. Defendant breached said duty to Plaintiff by failing to timely record and deliver said deed as instructed by Maria Flores.

7. Maria Flores died on July 15, 2008, at which time Defendant had not carried out the instructions of Maria Flores to record and deliver said deed to Plaintiff. Defendant failed to record the grant deed until August 20, 2008, one month after Maria Flores' death and almost eleven months after the deed was executed and delivered to him.

8. Due to Defendant's negligence and breaches, Plaintiff’s brother Charles Flores was able to challenge Plaintiff's title to the real property and house in a probate

proceeding; and Plaintiff was forced to litigate the rights to the ownership of Maria Flores' property and house, litigation that would have been avoided but for Defendant's negligence in carrying out the instructions given to him.

9. The Estate of Maria Flores was probated under the rules of intestate succession, and during the probate proceedings, in which Plaintiff's title to the real property and residence was challenged, the probate court issued a tentative decision stating that the court intended to rule that Maria Flores did not have the present intent to deliver title to Plaintiff when she delivered the deed to Defendant.

10. In deciding that Maria Flores did not have the present intent to deliver title to Plaintiff when she delivered the deed to Defendant on October 1, 2007, the probate relied upon Defendant's almost eleven-month delay in properly recording the deed.

11. Attached hereto as Exhibit A and incorporated herein as if fully set forth herein as allegations of this complaint is a true copy of said tentative decision of the probate court. By this reference, Plaintiff avers only that the decision said what it said, and does not adopt the findings or conclusions stated therein.

12. As a result of said tentative decision, Plaintiff was forced to enter into a settlement of her rights in the Estate of Maria Flores, which settlement was detrimental to Plaintiff and resulted in the loss of the full value of the real property and residence, which Plaintiff would have received if Defendant had not been negligent in performing his duty to Plaintiff.

13. As a consequence of said breach of duty by Defendant, Plaintiff was deprived of the benefit of the real property and residence that Maria Flores intended should be conveyed to Plaintiff during Maria Flores's lifetime.

14. As a result, the real property and residence that Maria Flores intended to have been conveyed to Plaintiff remained in the Estate of Maria Flores, and, under the rules of intestate succession, the value of the real property and residence was distributed to Maria Flores's three children in equal shares.

15. But for the Defendant's negligence and breach of duty to Plaintiff, the real property and residence would have been conveyed in its entirety to Plaintiff. Said negligence and breach of duty was the actual and proximate cause of Plaintiff's loss.

16. Plaintiff suffered damages as a proximate result of Defendant's negligence, including:

a. The loss of Plaintiff's right to the entirety of her mother's home; instead of sole ownership of the real property and house, Plaintiff will receive only a one-third share of the value of the property and house, after it is sold;

b. Attorney's fees paid to Defendant; attorney's fees and costs incurred in the probate case; and other general and special damages as allowed under law.

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For the value of Plaintiff's loss according to proof.
2. For such other and proper relief as the Court may deem just and proper.

Armond Acri

Armond Acri

Attorney for Plaintiff

EXHIBIT A

Tentative Decision

ESTATE OF MARIA FLORES, Deceased.

Charles Flores, as Administrator and Petitioner v. Dalia Flores, Objector

Super.Ct. No. BP052304. March 26, 2009.

The Superior Court, Angeles County

Kathe Henry, Judge:

For purposes of clarity and not out of any disrespect, the Flores will be referred to by their first names.

Maria Flores (Maria) died on July 15, 2008. Thereafter, Maria's son, Charles Flores (Charles), was appointed personal representative of Maria's estate. Charles has petitioned this court to have decedent's daughter, Dalia Flores (Dalia), transfer to the estate a deed to decedent's home, which allegedly transferred title to Dalia.

Dalia filed objections to the petition. The objections alleged that Maria executed a deed on October 1, 2007, transferring all interest in the residence to a joint tenancy of herself and Dalia; upon Maria's death, title would pass to Dalia exclusively; and after executing the deed, Maria delivered it to Mr. Falk with instructions to have it recorded. The deed was not duly recorded until August 20, 2008, or after Maria's July 15, 2008 death.

We will describe the conflicting evidence in some detail. It is undisputed that in September and October, 2007, Maria was ill with gastric cancer and hospitalized. Maria had surgery on September 17, 2007, and a second one on September 26, 2007. On October 1, 2007, Maria was in the hospital recovering from surgery.

Testimony of Attorney Falk

On or before October 1, 2007, Maria called Gary A. Falk, a lawyer who had helped her in the past, and asked him to come to the hospital. Maria asked that he prepare a "deed as joint tenants." Mr. Falk agreed to do so. When Mr. Falk talked to Maria that day, it was the first time he had spoken to her about a deed of any kind.

Mr. Falk did not recall how much of her medical condition Maria disclosed to him. Mr. Falk did not recall in which hospital they met nor the time of day the meeting occurred. Mr. Falk appeared at the hospital alone. A nurse may have been in the room. Maria was confined to the bed and "seemed to be in a lot of pain." But Mr. Falk testified, "She seemed to have all her wits about her." According to Mr. Falk, she knew who he was and what he was there to do. Mr. Falk did not recall whether he knew she had just had an operation.

Mr. Falk acted as the attorney and notary public in the transaction. Maria signed the deed and signed the notary book. Mr. Falk testified that after he prepared the deed, he "believed Mrs. Flores was under the belief" that he would record the deed immediately. However, after Maria signed the deed, he did not file or record the deed:

“Q. Mr. Falk, just to be clear, the decedent asked you to record that deed?

A. Yes, she did.

Q. And she asked you to record that deed on the date of the execution of the documents?

A. Yes.

Q. October 1st, 2007?

A. Yes.

Q. And after you left the hospital at that time, did you ever receive any other instructions from the decedent regarding not recording the deed?

A. No, I did not.”

Mr. Falk testified he did not want to record the deed right away because Maria was in the hospital. Mr. Falk wanted to talk to her after she got out of the hospital to make sure that her wishes remained the same. Mr. Falk explained that he was “just being overly protective of [his] elderly client and because [he had] seen her in the hospital.” Mr. Falk believed that when clients were hospitalized, they were a little bit more concerned or worried and “may change their minds upon their release.”

“Q. Mr. Falk. If Mrs. Flores asked you to record the deed, why did you wait for over eight months before you did that?

A. I had intended to call her upon her release from the hospital just to make sure that that was - those were still her wishes, and I never did call her.

Q. And so when she called you, she said to you specifically she wanted to make a deed for her daughter, but yet, you didn't just do what she said?

A. Right. I wanted to know what her wishes were. And she said that she wanted her daughter to receive her property once she passed away.

Q. And were you diligent about following her wishes?

A. In terms of seeing that the property was transferred appropriately, I obviously wasn't diligent in recording the deed she had asked me to.”

The first time Mr. Falk thought of recording the deed was when Dalia called him in early June, 2008, and asked him for a copy of the recorded deed. Mr. Falk did not recall whether Dalia said Maria was in the hospital or deceased. He thought he was aware Maria's condition had changed for the worse. He did not ask if Maria was incapacitated nor to speak with her. Mr. Falk did not believe that he spoke with Maria after she signed the deed on October 1, 2007.

Thereafter, on June 15, 2008, Mr. Falk sent the documents to the county recorder's office to be recorded. The recorder's office did not record the deed because his notary stamp was smudged and illegible. The rejected deed was received in his office on June 22, 2008. He imprinted another stamp, and he sent the deed back for recordation. [The

cover letter resubmitting the deed was dated August 1, 2008.] Maria had died on July 15th.

Testimony of Dalia Flores

Dalia testified that Maria asked her to call Mr. Falk and ask him to come to the hospital. Dalia telephoned Mr. Falk a day or two before October 1, 2007. Dalia related to Mr. Falk that Maria wanted a power of attorney and a "joint tenancy will" prepared.

On October 1st Maria was in pain but "she was herself." Dalia did not recall whether Mr. Falk was there when she arrived or he came in while she was at the hospital. Dalia did not stay in the room during the entire time Mr. Falk was speaking to Maria. Dalia walked out and left them alone but returned. Dalia testified she saw Maria sign the deed or "a paper." And Dalia heard Maria instruct Mr. Falk to record the deed. Dalia also heard Mr. Falk say he would record it.

Prior to the meeting with Mr. Falk, Maria did not disclose to Dalia whom she desired to have title to the residence. Dalia said that she did not tell Mr. Falk whom Maria wanted to receive the house. Dalia told Mr. Falk that Maria wanted to talk to him about a power of attorney and the house. On the evening of October 1st, after Mr. Falk left, Maria told Dalia what she had done and about the deed, with joint title to Dalia. Dalia testified that the first time she saw the deed was when Mr. Falk sent it to her after it had been recorded.

Dalia testified that she lived with Maria all her life. Maria lived in the house with her daughters, Dalia and Brenda, and Brenda's son Donnie. Brenda had suffered a stroke, could not work, and had limited mobility. Maria paid the mortgage, taxes, and insurance on the house until she died; Dalia paid the mortgage on the subject property commencing on July 28, 2008; Dalia and Brenda paid the taxes; they started paying the taxes in November 2008; and Brenda paid the insurance.

Testimony of Charles Flores

Charles, the administrator of the estate, testified that Maria went into the hospital September 16, 2007, and was released October 10, 2007. While Maria was in the hospital, she talked to Charles about the residence. The property initially belonged to both his parents. Because of the bickering between Charles and Dalia, Maria told him that she would rather sell the property and split the money between all the children. After she was released from the hospital, Maria never told Charles that she had given a deed or a joint estate to Dalia.

Testimony of Brenda Flores

Brenda Flores testified concerning a discussion in October 2007 with Maria about the ownership of the house, as follows, "She told me she had signed everything over to Dalia." Maria asked Brenda how she felt about it. Brenda testified that since Dalia was the oldest, she had no problem with it. Brenda added, "Maria knew I still had lots of physical problems, and she didn't want to put that pressure on me." Brenda also noted that Maria could not speak in September for about a week after she had surgery. Maria was under sedation. Brenda knew that Maria was in a lot of pain.

DISCUSSION

The dispositive issue is whether the deed was delivered with a present intent by the grantor to convey title to the property. Delivery to a third person to be recorded is sufficient delivery to the grantee. However, where the grantor has reserved the right to recall the deed, there is no delivery. The concept of delivery involves more than merely physically handing possession of the deed to the grantee or someone on his behalf. The act of delivery must be accompanied with the intent that the deed shall become presently operative as such, that is, must be accompanied with the intent to presently pass title, even though the right to possession and enjoyment may not accrue until some future time. Delivery or absence of delivery of a deed and intention of the grantor to pass title are questions of fact for the trier of fact to be determined upon all the circumstances surrounding the transaction.

There is no issue of Maria’s competence or testamentary capacity. Charles, Dalia, and Brenda thought that while Maria was in the hospital, she understood her condition and circumstances, and was in control of her mental faculties.

The facts and circumstances that occurred at or near the time the deed was executed and given to Mr. Falk, however, are in dispute. Mr. Falk and Dalia testified that Maria gave instructions that the deed be recorded. However, this evidence was contradicted in material respects. Charles testified Maria wanted the residence sold with all the children to share equally in the proceeds. Also after allegedly executing the deed, Maria continued to keep control of the property and did not cede control to Dalia. She paid the mortgage, all taxes and insurance. Dalia paid no part of those until after her mother's death.

As stated, delivery with a present intent to convey title is required for a valid transfer. However, recording of the deed is not a requirement for a valid transfer. Falk's failure to record the deed before Maria's death is not grounds to invalidate the deed. Nevertheless, the circumstances of the transaction, which include recordation after Maria's death, are relevant evidence concerning Maria's intent to make a present transfer of the property. Mr. Falk was so concerned about Maria's intentions he took no steps to record the deed she allegedly executed because she was hospitalized when she executed the document. Mr. Falk testified that he felt obligated to retain the document and to talk to decedent after she was released from the hospital so that he could make a further determination that she had made a final decision in connection with the deed. Failing to record the deed is circumstantial supporting evidence of Mr. Falk's doubts about Maria's real intentions concerning the deed. The attorney's delay in recording is significant, relevant evidence in the determination of whether decedent had present intent to convey title of property to her daughter.

Objector Dalia Flores invites the Court to speculate and contends that there would be no issue as to Maria's intent if Falk had recorded the deed as directed by Maria on October 1st, or if Falk had discussed the deed with Maria at any time between October 1st and her death approximately nine months later and then recorded the deed. However, that is not what occurred, and thus is irrelevant.

TENTATIVE DECISION

It is the Court's tentative conclusion that there is sufficient credible evidence to prove that the decedent did not have the intent to deliver the deed to her daughter when she entrusted the deed to her attorney, and that thus the decedent failed to have an immediate present intent to convey the property.

The Court's tentative disposition is to grant the petition and order the Objector to convey the real property back to decedent’s estate.

Kathe Henry,

Judge of the Superior Court

JESSICA RUTZICK

Attorney for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

FOR THE COUNTY OF ANGELES

_____

Case No. 88888

DALIA FLORES, Plaintiff,

vs.

GARY A. FALK, Defendant

_____

DEMURRER TO COMPLAINT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

Defendant Gary A. Falk, demurs to the complaint on file herein.

Wherefore, Defendant prays that:

1. This demurrer be sustained and Plaintiff take nothing by her complaint.
2. For costs of suit; and
3. For such other and further relief as the Court deems just and proper.

Jessica Rutzick

Jessica Rutzick

Attorney for Defendant

Defendant's Memorandum of Points and Authorities in Support of Demurrer

In a probate contest between the plaintiff and the executor of her mother's estate, the probate court issued a tentative ruling in which it refused to uphold a deed to her mother's house. The deed, executed prior to her mother's death, would have granted the house to the plaintiff and excluded her brother's and sister's shares. After giving up her claim in the probate court, plaintiff now sues her mother's attorney, who drafted the deed, because he delayed in recording the deed in order to protect his client's interest and to determine if that was her true intent.

Although in limited circumstances a lawyer retained to provide legal services to a grantor may also have a duty to act with due care for the interests of intended third-party beneficiaries, the lawyer's primary duty is to serve and carry out the client's intentions. Where, as here, there is a question as to the client's intent to favor one adult child over another, the lawyer should not be held accountable. Any other conclusion would place the lawyer in an untenable position of divided loyalty.

Statement of Facts

While hospitalized for surgery during October 2007, Maria Flores (the widowed mother of three adult children) summoned her lawyer, Gary Falk, to the hospital and asked him to prepare a deed transferring her residence to one of her daughters, Dalia Flores. Falk prepared a joint tenancy deed; Maria signed the deed. Falk, however, did not send it to the recorder's office until June 2008. The deed was recorded about a month after Maria died.

In a dispute between Maria's son, Charles Flores, as the personal representative of Maria's estate, and Dalia over whether Maria intended a present grant of the house, Falk testified that although Maria signed the deed, he chose not to immediately record the deed, because he was "being overly protective of [his] elderly client and because [he had] seen her in the hospital," and he was "just being overly cautious on [his] own."

The probate court issued a tentative ruling, indicating its intention to grant Charles's petition, resolving the conflicts in the evidence against Dalia. The court found the evidence insufficient to prove that Maria had "an immediate present intent to convey the property" to Dalia, and specifically noted Falk's testimony that he felt obligated to retain the deed until he could talk to Maria after her release from the hospital.

Dalia filed this action against Falk, grounded on the legal conclusions that Falk owed her a duty as a third-party beneficiary of the services Falk rendered to Maria; that he was negligent in failing to record the deed promptly; and that his negligence caused Dalia to lose the property in the probate proceeding. This demurrer challenges those legal allegations.

Argument

> **Where, as Here, a Lawyer Doubts a Client's Intention to Favor a Non-Client, His Primary Duty is to the Client, and the Lawyer Should Not Be Held Accountable to the Non-Client.**

Lucas v. Hamm, Col. Sup. Ct. (1961) held that an attorney who assumes preparation of a testamentary document may incur a duty not only to the testator client, but also to intended beneficiaries, and lack of privity alone does not preclude the testamentary beneficiary from maintaining an action against the attorney.

To prevail in these limited circumstances, the plaintiff must sustain the heavy burden of prevailing on seven factors identified by the Columbia Supreme Court in the Lucas case. These factors are: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him or her, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury, (5) the policy of preventing future harm, (6) whether the

recognition of liability to beneficiaries would impose an undue burden on the profession, and (7) the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client.

Weighing the factors is a question of policy for this court alone to resolve, and thus a demurrer is the proper forum for decision. It is not an issue of fact to be left to a jury.

Here we need but mention a few of the factors that are dispositive. For example, the alleged delay in recording the deed was not the cause of Plaintiff's failure to prevail in the probate court. Rather it was, as found by the probate court, that Maria Flores did not intend delivery of the deed to plaintiff. There is in effect no causal connection between Falk's failure to record the deed and plaintiff's alleged injury. Thus, factor 4 fails.

Similarly, plaintiff has already had a trial on her right to the property. No policy of preventing future harm (factor 5) is served by giving her a second bite at the apple.

Finally the probate tentative decision and Columbia cases dictate that defendant's only duty was one of undivided loyalty to his client. From the circumstances, Defendant was unsure of his client's true intent, and he chose to protect her interest by deferring recordation of the deed. If looking out for his elderly and ill client could expose him to liability to others, it would place an undue burden on the legal profession (factor 6) and would interfere with an attorney's primary ethical duty to his client (factor 7).

Radovich v. Locke, Col. App. Ct. (1995), held that there can be no liability to potential beneficiaries where the testator's true intent is in question. In Radovich, a lawyer prepared a new will for a client naming her husband as a beneficiary but the client died without executing the will. The Court held that as a matter of law the husband could not sue the lawyer for negligent lack of diligence because the "imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent."

In this case, Falk's duty was to Maria, and his testimony in the probate proceedings shows that he had that duty in mind when he did not immediately record the deed because he was "being overly protective of [his] elderly client." Since it is undisputed that Falk questioned his client's intent to deliver the deed, a rule that imposed on Falk an obligation to act in Dalia's best interests would necessarily result in a breach of Mr. Falk's duty to Maria, a classic example of divided loyalty.

Under these circumstances, Falk did not owe a duty to Dalia, and it follows that Falk's demurrer should be sustained without leave to amend.

JESSICA RUTZICK

Jessica Rutzick

Attorney for Defendant

JULY 2012

California
Bar
Examination

Performance Test B

LIBRARY

FLORES v. FALK

LIBRARY

OSORNIO v.WEINGARTEN

Columbia Court of Appeals (2004)

In Lucas v. Hamm, Col. Sup. Ct. (1961), our Supreme Court rejected the traditional rule that an attorney owed no duty to nonclients. The court held that beneficiaries could sue the attorney whose negligent preparation of a will caused them to lose their testamentary rights, where the attorney's engagement was intended to benefit the nonclient, and the imposition of liability would not place an undue burden upon the legal profession.

Our case is one involving a potential extension of Lucas. Simona Osornio, a nonclient, was the named executor and sole beneficiary under a will executed in 2001 (2001 Will). Because she was care custodian to the testator, a dependent adult, Osornio was a presumptively disqualified donee under Probate Code section 350. After the probate court held that she could not overcome that presumption and thus the bequest to her failed, Osornio filed this action against Saul Weingarten, the attorney who drafted the will on behalf of the testator, for failing to advise the testator of the presumptive disqualification and steps to cure the defect.

In early 2001 the testator, Dora Ellis, retained Weingarten to prepare a new will that would revoke her prior wills and codicils, and name Osornio as the executor and sole beneficiary under Ellis's new will. Osornio was the intended sole beneficiary of Ellis, and she would have received the entire value of Ellis's estate.

Peggy Williams was the beneficiary under Ellis's prior will (1993 Will). Williams filed a petition to probate the 1993 Will. Osornio objected to the Williams petition and filed a separate petition to probate the 2001 Will. The dispute proceeded to trial in the probate court.

The probate court's conclusion after trial was: "Osornio was a care custodian of a dependent adult, Dora Ellis, in September 2001. The provisions of Probate Code section 350 applied, and Osornio has failed to satisfy her burden of rebutting the presumption of undue influence created by Probate Code section 350." The presumption could have been rebutted had the testator obtained a certificate of independent review by another attorney. Failing that, "the Court finds that the evidence

before the Court is not sufficient to overcome the presumption that the will executed by Ms. Ellis on September 19, 2001, leaving all her estate to her caretaker, was the product of undue influence."

It is further apparent that, at the time Ellis consulted Weingarten in September 2001, he was aware that Osornio was Ellis's care custodian. In the probate proceeding, both Weingarten and his paralegal, Anne Fingold, testified that Osornio accompanied Ellis to Weingarten's office on September 19, 2001. Fingold testified further that "it appeared to me that Ms. Ellis was dependent on her caretaker, Ms. Osornio."

Osornio's theory of negligence is that Weingarten owed her a duty of care as the testator's intended beneficiary, and that, at the time the will was drawn, Weingarten: (1) failed to advise the testator that her intended beneficiary, Osornio, would be presumptively disqualified unless the testator obtained a certificate of independent review from another attorney, and (2) failed to take appropriate measures to ensure that the testator's wishes were carried out by referring her to counsel to obtain such a certificate.

Weingarten filed a demurrer to the complaint, contending that the complaint failed to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer without leave to amend.

DISCUSSION

In reviewing the propriety of the trial court's sustaining of the demurrer, we, of course, just as the trial court, must accept as true the factual allegations properly pleaded in the complaint.

A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. While negligence is ordinarily a question of fact, the existence of duty is generally one of law. A demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff. Thus, to defeat a demurrer the court looks for facts which, if later proved, would establish a cause of action.

A legal malpractice action is composed of the same elements as any other negligence claim: duty, breach of duty, proximate cause, and damage. Weingarten's demurrer was founded upon the conclusion that Weingarten, as a matter of law, owed no duty to Osornio, a nonclient.

We start with the undisputed proposition that, in Columbia, an attorney's liability for professional negligence does not ordinarily extend beyond the client except in limited circumstances. Indeed, until 1961, Columbia followed the traditional view that an attorney owes a duty of care, and is thus answerable in malpractice, only to the client with whom the attorney stands in privity of contract.

In Lucas, supra, the Supreme Court disapproved of the strict privity requirement. The beneficiaries sued the attorney who drafted the will and codicils in a manner that caused the instruments to fail because they ran afoul of statutory restraints on alienation and the rule against perpetuities. The Court held,

> When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests. Only the beneficiaries suffer the real loss. Unless the beneficiary could recover against the attorney in such a case, no one could do so and the social policy of preventing future harm would be frustrated.

The Court held that an attorney's liability to a third person not in privity in a particular case “is a matter of policy and involves the balancing of various factors, among which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury

suffered, (5) the policy of preventing future harm, (6) whether the recognition of liability would impose an undue burden on the profession, and (7) the likelihood that imposition of liability might interfere with the attorney's ethical duties to the client." (Lucas, supra.)

Applying these factors, the Supreme Court concluded that the attorney owed a duty of care to the beneficiary, even in the absence of privity.

In the near half-century since the Supreme Court decided Lucas, Columbia courts have considered numerous variations of the attorney's potential liability to nonclients. Some instances have involved an attorney's duty of care in the estate planning context, while others have addressed negligence claims by nonclients in other business settings.

It is against the foregoing backdrop concerning questions of the attorney's duty to nonclients that we now address the question on appeal.

Irrespective of the wording of the complaint, it is readily apparent that Osornio alleged that Weingarten breached a duty of care owed to her: Weingarten negligently failed to advise Ellis that the intended beneficiary under her 2001 Will, Osornio, would be presumptively disqualified because of her relationship as Ellis's care custodian. Under this theory, Weingarten was negligent not only by failing to advise Ellis of the consequences of Section 350; he was also negligent in failing to address Osornio's presumptive disqualification by making arrangements to refer Ellis to independent counsel to advise her and to provide a certificate of independent review.

We must now address whether this pleading sufficiently alleges a legal duty owed by Weingarten to the nonclient, Osornio, by balancing of seven factors considered by the Court in Lucas.

1. Transaction Intended to Affect Plaintiff

In the cases finding duties owed to nonclients, the nonclients were the intended beneficiaries of the attorney's work, or were relying on that work, or were to be influenced by it (and the attorney knew or should have known this).

Unquestionably, this factor supports Osornio. Here, there is no doubt that the end and aim of drafting of the 2001 Will was to provide for the passing of Ellis's estate to Osornio.

2. Foreseeability of Harm to Plaintiff

We have no trouble concluding that this factor similarly supports Osornio. It was clearly foreseeable at the time Weingarten drafted the 2001 Will that, if he failed to exercise due care to effectuate the testamentary transfer that Ellis intended upon her death, Osornio would be damaged.

In addition, the 2001 Will was a revocation of Ellis's prior 1993 Will, under which another person, Williams, was beneficiary. Thus a will contest in the probate court was probable. This relevant fact increased the foreseeability of harm to Osornio in the event that there was no certificate of independent review of the 2001 Will. It concomitantly decreased the likelihood that Osornio would be able to meet her heavy burden of proving by clear and convincing evidence that the bequest was not the product of undue influence.

3. Degree of Certainty of Plaintiff's Injury

It is clear that Osornio sustained injury. Although Ellis intended under the 2001 Will that Osornio receive the entire estate, she will receive nothing if she is unable to rebut her presumptive disability under Section 350. Osornio's efforts to rebut the presumption have been unsuccessful. Osornio will sustain the definite injury of being deprived of the estate she would have received, but for her disqualification.

4. Closeness Between Defendant's Conduct and Plaintiff's Injury

We acknowledge that Weingarten's conduct, as alleged in the complaint, does not have the same degree of closeness to Osornio's injury that is found in many of the authorities. This is admittedly not a case, such as Lucas, supra, where there are no possible factors that might break the direct causal connection between the attorney's conduct and the nonclient's damage. Here, the facts may ultimately disclose that it would have been unlikely, for a variety of reasons, that Ellis would have obtained a certificate of independent review, even had Weingarten advised her of the importance of seeking counsel to obtain it.

Under at least one scenario, however, Osornio may be able to establish that, but for Weingarten's failure to advise Ellis and refer her to independent counsel to address Osornio's presumptive disqualification, Osornio would not have been damaged.

It suffices to say that we conclude here that the absence of an extreme closeness between conduct and injury, by itself, should not trump a finding of an attorney's duty to a nonclient in a case that, otherwise applying the remaining six factors, warrants it.

5. Policy of Preventing Future Harm

If testamentary beneficiaries who are presumptively disqualified under Section 350, such as Osornio, are deprived of the right to bring suit against the attorney responsible for the failure of the intended bequest, no one would be able to bring such action. The policy of preventing harm would thus be impaired.

The imposition of duty under the circumstances before us would thus promote public policy. It would encourage the competent practice of law by counsel representing testators, trustors, and other clients making donative transfers to persons presumptively disqualified.

6. Extent of Burden on Profession

An important factor we must consider in evaluating Weingarten's potential duty to Osornio under the facts before us is whether the extension of liability here would “impose an undue burden on the profession.”

The existence of statutory limitations on donative transfers to certain classes of people is a matter known to competent estate planning practitioners.

We thus conclude that imposition of duty upon an attorney toward third parties here does not place an undue burden on the profession, particularly when taking into consideration that a contrary conclusion would cause an innocent beneficiary to bear the loss.

7. Interference with the Attorney's Ethical Duties

We find that the imposition of liability here would not result in a situation where the attorney would be faced with conflicting loyalties in representing the client. Imposing liability here does not burden the attorney with concerns that would prevent him from devoting his entire energies to his client's interests. To the contrary, it would encourage

attorneys to devote their best professional efforts on behalf of their clients to ensure that transfers of property to particular donees are free from avoidable challenge.

We have balanced the factors that must be considered in evaluating the question of an attorney's potential liability to third parties. As a matter of public policy, we must conclude that Weingarten owed a duty of care to Osornio under the facts as alleged in the complaint.

The judgment is reversed.

RADOVICH v. LOCKE

Columbia Court of Appeals (2005)

The facts material to the issues before us are essentially undisputed. Mio Radovich married Mary Ann Borina (the decedent) in 1967. Shortly before they married, Radovich and Borina signed a form of prenuptial agreement, prepared for Borina by the defendant Law Firm. The agreement stated among other things that each party's property, owned at or acquired after the marriage, should be and remain his or her separate property and that no community property shall exist during the marriage.

In November 1983 Borina executed a will, prepared by the defendant Law Firm, which, after specific gifts to Radovich and others, would give the residue of the estate to two charitable remainder trusts for the ultimate benefit of the Regents of the University of Columbia upon the death of the last to die, of Radovich, Borina's sister, and the sister's husband. Under the trusts, income payments were to be shared among Radovich, the sister, and her husband during their lifetimes.

On June 21, 2001, defendant Locke (an attorney with defendant Law Firm) met with Borina to discuss drafting a new will for her. At the meeting, Locke learned that Borina had been diagnosed as suffering from breast cancer, for which she had received chemotherapy treatments. The purpose of the meeting was to discuss the drafting of a new will under which Radovich was to receive 100% of the testamentary trust income for the rest of his life. Locke did not discuss the new will with Borina at any time after the June 2001 meeting.

Locke declares that "I delivered the proposed new will to Borina on October 8, 2001, for her review and comments. Once this proposed will had been delivered to Borina, it was my understanding that the next move was hers. I could not proceed any further with the preparation of the new will until she communicated to me her comments and whether she was satisfied with its provisions. Moreover, Borina told me she intended to confer with her sister." Locke further declares that Borina "did not communicate with me regarding the draft of the new will prior to her death."

Borina died on December 19, 2001. She had not executed a new will. Ultimately her 1983 will was admitted to probate.

Radovich then brought an action for legal malpractice against Locke and the Law Firm, alleging in his complaint that Locke, individually and as a representative of the Law Firm, had been dilatory and negligent in failing to obtain the decedent's execution of the 2001 draft will. The complaint in the malpractice action alleged that the decedent's estate had been valued at approximately $10 million.

Shortly before trial, Locke and the Law Firm (collectively “Locke”) moved successfully for summary judgment concluding that Locke owed no duty to Radovich. This appeal followed.

Review of summary judgment involves pure matters of law, which we review independently.

Radovich asserts that Locke, with knowledge of Borina’s life-threatening illness, fell short of the professional standard of skill, prudence, and diligence in two specific respects: by permitting three and one-half months to elapse before delivering a draft will to Borina, and by making no effort, in the more than two months between delivery of the draft and Borina's death, to remind Borina of what she needed to do to execute the will or even to find out whether she wished to execute it.

However, the narrow question framed for the trial court, and for us on independent review, is whether Locke's duty to use professional skill, prudence, and diligence extended beyond his client to an individual who would have benefitted had Locke's client executed a will consistent with the draft he submitted to her, but which she never signed. If Locke owed no such duty to Radovich, then Radovich could not recover from Locke for the asserted breach of the duty.

Lucas v. Hamm, Col. Sup. Ct. (1961) is well known for its development of the modern law of the duty of care owed by a party performing a contract to a plaintiff who is not a party to the contract and, in this sense, is not in privity with the contracting party.

The case before us differs from Lucas v. Hamm in one significant respect: Borina never signed the will Locke drafted. The crux of Lucas was that a will the decedent had signed

had been rendered wholly or partially ineffective, at least as to the beneficiaries, by the negligence of the person who had prepared the will. By contrast, the crux of Radovich's claim is that a will potentially beneficial to him had never become effective because of Locke's negligence; Borina had not signed it.

Radovich argues that “every one” of the *Lucas* policy factors supports his position here, citing Osornio v. Weingarten, Col. Ct. App. (2004). However, most of the Lucas factors by no means as clearly militate in favor of a finding of duty here.

The “extent to which the transaction was intended to affect” Radovich depends to some degree on one's perception of the nature of the transaction. In Lucas, the circumstances suggested that the decedent there foresaw a possibility of death within a very short time, within days or even hours, and it may be inferred that he, the decedent there, would need to make and implement a decision without assurance that he would have an opportunity to change his mind. The situation of the decedent in this case was significantly different: although she was aware of her cancer and, inferably, of its lethal potential, no one suggests that in June 2001 she believed her death was so imminent as to be likely to deny her an opportunity to give further thought to her testamentary plan after the will was drafted. Indeed she expressed an intention to discuss the draft with her sister, and it may be inferred that she could reasonably have expected the sister to try to change her mind.

We see both practical and policy reasons for requiring more evidence of commitment than is furnished by a direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. Thus we must, as a policy matter, insist on the clearest manifestation of commitment the circumstances will permit.

By the same token, the “foreseeability of harm” to Radovich, the degree of certainty that he “suffered injury” attributable to Locke's conduct, and the “closeness of the connection” between Locke's conduct and the injury Radovich assertedly suffered, are all significantly less in this case than they would have been in a case, such as Lucas, in which a new testamentary document had been signed by the decedent before she died.

On the other hand, the asserted deficiencies in Locke's performance, if proven, arguably should in some manner be sanctioned as a deterrent to “future harm” in similar circumstances. The strongest argument for Radovich's position is that if the duty of care owed by Locke is not extended to Radovich, in the circumstances of record, Locke will be liable to no one and an opportunity to deter such conduct in the future will be lost. Similar arguments were given substantial, if not dispositive, weight in Lucas.

Countervailing policy considerations are present in this case. The imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily and would contravene the attorney's primary responsibility, i.e., to ensure that the proposed estate plan effectuates the client's wishes and also to ensure that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. Where, as here, the extension of that duty to a third party could improperly compromise the lawyer’s duty of undivided loyalty by making him the arbiter of a dying client's true intent, the courts simply will not impose that insurmountable burden on the lawyer.

We acknowledge that in the circumstances it would have been professionally appropriate, at least, for Locke to have inquired of the decedent whether she had any questions or wished further assistance in completing the change of testamentary disposition she had discussed with him. But on weighing relevant policy considerations, we conclude that Locke and the Law Firm cannot be held to have owed a duty to Radovich to have done so.

Affirmed.

PT - B

ANSWER 1

Memorandum of Points and Authorities in Opposition to Demurrer

Statement of Facts

Dalia (the plaintiff), Charles, and Brenda Flores are the surviving children of Maria Flores. On or about October 1, 2007, Maria Flores employed the defendant, Gary Falk, to prepare and record a deed granting Dalia Flores joint title to real property that included the family home, so that the property would pass to her as sole owner upon the death of Maria Flores. At the time of her meeting with Mr. Falk, Maria Flores was in the hospital recovering from an operation, but she was alert and aware of what she was doing. She clearly and unambiguously stated to Mr. Falk that he was to both prepare and record a deed in order to affect joint ownership in the family home.

Mr. Falk, however, failed to carry out the direction of Maria Flores, and instead did not attempt to record the deed he had prepared until June 15, 2008. But this attempt to record the deed failed, and the deed was not properly recorded by Mr. Falk until August, 2008, nearly eleven months after he had been instructed to do so. Maria Flores died on July 15, 2008, before Mr. Falk recorded the deed as directed. After the death of Maria Flores, her son Charles was declared the representative of her estate, and he petitioned the probate court to direct Dalia Flores to transfer the deed to Maria's estate for distribution by intestate succession.

Dalia Flores timely objected to Charles' petition, but the probate court issued a tentative ruling against Dalia. The probate court found that Mr. Falk's failure to record the deed in a timely manner was significant evidence in the determination that Maria Flores lacked present intent to convey title to the property to Dalia. As a result of this proceeding, Dalia was forced to settle her dispute with Charles. Instead of receiving sole ownership of the property, as she would have had Mr. Falk followed the direction of Maria Flores, Dalia will now only receive a one third share of the property.

In order to recoup the losses she suffered as a result of Mr. Falk's action, Dalia Flores brought a malpractice suit against Mr. Falk seeking damages. Mr. Falk has responded with a demurrer, claiming that he owed no duty of care to Dalia Flores. Dalia now asks that the court overrule the demurrer.

Argument

In deciding whether to grant or overrule a demurrer, the court must accept as true the factual allegations pleaded in the complaint. Osornio. A demurrer tests the complaint only as a matter of law. In a malpractice claim such as this, a demurrer will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff. This is a difficult standard for defendant to meet, and Mr. Falk is unable to make that showing here.

In a case in which the attorney prepared a deed for the benefit of a third-party, the attorney can be held liable to that third party beneficiary for breach of the duty of care, based on the analysis of the seven Lucas factors.

In Lucas the Columbia Supreme Court made clear that third party beneficiaries of a will could sue the attorney whose negligent preparation caused the intended beneficiary to lose her testamentary rights. This holding has since been expanded to include beneficiaries of other legal documents. Osornio. In deciding whether an attorney should owe a duty to third party beneficiaries, the court promulgated a seven factor balancing test: (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between defendant's conduct and the injury suffered, (5) the policy of preventing future harm, (6) whether finding liability would impose an undue burden on the legal profession, and (7) the likelihood that imposing liability would interfere with ethical duties owed to the client. Lucas.

In his demurrer, Mr. Falk addresses only half of these seven factors, specifically ignoring those that favor the plaintiff in this case, while misinterpreting others. The

following analysis will indicate that Mr. Falk owed a duty of care to Dalia Flores when he failed to carry out her mother's direction in recording the deed in this case. As a result, the demurrer should be overruled.

Drafting and recording of a deed for the benefit of a third party is a transaction that is clearly intended to benefit that third party because it creates property rights in that third party.

Cases finding duties owed to nonclients often have the nonclient as an intended beneficiary of the attorney's work. Osornio. In that case, as in Lucas the transaction at issue involved a testamentary document. However, it is clear that a deed conveying property to a third party, not represented by the drafting attorney, is intended to affect that third party. The creation of property rights, where none previously existed is a legal effect. Before Maria Flores directed Mr. Falk to draft and record the deed in favor of Dalia, Dalia had a mere expectancy in the property as an heir apparent. Had the deed been effective, which would have been more likely had Mr. Falk done as instructed; Dalia would have obtained sole ownership of the property instead.

Here, as in Osornio this factor "unquestionably" supports Dalia Flores' claim of a legal duty. Mr. Falk's demurrer implicitly acknowledges this by refusing to address it. Radovich, on which Mr. Falk relies heavily in his demurrer, is of no help to him on this factor. There the court was concerned with a lack of commitment to a particular course of action, and found that merely asking a lawyer to draft a will, without executing it was insufficient to show that the transaction was clearly intended to benefit a third party. Here, by contrast, Maria Flores actually executed the deed and conveyed it to Mr. Falk with a direction that it be recorded. This is clear evidence of a commitment and intent to benefit Dalia as a third party.

It is easily foreseeable that failure of a deed purporting to transfer property to a named third party will cause harm to that third party should the deed prove ineffective to transfer title.

As with the previous factor, this factor weighs heavily in favor of Dalia's claim. When Maria Flores employed Mr. Falk, she stated explicitly that Dalia Flores was to be the named beneficiary on the deed. This, without more, would be enough to make harm to Dalia foreseeable in a case where the attorney's failure to exercise due care resulted in the deed being ineffective to transfer title. In this case, however, there is more. Not only did Maria Flores state her intention, but Dalia herself was the one to place the phone call to Mr. Falk in order to ask him to come to the hospital. Thus, Mr. Falk knew of Maria Flores' desire to transfer title to Dalia, and knew exactly who Dalia was.

The fact that this situation involves a deed rather than a will does nothing to make the harm less foreseeable, and this case cannot be distinguished from Osornio and Lucas on this factor. Mr. Falk might claim that a contest to the deed was less foreseeable here than was the will contest in Osornio because in that case there was a prior will that would be probated if the new will was not given effect. However, in this case it should have been apparent to Mr. Falk that a failure of the deed would result in passage of the real property by intestate succession resulting in a much lesser interest in the property for Dalia. Mr. Falk has helped Maria with legal issues in the past and either knew, or should have known, her intestate status.

An injury already suffered, with concrete damages, is a certain injury that weighs heavily in favor of finding a duty to an injured third party beneficiary.

The injury suffered by Dalia in this case is more certain than that suffered by the plaintiff in Osornio. In that case, the litigation over the decedent's will had not concluded, and it was not yet certain that the plaintiff in the malpractice suit would lose, although the outcome appeared likely to be adverse. By comparison, in this case Dalia Flores has already been forced into a settlement agreement with Charles Flores, as a result of the probate court's tentative ruling. She has already agreed to give up sole ownership of the family home that Maria Flores intended to convey to her.

Although Dalia Flores will receive some money as a result of the settlement agreement, it is far less than the full value of the property. Furthermore, the law has long

recognized the special and unique nature of real property, for example through a willingness to grant specific performance in land sale contracts. Mere money damages are a poor substitute for the privileges of exclusive ownership in land. This is even more so here, where the real property at issue was a family homestead in which Dalia Flores has spent a great portion of her life, living with and caring for her mother.

Where an attorney's negligent conduct is a substantial factor in a court's decision not to grant a deed legal effect, there is sufficient closeness between the attorney's conduct and the plaintiff's injury to support a legal duty.

Mr. Falk finally turns to the Lucas factors here, at factor four. He claims that this factor weighs against a finding of duty because his failure to record the deed as directed was not the cause of Dalia's failure to prevail in probate court. Rather, he claims that the cause of the probate court's decision was the lack of present intent to convey legal title on the part of Maria Flores. Mr. Falk, however, overstates the required causal relationship between conduct and injury that is necessary in order to impose a duty. The casual relationship in this case is more than sufficient to do so.

Although it is true that in Lucas there was a direct chain of causation, and there were no possible factors that could break the chain between attorney's conduct and the nonclient's injury, the court in Osornio made clear that this is not required. Rather, so long as "at least one scenario" may allow the plaintiff to show that but for the attorney's failure the plaintiff would not have been damaged there is sufficient causation. In this case, alleged, and it must be taken as true for purposes of this motion, that the probate court relied on Mr. Falk's failure to record the deed in a timely manner in concluding that Maria Flores lacked present intent to transfer title.

Thus, Dalia Flores can easily illustrate "one scenario" in which she would not have been harmed but for Mr. Falk's failure to follow simple instructions. Had Mr. Falk done as Maria Flores instructed him to, and had he timely recorded the deed, the probate court would have had no basis for finding a lack of intent to transfer title. In that scenario, Dalia would have prevailed in probate court, and would have suffered no injury. Thus,

but for Mr. Falk's failure to timely record, Dalia would have been the sole owner of the real property at issue. That is sufficient to support a legal duty between the attorney and the third-party beneficiary under Osornio.

Preventing attorneys from failing to follow clear and unambiguous directions from clients is prevention of future harm, and supports imposition of a duty to third parties.

This fifth factor of the analysis attempts to determine whether imposing liability on an attorney to a nonclient beneficiary would further the policy of preventing future harm. The courts have long been concerned that if third party beneficiaries are unable to sue the attorney for malpractice, no one will be able to. This is especially true in the context of testamentary transactions, where the client testator is typically dead by the time the attorney's malpractice comes to life. In cases of ordinary contracts and deeds, this interest may be less compelling. In the standard case, the client may very well still be alive and able to sue the attorney when the failure of the deed or contract comes to light.

In this case, however, Maria Flores was in fact dead because Mr. Falk's failure was exposed. Maria Flores is thus unable to bring suit to hold Mr. Falk accountable for his failure, and absent a duty owed to Dalia, as a nonclient beneficiary, Mr. Falk will get away with his misconduct. The courts have imposed this kind of liability in the context of ordinary, nontestamentary contracts, See Osornio, and there is no reason not to do so here.

In arguing that this factor weighs against Dalia's claim, Mr. Falk apparently misunderstands the clear purpose of this analysis. He claims that no policy is served by giving Dalia a second chance to litigate her right to the real property. This is plainly not correct. The future harm that courts seek to avoid here is not any harm to the plaintiff in the case at hand. But rather it is future harm inflicted by Mr. Falk, and other attorneys who neglect their duties, on future nonclient beneficiaries. The courts seek to hold attorneys to account for their actions, so that they will exercise due care in creating legal interests in third parties on behalf of old, dying, or sick clients. That is the situation of

this case, and that is the harm to be prevented. Furthermore, Dalia is not litigating here her right to the real property. That was a matter for the probate court. Whether or not Dalia Flores was entitled to the real property that was the subject of the deed Mr. Falk failed to record is only tangentially at issue here. At issue here is Mr. Falk's dereliction of duty in failing to timely record the deed as he was clearly instructed to do.

In Radovich, the court noted that prior cases, such as Lucas had given this factor substantial, if not dispositive weight in the analysis. Here this factor weighs in favor of Dalia, and as such tips the scale significantly in her favor. Although it may not be dispositive in and of itself, it certainly presents a compelling reason to impose liability on Mr. Falk.

Although imposition of a duty of care to nonclients necessarily imposes some burden on the legal profession, that burden is not significant in a case where the attorney failed to follow unambiguous and simple instructions from a client to the detriment of a third party, and the attorney's failure relates to a well-known rule of law.

Although it is not entirely clear from the demurrer, Mr. Falk appears to claim that imposing liability on him, and other attorneys in similar situations, would impose an undue burden not the legal profession because it would require them to defer to the wishes of their clients in situations where the attorney is unsure of the client's true intent. This is an important factor in the analysis, Osornio, and the court must give this factor careful consideration. However, imposing a duty in this case would not lead to a significant burden on the legal profession because of the specific facts at issue here.
In this case, Maria Flores stated to her lawyer, in clear unambiguous language that he was to record the deed with immediate effect. It was clear from the circumstances that Maria intended to convey title in the real property to Dalia, and Mr. Falk had no reasonable basis to doubt this. Although it is certainly true that an attorney has a duty to his client to be sure he understands her actual intent, once a client has expressed that intent in unambiguous terms, the attorney's duty is simply to affect that intent to the best of his abilities. There was no doubt of Maria Flores' legal capacity, either in the

probate proceedings or here, and Mr. Falk himself has admitted that Maria appeared lucid and sure of what she was doing when he spoke to her.

In this sort of factual situation it is not burdensome to expect an attorney to carry out the client's intent, and when that intent is clearly to benefit some nonclient third party, as it was here, the attorney should owe a duty of care to that nonclient to affect the client's clear intent. Mr. Falk later claimed, when the issue of his tardy recording came to light, that he was concerned about Maria Flores' "actual intent" because she was in the hospital. He claimed he was being protective, perhaps overprotective, of his elderly client. This, however, is no excuse for failure to do what the client directs. Maria Flores may have been in the hospital, but so long as she was competent and lucid a hospital stay may be just the type of situation in which an attorney's speedy compliance with a client's wishes is especially important. Hospital stays often accompany and always carry a risk of injury or death, and failure to quickly do as a client asks has the serious potential to frustrate the client's intent, as it did in this case.

Furthermore, the reason Mr. Falk's deed failed in this case was the probate court's determination of a lack of present intent to transfer title. As with the statutory limits on donative transfers at issue in Osornio, this is a matter well known to competent attorneys who draft deeds. It is a basic principle of real property law that a deed is ineffective absent delivery accompanied by present intent to convey title. Requiring attorneys who draft deeds to timely record them in order to avoid potential challenges to that intent is not an unreasonable burden on the legal profession.

When there is no reasonable basis to doubt a client's intent, and a deed has already been executed by the client imposing a duty to third party beneficiaries does not pose a significant risk of interference with the attorney's ethical duties to his client.

In expanding attorneys' liability to nonclient third parties, the courts have been concerned with creating a situation in which an attorney's loyalty is torn between the client and the third party. The courts seek to avoid a situation in which an attorney,

concerned with avoiding liability to some third party, fails to act in his client's best interest. See Osornio. Mr. Falk claims that is the case here because he was obligated to discern Maria Flores' true intent which, according to Mr. Falk, required him to sit on the deed he had drafted for 11 months without a single communication with his client. This of course prevented him from timely recording the deed, which is now the potential basis for liability to Dalia. Mr. Falk claims that had he timely recorded the deed he would have violated his duty of care and loyalty to Maria Flores. Setting aside for the moment the absurdity of claiming that ignoring a client's direction and making no communications was somehow protecting the client's true interests, there was little danger in this case that any conflict of loyalties would arise.

As mentioned above, Maria Flores' directions were clear, and there was no reasonable basis to doubt her capacity or desire to transfer title to the property to Dalia. Even accepting that in a more ambiguous case there might be some danger of divided loyalties, there was insufficient ambiguity here to pose a significant risk of divided loyalty. All Mr. Falk would have had to do in order to resolve any concerns would be to contact Maria Flores when she left the hospital. Had he contacted her, then recorded the deed after verifying her intent (or even had he not recorded it after learning her true intent was different) he would not have breached any duty to Maria, or to Dalia as a potential third party beneficiary. All that Dalia Flores seeks to impose here is a duty of reasonable care on Mr. Falk. There is no indication from the facts that exercising reasonable care and diligence in recording the deed, even if he double checked Maria Flores' intent, would impose liability to Dalia Flores as a third party beneficiary.

In contrast, in Radovich there was a significant concern that imposing liability to a beneficiary named in a drafted but unexecuted will would cause an attorney to pressure the client into signing the will rapidly, even where the client wanted time to consider and review the document before giving it legal effect. This is easily distinguished from the situation at hand here, where Maria Flores had already executed the deed in question. There is no danger in this case that liability to Dalia Flores would have made Mr. Falk pressure Maria to do something she wasn't ready to; she had already done it.

Mr. Falk also overstates the rule in Radovich. He claims that the case stands for the proposition that there can be no liability to potential beneficiaries where the testator's true intent is in question. This is an overbroad and mistaken reading of the holding. To the contrary, Radovich merely states that the possibility of divided loyalty between a client and a nonclient is a countervailing policy consideration that might outweigh some of the other factors of the Lucas analysis. It certainly does not state that any time a client's intent is unclear that there can be no liability to a third party. Rather it states that the lawyer's duty of undivided loyalty should not be compromised by making him the arbiter of a dying client's true intent. It also does not state that this factor, one of seven, stands alone as the sole arbiter of duties owed to nonclients. Lucas and Osornio make clear that this is careful balancing test. Although some factors may weigh more heavily than others, and the desire to avoid divided liability is certainly a heavy factor, the test requires a consideration of all seven factors, and no single factor is determinative.

In this case there is little risk that an attorney would be subjected to divided loyalty because of the circumstances of the case, but even were that not the case, it would be improper to give this single factor sole consideration in deciding whether to impose liability on Mr. Falk.

Conclusion

This court should only grant Mr. Falk's demurrer if, after accepting all allegations in the complaint as true, it determines that he owed no duty to Dalia Flores as a matter of law. Mr. Falk has failed to make that showing in his demurrer. A careful analysis of all seven of the Lucas factors shows that they weigh in favor of imposing liability on an attorney to a third party beneficiary of a deed when the attorney fails to follow his client’s direction to record the deed, and the deed is subsequently found to lack legal effect. The demurrer should be overruled.

PT - B

ANSWER 2

Attorney for Plaintiff
SUPERIOR COURT OF THE STATE OF COLUMBIA
FOR THE COUNTY OF ANGELES

_____

Case No. 88888
DALIA FLORES, Plaintiff,

VS.

GARY A. FALK, Defendant

OPPOSITION TO DEMURRER
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEMURRER

_____

Plaintiff Dalia Flores opposes the demurrer to the complaint on file herein.
Wherefore, Plaintiff prays that:
1. The demurrer be overruled and the case proceed; and
2. For such other and further relief as the Court deems just and proper.
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE DEMURRER

I. Statement of Facts
On September 16, 2007 Maria Flores (Maria) was admitted to the hospital. On October 1, 2007, Maria contacted her lawyer, Gary. A Falk (Falk), and asked him to come to the hospital to prepare a deed as "joint tenants" for their family home. There is no question that at this time Maria had her testamentay capacity and competence, and even Falk could tell that she had "all her wits about her." Maria asked Falk to prepare a deed as joint tenants with her and her daughter Dalia Flores (Dalia). Maria did this knowing that she had two other children, Charles and Brenda. Falk prepared the deed and Maria signed the deed and signed the notary book. Falk believed that Mrs. Flores was under the belief that he (Falk) would record the deed immediately. In fact, Maria asked him to

record the deed, and asked him to do so on the date that the deed was executed, October 1st, 2007. Maria then told her other daughter Brenda that the property had been transferred through deed to Dalia, believing that what she had asked Falk to do had been done. Brenda has been sick, and lives in the house with Maria, and Dalia, and understood why her mother had done so.

Falk however left the hospital, and did not record the deed as he was asked to do. He did not record the deed even though he had received explicit instructions to record the deed. He never received any contrary instructions from Maria, and he never called her to check in with her. In fact, he did not record the deed until 11 months later, once Maria had passed away. At the time that he finally recorded the deed, he did so without ever checking back in with Maria as he claimed that he intended to do.

Falk claims that he did not want to record the deed right away because Maria was in the hospital and he wanted to talk to her after she got out of the hospital to make sure she still wanted the deed recorded. However, even though Maria left the hospital on October 10th, 2007, just over a week later, Falk did not even contact Maria again, to see what her intentions were, nor did he call her to let her know that he had failed to record the deed. In fact he never spoke with her again.

In June of 2008, Dalia called Falk to ask for a copy of the deed. It was only at this time, that Falk first tried to record the deed. He tried to record the deed at this time even though he had not spoken with Maria since he last had decided not to record the deed. He tried to record the deed for the first time on June 15, 2008. This attempt failed because the notary stamp which he had used was smudged. He then sent the deed back with a new stamp, but this deed was not recorded until August 1, 2008, which was after Maria had passed away on July 15, 2008.

The probate court gave a tentative ruling that, based on this, there was no present intent to transfer the deed and so the deed failed and the property would be probated. As such, the home will be sold and split between Maria's three children instead of going to Maria in fee simple.

Now Falk believes that he is not liable to Dalia, because he claims that he did not have a duty to her.

II. Argument

A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. In this case, the question is whether Falk had a duty to Dalia, a nonclient. This Court should find that he did owe her a duty as a matter of law as analyzed below.

Lucas v. Hamm held that an attorney who assumes preparation of a testamentary document may incur a duty not only to the testator client, but also to intended beneficiaries, and lack of privity alone does not preclude the testamentary beneficiary from maintaining an action against the attorney. (Lucas). This case has been applied to many other situations and expanded attorney's potential liability to nonclients in other contexts as well as such estate planning context and negligence claims by nonclients in other business settings. (Osornio v. Weingarten). Similarly Lucas should be applied in the case at hand because the case of a joint tenancy deed is similar to a testamentary disposition and it matches the types of cases that Lucas has been expanded to apply to. As such, the Court should analyze the issues in this case under the seven-prong Lucas factors. Because these are factors, and not elements, the plaintiff's failure to meet even a few factors should not be dispositive if the other factors weigh strongly towards finding that there was a duty. When these factors are analyzed, the court will find that it should overrule the Defendant's demurrer.

1. Falk owes a duty to Dalia because Maria's drafting of a deed for joint tenancy with her daughter Dalia, while Maria was sick and expected to pass on soon, is a transaction that is intended to affect the plaintiff.

The court should find that the first Lucas factor weighs in favor of imposing a duty to Dalia on Falk because Dalia was clearly the intended beneficiary of the transaction between Falk and his client Maria.

This first factor for Lucas is that the transaction intended to affect the plaintiff. In the cases finding duties owed to nonclients, the nonclients were the intended beneficiaries of the attorney's work, or were relying on that work, or were to be influenced by it (and the attorney knew or should have known this). (Osornio). In Osornio, the court held that "there is no doubt that the end and aim of drafting of [a will] was to provide for the passing of [the testator's] estate to [the plaintiff]." In Radovich, the court stated that the extent to which the transaction was intended to affect the plaintiff depends to some degree on one's perception of the transaction." The Court stated that in that case, although the testatory was ill, she did not sign the will, so not only had it never actually benefitted him in the first place, the testatory also wanted more time to think about the will and wanted to discuss it with others before signing it. (Radovich) In fact, the court in Radovich stated that the fact that the document had been signed in Lucas and not in Radovich was the "crux" of the case and the key that differentiated the two.

In this case, the deed was for a joint tenancy; the deed would allow for the family home to be passed to Dalia on Maria's death without going through probate. Similar to Osornio, in this case, it is clear that the purpose of the deed was to allow for the property to pass to the Plaintiff and as such she was an intended beneficiary. Maria made it clear that she wanted the deed to be recorded. She intended and likely believed that the deed had been recorded when she asked her attorney to do so. She intended that the property pass to her daughter and she intended that her daughter benefit from this deed. The deed however did not have the effect of making Dalia the intended beneficiary because of Falk's failure to record the deed for 11 months. Defendant attempts to compare the case at hand to Radovich; however, unlike in Radovich, in which the testator had not signed the will and it was not clear that her present intent was to benefit the plaintiff, in this case, the testator signed the deed and believed that her attorney would immediately record the will. She was also in the hospital at this time, possibly after a surgery and so she may have believed that she needed to do this right away. As such, this case is more comparable to Lucas than to Radovich from which it can be distinguished. Falk claims that he was was being protective of Maria because of her health, but he failed to worry about and help the fact that her illness required his actions to ensure her intent to benefit her daughter Dalia after Maria's death.

As such, prong one of the Lucas factors has been met.

2. Falk's failure to record the deed until 11 months after he was told to created a foreseeable risk of harm to Dalia because it made it much more likely that she would not be able to show that the deed had properly been delivered after execution.

The court should find that the second Lucas factor weighs in favor of imposing a duty to Dalia on Falk because his failure to record the deed as he stated he would create a foreseeable risk of harm to Dalia.

The second factor of Lucas requires that the harm to plaintiff be foreseeable. (Osornio). This requires that a person in the defendant's position would reasonably be able to tell that they could harm the plaintiff through not exercising due care. In Radovich, the harm was not sufficiently foreseeable because the document purporting to benefit the plaintiff (a will) had not been signed. (Radovich)

In this case, the defendant failed to record a deed that was to transfer a document from a mother of three to only one of her children. If the deed failed, as it did, because of Falk's failure to record, it would clearly create a risk the property would not be disposed of thusly. Defendant failed to take the due care that was required of him, of following the instructions of his client and recorded the deed as she requested or at the very least informing her that he was not going to do so that she could arrange for alternative means of effectuating her intent and benefitting Dalia as Maria wished to do. It made it much more difficult for Dalia to show that she was the true sole owner of the family home and ultimately forced her to settle her claim, because of the difficulty that Falk's failure to exercise due care caused. Unlike in Radovich in which the document had not been signed and so it was not clear that the testator intended to benefit the plaintiff, in this case the deed for joint tenancy with Dalia had been signed and Maria believed it had been recorded. They both believed that the property would be transferred accordingly. This was a foreseeable harm that of which Falk must have been aware.

As such, the second prong of the Lucas factors has been met.

3. The harm that Dalia suffered as a result of Falk's failure to record the deed has a high degree of certainty because had Falk recorded the deed as Maria intended that he do, Dalia would have been the owner of the family home in fee simple absolute upon Maria's death instead of being a 1/3 owner with her two siblings as she is now.

The court should find that the third Lucas factor weighs in favor of imposing a duty to Dalia on Falk because Maria suffered harm that is reasonably certain as a result of Falk's failure to record the deed.

The third factor of Lucas is the degree of certainty that the plaintiff suffered injury. (Osornio; Lucas).

In this case, Dalia would have received the family home in fee simple absolute upon Maria's death had the deed been properly recorded as requested by Maria. However, because the deed was not recorded and so the court could not clearly find that Maria had the requisite intent to transfer at the time the deed was made, the property is probated with the rest of Maria's estate. Because Maria has three children, the property will either be owned by the three of them or will have to be sold. Either way, Dalia will not have a two-thirds interest that Maria intended her to receive. As such, the harm that would be suffered is certain.

Because the harm that was suffered is certain it meets the third factor in the Lucas.

4. Falk's failure to record the deed was closely connected to Dalia's injury because had Falk met his duty and recorded the deed when he was supposed to, Dalia would have received the property on Maria's death and would thus not have been harmed.

The court should find that the fourth Lucas factor weighs in favor of imposing a duty to Dalia on Falk because Falk was an actual cause of the harm that occurred to Dalia.

The fourth Lucas factor is the closeness between Defendant's Conduct and Plaintiff's injury. (Lucas) While there can be different levels of closeness that are sufficient to meet the requirement of this factor, in Osornio, the court held that the "absence of extreme closeness between conduct and injury, by itself should not trump a finding of an attorney's duty to a nonclient in a case that, otherwise applying the remaining six factors, warrants it." (Osornio). In that case, the court stated that in at least one scenario, the plaintiff could establish that, but for the defendant's failure, the plaintiff would not have been damaged.

In this case, had Falk recorded the deed at the time that he had been asked to do so, there would have been a presumption of a valid present intent to transfer the property to Dalia. Had he done so, Dalia would have received the property on Maria's death without any problems. While defendant tries to argue that the non recording of the deed was not a dispositive factor in the Court's decision, he fails to bring to the Court's attention the fact that had the deed been recorded as requested, that action would have been dispositive to the court's decision. Thus, his failure to act was in fact dispositive and was a causal link to the plaintiff's injury. "But for" Falk's failure to record, the Plaintiff would not have been damaged. This closeness is sufficient to satisfy this factor of Lucas, but even if it is not, as Osornio indicates, this should not be dispositive in Defendant's favor. As such, the fourth factor of Lucas is also met by the facts of this case.

5. The Court should impose a duty on Falk because the fifth Lucas factor is met because a nonclient (Dalia) in such a case, is the only person left who can hold the defendant attorney (Falk) liable and the Court should impose liability to deter such future conduct.

The court should find that the fifth Lucas factor weighs in favor of imposing a duty to Dalia on Falk because public policy so requires as there would not be anyone else to hold Falk accountable for his neglect otherwise.

The fifth Lucas factor is the policy of preventing future harm. In Osornio, the court found that the fifth factor of Lucas was met because, "If testamentary beneficiaries who are presumptively disqualified under [a statute] are deprived of the right to bring suit against

the attorney responsible for the failure of the intended bequest, no one would be able to bring such an action." (Osornio). The court found that it would thus be a promotion of public policy to impose the duty on the attorney who would otherwise be held unaccountable. (Osornio). Even in Radovich, in which the court did not find that a duty should be imposed on the lawyer, the court found that this element was met because otherwise, the attorney would be liable to no one and an opportunity to deter such conduct in the future will be lost. (Radovich). While this issue is not alone dispositive, it is another factor of Lucas that can weigh towards imposing a duty to a nonclient on the attorney.

In this case, only Dalia, the joint tenant that should have remained after the death of Maria, would feel the real loss. If she is unable to impose liability on Falk, Falk will not be liable to anyone since the only duty Falk claims to have is to his client, who is now deceased, and a client who was counting on him to do as he told her he would, by recording the deed and allowing her property to transfer to her daughter as she requested. In this case, the court should impose a duty on Falk because Falk failed to follow his obligation to his client and now the person who will suffer from his breach is Dalia, who happens to be a nonclient. The Court should impose duty in this case because otherwise there will be no deterrence for such cases in the future.

As such, the fifth Lucas factor for imposing a duty on an attorney is met in this case.

6. A duty should be imposed on Falk as to Dalia because it would not impose an undue burden on the profession to properly deliver and record a deed when the attorney has been asked to do so and to follow a client's explicit instructions.

The court should find that the sixth Lucas factor weighs in favor of imposing a duty to Dalia on Falk because doing so would not impose an undue burden on the legal profession.

The sixth Lucas factor the court should look at to impose a duty on the attorney is the extent of the burden on the profession that such an imposition of duty would cause. (Lucas; Osornio). The courts do not want to "impose an undue burden on the

profession." In Osornio, the court held that the existence of statutory limitations on donative transfers to certain classes of people is a matter known by a competent attorney in that field and so the imposition of such a duty would not be an undue burden on the profession.

Similar to Osornio, in this case, is a matter known to most lawyers, especially a lawyer that works with and drafts deeds that there must be a proper delivery to accompany the execution of a deed in order for the deed to be effective. In this case, Falk drafted the deed and then took it with him. He did not leave a copy to be transferred physically, and he did not record the deed as requested. It should have been known to Falk that his failure to record the deed as he was requested to do could cause problems. Furthermore, it would not cause an undue burden on lawyers to effectuate their client's intent when that intent is clearly manifested. Although Falk claims that he had doubts about Maria's present intent to transfer the property, there were no factual indications as to why Falk had these doubts or support these claims. Falk simply stated that he had doubts but not based on any articulable standards. There was nothing uncertain about Maria's request; her request was in fact an explicit instruction that Falk chose to ignore. He was simply second-guessing his client. Furthermore, Falk never did anything to confirm or deny these doubts; rather he decided to record the deed when, one can only assume, he felt like it, 11 months later.

As such, it would not impose an undue burden on the profession to require that an attorney record a deed when he says that he will or ensure that a client's deed is properly delivered when it is requested that it be recorded and so the sixth Lucas factor is also met in favor of imposing a duty on Falk as to Dalia.

7. The imposition of a duty would not interfere with the attorney's ethical duties because in this case it would reinforce the attorney's ethical duties to do as they told their client they would and to ensure that transfers of property to particular donees are carried out as the client wished.

The court should find that the seventh Lucas factor weighs in favor of imposing a duty to Dalia on Falk because doing so would not interfere with Falk's ethical duties as an attorney to his client.

The seventh and final Lucas factor that the court must examine is whether imposition of such a duty would interfere with the attorney's ethical duties. (Lucas; Osornio). The Court is rightfully concerned with creating a situation where the attorney would be faced with conflicting loyalties in representing the client. In Osornio however, the court held that there was no conflict of interest by imposition of a duty on an attorney to a nonclient when it was to "ensure that transfers of property to particular donees are free from avoidable challenges." (Osornio). In contrast, in Radovich, the court stated that pressuring a client into making a decision could create problems by compromising an attorney's primary duty of undivided loyalty to his client. (Radovich.) This was in the context of a will that had not been signed and so the client had not made any decisions yet. The court found that imposing liability in that case could create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily and would contravene the attorney's primary responsibility. (Radovich).

In this case, there would not be a conflict of interest for Falk between Maria and Dalia, nor would there be a conflict of interest in a future similar situation. This is a case in which a lawyer's client executed a deed that she believed to be a valid transfer of property. The transfer failed because of Falk's failure to record the deed as required to do. Both the client and nonclient have the same goal in this: to have the property rightly transferred. As such, their interests would be aligned. Furthermore, Falk claims that a conflict of interest could arise and that he was looking out for the interest of his client when he didn't record by giving her the opportunity to rethink her decision. However he never even gave her that opportunity. Rather, he neglected to record the document when requested to, and then decided to record it later when it was convenient for him. He never spoke to Maria as he claims he intended to and he never checked to see if transferring the property was her true intent. Finally, this case is not like Radovich in which it was not clear what the client wanted to do and the attorney did not want to

pressure her client into making a wrong decision. On the contrary, this case is one in which the client knew exactly what she wanted to do, and the attorney simply thwarted her to the injury of a nonclient. Falk does not want to take responsibility for his failure to record, so the court should impose the duty on him.

As such, the seventh and final Lucas factor weighs in favor of imposing the duty on Falk.

III. Conclusion

In this case all seven Lucas factors weigh in favor of imposing liability on Falk and finding that he did have a duty to Dalia even though she is a nonclient. The failed joint tenancy deed was intended to benefit Dalia, the failure of the deed transfer to be properly executed created a foreseeable risk of harm to Dalia, the harm was reasonably certain, and the harm was connected to the plaintiff's failure to record the deed. Furthermore, imposing liability on Falk would promote public policy since no one else can enforce the duty, it would not be an undue burden on the profession as the duty should have been followed regardless of its actual existence, and imposing a duty is not likely to interfere with the attorney's ethical duties to the client. As such, Plaintiff respectfully requests that the Court overrule the Defendant's demurrer and allow the case to proceed.

California Bar Examination

Performance Tests

And

Selected Answers

February 2013

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2013 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the February 2013 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 2013

California Bar Examination

Performance Test A INSTRUCTIONS AND FILE

Doral Digestive Medical Clinic v. Dr. Kyle Harris

Instructions

FILE

Memorandum from Catherine Tedesci to Applicant

Memorandum from Executive Committee to All Attorneys

Transcript of Interview with Dr. Kyle Harris

Excerpt from Employment Agreement

Memorandum from Joan Malzone to Catherine Tedescii

DORAL DIGESTIVE MEDICAL CLINIC v. DR. KYLE HARRIS

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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 CATHERINE R. TEDESCI

1199 Brian Drive

Sweetwater, Columbia

MEMORANDUM

TO: Applicant

FROM: Catherine Tedesci

DATE: February 26, 2013

RE: Dr. Kyle Harris

One of our clients, Dr. Kyle Harris, a gastroenterologist, is involved in a contract dispute with Doral Digestive Medical Clinic (DDMC). Four years ago, Dr. Harris signed a contract that included a covenant not to compete. Dr. Harris left DDMC about a month and a half ago. He would like to open up a gastroenterology (GI) practice near DDMC, and wishes to know whether the covenant not to compete is enforceable in whole or in part. You can glean all of the facts from his interview transcript and a "market survey" of the market in which DDMC operates, generated by an associate here along with a medical economist, both of which are in the file.

At this point, however, Dr. Harris needs to know the likelihood that the non-compete covenant is enforceable. Please prepare, for my signature, an opinion letter to Dr. Harris in accordance with the firm's guidelines.

LAW OFFICES OF CATHERINE R. TEDESCI
1199 Brian Drive
Sweetwater, Columbia

MEMORANDUM

TO: All Attorneys
FROM: Executive Committee
DATE: September 28, 2010
SUBJECT: Opinion Letter Guidelines

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

-- State your understanding of the legal issue or issues you are asked to address.

-- Analyze the client's legal position objectively, in light of the applicable law and the relevant facts, and resolve each of the issues implicated, arriving at a conclusion and identifying the degree of certainty as to each.

-- Remember that many opinion letters are written to lay clients and that an opinion letter must provide genuine assistance to the client. Although you must discuss the law, you should do so as clearly and straightforwardly as possible.

Transcript of February 12, 2013 Interview with Dr. Kyle Harris

CATHERINE TEDESCI: Good afternoon, Dr. Harris. If it is okay with you, I'd like to record our conversation, so it can be transcribed if necessary to review your case.

DR. HARRIS: That's fine with me.

TEDESCI: Okay. I understand you have a contract matter to discuss with me?

HARRIS: Yes. I need some advice about whether I can open up my own practice.

TEDESCI: Why don't you start at the beginning and tell me the whole story?

HARRIS: Sure. I graduated from Medical School and did both my internship and residency at the University of Columbia Medical School in internal medicine. After that, I went out on the job market and ended up with a medical group whose patients are in Doral County, Columbia. The name of the organization is Doral Digestive Medical Clinic, or "DDMC." They did gastroenterology and general internal medicine. I was looking for a place to learn gastroenterology (GI), learn how to find patients and develop a practice, and get my career going. And I like Doral County a lot -- it is quite rural, a great place to live and raise a family, and develop a practice. I thought they had a lot to offer me, so I kept after it, and eventually the clinic decided to give me a try.

TEDESCI: How big was the group?

HARRIS: Actually, the term "group" is a little misleading. The guy who ran it as the president and owner was Dr. David Medved. Dr. Medved set up the practice in 1998 as Doral Digestive Medical Clinic.

TEDESCI: Did you sign an employment agreement with the clinic?

HARRIS: Yes. I originally signed an agreement that was a one-year trial period, terminable-at-will on their part. It was a pretty simple document. It said I would be employed as an associate for a trial period of 12 months, identified the pay schedule, which was about $160,000 for the year, said that the clinic could terminate me at any time for any reason, and that was about it.

TEDESCI: How did that year go?

HARRIS: The year went great. It was sort of like a fellowship year in gastroenterology. There were only two gastroenterologists in the entire county, Medved and me. That is still the way it is today, by the way, although I've heard Medved is looking quite hard to find someone to replace me in the clinic. I learned the practice of gastroenterology and got to see just how Medved did it. I got training and took a lot of his overflow. I learned how to evaluate patients with gastrointestinal complaints, treat a broad range of conditions, and perform colonoscopies, which is the big part of the practice. But I also did the occasional biopsy and some interpretation of the results, and learned to make recommendations concerning the longer run health of the patients. As well, I did some endoscopies, mostly for ulcer diagnosis, and learned a little about irritable bowel syndrome. So I both got a lot out of the year and did a lot of good work for Medved and the patients in the county.

TEDESCI: What happened after the year?

HARRIS: We both agreed that I should join the clinic as a member, and had some vague discussion that if it continued to work out I might end up with equal ownership eventually. So I bought into the clinic as a shareholder member and signed a stock transfer and an employment agreement to work for DDMC. The agreement set up a 4-year employment term, with the pay increased to over $200,000. That agreement has a non-compete clause in it. The language is in paragraph 14 of the agreement. I've brought a copy of it for you to look at.

TEDESCI: Were you aware of that term in the agreement when you signed it?

HARRIS: Yes, I knew about it. I read the whole thing and discussed it with some of my professors at the University and one of their lawyers. They all said it was fairly standard in the medical profession, that all practices had similar terms, and that they were in all the employment agreements because clinics and practices don't want to train someone, help them develop a specialty and a patient base, and then have the doctor leave with all of the patients. Otherwise they might not hire me at all. One of the professors told me that she heard that if the terms are totally unreasonable, and try to keep you from practicing medicine of any kind or anywhere, sometimes they can't hold you to it, but that 3 years and the 20-mile radius are probably okay. That seemed fair enough to me. I understood Medved's point of view, and I went ahead and signed it. I was the one who

really wanted DDMC to hire me, so I wasn't about to wreck the opportunity by objecting. It wasn't really something to negotiate about at that point.

TEDESCI: After you became a member, how did things go?**HARRIS**: It continued to go quite well. The clinic had a lot of patients. We were getting plenty of referrals from the doctors in the county and we were making a lot of money. Colonoscopies, believe it or not, are in big demand because they are so effective for screening for colon cancer.

TEDESCI: So what happened?

HARRIS: It was all working out well until we sat down not that long ago to figure out what would happen when the 4-year agreement ended. I wanted to become an equal with Medved at that point, concerning the pay and ownership. I thought I had earned it, and I have brought in a lot of business for DDMC. Medved at first said we ought to be able to work that out. But I concluded that he never was genuinely interested in that, and he was just stringing me along on the equal ownership thing.

TEDESCI: Does the employment agreement say anything about renewal or negotiating in good faith towards a new arrangement at the end of the 4-year term?

HARRIS: Nothing. Medved had hinted that we might go in the direction of equal ownership at some point, but in all honesty he hadn't made any promises about that. So after going around and around with Medved about it, I got frustrated, told him it wasn't going to work, and when the 4-year term expired about a month ago, I resigned from DDMC and sold him back my shares.

TEDESCI: Was there anything in the agreement concerning what would happen to the shares if you left the practice?

HARRIS: Yes, there was a "buyout" provision. He gave me a fair amount for the shares. If anything, he was generous. I have no complaints about that.

TEDESCI: What have you been doing since?

HARRIS: I took a little time off, and then got into planning for my own practice. I'd like to open up my own office in Sweetwater to do gastroenterology. I've done some estimates, and if most of my patients stick with me and I get my share of referrals, I can do very well. There is some growth in the area, and I'm betting that the patients I developed during the five years with DDMC will be quite willing to come with me to my new office.

TEDESCI: Sweetwater isn't that big a place. Has Medved figured out that you would like to open up your own practice in Sweetwater?

HARRIS: Oh, yeah, he knows. That's why I'm here, really. Yesterday he called up and asked if I was going to be doing gastroenterology. When I said of course, that's what my practice is, he got mad, started yelling, and said that I couldn't do that, that that was a violation of the agreement, and that if I tried that I would have to shut down and move away. I tried to talk to him about it and said, "You know I live here now and have a family here, and this is the only way for me to make a living." But he wouldn't listen. He said I was violating the covenant not to compete in the agreement, and that he was going to get his lawyer to get an injunction to keep me from practicing.

TEDESCI: Has he filed a lawsuit?

HARRIS: He hasn't done anything yet, but it is only a matter of time, I think. He isn't the type to say he is going to do that and not do it. So I guess I need some help with this.

TEDESCI: Looking at the language in paragraph 14, it says that the geographic scope of the non-compete agreement is a 20-mile radius of Sweetwater, and a 5-mile radius around hospitals or offices served by Doral Digestive Medical Clinic. Is there a way to just move your practice outside of that radius? If that is easy to do, that is one easy way to solve the problem.

HARRIS: I wish, but it wouldn't make any sense to do that. Almost all of my patients live near Sweetwater. Many patients needing GI care are elderly and frail. Neither they nor I would be enthusiastic about making a long trip, and the only place that makes sense to locate outside the radius is about 75 miles away. There is one hospital and medical building area that might be outside the 20 miles, but DDMC has a contract with them and does their gastroenterology, so according to the agreement I can't locate within 5 miles of that place. So none of it makes sense. Besides, I shouldn't have to move out, should I? These are my patients. I'm meeting a real need for these patients, and all Medved would have had to do was be reasonable and I wouldn't have left DDMC.

TEDESCI: Let me ask you something else. According to paragraph 14, the duration is three years. Is it feasible to do gastroenterology elsewhere for that time and then come back to Sweetwater?

HARRIS: No, for a couple of reasons. I'd lose my patients and I feel responsible for them. This is a medical practice we are talking about. I can't just cut and run. When I got back, who knows where they would be? I wouldn't blame them for being upset if I abandoned them for three years. In addition, and maybe the main thing, I'd lose out on referrals I can get from local doctors. It took a while before they started referring to me. I'll lose all of that. Furthermore, I bought a home here, I'm married now and have a young child, and we want to stay in this area.

TEDESCI: The payment term in the agreement is 25% of the monthly income. Sometimes such terms are interpreted to be a buyout provision that enables you to choose to practice if you are willing to pay it. I'm not saying that is the way it would be interpreted, but is that reasonable?

HARRIS: Sure. But things would be tight those first three years.

TEDESCI: Yes, but given that the 25% figure is reasonable, that portion is enforceable. So it comes down to whether the non-compete provision itself is enforceable. I think I have a pretty good picture of it. But why don't you tell me exactly what you would like to know from us?

HARRIS: I'd like some advice on what will happen if I go ahead and open up my practice. I need to know if Medved can really close me down. It is hard for me to believe the law really lets him do that. That doesn't seem right at this point. I also need to know if I will have to pay the money. I may have to move away to practice.

TEDESCI: Okay. We can evaluate all that. I can see that you need an answer to this quite soon. We need to do some research and then we'll give you an opinion letter advising you.

HARRIS: Great.

Excerpt from Employment Agreement:
Dr. Kyle Harris and Doral Digestive Medical Clinic

Paragraph 14

The parties recognize that the duties to be rendered under the terms of this Agreement by the Employee are special, unique and of an extraordinary character. The Employee, in consideration of the compensation to be paid to him pursuant to the terms of his employment with the Employer Corporation, expressly agrees to the following restrictive covenant:

(A) The Employee agrees that for a period of three (3) years after the date of termination of this Agreement, the Employee shall not, either separately, jointly, or in association with others, establish, engage in, or become interested in any entity that directly or indirectly competes with the business of the Employer Corporation. For purposes of this paragraph, "the business of the Employer Corporation" is defined as the general practice of gastroenterology, within a geographical area of a 5-mile radius of any office or hospital used by or serviced by the Employer Corporation, or within a 20-mile radius of Sweetwater, whichever is a larger area.

(B) The Employee agrees that a violation on his part of any covenant set forth in this Paragraph 14 will cause such damage to the Employer Corporation as will be irreparable. For that reason, the Employee further agrees that the Employer Corporation shall be entitled, as a matter of right, to an injunction from any court of competent jurisdiction, restraining any further violation of said covenants by the Employee, his corporation, partners or agents. Such right to injunctive remedies shall be in addition to, and cumulative with, any other rights and remedies the Employer Corporation may have pursuant to this Agreement or law. In addition to injunctive relief and other rights and remedies, the Employee agrees that he will pay to the Employer Corporation, to indemnify the Employer Corporation for the Employee's breach of any covenant, liquidated damages of twenty-five percent (25%) of the gross receipts received for medical services provided by the Employee, or any employee, associate, partner, or corporation of the Employee during the term of this Agreement and for a period of three (3) years after the date of termination, for any reason, of this Agreement.

MEMORANDUM

TO: Catherine Tedesci

FROM: Joan Malzone

DATE: February 22, 2013

RE: Market and Other Factual Data Concerning Doral Digestive v. Dr. Harris

Pursuant to your request, with the help of medical economist Steven J. Long, I have developed data concerning gastroenterological (GI) medical care as it pertains to Doral Digestive Medical Clinic (DDMC) and the Doral County/Sweetwater area. Two hospitals serve the area. We interviewed many physicians and hospital administrators knowledgeable about the area and gastroenterology, and generated additional data via questionnaires.

It is correct that the only two gastroenterologists in the greater Sweetwater area are Dr. Medved and Dr. Harris. Other than those two, the nearest GI specialist is in Porter, a major metropolitan area about 70 miles away.

Gastroenterology is a subspecialty of Internal Medicine that focuses on the intestinal tract and liver. Ailments such as heartburn, ulcers, pancreatitis, hepatitis and colitis are the most common gastrointestinal complaints. Much of the field focuses on early colon cancer detection and endoscopy. Endoscopy is performed to visualize and examine internal organs and to treat conditions such as colon polyps, intestinal bleeding, and stones in the bile duct. Most patients see a GI specialist at least once every five years for basic checkups and colon cancer screening. Most care can be done in the office and does not involve hospitalization.

The nature of the doctor-patient relationship in a GI practice often is not particularly close. The bulk of the DDMC practice is devoted to colon cancer screening and thus concerns colonoscopy, a procedure in which a gastroenterologist threads a scope into the colon inspecting for cancer or precancerous polyps, both of which can be biopsied or removed during the procedure. The patient is usually not awake for the procedure, and there is little contact between the doctor and the patient. Gastroenterologists don't ordinarily treat cancers. They do remove polyps for testing.

There are other aspects of the practice, including endoscopies of the stomach, mostly to inspect for ulcers. But this is waning, as the bacteria that causes ulcers have begun to disappear, so there are fewer patients with chronic ulcers treated by gastroenterologists. A large amount of the remainder of the practice constitutes standard tests, including prescribing and then interpreting blood tests, x-rays, and endoscopy results. Occasionally, recurring pancreatitis, GI bleeding, liver disease or irritable bowel syndrome lead to a more personal, patient-specific relationship, but it is the exception rather than the norm for the practice of gastroenterology in the greater Sweetwater area. There is a financial disincentive to treating patients with these conditions because they require extensive discussions with patients to help them cope, for which there is not much remuneration. The major issue for a patient switching from one gastroenterologist to another is not the personal nature of the doctor-patient relationship, but rather the inertia effect. Most of the procedures are diagnostic and not particularly comfortable, and if given a reason not to go, some patients may not seek colonoscopies at all.

Colonoscopies currently can be done only by gastroenterologists. On the horizon in this field, however, is colon cancer screening done by radiologists using CT scans to create a "virtual" picture of the colon without the need to use the scope. Also, primary care physicians will be able to take routine DNA samples from the colon and then send them to a lab to test for cancer. These technologies are expected to come on the market in about five years.

A couple of physicians stated that losing Dr. Harris's services would be "tragic" for the community. Most did not state it that strongly, but stated that "people need to go to GIs for routine services such as colonoscopy." They explained that for most patients over 50, colonoscopy every five years can drastically reduce the death rate from colon cancer. They all expressed concern that patients might be more likely to stop going if they had to switch to a different GI specialist or if there were less availability, and that that result would be troubling.

All physicians believed that having more than one gastroenterologist in the area would be "desirable." Quite a few physicians stated that, in their view, one gastroenterologist would not be able to meet the community's demand for such services, and that losing Dr. Harris's services would create an excessive workload on Dr. Medved, and would "likely result in undesirable and possible critical delays in patient care and treatment." But many other physicians and hospital administrators commented that Dr. Medved did not appear pressed for time, and they anticipated he could probably fairly easily meet the community's demand for services, including those patients that until recently were handled by Dr. Harris. They pointed out that, in addition to treating his patients, Dr. Medved has had time to obtain and complete a large number of pharmaceutical contracts for major drug companies, has worked with local businesses in conducting preventive medicine programs and cost benefit studies, and, even prior to Dr. Harris's arrival in Sweetwater, has traveled outside the city to other communities in order to serve patients. Many of the physicians also stated that Dr. Medved has provided prompt and efficient care, and that they had no knowledge of patients going untreated. No one had heard of any circumstance in which a patient has gone without proper care at those times when Dr. Medved was the only gastroenterologist in Sweetwater, both before and after Dr. Harris was with DDMC.

Many physicians noted that many patients needing GI care are elderly and frail, and would be forced to travel about 70 miles from Sweetwater if Dr. Medved were unavailable or if the patients preferred to see a different gastroenterologist. They stated that several emergency situations, such as GI bleeding, liver coma and jaundice, and pancreatitis from biliary stones, occur in the GI field, and could make travel for care life-threatening. But no one said that patients needing emergency care had gone untreated and no one stated strongly that such a result was likely if Dr. Harris were unable to continue to practice in Sweetwater. A few indicated that Dr. Harris might perform certain highly specialized procedures that Dr. Medved does not perform, but everyone else thought the two were virtually identical concerning what they provided and their respective abilities. They also noted that there are presently four surgeons in Sweetwater who can perform surgery for GI bleeding and certain other semi-surgical

procedures performed by gastroenterologists. In addition, they mentioned that GI emergencies, mostly GI bleeding, are rare and that in severe cases patients can be transferred by helicopter from the hospital in Sweetwater to Baptist Hospital in Porter, a trip of about 70 miles. Helicopter facilities are available at both of the local hospitals in the greater Sweetwater area.

One internal medicine specialist stated that he and Dr. Medved cover each other's cases. He also noted that there are a large number of internal medicine specialists in the county area served by DDMC, but that no one else is certified in the subspecialty of gastroenterology, which generally requires two additional years of training beyond that required to become an internist. He wasn't aware of any internists presently in the Sweetwater area who had started the training.

Prior to Dr. Medved's arrival in 1998, there had never been a gastroenterologist practicing in Sweetwater. Dr. Medved established a successful practice. At least sixteen gastroenterologists practice in Porter, 70 miles from Sweetwater. There is no shortage of specialists in internal medicine in Sweetwater.

The geographic area described in the non-compete covenant encompasses approximately 1200 square miles in and near Sweetwater and that portion of Doral County. All physicians agreed that DDMC's patients were from all over Doral County in the Sweetwater area. According to the doctors, Dr. Medved has "a well-established referral network" in the greater Sweetwater area. Most physicians have been referring their patients to Dr. Medved for GI work. The statement of one physician was typical: "Medved and Harris get my referrals. They are local and they do very good work. If Harris goes out on his own, I'd refer to both." When asked how long it would take for a new GI specialist to build up such a referral base, everyone agreed that it would take a minimum of two years to become known by the physicians in the area, and that realistically it might take up to three years. They said they didn't start seriously referring people to Dr. Harris, instead of Dr. Medved, until Dr. Harris had been with DDMC for two or three years.

There was a lot of speculation that Dr. Medved was trying to hire someone to replace Dr. Harris. There is a bit of a shortage of GI specialists throughout Columbia. One might think that this fact would make it easy to attract someone to Doral County,

but in fact the opposite is true. The fact that it is somewhat rural in the county is not particularly attractive to most GI specialists, and in a comparative sense it would be easy and more lucrative to set up a GI practice around Porter. Since that is easy to do, and Porter is not yet overcrowded, it is harder to attract someone out to Doral County. Nevertheless, Dr. Medved has interviewed four or five doctors, and could hire at least one, and that might alleviate some of the situation of having only one provider if Dr. Harris were unable to practice in the area.

February 2013

California Bar Examination

Performance Test A LIBRARY

Doral Digestive Medical Clinic v. Dr. Kyle Harris

LIBRARY

Canyon Medical Specialists v. Eiger

Columbia Court of Appeal (2005)

Canyon Medical Specialists v. Eiger

Columbia Court of Appeal (2005)

We granted review to determine whether the restrictive covenant between Dr. Eric Eiger and Canyon Medical Specialists is enforceable. We hold that it is not.

Canyon Medical Specialists ("CMS"), a professional corporation, hired Eric S. Eiger, an internist and pulmonologist who, among other things, treated AIDS and HIV-positive patients and performed brachytherapy -- a procedure that radiates the inside of the lung in lung cancer patients. Brachytherapy can only be performed at certain hospitals that have the necessary equipment. The employment agreement, which initially committed both Dr. Eiger and CMS for three years, contained the following restrictive covenants:

> The parties recognize that the duties to be rendered under the terms of this Agreement by the Employee are special, unique and of an extraordinary character. The Employee, in consideration of the compensation to be paid to him pursuant to the terms of this Agreement, expressly agrees that in the event either Employee or Employer terminates Employee's employment with the Employer, the Employee shall not
>
> (a) Establish, engage in, become interested in, or work for anyone competing with, or who may compete with, the Employer in the practice of medicine within a five (5) mile radius of any office currently maintained or utilized by Employer for a period of two (2) years following the date of termination or dissolution or
>
> (b) Either separately, jointly or in association with others, provide medical care or medical assistance to any person or persons who were patients of Employer during the period that Employee was in the hire of Employer.
>
> Employer shall be entitled as a matter of right to an injunction restraining any violation of this covenant.

Dr. Eiger ultimately left CMS and began practicing within the area defined by the restrictive covenant. CMS sought preliminary and permanent injunctions enjoining Dr. Eiger from violating the restrictive covenant. The trial court denied CMS's request for a preliminary injunction, finding that the restrictive covenant violated public policy, as it interfered with the ability of AIDS patients to select the doctor of their own choosing or, alternatively, the restriction was unreasonable because it did not provide an exception for emergency medical aid and was not limited to pulmonology.

I. DISCUSSION

A. Level of Scrutiny

Despite the freedom to contract, the law does not favor restrictive covenants because they restrain trade, particularly in the employer-employee context. This disfavor is particularly strong concerning such covenants among physicians because the practice of medicine affects the public to a much greater extent. In fact, for the past 60 years, the American Medical Association (AMA) has consistently taken the position that non-competition agreements between physicians have a negative impact on patient care. Dr. Eiger signed the covenant not to compete in the context of an employee-employer relationship. Accordingly, the covenant will be strictly construed against CMS.

B. Columbia Law for Non-Competition Covenants

Under Columbia law, non-competition covenants are enforced only when reasonable. Reasonableness is a fact-intensive inquiry that depends on the totality of the circumstances. Each case hinges on its own particular facts. A restriction is unreasonable and thus will not be enforced: (1) if the restraint is greater than necessary to protect the employer's legitimate interest; or (2) if that interest is outweighed by the hardship to the employee and the likely injury to the public. Thus, in the present case, the reasonableness inquiry requires us to examine the interests of the employer, employee, patients, and public in general, to accommodate a right to work, a right to contract, and the public's right to competition. Balancing these competing interests is no easy task and no exact formula can be used. Accordingly, when strictly construed, a

physician's covenant not to compete will be enforced only if it (1) is in writing; (2) was entered into at the time of and as part of a contract of employment; (3) is based on valuable consideration; (4) can be shown by the covenantee to be reasonable in scope, including time, territory, and activity; and (5) does not fail due to public policy concerns.

The first two requirements, which are routinely present, exist here. It is uncontested that the agreement is in writing and was part of the contract of employment.

1. Consideration

The covenant must be based on valuable consideration. When the employment relationship is established before the covenant not to compete is executed, unless there is separate consideration to support the covenant such as a pay raise or other employment benefits or advantages for the employee, the covenant will not be enforced. Here the relationship was established at the time of the covenant, however, so there is consideration for the covenant: Dr. Eiger obtained, in exchange for the promise, the chance at a job.

2. CMS's Protectable Interest

CMS contends that it has a protectable interest in its patient base and network of referral sources. In the commercial context, it is clear that employers have a legitimate interest in retaining their customer base. The employer's point of view is that the company's clientele is an asset of value which has been acquired by virtue of effort and expenditures over a period of time, and which should be protected as a form of property. CMS has thousands of patients and a well-developed referral network. The employer's interest in its patient "customer base" is balanced with the employee's right to the patient "customers." Where the employee took an active role and brought already developed skills and customers with him or her to the job, courts are more reluctant to enforce restrictive covenants.

Dr. Eiger was a pulmonologist when he joined CMS, and brought some of his patients with him. He did not learn his skills from CMS. Restrictive covenants are designed to protect an employer's customer base by preventing a skilled employee from

leaving an employer and, based on his skill acquired from that employment, luring away the employer's clients or business while the employer is vulnerable; that is, before the employer has had a chance to replace the employee with someone qualified to do the job. These facts support the trial judge's conclusion that CMS's interest in protecting its patient base, ordinarily a strong interest, was less significant here. We agree with CMS, however, that in addition to its patient base, CMS has a protectable interest in its referral sources. Clearly, the continued success of a specialty practice, which is dependent upon patient referrals, is a legitimate interest worthy of protection.

3. Scope of the Restrictive Covenant

The restriction cannot be greater than necessary to protect CMS's legitimate interests. A restraint's scope is defined by its duration, geographic area, and definition of activities prevented. The idea is to give the employer a reasonable amount of time to overcome the loss of the former employee, usually by hiring a replacement and giving that replacement time to establish a working relationship, while giving the employee a reasonable opportunity to return to the geographic area after practicing outside of the area or in a different specialty for the duration.

a) Scope - Duration

An unduly lengthy time restraint in a covenant affords more protection to the employer than is justified, given the protectable interests, and will not be enforced. The duration of the restrictive covenant here is two years. Such durations have been found reasonable in many cases concerning physician covenants not to compete. While flat rules of reasonableness do not exist with regard to duration, two years appears to be near the outer edge of permissible restrictions, although some longer covenants (e.g., three years) have been found reasonable in duration even using the strict scrutiny applied to these covenants in employment contexts. Here, in order to protect CMS's interest in the referral base, the two years is reasonable, as it would take three to five years for Dr. Eiger's replacement to develop his pulmonary practice referral sources to the level they were when Dr. Eiger resigned.

b) Scope - Geographic Considerations

A covenant which includes more territory than necessary to protect the legitimate business interests of the employer is not reasonable, as it excludes the physician from practicing in areas where the employer has no claim to need protection. The question thus is whether the size of the territory at issue here, which encompasses approximately 235 square miles, is necessary to protect CMS's legitimate interests. Evidence supports the trial court's finding that this was a reasonable restricted territory, as CMS attracted patients and referrals from throughout the designated area. Significantly, larger areas have been upheld as reasonable geographic restrictions on a physician's practice (e.g., an 1800 square mile area was upheld because the clinic attracted patients from throughout the restricted area; a ten county territory was upheld because the professional corporation had patients in all ten counties; and in the non-physician context, a half million square mile area was upheld because the employee and employer did business throughout substantial portions of the area). See generally, Sasabe v. Island Dialysis Clinic.

c) Scope - Activity Prevented

The activity prohibited by the restraint also defines the covenant's scope. In order to protect the employer's legitimate interests, the restraint must be limited to the particular areas of the present employment. Peairs v. Old Town Orthopedic (upholding injunction that enforced restrictive covenant preventing doctor from practicing only orthopedic medicine and orthopedic surgery). Otherwise, the restriction on the physician is too great.

On its face, the restriction at issue here precludes any type of medical practice, even in fields that do not compete with CMS. The covenant prohibited Dr. Eiger from providing any and all forms of "medical care," including not only pulmonology, but emergency medicine, brachytherapy treatment, and HIV-positive and AIDS patient care. Thus, we agree with the trial judge that this restriction is too broad.

4. Public Policy Considerations

The general rule is that a covenant not to compete is contrary to public policy unless the covenant protects a legitimate interest of the employer and is not so broad as

to be oppressive to the employee or the public. In examining covenants not to compete between physicians, many courts in many jurisdictions have recognized the need to balance the public interest in health care with personal freedom of contract, and have determined that under the particular facts before them, the public interest must prevail. If ordering an employee physician to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interest outweighs the contract interests of the employer, and the court will refuse to enforce the covenant. But public policy can sometimes best be served by enforcing a narrowly tailored physician covenant not to compete. There is benefit to the public as well as to the employer physician if the covenant encourages agreements between young doctors and older or more experienced practitioners. If ordering the employee physician to honor his agreement will merely inconvenience the employee physician without causing substantial harm, and enforcement can be seen to facilitate a desirable type of risk-taking physician relationship, the employer is entitled to have the covenant enforced.

There are several aspects to this consideration, including the availability of other physicians in the community affected by the covenant, the extent to which a patient's ability to select the doctors of his/her choice is significantly impaired by the covenant, and the hardship to the individual physician.

a) Are Covenants Restricting Medical Professionals Unreasonable Per Se as a Matter of Public Policy?

Dr. Eiger asks us to hold, as some states do, that restrictive covenants in the medical profession are void per se as against public policy. Such a rule assumes restrictive agreements are not in the public interest because free choice of doctors is the right of every patient, and free competition among physicians is a prerequisite of optimal care and ethical practice. Dr. Eiger's argument, however, would overturn a staggering number of Columbia cases that have implicitly rejected his argument by enforcing restrictive covenants in the medical context. We decline to overrule the longstanding principle that such agreements are not unreasonable per se.

b) Undue Hardship to the Physician

An original public policy concern with covenants not to compete was that, in addition to being anti-competitive and thus depriving the public of adequate choice, enforcement might deprive the restricted employee from earning a living. If the covenant would effectively remove a physician from the marketplace entirely, by either explicitly or as a practical matter prohibiting him or her from practicing entirely, such an undue hardship can render a covenant unenforceable.

The trial court concluded that hardship to Dr. Eiger was not a sufficient justification for refusing to enforce the covenant. Again, we agree. Although Dr. Eiger and his expert testified that they did not believe Dr. Eiger could maintain an adequate practice outside the restricted areas, the facts demonstrated that Dr. Eiger is a highly qualified pulmonologist who could quite easily continue to practice outside of the restricted area. It might necessitate a move of offices, and perhaps a move to an alternative metropolitan area in the state, although there appear to be hospitals outside the restricted area near enough to where Dr. Eiger currently lives that he need not relocate or face an untenable commute. The question is whether doing so would be such a hardship that, as a practical matter, he would be unable to continue his practice and be forced to leave medicine entirely. Case law from many jurisdictions indicates that the physician must face such a significant relocation that so disrupts his or her personal life as to render a move impractical. Here, and generally, the "inconvenience" category is a large one. While enforcement of the covenant would no doubt have an adverse effect on Dr. Eiger's practice, it would not amount to an "undue hardship" that would prevent enforcement of the covenant.

c) Availability of Other Physicians

The public always has an interest in the availability of an adequate number of providers of any good or service. Thus, all non-compete agreements are scrutinized to make sure that the covenant does not shield the covenantee from minimal competition necessary to provide goods and services at the highest output and lowest cost to society. Such a concern is paramount concerning non-compete agreements applicable to physicians, as the public needs for available medical care are crucial. Courts in

many jurisdictions have refused to enforce covenants that otherwise appeared reasonable in scope for this public policy concern. For example, an injunction was denied against a podiatry specialist where there was testimony of a shortage of such specialists in the county and patient delays in getting appointments. Similarly, a covenant was not enforced against an ear, nose, and throat (ENT) doctor where the court noted that it was common knowledge that specialists were in short supply in the state, despite the fact that there was conflicting testimony as to the number of ENT specialists in the area. See generally, ENT Inc. v. Atkinson. In New Castle Orthopedic Associates v. Burns, enforcement against an orthopedic specialist who was one of only two such physicians in a small community was denied, because the result might leave the community in a vulnerable position.

Here, the trial court concluded that the restrictive covenant is not so broad as to violate public policy concerning a restricted number of physicians. We agree. The record contains nothing to suggest there will be a lack of pulmonologists in the restricted area if Dr. Eiger is precluded from practicing there. To the contrary, there appears to be an abundance of highly qualified pulmonologists in the five-mile radius from each of the three CMS offices, even though it covers a total of 235 square miles.

d) Patient Physician Choice

A court must evaluate the extent to which enforcing the covenant would foreclose patients from seeing the departing physician if they desire to do so. If a covenant not to compete fully removes patients' ability to continue to see a particular doctor of their choice, where successful treatment relies on the individualized nature of the doctor-patient relationship, the covenant may run afoul of public policy. For example, a court recently denied enforcement of a covenant against two pediatric specialists with many special needs patients in the restricted area, even though the community would still have had five pediatricians in the restricted area. Given the nature of the relationship between the pediatricians and their special needs patients, the covenant was unenforceable due to public policy. Similarly, a covenant asserted against a speech and hearing pathologist was struck down when she demonstrated that the patients she treated were not readily transferable to another therapist, even though there were other

therapists in the area. Where there is less of a personalized nature of the doctor-patient relationship, however, this concern bears less weight. It is a reality of modern medical practice that patients find many doctors interchangeable within particular practices, and patients change doctors frequently due to changes in insurance. Practices that involve mostly standard diagnostic procedures and tests, such as x-rays, CAT scans, endoscopy and blood tests, create less of a concern and covenants have been enforced against physicians whose practices predominantly involved those areas, although the covenant must be evaluated on a case-by-case basis rather than solely on the area of practice.

Here, the trial court found a crucial need for patients to select a particular pulmonologist with whom to work. We agree, particularly concerning pulmonologists who treat AIDS patients, given the potential for ongoing and specialized treatment. The geographic scope of this covenant encompasses approximately 235 square miles, making it very difficult for Dr. Eiger's existing patients, some of whom established their relationships with Dr. Eiger before he joined CMS, to continue treatment with him if they so desire. We thus hold that the covenant not to compete is unenforceable as a matter of public policy because it interferes with Dr. Eiger's patients' ability to select the doctor of their choice.

C. Judicial Rewriting of Covenants Not to Compete

On its face, the covenant broadly restricts Dr. Eiger from providing "medical care or medical assistance to any person or persons who were patients of Employer during the period that Employee was in the hire of Employer." CMS invites this court to use a "blue pencil" to rewrite the covenant to make it reasonable and thus enforceable. CMS's proposed approach has some superficial appeal on the theory that it results in enforcement of reasonable prohibitions. Columbia courts, however, have consistently refused to "blue pencil" or otherwise rewrite a non-compete covenant to make it reasonable. We decline to overturn this longstanding rule.

II. CONCLUSION

We hold that the restrictive covenant between Dr. Eiger and CMS cannot be enforced. Canyon Medical Specialists' interest in enforcing the restriction is outweighed by the likely injury to patients and the public in general.

ANSWER A TO PERFORMANCE TEST A

Applicant
Law Offices of Catherine R. Tedesci
1199 Brian Drive
Sweetwater, Columbia

February 26, 2013

Dear Dr. Harris,

I understand that you have recently left your employment with Doral Digestive Medical Clinic (DDMC) and part of your employment contract with DDMC contained a covenant not to compete should you leave DDMC employ. You have contacted the Law Offices of Catherine R. Tedesci to learn whether or not this covenant is enforceable in whole or part. This letter provides the Firm's opinion of whether and to what extent the covenant is enforceable.

Whether or not and to what extent a covenant not to compete is enforceable is a matter governed by case law of Columbia, the jurisdiction in which DDMC is located and the jurisdiction in which the covenant would be enforced. In determining whether a covenant not to compete is enforceable Columbia courts will look at a variety of factors which are balanced against each other. No one factor is necessarily determinative of whether or not the covenant will be enforceable. However, as discussed below, it is likely that the covenant will be held to be reasonable in all respects except its negative impact on the availability of gastroenterologists (GI doctors) in Sweetwater.

ANALYSIS

As an initial matter, it should be noted that covenants not to compete are disfavored and the disfavor is particularly strong with respect to covenants not to compete applicable to physicians. In fact, Columbia courts have recognized that the American Medical Association regards such covenants are having a negative impact on patient care. Because of this disfavor, Columbia courts "strictly construe" non-competition agreements against the employer seeking to enforce the covenant. This means that Columbia courts are very critical of covenants not to compete and will view such agreements with an eye against enforcement. This general disfavor is a factor in your favor.

Factors the Court Will Consider

In general, at a very high level of generality, a covenant not to compete will not be enforced if either the restraint is greater than necessary to protect the employer's legitimate interest or if the employer's interests are outweighed by the hardship the covenant places on the employee and the public. In an attempt to balance these interests, Columbia courts have held that a covenant not to compete will be enforced only if (1) it is in writing, (2) was entered into at the time of employment and as part of the employment contract, (3) is based on valuable consideration, (4) is reasonable in scope (time/duration, geographic territory, and activity), and (5) is not contrary to public policy.

1. Writing

In this case, there is no dispute that the employment agreement with the non-compete clause you signed was in writing. This factor is not going to be an issue in the case.

2. Entered into At Time of Employment and As Part of Employment Contract

In this case, the covenant not to compete was entered into while you were employed and as part of an employment agreement. This factor is not going to be an issue in the case.

3. Valuable Consideration

The covenant not to compete must be based upon consideration. This means that in exchange for agreeing not to compete the employee received something valuable from the employer in return.

If the covenant not to compete was part of the original employment agreement, meaning that the employer-employee relationship had not already been established, consideration is not an issue. This is because the employer's agreement to hire the employee based on the employee's promise to fulfill his employment duties including a promise not to compete is regarded as fulfilling the consideration requirement. In short, being hired is the consideration.

If the covenant not to compete was entered into after the employment relationship had already commenced, the covenant will be enforceable only if it was supported by some separate, additional consideration. Mere employment will not suffice in this context. An increase in salary or additional employment benefits would be examples of separate additional consideration to support the covenant not to compete that was introduced into an already existing employment relationship.

In this case, when you officially started as an employee of DDMC will be an issue. You described your initial agreement with DDMC as a trial-period agreement and as "sort of like a fellowship year". Moreover, when you signed the employment agreement with the covenant, it was as part of a discussion of you joining the clinic as a "shareholder member" for which you signed an "employment agreement". If the original agreement you had with DDMC is regarded as a fellowship relationship rather than an employment

relationship, DDMC will not have to show additional or separate consideration for the covenant because there was technically no prior or pre-existing employment relationship between you and DDMC. Thus, the covenant was included at the commencement of the official employment relationship meaning that employment was sufficient consideration for the covenant.

On the other hand, even if the court were to find that the trial year or fellowship year was an employment relationship, DDMC can show that it paid separate additional consideration for the covenant not to compete that it included in the second employment agreement. Since the second employment agreement included a pay raise (from $160,000 per year to $200,000 per year) and a stock transfer this would constitute separate, additional consideration beyond the pre-existing employment relationship.

Thus, DDMC will be able to show valuable consideration supported the covenant regardless of whether or not the covenant was introduced at the commencement of the employment relationship or was introduced into a pre-existing employment relationship.

4. Reasonable in Scope

Whether a covenant not to compete is reasonable in scope is dependent upon employer's ability to show that the restrictions in the covenant are reasonable in relation to the importance of the employer's interest. Columbia courts have recognized that an employer has a legitimate interest in keeping its "customers" and that a covenant not to compete can be a reasonable means of protecting this interest. This is because the employer has expended time and money in acquiring its client base. The courts regard this expenditure as giving employers a property interest in the client base which is entitled to protection.

However, the strength of the employer's interest in protecting its client base is reduced when the employee subject to the restriction played an active role in the development of that client base and/or brought clients with him to the employer. Thus, the strength of an employer's interest in protecting its client base is weakened when the very employee it

is seeking to restrain was a driving force behind development of the client base. Examples would include a doctor who has garnered a strong following among patients such that they refer others to the doctor (and by extension to the employer) or a doctor whose pre-existing patients continued to go to him after he was hired by the employer.

The employer also has a strong interest in protecting its client base when the employees sought to be restricted obtained their skills from the employer. This is because the employer has expended time and resources in training the employee and it would be unfair to allow the employee to use his skills acquired at the employer's expense to immediately take away clients from the employer.

However, the strength of the employer's interest in protecting its client base would be reduced if the employee were already skilled prior to being hired. If a doctor was already well-experienced at the time he was hired, his ability to lure patients away from the employer would not be based on skills acquired at the employer's expense; thus, the employer's interest in protecting its client base on the grounds that it trained the employee are less strong.

In this case, you were a novice doctor at the time you joined DDMC. Indeed, you stated that you sought out DDMC in order to learn and acquire skills and knowledge and to get your career going. DDMC provided you with training and experience. In short, DDMC has invested a great deal of resources in you and thus has a strong interest in ensuring that you do not immediately turn around and use those skills against them to take its patients. Indeed, you stated that you recognized this interest of Dr. Medved at the time you were presented with the covenant not to compete in your employment agreement.

DDMC is also likely to make a strong argument that the vast majority of the patients who would form the clientele for your new practice were gained during your employment with DDMC and that DDMC provided you with the opportunity, resources, and training to develop these patients. We can argue that you played an important role in the development of the patient base as evidenced by the fact that your patients are willing

to following you to your new practice. However, since DDMC did provide you with all of your practical experience and training, it is likely they have the stronger interest with respect to the development of the client base.

Once the strength or importance of the employer's interest is known, the employer has the burden to show that the covenant not to compete's restrictions are not greater than necessary to protect that interest. The employer cannot use means that are overbroad or excessive in relation to his interest. The restrictions must be proportionate to the strength of the employer's interest. A covenant not to compete is based on the rationale that it will take an employer time to recover from the loss of an employee with specialized skills. Thus, restrictions give the employer a bit of time in which to hire a replacement and allow the replacement to become an effective employee but they must also allow the former employee a reasonable opportunity to return to practice.

a. Time/Duration

The length or duration of the covenant cannot be excessive. While there is no bright-line rule that says “x number years is too long but y number of years is okay”, Columbia courts have found that generally two years is at the outer edge of what is permissible. While covenants for a longer period have been upheld, in general two years appears to be reasonable but at the outer limit. In determining whether a particular amount of time is reasonable, the court will likely look to the length of time it would take for the replacement to develop the skills and customer base the former employer had at the time he left.

The covenant not to compete has a duration of 3 years. This period is outside what is generally regarded as the outer edge of permissible. However, as there is no bright line it is not necessarily unreasonable. On the other hand, based on the Firm's interview with you, it appears that it took about 1 year for you to acquire the skills necessary to practice with and become a full member of DDMC as a gastroenterologist. If DDMC could hire and train a replacement for you within a year then a 1 year restriction will certainly be upheld as reasonable. The question is how long would it take

for DDMC to hire and train a replacement with your level of skill and patient base. You were employed with DDMC for an additional 4 years before you left for a total of 5 years for you to acquire the skills and client base you had when you left. It is likely that it would take at least 3 years for DDMC to hire a replacement, train him in the specialty, and have him obtain the same sized client base as you. Indeed others have indicated such a client base takes 2 years to develop. Thus, it is quite possible that the 3 year restriction is not unreasonable. This is all the more likely to be upheld as reasonable since the GI specialty requires an additional two years of training and currently no internists in the Sweetwater area have started that training. It is thus very likely the duration of 3 years is reasonable.

b. Geographic Territory

The territory covered by a covenant not to compete cannot be greater than necessary to protect the employer's interest. There is no bright-line rule setting a specific number of miles as permissible or impermissible. Rather, the court will look to the geographic area of the employer's customer base. If the restricted territory is limited to areas from which the employer draws its clients and referrals that restriction is likely to be held as reasonable. Thus, even very large areas could be restricted if it were shown that the employer draws clients from that large a geographic area.

In this case, the geographic area in which you are restricted from practicing is the larger of within a 5 mile radius of any office or hospital used by DDMC or within a 20 mile radius of Sweetwater. Based on the Firm's assessment this covers 1200 square miles. These 1200 square miles also represents the area from which DDMC draws its patient and referral base. Thus, it is very likely to be held to be reasonable.

c. Activity

The covenant not to compete must be limited to the particular areas of the former employee's employment. Thus, the Columbia Court of Appeal has held that a covenant not to compete purportedly restricting a specialty doctor from not only practicing his specialty but also all forms of medical care was unenforceable as too broad.

In this case, the covenant is limited to your specific area of practice while employed with DDMC. You are precluded under the covenant only from the general practice of gastroenterology. This is likely a reasonable restriction because it is limited to the area you practiced while employed with DDMC and it is a specific area of practice. Thus, you would be free to practice other types of medicine and provide other types of medical care.

5. Public Policy

Unlike some other jurisdictions, Columbia courts have consistently refused to hold that covenants not to compete among physicians are unreasonable per se as against public policy. Rather, Columbia courts will assess the level of harm or benefit to the public from the covenant not to compete. Indeed, it should be noted that Columbia courts have acknowledged that a narrowly drawn covenant not to compete between physicians can benefit the public by encouraging what would otherwise be uncertain or risky agreements between young doctors and more experienced doctors. This is because the covenant protects the more experienced doctor's investment in his client base and the resources expended to train the younger doctor.

Your relationship with DDMC is just the kind of relationship that covenants not to compete foster. Dr. Medved was an experienced doctor who took a chance by expending resources training you. As a result, you are now an experienced GI doctor with much to offer. However, such relationships would not be possible if covenants were not enforced and employees were allowed to immediately use the skills their employers paid for against those same employers by taking away patients. Thus, if the covenant is found to be narrowly drawn, it will likely be enforced.

(a) Undue Hardship to Physician

The public policy assessment also includes the hardship to the employee who is restricted. If the covenant is so restrictive that it effectively removes a physician from the marketplace, it will not be enforced. This is a high burden to show. The Columbia Court of Appeal has found that a highly qualified specialist doctor could easily continue to

practice outside of the restricted geographic area. Indeed, the costs and hassle associated with relocation do not suffice as sufficiently unduly burdensome unless it is so significant and disruptive to the doctor's personal life to render the relocation impractical. The relocation must present such a hardship that the doctor would be unable to continue practice and have to leave medicine completely.

Although you have recently bought a home, got married, had a child, and wish to stay in Sweetwater, this is unlikely to constitute an undue burden on relocation to such an extent that you would forego medical practice altogether. It would certainly be a major inconvenience to you and would reduce your ability to retain clients and obtain referrals. However, this hardship will be offset by the fact that you gained those patients and the referrals from the investment that DDMC placed in you during your employ.

Additionally, the fact that you would be able to afford, although it would be tight, the 25% penalty for violation if you were to practice in Sweetwater also indicates that the covenant does not impose a severe and unreasonable hardship on your personal life such that you would be taken out of the medical practice entirely.

The court is unlikely to find that you will personally incur a substantial and undue hardship if the covenant were enforced.

(b) Availability of Other Physicians

The public has a strong interest in an adequate number of medical providers. Competition contributes to the goals of quality services at a decrease in cost. However, even absent the economic benefits of competition, Columbia courts have consistently ruled against covenants not to compete among physicians when there was evidence of delays in appointments among patients or merely common knowledge that specialists were in short supply in the restricted area. Moreover, even when this evidence of shortage was conflicted, Columbia courts have ruled against the restriction.

There is a shortage of gastroenterologists in the county. There is only you and Dr. Medved. Although you stated that he plans to hire another GI doctor, it is likely that this would still constitute a dearth of available GI doctors. Indeed, the nearest other GI doctors are 70 miles away in Porter. Moreover, there is no indication that any internists in the Sweetwater area have yet started the 2 year training required to become a GI doctor. This strongly supports the unreasonableness of the covenant.

On the other hand, while there is concern that only having one GI doctor in Sweetwater would put a strain on services, there is no evidence that prior to your arrival or after your departure, any patients were delayed in receiving service or received anything other than prompt and efficient care. Moreover, there is evidence that Dr. Medved would have time to serve the additional patients previously served by you and other physicians and hospitals have also opined that he could handle the increased caseload.

In the case of an emergency, such as internal bleeding, patients could be transported to Porter 70 miles away. Although such cases are rare, emergency treatment that is 70 miles away is a very long distance especially for elderly patients who are those most likely to require such treatment. On the other hand, such bleeding can be treated in Sweetwater by four surgeons who, although not GI doctors, could provide similar semi-surgical procedures in an emergency.

There is a strong argument to be made on the basis that competition among doctors would increase the quality of services and also serve to curtail price increases. With only Dr. Medved practicing in Sweetwater, patients do not have a choice if they want to stay within Sweetwater for treatment and their only other option is to travel 70 miles away. Given that the demographics of the clientele for GI doctors is older patients, it is unlikely they would make such the choice or even have the ability to make a choice to receive care so far away if their mobility or transportation options are limited.

It is unclear how the court will rule on this factor. You have a strong argument. Only one GI doctor in all of Sweetwater with the nearest available other GI doctor 70 miles away is likely not reasonable especially since many of the patients are elderly and would be disinclined or unable to travel that distance. While the quality or availability of care has not yet been compromised, there is a strong argument to be made that the court should allow you to practice to protect against a decline in services and/or an increase in prices.

(c) Patient Physician Choice

If a covenant not to compete would preclude individualized treatment of patients who are not easily transferable to other physicians, the covenant is likely not enforceable. If the nature of the doctor-patient relationship is such that successful treatment is dependent upon a specialized or highly individualized and ongoing method of treatment a covenant restricting a doctor from providing such care to a pre-existing patient will not be enforceable. It would burden the patient's ability to select the doctor of their choice for a particularly specialized medical issue. Conversely, if the treatment is more standardized, including routine diagnostic procedures and tests, the doctor is regarded as more easily interchangeable without negative impact on the patient or treatment success and, thus, the covenant is more likely to be enforced.

While you have understandably expressed a concern for many of your elderly patients, the court is unlikely to find that gastroenterology is the type of specialty that requires a close doctor-patient relationship with highly individualized and specialized care required for successful treatment. Since much of the practice focuses on early colon cancer detection and endoscopy, the court is likely to find that these are routine diagnostic tests that are standardized to such a degree that doctors are interchangeable. Moreover, most patients only receive a screening once every five years and do not require hospitalization. While this does not and should not diminish the importance and value of the service you provide, it does mean that the court is unlikely to find that the covenant not to compete will greatly impair patient choice in a negative manner.

On the other hand, early colon cancer detection is critical to survival. Thus, the fact that many patients in Sweetwater stated that if you were not available they would no longer go for their colonoscopies every five years. While this sentiment does favor allowing you to continue to practice in Sweetwater, it is not clear that it will be sufficient to find the negative impact on patient physician choice required.

Finally, it should be noted that Columbia courts have consistently refused to rewrite covenants not to compete in order to make them enforceable. This practice of eliminating the unreasonable portions or rewriting the provisions to make them reasonable is known as "blue penciling" and it is not an accepted remedy in Columbia. Thus, although, as discussed above, it is likely that the covenant is enforceable, if the court finds that particular provisions are not reasonable, you do not have to worry that the court may attempt to rewrite otherwise unenforceable provisions of the covenant not to compete in order to make them enforceable.

In conclusion, it is likely that the court will uphold the covenant not to compete as reasonable in all respects except for the impact on the availability of GI doctors. The strongest argument that can be made against enforcement is the dearth of available GI doctors in Sweetwater which raises the public policy concern that lack of competition will result in a decline in the quality of services and/or an increase in the cost of care. However, it is unclear how the court will rule on this issue. There is currently no evidence that this has been a problem in the past or is currently a problem. However, it does portend as a potential problem. Given the great importance of the availability of quality medical care, it is possible that the court may hold the covenant not to compete to be unenforceable on this ground alone. The Firm is of the opinion that the negative impact on doctor availability is a viable argument and that it would be reasonable to attack any attempt to enforce the covenant on these grounds. However, it should be emphasized that there is no certainty that this argument will be successful and the covenant, which as discussed above, is in all other respects reasonable, may be upheld and enforced against you.

The Firm thanks you for consulting it on this matter and awaits your response as to what, if any, steps you would like to take in this matter. Please do not hesitate to contact the Firm with any questions or concerns.

Respectfully,

Applicant

ANSWER B TO PERFORMANCE TEST A

To: Dr. Kyle Harris
From: Catherine Tedesci
Date: February 26, 2013
Re: Covenant Not to Compete with DDMC

Summary of the Legal Issue in this Matter

The issue at hand concerns the enforceability of a non-compete clause in an employment agreement that you entered into approximately four years ago with Dr. David Medved at the Doral Digestive Medical Clinic ("DDMC"). The non-compete clause restricts you from engaging in the practice of gastroenterology ("GI") for a period of three years after the date of termination of the agreement. Furthermore, the non-compete clause geographically restricts you from establishing a GI practice within a 5-mile radius of any office or hospital used by DDMC, or within a 20-mile radius of Sweetwater. A month after the 4-year agreement expired, you resigned from DDMC and decided that you wanted to open up your own office in Sweetwater to set up a GI practice. As such, you are interested in knowing whether or not Dr. Medved will successfully be able to enjoin you from setting up your own GI practice in Sweetwater, pursuant to the terms of the non-compete clause in your employment agreement with DDMC, and also if you will need to pay money to DDMC in order to maintain your GI practice in Sweetwater.

The Enforceability of the Non-Compete Clause

The underlying issue in this case is whether or not Dr. Medved will be able to enjoin you from setting up your own GI practice in Sweetwater, pursuant to the terms of non-compete clause in the employment agreement you entered into with DDMC approximately four years ago. Generally speaking, the law disfavors restrictive covenants because they restrain trade, and in the law particularly disfavors such

covenants among physicians because the practice of medicine affects the public to a much greater extent and such covenants tend to negatively impact patient care. Under Columbia law, non-compete clauses are enforced only if they are reasonable. To determine whether a particular non-compete clause is reasonable, a court will conduct a fact-intensive inquiry into 1) whether the restraint is greater than necessary to protect the employer's legitimate interest, and 2) whether that interest is outweighed by the hardship to the employee and the likely injury to the public.

In order to more systematically analyze the abovementioned factors, the courts have established five requirements for enforcing a non-compete clause:

1) It must be in writing;
2) It must have been entered into at the time of and as part of a contract of employment;
3) It must be based on valuable consideration;
4) It can be shown by the employer to be reasonable in scope, including time, territory, and activity; and
5) It must not fail due to public policy concerns.

DDMC's failure to satisfy all five of these requirements will result in invalidation of the non-compete clause. My objective analysis of each of these factors follows.

The Non-Compete Clause in this case was in writing and was entered into at the time of and as part of a contract of employment

DDMC will be able to easily satisfy the first two elements of the test. First, the non-compete clause is in writing, as evidenced by the written agreement that you have provided me with. Second, you agreed to the non-compete clause at the time of and as part of a contract for your employment with DDMC. At the conclusion of your one-year trial period, you entered into a 4-year employment term agreement with DDMC that

included the non-compete clause that forms the basis of this inquiry. As such, DDMC will be able to satisfy the first two elements of this test.

The Non-Compete Clause was based on valuable consideration since the employment relationship was established at the time of the non-compete clause.

For the non-compete clause to be valid, it must be based on valuable consideration. Consideration is a legal term which essentially means that there must have been a bargained-for exchange between you and DDMC. Courts have held that where the employment relationship was established at the time of the non-compete clause, there is consideration for the covenant, because in exchange for the promise not to compete, you are being given a chance at the job. In this case, your employment relationship was probably established at the same time that you agreed to the non-compete clause. You might be able to argue that your employment relationship arose a whole year earlier, when you began the one-year trial period; however, DDMC will successfully argue that the prior 1 year was just a trial, and therefore it did not constitute the beginning of an official employment relationship. Rather, the official employment relationship commenced when you entered into the 4-year agreement that included the non-compete clause, because that is when you bought into the clinic as a shareholder and signed a stock transfer and employment agreement with DDMC. Furthermore, even if DDMC is unsuccessful in making this argument, they will succeed in arguing that you were nonetheless given valuable consideration in exchange for the non-compete clause. DDMC will point to the increased pay of $200,000 and shareholder status in the organization. As such, it is unlikely that you will prevail in showing that DDMC did not provide you with valuable consideration in exchange for the non-compete clause.

DDMC has a strong, protectable interest in its patient base and its network of referral sources that must be considered

Before considering the reasonableness of the scope of the non-compete clause, it is also important to determine if DDMC has a strong protectable interest that justifies the

non-compete clause, because such an interest is weighed against the restrictions placed on scope. In another case heard before the Columbia Court of Appeal, Canyon Medical Specialists v. Eiger ("Eiger"), the Columbia Court of Appeal held that a medical group much like DDMC had a protectable interest in its patient base and network of referral sources. The facts of that case are actually very similar to the facts of your case, and so I will be making reference to the facts and analysis the Eiger court conducted in reaching its conclusion. Much like your case, Eiger involved the enforceability of a non-compete clause that barred a pulmonologist who left a medical group from setting up his own practice (in that case, the court found the restrictive covenant to be unenforceable, although the facts of that case differ in some significant ways from the facts of your case).

In Eiger, the court held that where an employee took an active role and brought already developed skills and customers with him to the job, it is less likely that a non-compete clause will be enforced. The court held that an employer has a stronger interest in his customer base and referral sources where a departing employee brought patients with him and did not learn his skills from the employer. Unfortunately, in your case, the reality is that you actually learned a lot from DDMC and brought no patients into the practice. You joined DDMC after completing your residency, and you joined DDMC to learn GI and to learn how to find patients and develop a practice. Since you learned a lot from the practice, both about GI and about running a GI practice, DDMC has a much stronger interest in protecting its patient referrals and customer base. With this in mind, let us take a look at the reasonability of the scope of the non-compete clause.

The scope of the non-compete clause is reasonable in terms of duration, geographic considerations, and the type of activity prevented.

A non-compete clause's scope will be defined by its duration, geographic area, and activities prevented, and cannot be greater than necessary to protect DDMC's legitimate interests. The idea behind these restrictions is to give DDMC enough time to both

overcome your loss by hiring someone else, while still allowing you to come back to the area after practicing outside of it for a reasonable period of time.

Duration

A restraint that is unreasonably long in time given the protectable interests will not be enforceable. Here, it is important to remember that because of the circumstances surrounding your case, DDMC has a strong protectable interest in maintaining its patient referrals and customer base. In Eiger, where that protectable interest was not as strong as DDMC's here, the court found that a 2-year duration was reasonable. It noted that while 2 years was on the outer edge of what was considered permissible, other courts have found durations of three years to also be permissible. In our case, the 3-year duration is probably reasonable, because DDMC has a much stronger protectable interest than the employer did in Eiger, and because all physicians in the area agree that realistically it will take up to 3 years for a new GI specialist to build up a referral base. And of course, those 3 years do not take into account the time it will take Dr. Medved to find a new physician, since it is harder to attract someone to Doral County (because of its rural background). Although it seems like Dr. Medved has some options lined up, a three year restriction is nevertheless likely to be upheld as reasonable.

Geographic Considerations

A non-compete clause that includes more territory than necessary to protect the legitimate business interests of the employer is not reasonable. In Eiger, the court upheld a 235 square miles restriction, which is significantly smaller than the one imposed on you -- 1200 square miles. However, in the same breath, the Eiger court noted that other courts have approved an 1800 square mile restriction, because the clinic in that case attracted patients from throughout the restricted area. The current restriction on you prevents you from setting up a practice within a 1200 square mile radius around Sweetwater and surrounding areas. Unfortunately, the report from our

medical economist suggests that all physicians agree that DDMC patients span that entire 1200 square mile radius and, according to them, Dr. Medved has a "well-established referral network" in the greater Sweetwater area. Given these facts and once again keeping in mind DDMC's strong protectable interest in protecting its referral source and customer base, it is unlikely that the proposed 1200 square mile restriction will be deemed unreasonable.

Activity Prevented

Finally, a restriction may be unreasonable in scope if it is not limited to the particular areas of the present employment. Once again, in Eiger, the court found the restriction to be unreasonable, because it prohibited Dr. Eiger from providing any and all forms of medical care, not just pulmonologist. But in your case, the non-compete clause is limited to GI practice only, and would allow you to still practice in other areas of medicine. Since another court upheld a similar restriction -- one preventing a doctor from practicing only orthopedic medicine and orthopedic surgery -- it is highly unlikely that the restriction's restraint on GI practice alone will not be deemed unreasonable.

In sum, a court is likely to find that the restrictions imposed on you by way of the non-compete clause are reasonable with respect to their scope.

Public policy considerations weigh in favor of enforcing the non-compete clause in your employment agreement with DDMC.

Generally speaking, a non-compete clause is contrary to public policy unless it protects a legitimate interest of the employer and is not so broad as to be oppressive as to the employee or the public. In examining these clauses, courts have recognized the need to balance the public interest in health care with the personal freedom of contract, and have determined that the public interest must prevail. However, there is also benefit in enforcing these agreements, because the covenant may encourage agreements between young doctors like yourself and more experienced doctors like Dr. Medved.

Thus, if ordering the employee physician to honor his agreement will merely inconvenience the employee physician without causing substantial harm, and enforcement can be seen to facilitate a desirable type of risk-taking physician relationship, the employer is entitled to have the covenant enforced. In light of these competing considerations, courts have been unwilling to deem such agreements unreasonable on their face.

In making this determination, the Eiger court looked to a few different factors: 1) the undue hardship to the physician; 2) the availability of other physicians; and 3) patient physician choice.

Undue Hardship to You

If a non-compete clause would effectively remove a physician from the marketplace entirely, such an undue hardship can render a covenant unenforceable. Courts have held that the physician must face such a significant relocation that so disrupts his personal life as to render a move impractical. I know that you've pointed to a couple of reasons why this non-compete clause imposes a significant hardship on you. You noted that most of your patients live near Sweetwater and requiring them to travel long distances is inconvenient. Moreover, you noted that leaving temporarily would cause you to lose patients and referrals in the three years you were gone. Unfortunately, the reality is that these reasons in and of themselves are not likely to be strong enough reasons to constitute an "undue hardship." Even if this non-compete clause was enforced, you still would be able to maintain a GI practice -- albeit further away in a metropolis, like Porter -- and your personal life would not be greatly disturbed for a three year period in any unusual way. A court is unlikely to find that this clause imposes a significant hardship on you such that it would render you incapable of practicing altogether. Granted it would certainly upset you because you would lose your patients who you care so deeply for, but the inconveniences do not outweigh DDMC's strong interest in enforcing the non-compete clause.

Availability of Other Physicians

The public has an interest in the availability of an adequate number of providers of any good or service. It is no secret that you and Dr. Medved were the only 2 GI doctors in Sweetwater. Courts have noted that healthy competition is important to ensure the high quality of service and care to patients, but courts have also held that enforcing non-compete clauses is permissible where the only worry is that the result might leave the community in a vulnerable position. Although you may have a very strong argument here, it is still unlikely that a court will invalidate the non-compete clause on these grounds.

The reviews from your colleagues in the area with respect to this issue are mixed. Some have described your loss as "tragic," and most agreed that it would be desirable to have more than one GI in the area. That being said, there is no evidence that Dr. Medved has been pressed for time and many agreed that he would be able to meet the community's demand for his services, even in your absence. While others also noted the inconvenience of having to travel 70 miles to see another GI for an emergency, none of those doctors stated that there has ever been a problem of people going untreated in the Sweetwater area. Additionally, most of your colleagues noted that the two of you were virtually identical in what you did, even though there might have been a couple of things you could do that Dr. Medved could not. Finally, while Dr. Medved is the only GI practicing in Sweetwater, he could always cut back his internal medicine practice to focus more on patients needing GI services, and there is an abundance of other internal medicine doctors in Sweetwater to accommodate this situation.

In sum, it will be a very close call on how the court rules on this issue, but taking into account all of the evidence, my impression is that the court is not likely to find that your absence will create such a devastating situation for both patients and Dr. Medved that it would be unreasonable to enforce the non-compete clause. While you are gone, Dr. Medved will likely hire another GI to help him with patients (he is already interviewing

more people), and there is no reason to believe that patients will suffer a significant detriment in terms of the quality of care they will receive due to your departure.

Patient Physician Choice

Finally, a court has stated the importance of invalidating a non-compete clause where successful treatment relies on the individualized nature of the doctor-patient relationship, and the departure of a physician would mean that a patient would no longer be able to continue to see their doctor of choice. Unfortunately, in a GI practice, as you know, the nature of the doctor-patient relationship is not particularly close, because it involves colonoscopies, during which the patient is not awake, and a large amount of the practice constitutes standard tests and involves interpreting blood tests, x-rays, and endoscopy results. Although there may be parts of the GI practice that still may be personal in nature, for a large part the practice tends to be more impersonal in nature. As such, even though I know that you deeply care about your patients and the relationships you have established with them, a court is unlikely to find that the GI practice is of the type that requires a personal relationship with their doctor. You may be able to argue that some of your colleagues have noted that your departure might lead them to not see a GI doctor at all as a result of having to switch to a new GI specialist, and that this result would be troubling because of the harms associated with colon cancer. That being said, it is unlikely still that a court will believe that the GI practice requires a personal relationship between the doctor and patient, such that your absence will deprive them altogether of the important need for them to choose a doctor they can feel comfortable with.

Payment and the Liquidated Damages Clause

Courts will typically not rewrite agreements to make them more reasonable, but it may nonetheless invalidate a particular portion of an agreement. Here, the liquidated damages clause, which would require you to pay 25% may be deemed a "penalty," and if that is the case, it may be unenforceable. If that is the case, you will simply have to

abide by the terms of the non-compete clause except for the liquidated damages provision. If, however, the liquidated damages clause is deemed to be fair by the courts and not a penalty, then it will be enforceable and you will have to pay the money in addition to abiding by the terms of the non-compete clause.

Conclusion

In sum, although I sympathize with your desire to remain in Sweetwater and open your own GI practice, unfortunately, based on the foregoing analysis, I think it is unlikely that you will prevail in defeating the non-compete clause in your employment agreement with DDMC. I apologize for the bad news, but I hope that this opinion provides you with an understandable basis for my conclusion.

Best regards,
Catherine Tedesci

February 2013

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

In re. Yamata Logging, Inc.

Instructions

FILE

Memorandum from Scott Rawlins to Applicant

Transcript of Interview with Hari Yamata

Note from Hari Yamata to Marvin Cox

Letter from Stanley Merrick to Hari Yamata

IN RE. YAMATA LOGGING, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
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.

Rawlins Baird, LLP

One Parkstead Plaza, Suite 1200

Fair City, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant

FROM: Scott Rawlins

SUBJECT: Yamata Logging, Inc.

DATE: February 28, 2013

Hari Yamata, the owner of Yamata Logging, Inc., has asked us to represent him in a contract dispute with Marvin Cox, owner of Albion Flat Properties. Yamata made a "handshake" deal with Cox to log a stand of timber at Albion Flat.

When Yamata was gearing up to begin logging, Cox told Yamata that he would not allow Yamata and his crews onto the property. Cox's attorney wrote Yamata a letter asserting that Yamata has no enforceable contract to cut the timber.

Mr. Yamata does not want to commence litigation if it can be avoided. He has commitments to provide logs to buyers in Japan this spring, and his failure to deliver would have a disastrous long-term effect on his business. He would prefer first to try to persuade Cox to honor his contract. Stan Merrick, Cox's attorney, is a reasonable, levelheaded counselor. If we can demonstrate persuasively that his client would be exposing himself to large damages by refusing to allow Yamata to do the logging, I'm confident he would counsel Cox to go forward with the contract.

What I would like you to do is to draft a persuasive letter for my signature to Cox's attorney setting forth the facts and the law supporting Yamata's position that he has an enforceable contract to log the tract at Albion Flat starting in March. Be sure to address each of the points asserted in Stan Merrick's letter and, in addition, to explain to him the terms of the contract we believe Yamata will be able to prove.

Transcript of Interview with Hari Yamata

February 25, 2013

SCOTT RAWLINS: Good day, Mr. Yamata. I'm glad you could come in to flesh out the details of our short telephone conversation a few days ago. Since this is our first representation of you and your business, why don't we start with the basics?

HARI YAMATA: Sure, but let's get on a first name basis. I'll call you Scott if you'll call me Hari. Okay?

RAWLINS: Terrific! You faxed me this letter you got from Stan Merrick dated February 19th. I need to understand in detail what happened so I can make sense of the letter. So, tell me about your business.

YAMATA: I've been in the logging business for about 20 years. I've developed relationships with Japanese buyers for cut timber. I ship logs in 18-foot lengths to Japanese mills, where the logs are cut into lumber. Lately, there's been a big demand in Japan for red cedar. There's a small market for it here in the States, but in Japan they can't get enough of it.

RAWLINS: How does this fit in with what we talked about on the phone the other day?

YAMATA: Okay. Marvin Cox owns a thousand or so acres called Albion Flat on the north coast. He sells the trees and replants. It's a managed, renewable tract heavily forested with second-growth cedar. About four months ago, I logged 50 acres on the southwest corner of Albion Flat, and since then I've tried to get Cox to let me log a larger swath.

RAWLINS: Explain that to me. Were there discussions with him, or what?

YAMATA: Yeah. My Japanese buyers contacted me and asked me if I could get some more of the Albion Flat cedar.

RAWLINS: Is there something unique about Albion Flat cedar?

YAMATA: From what I hear from the buyers, the growing conditions in the area create an environment in which the timber grows rapidly and produces a lighter kiln-dried cedar that suits the Japanese needs better. From my point of view, logging at Albion is more productive because it's in a flat area and the growth is very dense and concentrated.

RAWLINS: Okay. Back to your discussions with Cox.

YAMATA: When I was logging the southwest corner, I saw a stand of trees of about 200 acres in the northwest corner that looked about ready for harvest. I told him I'd like to log that plot and that I'd pay him a premium for the logs.

RAWLINS: Did he agree?

YAMATA: Not right away. He said he'd think about it and get back to me. About a month later, I ran into him having breakfast at the Chatterbox Café, and I raised the subject again. We talked for a while, and he finally said, "Okay. I'll let you log those trees, but only those 18 inches or bigger."

RAWLINS: Do you mean 18 inches tall?

YAMATA: No, no. That's trade talk for the diameter of the tree trunks. I believe there are enough 18-inch trees in the stand to make the logging worthwhile.

RAWLINS: Did you talk about any further details?

YAMATA: Sure. We talked about all the usual stuff that's involved in logging -- price, start and finish time, marking the trees, cutting in the roads, storing the logs, cleaning up and burning slash, environmental permits, replanting seedlings, and so forth.

RAWLINS: Did you reduce any of this to writing?

YAMATA: Not really. It was basically a handshake deal. We're both in the business. He's been selling timber from Albion for years as the trees mature and I've been logging in the vicinity a long time, so we know how it works.

RAWLINS: Well, how would you know how much timber you could cut?

YAMATA: A few days later, we walked the northwest plot, marked the corners with stakes, did a rough count of the 18-inch trees, and estimated the board-footage. I figured about 750,000 board-feet, and he said that sounded about right.

RAWLINS: Tell me more about the details. Let's start with price.

YAMATA: There's a price the local mills will pay for logs, and there's an export market FOB price that fluctuates. But the export price is always a lot higher than the local price. We agreed I'd pay Cox 20% of the export FOB price. That was the same price deal we made the time before when I logged the 50 acres.

RAWLINS: What do you mean by "FOB" price?

YAMATA: That means "free on board," the price the buyer will pay for the logs once they're delivered to the shipping company at the Port Columbia dock.

RAWLINS: All right. Is there a way someone could find out exactly what those prices are at any given time?

YAMATA: For the local mill price, you just ask the mill operators -- but it's pretty much common knowledge in the trade. The export price is posted daily in the trade journals and financial newspapers.

RAWLINS: Well, is there any document you or he signed?

YAMATA: I know he's never signed anything, and I don't believe I have either.

RAWLINS: Has either of you ever put the terms of the deal in writing?

YAMATA: Not really. I believe he took some notes on a napkin while we were sitting at the table at the Chatterbox Café. The only thing I ever put in writing was that, on November 26th, about a week after we met, I typed a very short memo on a message pad I keep by my phone and made a copy of it. I dropped the original off at Cox's office.

RAWLINS: What did the memo say?

YAMATA: I brought the copy with me. Here it is. [Attached to this transcript.]

RAWLINS: Did you actually hand it to Cox?

YAMATA: No, I left it on the counter in his office. I know he saw it because I ran into his office assistant at the Chatterbox, and she told me she had given the note to him when he got back from lunch later that same day.

RAWLINS: Did he ever respond to your note in any way?

YAMATA: Not until February 5th. I ran into Cox at the Chatterbox at around breakfast time. That's when he shocked me.

RAWLINS: Shocked you? How?

YAMATA: I asked him how it was going cutting in the road and marking the trees and told him I was all geared up to start the logging on Albion Flat on March 5th. He just looked at me blankly and said, "You're not gonna do any logging on my property." I said, "Wait a minute. What about the deal we made back in November?"

RAWLINS: What did he say about that, Hari?

YAMATA: He said, "What deal? I never signed any contract. That piece of paper you gave my secretary doesn't mean squat."

RAWLINS: Did you talk any further about it?

YAMATA: All I said was, “Come on Marv. Don’t make me have to sue you over this.” Then, he just got up and walked out. In fact, I got stuck with his breakfast tab. I’ve tried several times to call him, but he won’t return my phone calls.

RAWLINS: Do you have any idea why his sudden reversal?

YAMATA: I mean it’s just scuttlebutt around town, but I hear he’s having big marital troubles and he expects his wife to file for divorce. My guess is that he’s trying to avoid generating any income that his wife can get her hands on. I know he inherited Albion Flat from his father and that he’s always run it as a separate business. I’m no lawyer, but I guess the income is subject to claims by his wife.

RAWLINS: How much money is involved in your deal with Cox?

YAMATA: Assuming the 750,000 board-feet we estimated, at the export market price, my sale price comes to about $500,000, plus or minus, depending on the spot price on the day I deliver. Cox’s piece of that is about $100,000. That’s the price he would receive for the logs based on our agreement. But you know, Scott, that’s the least of it. I really can’t make another logging contract for such high quality logs anywhere quickly or buy them on the open market and turn them over for a profit in time to meet my delivery commitments -- and that assumes I can even get them, which is highly doubtful. If I can’t deliver to my Japanese buyers, they’ll find other sources and that’ll be the end of that. I’d lose a very large amount of future business, which I estimate would net me about $750,000 to $1,000,000 over the next five years.

RAWLINS: How much would you net from this deal?

YAMATA: My net, after expenses, would be about $200,000.

RAWLINS: Okay. Let’s talk about the details of the deal you believe you had with Cox. It’ll help me understand the things Cox’s attorney says in his letter.

YAMATA: Right. What the letter says is just plain not true. We *did* talk about those things, and we agreed on them.

RAWLINS: Okay, a minute ago you mentioned that when you last met Cox at the Chatterbox you asked him how cutting the road and marking the trees was coming along. Explain those things to me.

YAMATA: To get equipment and trucks into the logging site, you have to have a road. There wasn't a road there, so when we talked about it, Cox said he would cut in the road.

RAWLINS: The time you logged the 50 acres four months ago, who cut the road?

YAMATA: It wasn't necessary because there was an existing road.

RAWLINS: Well, is cutting in a road a major item?

YAMATA: Definitely. It's expensive. And what it would cost him was all figured into the percentage I agreed to pay him. Plus, it's pretty much standard practice for the landowner to do it because it's his land and he can do it without additional permits. If I were to do it, I'd have to hassle with local bureaucrats about a permit.

RAWLINS: Okay. And what about marking trees?

YAMATA: Well, someone has to go through the stand and mark the trees that are 18 inches and over. You spray a stripe on the trunks with a can of blue spray-paint. Usually, the landowner and the logger will walk the tract together and mark the trees. That's how we did it the time I logged the 50 acres. But, at this time, since we had already walked through the area, we both had a good idea of how many trees would be marked, so I suggested that Cox do the marking. He nodded his head, so I took that to mean that he agreed.

RAWLINS: How big a deal is that?

YAMATA: Not a big deal at all. Two workers with two cans of spray-paint can do it in a matter of hours.

RAWLINS: You said something about cleaning up and burning slash. What does that mean?

YAMATA: Slash is the bark, stumps, roots, limbs, and other debris that's left when you fell and strip the logs. It has to be piled up and burned, which is something the logger usually does. But sometimes it can be hauled away and sold to woodchip mills. Cox said he wanted to see if he could make any money selling the slash, so we agreed that I'd rake it into piles and leave it.

RAWLINS: What's this about environmental permits?

YAMATA: Well, before you can cut any trees, the local forest protection agency has to issue environmental permits. Cox told me that he already has an approved

environmental impact plan, which includes a logging schedule. He also told me that the 200 acres in the northwest plot have already been approved for logging, so all he has to do is request the permits. I can't get them because I'm not the landowner.

RAWLINS: Okay. Another item you mentioned was replanting. What's that all about?

YAMATA: As I said, Albion is a managed, renewable forest. Every tree that's cut is required by law to be replaced with a seedling -- a tree sprout, if you will. That's a condition of Cox's getting some renewable resource tax benefits that I don't fully understand.

RAWLINS: What was your discussion with Cox about that?

YAMATA: Well, since it's his forest, he's the one obligated to replant. He's got a greenhouse operation where Albion Flat sprouts the seedlings.

RAWLINS: Okay. And, finally, you said something about log storage. What's the significance of that?

YAMATA: Ordinarily, I'd haul the logs to local mills as I cut them. In this case, since I was to ship them overseas I would need to store them on site until I accumulate enough for a shipping container load. Without an onsite storage area, I'd have to rent a storage yard at Port Columbia. Double handling is expensive. So it's an important piece of the deal for me.

RAWLINS: How big a deal is it for Cox?

YAMATA: I don't see how it would cost him anything. There are lots of bare areas right alongside the 200 acres I'd be logging where I can stack the logs temporarily.

RAWLINS: Is on-site log storage standard practice in the industry?

YAMATA: No. Usually you just load the logs on trucks and haul them directly to the local mills. But Cox certainly knows it's different in this case because he knows the logs are going to be shipped in containers from Port Columbia and that double handling makes no sense. In fact, he let me store the logs on his land for a few days when I logged the 50 acres.

RAWLINS: I want to be certain that I've got it straight. It sounds like a few of the items you agreed to were critical. That is, if no agreement on them between you and Cox, then no deal. I mean the road, environmental permits, replanting, and on-site storage were a necessary part of the deal to you?

YAMATA: Yes. Any one of them would have been a deal breaker. But as I said, we did agree on each.

RAWLINS: Anything else that you and Cox agreed on?

YAMATA: No. I think that's about it. I know to a certainty that Marv and I settled on all the things I've told you. That's why I'm so upset by the letter from his attorney. My past experiences with Marv have always been on the up and up, so I can only assume he must be under a lot of pressure, because it's not like him to back out of a deal.

RAWLINS: All right. Based on what you've told me, I believe we stand a good chance in a lawsuit for breach of contract. Is that what you want us to do?

YAMATA: I'd rather try to work it out amicably with Marv. I was supposed to start logging in a few days, but two or three weeks delay won't make much difference to me. So, if you can try to work it out quickly, that would be the best for me. But I guess, as a last resort, if he won't come around I'll have to sue.

RAWLINS: Are you willing to renegotiate any of the points you and Cox agreed on?

YAMATA: Sure, within limits, on things like marking trees and burning slash, but not on the expensive things.

RAWLINS: Okay. Let me see what I can do. I've found Stan Merrick to be a reasonable guy in my past dealings with him. I'll send him a letter and then sit down with him.

YAMATA: Great. Please keep me posted on the status.

RAWLINS: I will.

YAMATA LOGGING

Wooden you like to call me back?

Bailey Road & Sawmill Lane

Fair City, Columbia

(541) 434-7237

November 26, 2012

Marv: Just a note to let you know I plan, per our deal, to start logging Albion Flat (marked trees in staked area of NW corner) on March 5, 2013. Estimate 750K board-feet. Pricing per our discussion payable to you upon my delivery of logs FOB Port Columbia dock.

Stanley J. Merrick
Attorney at Law

Law Offices of Stanley J. Merrick

South Shore Center, Room 275
Fair City, Columbia
(541) 444-0790

February 19, 2013

Hari Yamata
Yamata Logging, Inc. **Delivered by Hand**
Bailey Road & Sawmill Lane
Fair City, Columbia

Re: Albion Flat Properties

Dear Mr. Yamata:

Marvin Cox, owner of Albion Flat Properties, has asked me to communicate with you regarding your claim that Yamata Logging, Inc. has a contract to conduct logging operations on a designated tract at Albion Flat. Apparently, at your last meeting with Mr. Cox, you threatened to sue him for breach of contract. By this letter, I hope to persuade you that you do not have an enforceable contract and that any such suit would be fruitless.

Under Section 2-201 of the Columbia Commercial Code, any contract for the sale of goods for more than $500 must be in writing and signed by the party against whom you are asserting the contract. Moreover, if there is a writing upon which you base your claim, that writing must be detailed and definite enough to clearly evidence the existence of a contract. I realize that you delivered to Mr. Cox's office an informal note stating your intention to start logging on March 5th, but that note in no way satisfies the requirements for a written, signed contract.

Mr. Cox informs me that he has never signed any document evidencing any such contract and that, in any event, your assertions regarding the terms of what you claim is a contract are widely at odds with anything he would ever have agreed to. Let me explain the reasons why we believe there is no enforceable contract.

- Mr. Cox never signed any such contract.
- The informal note that you delivered is so vague that it cannot be determined from it what the terms of the contract you claim might be.
- The quantity of timber you claim the right to take is a mere estimate and cannot be ascertained from the document.
- The location of the tract you claim to log is not certain.
- The price of the timber you claim the right to take is not stated.

In addition to the foregoing, Mr. Cox informs me that you have insisted on many additional terms to which he would never have agreed. Moreover, notwithstanding the fact that there was never even a general understanding that Yamata Logging, Inc. might be allowed to log an area on Albion Flat, it appears that you have belatedly insisted on the inclusion of the following additional terms:

- That Mr. Cox would be required to mark the trees,
- That Mr. Cox would be required to cut in a road,
- That Mr. Cox furnish you a temporary storage site,
- That you would not be required to burn the slash,
- That Mr. Cox would be required to obtain the necessary environmental permits, and
- That Mr. Cox would have to do the replanting.

Within the meaning of Section 2-207 of the Commercial Code, these are additional terms that would materially alter anything Mr. Cox might conceivably have agreed to. For that reason as well, there was never any enforceable contract between you.

I hope the foregoing convinces you that suing Mr. Cox for breach of contract would not be worth your while.

Very truly yours,

/s/ Stanley J. Merrick

STANLEY J. MERRICK

February 2013

California
Bar
Examination

Performance Test B
LIBRARY

In re. Yamata Logging, Inc.

LIBRARY

Excerpts from Columbia Commercial Code

Marlene Industries v. Carnac Textiles
Columbia Supreme Court (2005)

A & G Construction Co. v. Reid Brothers Aggregate Co.
Columbia Court of Appeal (1999)

In re. Estate of Frost
Columbia Court of Appeal (2001)

EXCERPTS FROM COLUMBIA COMMERCIAL CODE

1-303. Course of Performance, Course of Dealing, and Usage of Trade.

(a) A "course of performance" is a sequence of conduct between parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

(d) A course of performance or course of dealing between the parties, or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware, is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.

2-201. Formal Requirements; Statute of Frauds.

(a) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in the writing.

(b) As between merchants, if within a reasonable time, a writing in confirmation of the contract and sufficient against the sender is received, and the party receiving it

has reason to know its contents, it satisfies the requirements of subsection (a) against the party, unless written notice of objection to its content is given within 10 days after it is received.

Official Comments to Section 2-201.

The required writing need not contain all of the material terms of the contract, and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated, but recovery is limited to the amount stated. The price, time, and place of payment or delivery, the general quality of the goods, or any particular warranties may be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term, even where the parties have contracted on the basis of a published price list. Frequently, the price is not mentioned because “market” prices and valuations that are current in the vicinity can normally be supplied without the danger of fraud.

Only three definite and invariable requirements as to the memorandum are made by this section. First, it must evidence a contract for the sale of goods; second, it must be “signed,” a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

Between merchants, failure to answer a written confirmation of a contract within 10 days of receipt is tantamount to a writing under subsection (b) and is sufficient against both parties under subsection (a). The only effect, however, is to take away from the party who fails to answer, the defense of the statute of frauds. The burden of persuading the trier of fact that a contract is in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under Section 2-207.

2-207. Additional Terms in Acceptance or Confirmation.

(a) A definite and seasonable expression of acceptance, or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) The additional terms are to be construed as proposals for addition to the contract. Between merchants, such terms become part of the contract unless:

(1) The offer expressly limits acceptance to the terms of the offer;

(2) They materially alter it; or

(3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Official Comments to Section 2-207.

If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. The written confirmation is also subject to Section 2-201. Under that section, a failure to respond permits enforcement of a prior oral agreement. Under this section, a failure to respond permits additional terms to become part of the agreement.

Marlene Industries v. Carnac Textiles

Columbia Supreme Court (2005)

This appeal involves yet another of the many conflicts which arise as a result of the all too common business practice of blithely drafting, receiving, and filing unread numerous purchase orders, acknowledgments, and other diverse forms containing a myriad of discrepant terms. Both parties agree that they have entered into a contract for the sale of goods; indeed, it would appear that there is no disagreement as to most of the essential terms of their contract. They do disagree, however, as to whether their agreement includes a provision for the arbitration of disputes arising from the contract.

The dispute between the parties, insofar as it is relevant on this appeal, is founded upon an alleged breach by Marlene Industries ("Marlene") of a contract to purchase certain fabrics from Carnac Textiles ("Carnac"). The transaction was instituted when Marlene orally placed an order for the fabrics with Carnac. Neither party contends that any method of dispute resolution was discussed at that time. Almost immediately thereafter, Marlene sent Carnac a "purchase order" and Carnac sent Marlene an "acknowledgment of order." Marlene's form did not provide for arbitration. Carnac's form, on the other hand, contained an arbitration clause placed in the midst of some thirteen lines of small type "boilerplate." Neither party signed the other's form. When a dispute subsequently arose, Carnac sought arbitration, and Marlene moved for a stay.

The courts below applied subsection (b) of Columbia Commercial Code section 2-201 and denied the application to stay arbitration, reasoning that as between merchants, where a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, written notice of objection should be given within 10 days after it is received. Since Marlene had retained without objection the form containing the arbitration clause, the court concluded that Marlene was bound by that clause. We disagree.

This case presents a classic example of the "battle of the forms," and its solution is to be derived by reference to Section 2-207 of the Columbia Commercial Code, which is specifically designed to resolve such disputes. The courts below erred in applying subsection (b) of Section 2-201, for that statute deals solely with the question whether a

contract exists which is enforceable in the face of a statute of frauds defense. It has no application to a situation such as this, in which it is conceded that a contract does exist and the dispute goes only to the terms of that contract. In light of the disparate purposes of the two sections, application of the wrong provision will often result in an erroneous conclusion.

The easiest way to avoid the miscarriages this confusion perpetrates is simply to fix in mind that the two sections have nothing to do with each other. Though each has a special rule for merchants sounding very much like the other, their respective functions are unrelated. Section 2-201(b) has its role in the context of a challenge to the use of the statute of frauds to prevent proof of an alleged agreement, whereas the merchant rule of Section 2-207(b) is for use in determining what are the terms of an admitted agreement. The proper and rather limited role of subsection (b) of Section 2-201 is a partial exception to the statute of frauds which merely ameliorates the writing requirement. A writing is still required, but it need not be signed by the party to be charged. The character of this exception is best understood in light of the form of fraud it was designed to combat.

Assume that two merchants, Orval Orfed and Len Lemhi orally agree over the telephone that Orfed will sell Lemhi 1000 bushels of wheat at $40 a bushel. Orfed, the seller, thereafter sends a signed confirmatory memorandum to Lemhi reciting the terms of the deal, a common practice in such transactions. Such a memo would be good against Orfed under Section 2-201 should Orfed back out and Lemhi sue him for damages. But absent Section 2-201(b), the confirmatory memo would not be good against Lemhi, for it is not signed by him as required by Section 2-201(a). Thus Lemhi would be free to sit back and play the market. If at delivery date the cost of wheat had fallen to some level below $40 a bushel, and he wanted to buy elsewhere, he could back out, whereas Orfed could not back out, at least so far as the statute of frauds goes, should the market rise. Section 2-201(b) is designed to prevent the Lemhis of the world from taking advantage of the Orfeds. It says that a memo good against Orfed will also be good against Lemhi provided that: (1) both are merchants, (2) the memo is sent by Orfed to Lemhi within a reasonable time after the phone call, (3) the memo by its terms confirms the oral contract, (4) the memo is good against Orfed under Section

2-201(a), (5) Lemhi receives it, (6) Lemhi has reason to know its contents, and (7) Lemhi does not object to its contents within 10 days of receipt. This carefully circumscribed section thus seeks to combat one form of fraud which pre-Code versions of the statute of frauds actually facilitate. At the same time, Section 2-201(b) itself encourages the common and wise business practice of sending memoranda confirming oral deals, for the section obviates a disadvantage to which the sender would otherwise be subject.

Subsection (b) of Section 2-207, on the other hand, is applicable to cases such as this, in which there is an agreement that a contract exists, but disagreement as to what terms have been included in that contract. Subsection (a) of Section 2-207 was intended to abrogate the harsh "mirror-image" rule of common law, pursuant to which any deviation in the language of a purported acceptance from the exact terms of the offer transformed that "acceptance" into a counteroffer and thus precluded contract formation on the basis of those two documents alone. Under subsection (a) of Section 2-207, however, an acceptance containing additional terms will operate as an acceptance unless it is "expressly made conditional on assent to the additional or different terms." Having thus departed from the common-law doctrine, it became necessary for the Code to make some provision as to the effect upon the contract of such additional terms in an acceptance. Subsection (b) of Section 2-207 was designed to deal with that problem.

Subsection (b) of Section 2-207 provides that any additional terms in an acceptance or a written confirmation are to be considered merely proposals for additions to the contract, and that such terms normally will not become a part of the contract unless expressly agreed to by the other party. As with many sections of the Code, however, there is a special provision for merchants: "(b) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (1) the offer expressly limits acceptance to the terms of the offer; (2) they materially alter it; or (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

The parties to this dispute are certainly merchants, and the arbitration clause is clearly a proposed additional term. As such, it became a part of the contract unless one of the three listed exceptions is applicable.

We hold that the inclusion of an arbitration agreement materially alters a contract for the sale of goods, and thus, pursuant to Section 2-207(b)(2), it will not become a part of such a contract unless both parties explicitly agree to it. The reason is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.

Applying those principles to this case, we conclude that the contract between Marlene and Carnac does not contain an arbitration clause; hence, the court below erred in refusing to permanently stay arbitration.

Reversed.

A & G Construction Co. v. Reid Brothers Aggregate Co.

Columbia Court of Appeal (1999)

This appeal concerns a dispute as to the amounts due for materials furnished for use on a highway construction project. Our resolution of the issues involves application of provisions of the Columbia Commercial Code (hereinafter CCC) to the contract in dispute.

On August 10, 1996, A & G Construction Company ("A & G") and Reid Brothers Aggregate Company ("Reid") entered into a materials supplier agreement wherein Reid agreed to supply A & G with sand and hot bituminous pavement aggregate (hot rock). The material was to be used in a State highway construction project in the Petersburg area for which A & G was the general contractor. Payment for the materials was to be on the basis of State-accepted scale ticketed tonnage at the price of $23.65 per ton of hot rock.

During the course of performance, the agreement was modified. At Reid's request, the parties agreed to increase the price of additional hot rock by $10.00 per ton to $33.65.

A & G contests the award of $58,000 for 5,800 tons of hot rock. The lower court found that, as to that additional quantity of hot rock, the original contract setting a price of $23.65 per ton had been modified to $33.65 per ton. The original agreement did not contain any reference to the amounts of material to be supplied. On August 30, 1997, A & G sent Reid a purchase order for 5,800 tons of hot rock. Earlier in the summer of 1997, Fred Hardesty, A & G's superintendent, orally informed Glenn Reid that an additional 10,000 tons of hot rock would be needed. Mr. Reid replied that the hot rock could be furnished, but that the price would have to be increased $10.00 per ton to $33.65 per ton. Mr. Hardesty asked Mr. Reid to send a letter on the subject. The letter, sent on July 13, 1997, stated:

On any additional hot rock to be delivered from this date, we will have to have $33.65 a ton, as we are not breaking even. We have already delivered the original order but understand that you need about 10,000 tons more.

Yours truly,
(No personal signature)
Glenn W. Reid

The 5,800 additional tons were used by A & G for the project. A & G paid Reid only $23.65 for the additional hot rock. A & G contends that Reid's claim for the additional sum is barred by the statute of frauds. CCC section 2-201 specifies, in pertinent part: "(a) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. . . .(b) As between merchants, if within a reasonable time, a writing in confirmation of the contract and sufficient against the sender is received, and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (a) against the party, unless written notice of objection to its contents is given within 10 days after it is received."

A & G cites subsection (a) of Section 2-201 and argues that since the letter from Reid to A & G was the only writing evidencing the modified agreement, and since A & G, the party to be charged, did not sign the writing, the statute of frauds was not satisfied. The necessity of the signature of the party to be charged required by subsection (a) is not absolute. It may be dispensed with if certain conditions set forth in subsection (b) are satisfied. Subsection (b) of Section 2-201 dispenses with the signature requirement if the following conditions are met: 1) the agreement is one between merchants; 2) the writing in confirmation is sent within a reasonable time after the agreement is reached; 3) the writing is sufficient as against the sender (i.e. would satisfy subsection (a)); 4) the party receiving it had reason to know of the contents; and 5) no written notice of objection is sent to the sender within 10 days of its receipt by the party to be charged.

Here, there is no question as to criteria (1), (2), and (4). CCC section 2-104(a) defines "merchant" as meaning a person who deals in goods of the kind, or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods, involved in the transaction. "Goods" is defined in CCC section 2-105(a) as "all things . . . which are movable at the time of identification to the contract for sale" and, in some cases, things that are not movable at the time of the contract. For example, a contract for the sale of timber to be cut is a contract for the sale of goods whether the subject matter is to be severed by the buyer or the seller even though it forms part of the realty at the time of contracting. Both Reid and A & G dealt with the materials here involved and held themselves out as having knowledge or skill with reference thereto and are therefore merchants.

Criterion (3) requires that the writing be sufficient as against the sender, in this case, Reid. The letter from Glenn Reid to Fred Hardesty confirming the oral agreement indicates that a contract for sale had been made between the parties – approximately 10,000 tons of additional hot rock at $33.65 per ton. The writing thus complied with the portion of Section 2-201(a) requiring it to be sufficient to indicate that a contract for sale had been entered into between the parties.

The question remains as to whether it may be regarded as sufficient against Reid, "the sender," so as to come under the exception set forth in Section 2-201(b). This, in turn, depends on whether a typewritten signature may be adequate. The letter did not contain Mr. Reid's personal signature. "Glenn W. Reid," however, was typed at the end of the letter. CCC section 1-201(39) defines "signed" as including "a symbol executed or adopted by a party with present intention to authenticate a writing." The official comments to that section state: "The inclusion of authentication in the definition of 'signed' is to make clear that . . . a complete signature is not necessary. Authentication may be printed, stamped, or written; it may be by initials or thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. A typed name is sufficient to meet the requirement."

As to criterion (5), A & G did not send any written notice of objection. In its brief, A & G states that "[b]y telephone, George Atkinson of A & G informed Reid that the money would not be paid." A & G does not cite any portion of the record in support of this allegation, and an independent review of the record and trial transcript has not revealed any supporting material. Furthermore, even if Mr. Atkinson did object by telephone, this does not meet the statutory requirement of a "written notice of objection." In the absence of a written objection from A & G, the confirmatory letter sent by Reid to A & G meets the statutory requirements, and accordingly the claim for the modified price as to additional hot rock was not barred by the statute of frauds.

Affirmed.

In re. Estate of Frost

Columbia Court of Appeal (2001)

Appellant, Glenn L. Gest ("Gest"), appeals from the probate court's denial of his claim against the estate of Warren Bert Frost.

Warren Bert Frost ("Decedent") died on February 2, 1999. On February 19, 1999, appellee Jerry Lee Frost ("Frost") filed a petition to commence probate proceedings. Gest filed his claim against the estate on March 23, 1999, alleging that he and Decedent had entered into a written agreement on October 25, 1997, whereby Gest was to remove all specified timber from a parcel of land owned by Decedent. Decedent, it was alleged, had subsequently breached the agreement by allowing others to remove timber from that land. Attached to appellant's claim was a copy of the agreement, which read as follows:

Glenn L. Gest 10/25/97

Sold all trees for $4.00 per rick. 16" dimensions 8 feet

high, 4 feet long. Does not cut anything that will log out

16 feet long and 12 inches on top end.

Take all wood sawable. Bunch brush burnable.

Owner Warren Frost [signature]

Buyer G.L.Gest [signature]

At the January 28, 2000 hearing on Gest's claim, Frost raised the statute of frauds as a defense, arguing that the writing was insufficient to support Gest's claim of a contract because it failed to include a quantity term. The probate court rejected Gest's

argument that the word “all” was a quantity term and held that the agreement was unenforceable under the statute of frauds provision of the Columbia Commercial Code (CCC). The court held that a quantity term could not be supplied by parol evidence and, since Decedent had owned several parcels of land, the court would not guess at which one had been referred to in the contract. Gest’s claim was dismissed.

QUANTITY TERM

Both parties have conceded that the agreement in question falls within the Columbia Commercial Code. Section 2-201 of the Code provides that such a contract is not enforceable unless “there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . . A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in the writing.” The Official Comment to this provision states that the purpose of the writing requirement is to “afford a basis for believing that the offered oral evidence rests on a real transaction.” The only term which must appear in the agreement is the quantity term.

In earlier discussions, this Court has held that parol evidence could not be offered to supply a missing quantity term. Instead, stated the Court, the quantity term must appear in the writing. In the instant case, however, appellant argues that the quantity term does appear in the written document as the word “all” which describes the number of trees which may be taken by appellant. Once a quantity term appears in the writing, it may be explained or supplemented by parol evidence.

The parties’ failure to describe the parcel of land upon which the trees to be cut were located lends ambiguity to the agreement. The agreement is unenforceable, however, only where no quantity term appears at all. When quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity, but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term.

PAROL EVIDENCE

CCC section 2-204 provides that "[e]ven though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." This reflects the Commercial Code policy of authorizing courts to fill in gaps in sales agreements. Parol evidence may be admissible under CCC section 2-202, which provides that terms intended by the parties to be a final expression of their agreement as they are set forth in a writing may not be contradicted "by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented" by course of dealing, usage of trade, or course of performance and by evidence of "consistent additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."

It is apparent from a reading of these two sections that, once the basic requirements of Section 2-201 are met, additional evidence may be offered to explain or complete the writing. In this case, however, the probate court ruled that, because the writing failed to describe the land on which the trees were located, the agreement did not state an ascertainable quantity and that Gest could not introduce evidence to further clarify the writing, as that would be violative of the parol evidence rule.

In this case, it is clear from the face of the writing that it did not contain the complete agreement as assented to by the parties. Under the parol evidence rule, parties may introduce evidence not intended to contradict an integrated writing. Since the rule is supported by the public policy of preventing frauds and perjuries by limiting evidence of facts that contradict a valid contract, the rule does not apply to prevent proof of one or more of the terms of the contract. Where the quantity term is included in the writing, however, other omitted items may be shown by parol evidence. Such evidence should have been admissible in this case since it is clear from the face of the writing itself that it was not intended to be a "complete and exclusive statement of the terms of the agreement."

Section 2-202 “makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached.” Appellant claims on appeal to have evidence showing that he had partially removed the trees referred to in the writing on a particular parcel of land, pursuant to the agreement, prior to Decedent’s breach of their contract. This would be evidence of course of performance. Such evidence is particularly relevant for “the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.”

Parol evidence consisting of the descriptions of the various parcels of land owned by Decedent at the time of the writing was made may also be helpful. It is possible that much of the land owned by Decedent was unsuited to the harvesting of timber, thus further clarifying the terms of the agreement. We do not limit here, however, the types of parol evidence which may be offered on remand. That evidence shall be whatever is relevant and helpful in proving the intent of the parties to the contract, subject to the probate court’s discretion as regards applicable rules of evidence.

CONCLUSION

The probate court erred in finding that no quantity term appeared in the writing evidencing the agreement between Gest and Decedent. The term “all” referred to a quantity and was sufficient to meet the requirements of the statute of frauds. Since additional evidence was required to explain the quantity term, however, parol evidence should have been admitted.

Reversed and remanded.

ANSWER A TO PERFORMANCE TEST B

To: Scott Rawlins
From: Applicant
Subject: Yamata Logging, Letter to opposing counsel drafted for your signature
Date: February 28, 2013

Dear Mr. Merrick:

It is my understanding that you represent Marvin Cox in relation to a dispute arising over a contract he entered into with Mr Yamata. I represent Mr. Yamata in this matter and I hope that we can come to a quick and reasonable resolution.

I am in possession of a copy of your letter dated February 19, 2013 to Mr Yamata. I understand that your position is that no contract was formed, and that this is based on an assertion that 2-201 of the Columbia Commercial Code (CCC) bars enforcement of a contract unless it is signed by the party to be charged. Further you assert that any writing on which a contract claim is based must be detailed and definite enough to clearly evidence a contract. You also allege that there are a number of terms alleged to exist by my client that Mr Cox would never have agreed to.

I believe that you have misunderstood how to apply the relevant law to the facts of this transaction. We know that our clients have done business together before in that Mr. Yamata logged 50 acres of his land. That during this logging Mr Yamata requested to be able to log the portion of timber now in dispute. I think that we can agree that there was some sort of conversation that occurred between our clients after this concerning the logging of Albion Flat. This is evidenced by the fact that they staked out a portion of Mr. Cox's land and my client sent a letter to your client stating his intention to proceed based on that conversation. Further I think we can agree that goods are involved here and that both parties are merchants; therefore the CCC and the merchant sections in

particular will apply. The question then is what does it take to create an enforceable agreement under the CCC?

As I will explain in detail below the 2-201 of the CCC requires a writing signed by the party to be charged or, as between merchants, a writing which is sufficient against the other merchant and not objected to. Here the letter that Yamata gave to Cox satisfies this part of the requirement and Mr. Cox did not object within 10 days. You are correct in asserting that there is a requirement of certainty of terms; however, under the CCC this merely requires that the writing contain a quantity term. The quantity term need not be precise; once it is stated it may be explained or supplemented by parol evidence (see In re. Estate of Frost, herein Frost). Since the writing states that the quantity is the "marked trees in staked area of NW corner" and approximately "750k board-feet," there is a stated quantity term and a contract exists.

Your assertion that CCC 2-207 prevents additional material terms to a contract is correct. However, application of 2-207 only occurs where the parties agree that a contract exists but do not agree on its terms; 2-207 is used to deal with the "battle of the forms." Our supreme court, in Marlene Industries (Marlene), stated "2-201(b) has its role in the context of a challenge to the use of the statute of frauds to prevent proof of alleged agreement, whereas the merchant rule of 2-207(b) is for use in determining what are the terms of an admitted agreement." There is no battle of forms here, merely a battle over the existence and terms of a contract; therefore 2-207 is inapplicable.

As the writing Yamata gave Cox is sufficient against Yamata, not objected to and contains a quantity term, the contract was formed. Once formed we can prove its terms using parol evidence.

We will be able to prove that Yamata is looking at lost profits on this transaction in excess of $200,000. Further, as Mr. Cox knows that the purpose of this was to fulfill Mr. Yamata's need to supply his Japanese customers, and that failure to do so would result

in a loss of customer base, Mr. Cox will be liable for lost future earnings. We estimate that these damages will be close to 1 million dollars over the next five years alone.
My client is not unreasonable. We know that your client is sacrificing his stake in the approximately $100,000 in profits; it seems as though it is in his interest to allow Yamata to proceed. We understand that your client objects to many of the terms that Mr. Yamata asserts are part of the contract. We would be willing to negotiate some of these terms. I hope that my arguments and explanations below convince you of the strength of our claim and that you will convince your client that coming to a resolution without litigation is the best course of action. We both know that litigation is an expensive route that is usually not in the best interest of our client.

The Letter Yamata Sent Mr. Cox Satisfies CCC 2-201 Because it is Sufficient against him and Contains a Quantity term.

CCC 2-201(a) requires a writing signed by the party to be charged. Mr. Cox took notes on a napkin during the initial conversation that occurred between Cox and Yamata at the Chatterbox Café where this transaction occurred. Although I am uncertain of what was on this napkin, it is possible that this napkin satisfies 2-201; according to the A & G case, a fingerprint can be sufficient if it was intended to authenticate the writing. I assume that Cox's fingerprint would be on this napkin. I am not certain he intended to authenticate.

Even if 2-201(a) is not satisfied, which I admit seems unlikely, 2-201(b) can be used to satisfy the section. Under 2-201(b) and Marlene, a memo that is good against Yamata will be good against Cox if 1) both are merchants, 2) the memo was sent within a reasonable time by Yamata to Cox, 3) the memo by its terms confirms the oral contract, 4) the memo is good against Yamata under 2-201(a), 5) Cox received it, 6) Cox knows of its contents, and 7) Cox did not object to its contents within 10 days of receipt.

Each of these is looked at below.

1) Both are merchants

A merchant is one who deals in goods of the kind (A&G). Yamata has been buying and selling timber for 20 years, he deals regularly in timber, and this makes him a merchant. Cox plants, grows, and sells timber on his land; this makes him a merchant as he regularly deals with selling timber.

2) The memo was sent within a reasonable time by Yamata to Cox

Yamata sent the memo on November 26th about a week after their conversation; this is a reasonable time. Especially considering that performance was not to occur until March 5th, over three months later.

3) The memo by its terms confirms the oral contract

This is clearly satisfied because the memo states "as per our deal" indicating that it is a confirmation of the oral contract and that the oral contract was an agreement to sell timber. This confirms that the writing is referencing an oral contract.

4) The memo is good against Yamata under 2-201(a)

To be good against Yamata the memo must be signed by him and contain a quantity term (see A&G and Frost).

Signed, under CCC 1-201(39) and A&G is any symbol executed or adopted with the present intention of authenticating the writing. Specifically the comments to the CCC state that a complete signature is not necessary, that it may be found in a billhead or letterhead. Here as the memo given to Cox was on Yamata's letterhead, it is sufficiently authenticated or signed.

As to the quantity term. This is the only term that is required by 2-201 (see Frost). The other terms of the contract need not appear in the writing. Here the quantity term is stated as being the "marked trees in staked area of NW corner," and "750k board-feet." It is not necessary that these terms are ambiguous, as once it is established that there is a quantity term the writing is enforceable. It can further be noted that this writing specifically references Cox's land as being Albion Flat, helping to eliminate some of the ambiguity.

The writing has both a valid signature in the form of the letterhead and it has a quantity term; therefore it would be enforceable against Yamata under 2-201(a).

5) Cox received it

You have admitted that your client received the letter. Further your client's secretary told Yamata that she gave him the letter. Cox received the letter.

6) Cox knows of its contents

Cox has presumably read the letter and gone over it with you; this indicates that he knows of its contents.

7) Cox did not object to its contents within 10 days of receipt.

The objection to the letter must be in writing (A&G). The only writing rejecting the letter is your letter to my client; this was sent months after Yamata delivered the letter to Cox. As such there is no valid objection.

As I have explained, the letter Yamata sent to Cox, that you describe as an informal note, is sufficient to satisfy the statute of frauds and create a binding contract. The question still remains as to what the terms of the agreement are. As a preliminary matter you have asserted that 2-207 applies. It does not.

CCC 2-207 does not apply because there is no agreement as to the terms of the contract.

The Supreme Court states in Marlene that 2-207 only applies in determining the terms of an admitted agreement. Here there is no admitted agreement; therefore 2-207 does not apply.

The terms of the contract can be proved by extrinsic evidence because the evidence will not contradict the writing

As 2-207 does not apply, we are left to determine the terms of the contract based on the writing we have, Mr. Cox's actions, Mr. Yamata's actions and provisions of the CCC.
CCC 2-204 provides that contracts for sale do not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving a remedy. The CCC allows for gap fillers to be used: course of performance, course of dealings and trade usage can be used to supplement or qualify the terms of the agreement (CCC 1-303 and Frost). Further consistent additional terms are allowed so long as the writing is not intended as a complete and exclusive statement of the terms of the agreement (Frost); it is unquestionable that the note from Yamata to Cox is not complete and exclusive. It merely contains a few sentences of ambiguous writing (however this is sufficient to form a contract).

Once it is determined that the writing is not integrated, the terms may be explained by extrinsic evidence. The court has said that the course of performance of the parties is particularly relevant (Frost.)

With this in mind we can look at each term in the contract that you dispute.

Quantity of timber

The quantity of timber to be taken will be supplemented by the course of dealings and performance. My client is not asking for more than what was promised. Which are trees larger than 18" in diameter. As Cox has already staked off the land to be logged with Yamata the court will have no problem determining what is to be given.

Location

The location is clearly referenced in the memorandum as the NW corner of Albion Flat. Further Cox and Yamata staked the area off. This evidence can all be used to show that the location is not uncertain.

Price

Price does not need to be stated. The writing references a "pricing discussion" and specifically states that it is payable on delivery of the logs FOB to Port Columbia Dock. Further my client admits that the pricing agreed upon is 20% of the price the buyer will pay, which will be the published export price in the trade journals. Although this term is unknown now it will be certain at the time of payment.

The marking of trees

Although there is no course of performance here, the prior dealings do indicate that my client was the one who marked the trees in the prior contract. My client is willing to mark the trees in this agreement. This term is not essential to us coming to a resolution of the dispute and we are happy to appease Mr. Cox's wishes as to who should mark the trees.

Cutting the Road

Although in the prior timber deal between Yamata and Cox there was no need to cut a road, the industry standard is that the landowner cuts the road. This is due to the permitting required when third parties try to do so. As such the court will find that this was a term of the contract.

Temporary Storage

In the prior deal between Yamata and Cox Yamata was allowed to store timber on Cox's land for a short time. Further Cox is aware that Yamata is not taking the timber to the mills as is usually done. This shows that the industry standard of not allowing storage should not apply. I would like to point out to you that not only is the law on our side as to this contract term but it is easy for your client to satisfy us here; Cox has considerable open space next to the tract Yamata will be logging and it can be used at no cost or damage to Cox.

Slashing and Burning

My client understood that Cox wanted to try to sell the slash. If your client is not interested in doing so, after Yamata puts it in piles for him, then Yamata is willing to negotiate some other solution to this point.

Obtaining Permits

It is impossible for Yamata to obtain the necessary permits to take the timber because he is not the landowner. As such the court will infer that the duty to do so rests on Cox. Further my client is under the belief that this will merely require Cox to request the permits as the environmental impact report and logging schedule are complete. It seems that your client could easily comply with this.

Replanting

Cox is the one obligated to replant. Further he has a greenhouse operation where he sprouts the seedlings. Further as the replanting is something that Cox does to get a renewable resource tax benefit it is likely the court will side with Yamata and determine that Cox was likely responsible for replanting.

Conclusion

Although I am unsure why Mr. Cox no longer wishes to make around $100,000 off of his sale of timber, I do know that my client has a valid contract claim. Our case that a contract exists is very strong. We have a writing that is sufficient to satisfy CCC 2-201. Further the missing terms can all be supplied by extrinsic evidence. We can show that it is reasonable under course of performance or course of dealings, trade usage and other extrinsic evidence that Cox needs to cut the road, allow for storage and obtain the permits. Further my client is not going to have to replant the harvested trees.

Mr. Cox made this agreement with my client so they could both make money. He proceeded to actually enter on his land and stake out the trees to be cut. My client thinks that his refusal to perform is based on a divorce proceeding; I am unsure of whether or not this is true. However, I am sure that if we cannot quickly resolve this dispute my client will suffer great losses and we will be forced to proceed with litigation.

I urge you to discuss the strength of our case with Mr. Cox and explain to him the potential extent of liability. I look forward to resolving this issue and allowing both of our clients to profit by this transaction.

ANSWER B TO PERFORMANCE TEST B

DRAFT LETTER TO STAN MERRICK FOR MR. RAWLINS' REVIEW

CONFIDENTIAL

Rawlins Baird, LLP
One Parkstead Plaza, Suite 1200
Fair City, Columbia

February 28, 2013

Stanley J. Merrick
Attorney at Law
Law Offices of Stanley J. Merrick
South Shore Center, Room 275
Fair City, Columbia

Re: Albion Flat Properties

Dear Mr. Merrick,

We are representing Mr. Hari Yamata in his dispute regarding a logging contract with your client, Mr. Marvin Cox. We have reviewed your letter to Mr. Yamata, and appreciate the concerns you raised regarding the enforceability of an agreement between our clients and the terms of such agreement. However, for the reasons stated below, we believe our client does have an enforceable agreement and that certain terms you noted as being belatedly added were part of the original agreement and would be enforceable by the courts.

The following discusses (1) why there is an enforceable logging agreement between our clients, and (2) the terms of the agreement between our clients.

THERE IS AN ENFORCEABLE LOGGING AGREEMENT

As you know, the Columbia Commercial Code (CCC) Section 2-201(a) provides that contracts for the sale of goods for the price of $500 or more is not enforceable unless in writing and signed by the party against whom enforcement is sought. The timber to be cut would be roughly $100,000, so well more than the $500 threshold. In addition, an agreement for the sale of timber to be cut is a contract for the sale of goods even though it forms part of the realty at the time of contracting. A&G Construction Co. v. Reid Brothers Aggregate Co., Col. Ct. of Appeal, 1999. Accordingly, we believe Section 2-201(a) is applicable.

Pursuant to Section 2-201(a), an agreement should be signed by the party to be charged, which would be your client. As you pointed out in your letter to Mr. Yamata, the note Mr. Yamata sent to your client is not signed by your client, so the agreement would fail under Section 2-201(a).

We agree with you that there is no enforceable agreement under Section 2-201(a); however, we believe the note would be enforceable under Section 2-201(b). The necessity of the signature of the party to be charged is not absolute, and Section 2-201(b) provides for an exception to the signature requirement. A&G.

Confirmatory Memo Rule

Section 2-201(b) deals directly with the question of whether a contract exists which is enforceable. Marlene Industries v. Carnac Textiles, Col. Sup. Ct., 2005. Section 2-201(b) provides that a contract is enforceable if it is (1) between merchants, (2) the memo is sent within a reasonable time after an oral agreement, (3) the memo by its terms confirms the oral agreement, (4) the memo is good against the sender of the memo, (5) the recipient receives the memo, (6) the recipient has reason to know of its contents, and (7) the recipient does not object to its contents within 10 days of receipt. See Marlene, A&G. Each of these elements is satisfied in our case as detailed below.

1. Merchants

Merchants are persons who deal in goods of the kind, or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. CCC Section 2-104(a), A&G. Here, Mr. Yamata is in the business of logging and selling logs to end-customers and your client is in the business of selling logs. Since both of our clients deal in the goods of the kind sold (i.e., logs) they are both merchants.

2. Memo is sent within a reasonable time after the oral agreement

The note that Mr. Yamata sent your client was sent on November 26, 2012, which was about a week after the oral agreement between our clients. In A&G, the court found that a memo sent almost two weeks after the oral agreement was unquestionably sent within a reasonable time. As a result, the one week lapse between the agreement and Mr. Yamata sending the confirmatory note is reasonable.

3. Confirms the oral agreement

Mr. Yalata's note expressly references the oral agreement by stating "per our deal" and "per our discussion". Accordingly, the note confirms their oral agreement.

4. Memo is good against the sender

As discussed above, Section 2-201(a) would require Mr. Yamata's signature and that the material terms are in writing.

Signed

You may argue that the memo is insufficient against the sender because it was not signed by Mr. Yamata. However, "signed" means "a symbol executed or adopted by a

party with present intention to authenticate a writing." Section 2-201(39), A&G. The comments to the definition of "signed" state that "a complete signature is not necessary" and that a signature may be found on any part of the document including "letterhead." In this case, the note Mr. Yamata sent your client was on Mr. Yamata's letterhead, so the note was "signed" by Mr. Yamata.

Terms

You have noted that the terms of the note are vague, lacks a quantity term as the quantity reference is a mere estimate, and location of logging is not certain. At first glance, your arguments would indeed render the memo insufficient and the agreement could therefore not be saved by Section 2-201(b). However, we think that you'll agree that on closer inspection the note is not vague and has sufficient material terms.

First, as the CCC comments state, "The only term that must appear is the quantity term". You found the quantity term to be an estimate and vague. Mr. Yamata's note provides that the logging will be of an estimated 750K board-feet that are the marked trees in the staked area of the NW corner of the Albion Flat. In other words, while 750K is an estimate of the total production from the logging, the note references a staked area, which is certain. All of the marked trees in the staked area are subject to logging.

You may still argue that the staked area is vague as there may be many staked areas and that parol evidence could not be used to show the existence of the staked area in question. As you know, the parol evidence rule provides that terms in a writing that is to be a final expression of the agreement may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement, but may be explained or supplemented by course of dealing, usage of trade or course of performance, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. This rule does not apply to prevent proof of one or more terms of the contract. As discussed by the Columbia Court of Appeal in In

re Estate of Frost (2001), once a quantity term appears, then it may be explained or supplemented by parol evidence.

We believe the staked area that Mr. Yamata and your client agreed upon and as described in Mr. Yamata's note is a clear and sufficient quantity term on its face. However, even if you find it vague given the existence of other staked areas or the lack of current markings, parol evidence of our clients' prior conversations may be used to explain what the marked trees and staked area is, as the note was not meant to be exclusive statement of terms and other evidence may be used to explain a term. This is similar to the case in Frost, where the quantity term was "all" trees, which was considered complete and exclusive on its face, but other evidence was admissible to show what parcel was intended to be subject to the agreement. Here, we have a clear quantity term on the face of the note (i.e., marked trees in a staked area), and parol evidence can be used to show that this means the 18" trees in the staked area.

Your last objection is that the price term is missing. However, since we have a clear quantity term, no other term is required to be put in writing pursuant to the comments to the CCC section 2-201. There is a Commercial Code policy of authorizing courts to fill in gaps in sales agreements, and CCC section 2-204 provides that "[e]ven though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonable certain basis for giving appropriate remedy". See Frost.

In sum, because Mr. Yamata's note is "signed" by Mr. Yamata and has a clear quantity term, the note would be good against Mr. Yamata and the fourth element of Section 2-201(b) is met.

5. Recipient receives the memo

Mr. Yamata left his note at your client's office. Your client's assistant told Mr. Yamata that Mr. Cox received Mr. Yamata's note the same day Mr. Yamata left his note at Mr.

Cox's office. Your client referred to the note when he repudiated the agreement to Mr. Yamata. You also referred to the note in your letter to Mr. Yamata. As a result, there is no reason to believe that your client did not receive the note.

6. Recipient has reason to know of its content

Mr. Yamata and your client have had prior dealings and spent time together marking the plot to be logged before Mr. Yamata sent your client the note. Your client surely must have understood what the note was referring to. Moreover, your client's defense to Mr. Yamata was that he didn't sign a contract, not that he didn't know what Mr. Yamata was talking about. Accordingly, this element of Section 2-206(b) is also met.

7. Recipient does not object within 10 days

Mr. Yamata did not receive any evidence that your client objected to the note within ten days of receipt. Even if there was an oral objection, the objection must be in writing to be sufficient. A&G.

In sum, all of the elements of Section 2-201(b) are met. This means that, despite all of your objections noted in the first set of bullet points in your letter, there is an enforceable agreement between Mr. Yamata and Mr. Cox.

TERMS OF THE AGREEMENT

As touched upon above and discussed in Frost, the public policy of the parol evidence rule is to prevent fraud and perjuries by limiting evidence of facts that contradict a valid contract; however, the rule does not apply to prevent proof of one or more terms of the contract. This means that when a quantity term is included in writing, other omitted terms may be shown by parol evidence. Frost.

Each of the omitted terms is discussed below in turn, and we understand all of the terms were agreed to with your client when the deal was initially struck orally.

1. Marking the trees

We understand your client nodded his head when asked to mark the trees. We believe this parol evidence would be admissible to show that your client agreed to mark the trees. Having said that, given the ease of marking, we believe our client may be willing to mark the trees if this is difficult for Mr. Cox and if Mr. Cox is reasonable on other terms of the agreement. We would of course have to discuss this with our client, but we do not believe this item should be a deal-breaker.

2. Cut the road

Again, we understand that your client agreed to cut the road, which we believe would be admissible. Pursuant to Section 1-303 of the CCC, usage of trade in the area of trade is relevant to supplement the terms of an agreement. Here, cutting roads is standard practice for the landowner to do, because it's his land and he can do it without additional permits. Moreover, the pricing agreed to take into account the cutting of the road.

Course of dealing is also important evidence showing a contract term. Course of dealing is conduct between the parties in previous transactions, which establish a common basis of understanding for interpreting their expressions and conduct. CCC Section 1-303. Here, you may argue that in the last transaction between our clients, Mr. Cox did not build a road. However, there was no need for a new road in the last logging, because there was already a road on the property.

Given the custom in the industry for the landowner to cut the road, your client will be obligated to cut the road. Note, your client is being compensated for this in the agreed pricing.

3. Temporary storage

Your client also agreed to allow Mr. Yamata to store logs on Mr. Cox's land. While this is not customary in the industry, course of dealing between parties is also relevant to understanding the terms of an agreement. CCC Section 1-303. Mr. Cox has allowed Mr. Yamata to store logs on his land on a prior logging project, and knows that Mr. Yamata needs to do this to avoid double handling. We also note that this storage will not cost your client any money as there is ample storage area on Mr. Cox's land.

In sum, given your client's agreement, the course of dealing and the immaterial effect to your client, allowing storage is also part of the agreement.

4. Burn the slash

We understand your client wanted to see if he could make money selling the slash. You may want to check in with your client on this term, as we think your client would like to keep the slash. We don't believe this term should upset the agreement though, and, if required and subject to further discussion with our client, our client may be able to burn the slash as it would be customary for the logger to do so.

5. Obtaining environmental permits

Before cutting trees, the forest protection agency has to issue environmental permits. These permits must be requested by the landowner, so it is not something Mr. Yamata could do even if he wanted to. In addition, we understand your client has an approved logging environmental plan, which includes the logging contemplated by the agreement in this case. Since your client agreed, it is customary and required for the landowner to request the permits, and since it would not be difficult for your client to do so, obtaining environmental permits would also be part of the agreement.

6. Replanting

Similar to obtaining environmental permits, replanting is the duty of the landowner and customary for the landowner to do. We also note that your client has a greenhouse operation with seedlings, so it's his seedlings to plant, and that your client will receive the tax benefit of planting the seedlings. Given the agreement for Mr. Cox to replant and since it's customary for Mr. Cox to do so, this would be a required part of the agreement.

7. Price

The price of 20% of the export FOB price was agreed to and is what our clients have agreed to in the past in their course of dealing. As a result, this price would also be found by a court to be applied to the contract between our clients.

In sum, there was an agreement on all of these terms at the time of the deal. Given the agreement, the custom and prior course of dealing between the parties, all of these items would be considered to be part of the agreement.

Section 2-207

We also wanted to discuss Section 2-207. In your letter, you reference this section as a reason for why the terms discussed above should not be part of the agreement and why the agreement fails. However, Section 2-207 only applies when a confirmation includes an additional term than what was agreed to orally. In other words, if Mr. Yamata's confirmatory note to your client included additional terms, Section 2-207 would be applicable. For instance, in Marlene, there were two confirmatory notes with different terms, so Section 2-207 was applicable. Here, your client agreed to each of the terms above at the time of the original handshake agreement. None of these terms were subsequently added to the agreement. The fact that Mr. Yamata's note doesn't refer to additional terms further shows that these terms were agreed upon orally. These are

experienced businessmen and would have discussed these terms at the time of agreement and they did so.

Moreover, even assuming Section 2-207 applies, this would not mean there is no agreement between the parties. Section 2-207 of the CCC is for only for use in determining what the terms of an admitted agreement are. Marlene. But, this is beside the point, as Section 2-207 is simply inapplicable to this case.

DAMAGES

We do not want to get ahead of ourselves and believe that our clients can agree to move forward with the contract they agreed to previously. However, we do not want to underestimate the gravity of the situation and believe it is important for you to know the potential cost of breaching the contract. At this point, we understand Mr. Yamata can proceed with logging without too many damages, but if your client continues to prevent the logging, Mr. Yamata's damages will be serious. This is a large contract for our client and if your client continues to breach the contract, our client would seek full damages from the breach of contract, which could be hundreds of thousands of dollars. Again, we do not believe it has to come to this given the clarity of the situation, but we wanted to give you a sense of Mr. Yamata's injuries and your client's potential exposure.

CONCLUSION

We appreciate the objections you raised in your letter to Mr. Yamata. However, as discussed above, under Section 2-201(b), a court would find an enforceable agreement between our clients despite your objections. In addition, all of the additional terms you raised in your letter were actually agreed upon by the parties, and given custom and course of dealing, indicate that a court would enforce these terms in the agreement. They are not additional terms after an agreement, so Section 2-207 is inapplicable.

To help come to an amicable agreement and resolution, we believe our client would be flexible on the marking of the trees and the burning the slash terms, subject to further discussions with our client.

Once you've had a chance to review this letter, we think it would be helpful to discuss in person. Please let us know if there is a convenient time to meet and we'll set up a meeting. We look forward to working with you to resolve this matter in a timely and efficient manner to the benefit of both our clients.

Sincerely,

[MR. RAWLINS TO SIGN]

California Bar Examination

Performance Tests and Selected Answers

July 2013

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the two Performance Tests from the July 2013 California Bar Examination and two selected answers for each test.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Contents

July 2013

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

IN RE SIA

FILE

IN RE SIA

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

SANCHEZ & MARTIN
ATTORNEYS AT LAW

1600 K STREET, SUITE 250
P.O. BOX 423, FRANKLIN, CL 94203-4470
Telephone: (926) 445-2021 Facsimile: (926) 444-3651

MEMORANDUM

TO: Applicant

FROM: Sonia Sanchez

DATE: July 30, 2013

RE: In re SIA

Sensory Integration Alliance, Inc. (SIA) is a nonprofit corporation. Two weeks ago, SIA received a letter from the State Attorney General's Office, enclosing a consumer complaint filed with the Registry of Charitable Trusts. According to the complaint, SIA failed to refund fees for canceled seminars.

As a result of the letter and complaint, SIA's new Executive Director, Karen Barber, did an investigation. To her surprise, she discovered additional serious issues related to the operation of SIA.

Given what she has discovered, Ms. Barber seeks our advice. I need to counsel her concerning what potential liability SIA has for the following acts:

1. Canceled or unscheduled seminars;
2. Payments for Klene Up Kroo janitorial services;
3. Unfiled Form 990s;
4. Expense account reimbursements to Vernon Ellis; and
5. Cruise taken by board members.

Please prepare an objective memorandum that:

1. For each of the above-listed acts:
    A) States the potential remedies;
    B) States what statute and section prescribes the remedy; and
    C) Discusses whether the available facts would support an effort by the Attorney General to impose the remedy;

and,

2. Discusses whether the Attorney General could successfully seek a receivership or dissolution of the corporation.

Another associate is looking at SIA's remedies against the individual transgressors, so do not discuss either SIA's rights against these individuals or the Attorney General's remedies against these individuals.

TRANSCRIPT OF INTERVIEW WITH KAREN BARBER

(July 30, 2013)

SONIA SANCHEZ: Ms. Barber – Karen – from what you told me over the phone, it sounds as if you have some fairly troublesome things you want to talk about. Why don't we go back to the beginning?

KAREN BARBER: Right. First let me say how glad I am that you could see me right away. As I understand it, your firm is counsel to Sensory Integration Alliance, Inc. – SIA.

SANCHEZ: Yes, that's right. We've represented them for the past 10 years or so. I did the original incorporation papers and took care of registering SIA with the Registry of Charitable Trusts. My contact has always been with Vernon Ellis.

BARBER: I'm his replacement. I've just started working as the new Executive Director.

SANCHEZ: When did you start?

BARBER: Two weeks ago.

SANCHEZ: What's your function as Executive Director at SIA?

BARBER: Basically, the same as Vernon Ellis's was. I'm responsible for financial and operational aspects of the corporation and supervising the staff. I report to the five-member Board of Directors, and I work closely with Alan Zackler, the Chair of the Board's Budget and Finance Committee.

SANCHEZ: What happened to Vernon?

BARBER: Unfortunately, about three months ago, he was killed in an auto accident.

SANCHEZ: I'm so sorry to hear that. What is it that brings you here?

BARBER: Well, on my first day of work, I received a letter from the Attorney General's Office enclosing a complaint from a person who claims that she had sent in a check to cover the cost of her attendance at a series of classes that SIA was sponsoring. The Attorney General's letter says I have 30 days to respond. Well, now two weeks.

SANCHEZ: Was the complainant right – that is, did she pay and did she not get a refund?

BARBER: Well, I haven't been able to pinpoint that exactly as yet, but in the course of looking into it, I found something that really looks suspicious. I was – and still am – in

the process of getting familiar with the operation, so what I'm going to tell you is what I've found so far.

SANCHEZ: What was suspicious?

BARBER: It's pretty complicated, but let me try to outline it for you. As best I can tell at this point, SIA sponsors seminars and classes on sensory integration several times a year. There's a separate file for each seminar or class, containing spreadsheets showing the names and contact information for each of the people who signed up and recording each person's advance payment. Occasionally, the classes get canceled for one reason or another. When a seminar got canceled, apparently Vernon Ellis sent out letters to the people who had paid telling them of the cancellation and asking whether they wanted a refund or whether they would agree to donate their payment to SIA as a charitable contribution.

SANCHEZ: So, after notice goes out to the public and all arrangements are made, the classes get canceled? Did people who wanted their money back usually get a refund?

BARBER: Well, I found refund checks written to those individuals but when I tried to track them so I could respond to the Attorney General's letter, what I found is that all of those checks had been deposited at Balfour Bank, into an account in Vernon Ellis's name.

SANCHEZ: These were refund checks for <u>all</u> canceled seminars?

BARBER: That's partly right. There are some where all the rooms were booked and instructors engaged and then canceled, apparently because there wasn't enough enrollment. There are about an equal number for which public announcements went out, but as to which I can find absolutely no evidence that anything was ever done to arrange for the events – no rooms booked, no instructors contacted, or anything.

SANCHEZ: You mean nonexistent seminars?

BARBER: Apparently so.

SANCHEZ: Why would anyone do that?

BARBER: Well, here's where it gets complicated. When I moved into Vernon Ellis's office, I was trying to clear out his desk and get mine set up. The three drawers on the right side were locked, and no one knew where the key was. I actually had to call a locksmith to open the drawers. And what I found really surprised me. There were some bank records for an account set up at Balfour Bank in Vernon Ellis's name.

SANCHEZ: I take it that Balfour Bank is not the bank SIA uses for its own accounts, right?

BARBER: Right.

SANCHEZ: Is there any connection between the Balfour Bank records and the "refund" checks that you just told me about?

BARBER: Yes. Here's what I've been able to figure out. As to any person who responded that he wanted his money back, Vernon would write a check in the proper amount payable to that person, then, in what I've been able to recognize as his handwriting, he'd endorse the check with that person's name and deposit it into his account at Balfour Bank. Then, periodically, he would write checks from that account to someone named Adele Stevens, who I've found out is Vernon's sister.

SANCHEZ: Did this pattern appear with respect to the seminars that were canceled after they had actually been planned and also as to the never-planned or "phony" seminars?

BARBER: Pretty much the same.

SANCHEZ: Do you have any idea how much money we're talking about?

BARBER: For the past three years, I've been able to track about $18,000 in refund checks that were written to the paying customers but actually deposited into Vernon Ellis's account at Balfour Bank.

SANCHEZ: On the face of it, it sounds as if Vernon was running a scam. What else did you find in Vernon's desk drawers?

BARBER: There was a whole other series of bank records, and this one is even scarier. There were a series of invoices from a company called The Klene Up Kroo for janitorial services and checks written to that company for the amounts of the invoices. The checks, totaling $22,000 over an 18-month period, were drawn on SIA's account and signed by Vernon Ellis. Those checks were endorsed in the name of Howard Klene and then deposited into an account in Howard Klene's name at First Bank. Regular withdrawals made from the Howard Klene account were then deposited into an account opened in Vernon Ellis's name at Arden Bank. Disbursements from the Arden Bank account were made regularly to Vernon Ellis and Alan Zackler – each of them received cumulatively about $8,000. The current balance in the account is about $6,000.

SANCHEZ: Oh! Is that the same Alan Zackler you report to – a member of SIA's Board and the Chair of the Budget and Finance Committee?

BARBER: I'm certainly assuming so. I mean, I don't know any other Alan Zackler.

SANCHEZ: What else did you find?

BARBER: There's something called a Form 990 that SIA is supposed to file annually with the Attorney General and the Internal Revenue Service.

SANCHEZ: Yes. That's basically an informational tax return for charitable organizations. It includes information such as the major donors, the members of the board, the amounts of compensation paid to board members and staff, and the operational expenses.

BARBER: In the bottom drawer of the desk, there was a file labeled "990s." There were Form 990s that appeared to be completely filled out and signed by Alan Zackler – they were for 2010, 2011, and 2012 and they looked like the originals. Also, memos to the Board from Vernon Ellis, dated the last two years, stating that the 990s for 2010, 2011, and 2012 were timely filed. And there was also a letter from the IRS to Mr. Zackler dated April 20, 2012 stating that the 990s for 2010 and 2011 had never been received by the IRS. On the IRS's letter, there was a handwritten note across the top, "Vernon, please handle this. AZ."

SANCHEZ: Were you able to tell from the forms whether they had been accurately filled out?

BARBER: Not really, but I can tell you that the numbers didn't seem to add up. I mean, I know who the major donors are, and I saw only a few of them listed. Also, the operational expenses reported on the form seemed to me to be overstated quite a bit.

SANCHEZ: What else?

BARBER: One of the folders in the drawer was labeled "Expense Accounts – Vernon/2011." The expense vouchers were filled out in Vernon Ellis's handwriting. A few of them had receipts and other supporting documents attached, but not many. Many entries had to do with SIA travel and entertainment – dinner parties, cocktails, and the like. What I found with respect to a couple of the dinner parties is that Vernon had written an SIA check to the restaurant where the party was held. Then, he'd sometimes attach the restaurant dinner bill to his expense report and get personal reimbursement for it. Also, he would use an SIA credit card, pay the credit card bill with an SIA check, and then also seek personal reimbursement -- double-dipping, so to speak. He got some other reimbursements not supported by receipts. All in all for 2011, the total

reimbursement to Vernon was close to $12,500 and only about $4,000 was supported by back-up receipts.

SANCHEZ: Was there any procedure for verifying expense reimbursements and approval of them?

BARBER: As I understand it, expense reports of the Executive Director are supposed to be submitted to the Board of Directors for approval. I checked the board minutes to see if that had been done, and what I found is that Vernon Ellis would attend the board meeting and present his expense reports about once a quarter. The minutes showed that, on each occasion, Alan Zackler "assured the Board" of the accuracy of the expense reports and made a motion that they be accepted as submitted.

SANCHEZ: Is there anything else that gives you pause?

BARBER: While I was going over the check registers, I noticed a $70,000 check written to Wanderly Travel Service. Melanie Wanderly is a member of the Board and she owns Wanderly Travel Service. I tracked it back to an invoice for a Caribbean cruise last summer for the Executive Committee of the Board – the members of the Executive Committee are Alan Zackler and Melanie Wanderly. The Executive Director is an ex officio member of that committee.

SANCHEZ: What was that all about? Do you know?

BARBER: The best I can tell from the records is that Alan Zackler, Melanie Wanderly, and Vernon Ellis and their spouses went on this 10-day cruise. The written agenda described it as a "long-range planning" meeting of the Executive Committee – meeting at breakfast each day for one hour to discuss long-range planning followed by "free time."

SANCHEZ: I agree it sounds suspicious, but maybe not if they really did conduct official business during a substantial portion of the time. Is there any record of what they accomplished by way of long-range planning?

BARBER: None that I could find. In fact, the $70,000 expenditure showed up on the financial statements for that period as "accumulated organizational expenses," and the minutes of that meeting do not show that there was any discussion of the item during Alan Zackler's presentation of the financial report in his capacity as Chair of the Finance and Budget Committee.

SANCHEZ: By the way, what's your sense of the overall financial health of SIA?

BARBER: As far as I can tell, it's pretty healthy. We have a steady stream of charitable donations coming in. We also have a number of foundation grants that are on track for renewal. We also have a half a million dollars in reserves.

SANCHEZ: Well, that's good to hear. I remember reading about problems of charities using commercial fundraisers. Does SIA use any fundraisers?

BARBER: You mean, telemarketers or mass mailers, no, no. We don't do any fundraising appeals to the general public, either on our own or through professional solicitors.

SANCHEZ: How much of this have you disclosed to the Board?

BARBER: Nothing. Fortunately, the Board is changing. The terms of Wanderly and Zackler are up, and they have said that they are stepping down from the SIA Board. At the next meeting, two new board members have been nominated by the other board members, and then new officers and a committee chair will be selected by the new Board.

SANCHEZ: That will make things easier for us to keep this between us for the time being, at least until the next board meeting, and there is a new Board. Our firm represents SIA, not the individual directors. I think there's some exposure here.

BARBER: Well, that's what I want to know. I need to respond to the Attorney General and I'm obviously in a bind.

SANCHEZ: Yes, I agree, and although there are others we probably need to be concerned about, the primary regulator is the State Attorney General. She has broad powers of supervision over charitable organizations like SIA, and there's an extensive statutory scheme for regulations that range from a mere slap on the hands to taking over completely or even dissolving the entity. Given your time constraints, let's focus for now on the Attorney General. I'm going to have to see how all the things you've told me interact with the statutes and what the consequences are. I'll piece it all together and give you written advice.

BARBER: OK. I look forward to hearing from you.

SANCHEZ: I'll be in touch soon. Thanks for coming in.

State of Columbia Department of Justice
1300 I Street, Suite 125
P.O. Box 903447
Franklin, CL 94203-4470

Rosalie Edmonds, Attorney General

July 15, 2013

Karen Barber
Executive Director
Sensory Integration Alliance, Inc.
465 Monument Boulevard, Suite 325
Martinville, CL 93625

Re: Complaint # 2555

Dear Ms. Barber:

The Registry of Charitable Trusts of our office has received the enclosed complaint regarding an unpaid refund for a seminar sponsored by Sensory Integration Alliance, Inc. and subsequently canceled. We are considering whether to initiate an investigation. Please provide us with an explanation for this problem, state what you intend to do to remedy it, and any other pertinent information. If you do not respond in writing within 30 days, our Investigations Unit will proceed with an investigation.

Sincerely yours,

Matt Conyers
Deputy Attorney General

ROSALIE EDMONDS, Attorney General

State of Columbia
DEPARTMENT OF JUSTICE
1300 I Street, Suite 125
P.O. Box 903447
Franklin, CL 94203-4470

Public: (926) 777-3200
Facsimile: (926) 777-4446

COMPLAINT TO ATTORNEY GENERAL ON A NONPROFIT ORGANIZATION

Name of organization: **Sensory Integration Alliance, Inc.**

List any other names it uses: **Unknown**

Address of organization: **465 Monument Blvd., #325**

City, State, ZIP: **Martinville, CL 93625**

Telephone number of the organization: **(555) 329-4686**

Briefly summarize the main points of your complaint here: (Attach additional pages for the details of your complaint, if necessary.)

I signed up for a 5-session class for $895 that I paid for in advance. I was notified that the classes were canceled and have been promised a refund, but it's been over 6 months and I haven't received a refund yet.

Have charitable funds or other assets been lost, wasted or diverted from proper charitable purposes? Or, is there a danger that such loss will soon occur? Please explain, giving your best estimate of the amount lost or at risk, if you know:

I have no idea whether the funds have been diverted.

What action has already been taken, either within the organization or with other law enforcement agencies, to try to resolve this problem? Please include dates if available:

I had at least four calls with Vernon Ellis. He assured me that the funds were being refunded, but I never received them.

List the names, addresses and telephone numbers, if known, of all persons you believe may be responsible for this problem:

Unknown

Your name, address and telephone number:

Alice Rayburn
14 Stonecrest Manor
Jackson, CL
(555) 206-3872

Date: January 30, 2013

___ Check here, if you request that your identity be kept confidential.

Mail the completed form and any attachments to:

Registry of Charitable Trusts
Office of the Attorney General
P.O. Box 903447
Franklin, CL 94203-4470

Sensory Integration Alliance, Inc.
Research, Education, Accommodation, Treatment
A 501(c)(3) Nonprofit Corporation

Nearly one out of every thousand people has difficulty processing information from one or more of their five basic senses:

- Vision
- Auditory
- Touch
- Olfaction (smell)
- Taste

Plus two lesser-known senses:

- Vestibular (sense of movement)
- Proprioception (sense of position)

The disability includes over-response (for example, when a person finds the touch of clothing or physical contact unbearable) and under-response (for example, when a person shows little or no reaction to pain or temperature extremes).

Sensory Integration Alliance, Inc. (SIA) exists to help people who live with sensory disorders and their families.

Services to Individuals with Sensory Disabilities

Information - SIA collects and disseminates up-to-date information to enable individuals to understand their disability, to find treatment, and to seek accommodations at school or in the workplace. This information is available on the SIA website, www.senses.org.

Referral - SIA maintains a database of medical and education specialists and is able to make referrals for individuals to receive the services necessary and appropriate for their condition.

Services to Families of Individuals with Sensory Disabilities

Education - SIA convenes presentations and seminars to explain sensory integration disorder (SID) and its treatments, therapies, and other interventions to parents and other family members. Seminars feature qualified professionals, doctors, occupational therapists, psychologists, educators, etc. Topics include new therapies, special education programs at schools, available community resources and more.

Services to Professionals

Education - SIA will convene presentations and seminars to bring the latest information to professionals working in the field of sensory disability. Seminars will feature expert practitioners and researchers. Topics may include new therapies, special education programs at schools, available community resources, and more.

Referrals - Professionals have the opportunity to be part of SIA's referral network. Please contact Karen Barber, SIA Executive Director, for details. kbarber@senses.org.

Minutes of the Quarterly Meeting, SIA Board of Directors

September 15, 2011

The meeting was convened at 5:00 p.m. at the SIA offices. All board members were present, and the Chair declared that a quorum was present.

Moved, seconded and resolved to approve the minutes of the June 6, 2011 meeting.

Executive Director, Vernon Ellis, provided his report to the Board. Director Alan Zackler orally presented his Budget and Finance Committee Report, concluding that the financial status of SIA was solid, and asked that the Board approve all of the expense reimbursements of the previous quarter. Directors Jeff Garcia and Warrick Dunne questioned certain expenditures. Director Zackler responded that he had reviewed each of them and that each was bona fide. The Board moved, seconded and resolved approval of payment of the quarterly expenditures.

The Board discussed the status of the public seminars. Executive Director Ellis reported that the programs were on track and had been well received.

The meeting was adjourned at 5:45 p.m.

Minutes of the Quarterly Meeting, SIA Board of Directors

April 15, 2012

The meeting was convened at 5:15 p.m. at the SIA offices. All board members were present, and the Chair declared that a quorum was present.

Moved, seconded and resolved to approve the minutes of the January 15, 2012 meeting.

Director Alan Zackler orally presented his Budget and Finance Committee Report, and reported that expenditures were under the budgeted amounts and that revenues were on target. Director Warrick Dunne led a discussion by several directors about the apparent increase in staff travel reimbursements. Director Zackler explained that these were legitimate expenses associated with the increase in public seminar programs, and that all of the expenditures had been reviewed and each was well-documented in the files of SIA.

The meeting was adjourned at 5:45 p.m.

Minutes of the Quarterly Meeting, SIA Board of Directors

January 15, 2013

The meeting was convened at 5:00 p.m. at the SIA offices. All board members were present, and the Chair declared that a quorum was present.

Moved, seconded and resolved to approve the minutes of the September 15, 2012 meeting.

Director Alan Zackler reported that preparation of the annual budget had been delayed because all of the previous year's income and expense data were not ready. Executive Director Vernon Ellis was still working on it. Several directors expressed serious concern. Director Zackler reassured them that everything was in order; just a little slow this year. Director Jeff Garcia asked if SIA's reports to the IRS and State Franchise Tax Board had been filed, and Director Zackler assured the Board that all reporting requirements had been met.

The meeting was adjourned at 5:45 p.m.

July 2013

California Bar Examination

Performance Test A

LIBRARY

IN RE SIA

LIBRARY

Selected Provisions of the Columbia Corporations Code, Nonprofit Corporation Law

Section 5231.

(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:

(1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;

(2) Counsel, independent accountants, or other persons as to matters which the director believes to be within such person's professional or expert competence; or

(3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.

(c) Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated.

Section 5233.

(a) Except as provided in subdivision (b), for the purpose of this section, a self-dealing transaction means a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest and which

does not meet the requirements of subdivision (d). Such a director is an "interested director" for the purpose of this section.

(b) The provisions of this section do not apply to any of the following:

(1) An action of the board fixing the compensation of a director as a director or officer of the corporation.

(2) A transaction which is part of a public or charitable program of the corporation if it: (i) is approved or authorized by the corporation in good faith and without unjustified favoritism; and (ii) results in a benefit to one or more directors or their families because they are in the class of persons intended to be benefited by the public or charitable program.

(3) A transaction, of which the interested director or directors have no actual knowledge, and which does not exceed the lesser of 1 percent of the gross receipts of the corporation for the preceding fiscal year, or one hundred thousand dollars ($100,000).

(c) The Attorney General may bring an action in the superior court of the proper county for the remedies specified in subdivision (e).

(d) In any action brought under subdivision (c) the remedies specified in subdivision (e) shall not be granted if the following facts are established:

(1) The corporation entered into the transaction for its own benefit;

(2) The transaction was fair and reasonable as to the corporation at the time the corporation entered into the transaction;

(3) Prior to consummating the transaction, the board authorized or approved the transaction in good faith by a vote of a majority of the directors then in office without counting the vote of the interested director or directors, and with knowledge of the material facts concerning the transaction and the director's interest in the transaction; and,

(4) Prior to consummating the transaction in good faith, determined after reasonable investigation under the circumstances that: (i) the corporation could not have obtained a more advantageous arrangement with reasonable effort under the circumstances, or (ii) the corporation in fact could not have obtained a more advantageous arrangement with reasonable effort under the circumstances.

(e) If a self-dealing transaction has taken place, the interested director or directors shall do such things and pay such damages as in the discretion of the court will provide an equitable and fair remedy to the corporation, taking into account any benefit received by the corporation and whether the interested director or directors acted in good faith and with intent to further the best interest of the corporation. Without limiting the generality of the foregoing, the court may order the director to do any or all of the following:

(1) Account for any profits made from such transaction, and pay them to the corporation;

(2) Pay the corporation the value of the use of any of its property used in such transaction; and

(3) Return or replace any property lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate. In addition, the court may, in its discretion, grant exemplary damages for a fraudulent or malicious violation of this section.

Section 5250.

A corporation is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it fails to comply with trusts which it has assumed, or has departed from the purposes for which it is formed. In case of any such failure or departure, the Attorney General may institute, in the name of the State, the proceeding necessary to correct the noncompliance or departure.

Section 6511.

(a) The Attorney General may bring an action against any corporation or purported corporation, in the name of the people of this State, upon the Attorney General's own information or upon complaint of a private party, to procure a judgment dissolving the corporation and annulling, vacating or forfeiting its corporate existence upon any of the following grounds:

(1) The corporation has seriously offended against any provision of the statutes regulating corporations or charitable organizations.

(2) The corporation has fraudulently abused or usurped corporate privileges or powers.

(3) The corporation has violated any provision of law by any act or default which under the law is a ground for forfeiture of corporate existence.

(b) If the ground of the action is a matter or act which the corporation has done or omitted to do that can be corrected by amendment of its articles or by other corporate action, such suit shall not be maintained unless: (1) the Attorney General, at least 30 days prior to the institution of suit, has given the corporation written notice of the matter or act done or omitted to be done; and (2) the corporation has failed to institute proceedings to correct it within the 30-day period, or thereafter fails to duly and properly make such amendment or take the corrective corporate action.

(c) In any such action, the court may order restitutionary and/or injunctive relief to compensate or protect members of the public who have been harmed by the corporation's violations of the law. The court may order dissolution or such other or partial relief as it deems just and expedient. The court also may appoint a receiver for winding up the affairs of the corporation or may order that the corporation be wound up by its board, subject to the supervision of the court.

Selected Provisions of the Columbia Government Code, also known as the Columbia Uniform Supervision of Trustees for Charitable Purposes Act (the Uniform Act)

Section 125.

(a) Annually, every charitable corporation, unincorporated association, and trustee subject to this article shall file with the Attorney General a copy of the Form 990 submitted to the Internal Revenue Service.

(b) Upon registration, a corporation shall file the first Form 990 not later than four months and 15 days following the close of the first calendar or fiscal year in which property is initially received.

(c) In addition to a registration fee, a charitable corporation or trustee, or commercial fundraiser may be assessed a late fee of twenty-five dollars ($25) for each month or part of the month it fails to file its first and subsequent Form 990s.

Section 126.

(a) Any person who violates any provision of this Act with intent to deceive or defraud any charity or individual is liable for a civil penalty not exceeding ten thousand dollars ($10,000).

(b) Except as provided in subdivision (d), any person who violates any other provision of this Act is liable for a civil penalty, as follows:

(1) For the first offense, a fine not exceeding one thousand dollars ($1,000).

(2) For any subsequent offense, a fine not exceeding two thousand five hundred dollars ($2,500).

(c) Any offense committed under this Act involving a solicitation may be deemed to have been committed at either the place at which the solicitation was initiated or at the place where the solicitation was received.

(d) Any person who violates only subdivision (a) or (b) of Section 125 shall not be liable for a civil penalty under subdivision (b) if the person: (1) has not received reasonable notice of the violation; and (2) has not been given a reasonable opportunity to correct the violation. The Attorney General shall notify in writing a person who violates only subdivisions (a) or (b) of Section 125 that he or she has 30 days to correct the violation.

(e) The recovery of a civil penalty pursuant to this section precludes assessment of a late fee pursuant to Section 125 for the same offense.

Section 127.

(a) The primary responsibility for supervising charitable trusts in Columbia, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations, resides in the Attorney General. The Attorney General has broad powers under common law and Columbia statutory law to carry out these charitable trust enforcement responsibilities. These powers include, but are not limited to, charitable trust enforcement actions under all of the following:

(1) This Act;

(2) The Nonprofit Corporation Law, Corporations Code sections 5000, et. seq.

(b) The Attorney General may refuse to register or may revoke or suspend the registration of a charitable corporation or trustee or commercial fundraiser whenever the Attorney General finds that the charitable corporation or trustee or commercial fundraiser has violated or is operating in violation of any provisions of this Act.

People v. Orange County Charitable Services

Columbia Court of Appeal (1998)

This appeal arises from a case brought by the Attorney General against more than 130 individual and business entities engaged in commercial fundraising, and related charitable organizations. After a bench trial, the court entered a judgment enjoining the defendants from engaging in the business of soliciting funds for charitable purposes until they had made a complete accounting of nearly $15 million in funds raised from the public through telephone solicitations. The court further enjoined them from making false or misleading statements in their solicitations and directed them to make specific, statutorily mandated affirmative disclosures. It also imposed a constructive charitable trust on the funds.

The appellant, Mitchell Doyle, dba Orange County Charitable Services, the only party pursuing this appeal, challenges the court's factual findings as unsupported by sufficient evidence and its legal conclusions as erroneous. We affirm.

Orange County Charitable Services (OCCS) is a sole proprietorship established by Mitchell Doyle (Doyle) in 1987. It is in the business of raising funds for charities through telephone solicitations for contributions from members of the public. In the years 1990 through 1994, OCCS was registered as a commercial fundraiser, as required under Columbia's Uniform Supervision of Trustees for Charitable Purposes Act (the Uniform Act), Government Code sections 125, et. seq.

In order to increase OCCS's profitability, Doyle created charities that would contract their fundraising with OCCS, American Veterans Assistance (AVA) and Columbians Against Drugs (CAD). He then hired OCCS to raise funds for both charities. AVA and CAD agreed to pay OCCS 92 percent and 93 percent, respectively, of the gross revenues secured by the fundraiser.

Doyle controlled the finances and, to a significant degree, the operations of AVA and CAD from their inception dates. The charities were incorporated as Columbia public benefit corporations. Each charity's articles of incorporation contained substantially the following clause: "This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. This corporation is

organized and operated exclusively for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. The property of this corporation is irrevocably dedicated to charitable purposes and no part of the net income or assets of this corporation shall ever inure to the benefit of any director, officer, or member or to the benefit of any private person."

OCCS entered into more than 100 subcontracts with various parties to conduct commercial fundraising for various charities, including AVA and CAD. Under the customary subcontract, 10 percent or less of the gross revenues would be paid to the charitable organizations. The subcontractor and OCCS divided the 90 percent fee, according to the terms of the agreement.

OCCS operated telemarketing rooms -- "boiler rooms" -- throughout the state. The boiler room managers were instructed to have telemarketers inform the donors that 75 to 80 percent of the money being raised was used for "program services." OCCS gave similar instructions to its subcontractors. Telemarketers identified themselves as "from the charity." After donors agreed to contribute, the monies were collected by the fundraiser and deposited into the respective charitable organization's bank account. Interestingly, AVA and CAD were not accused of any wrongdoing. Apparently, the meager 7 to 8 percent of monies redounding to the charities was actually used for charitable purposes. Were it otherwise, the Attorney General could well have sought similar injunctive and other relief against the charitable organizations, their board members, and any employees who committed any wrongdoing.

Numerous donor witnesses testified regarding misrepresentations. Typical testimony recounted multiple telephone solicitations between 1991 and 1994 in which the telemarketers identified themselves as being *from* the charities. No one ever disclosed his or her commercial fundraising status. No one was informed about the percentage of funds that would be used to pay for the fundraising.

Public benefit corporations and commercial fundraisers must file annual reports, containing specific forms and information, with the Attorney General. Among these reports is a copy of the Form 990, an informational tax return filed with the Internal Revenue Service (IRS) annually. The Form 990 contains information about sources and amounts of income, salaries for key employees, a list of board members and their

compensation, and the top five consultant fees. OCCS filed no statutory financial reports of its fundraising for charitable purposes for the calendar year 1993. OCCS registered as a commercial fundraiser in Columbia for each of the years 1990 through 1994. The 1990 reports did not mention OCCS's fundraising activities. Instead, they reported figures copied from the annual federal informational tax returns (Form 990s) of AVA and CAD. Reports for subsequent years either were copied from the charities' Form 990s or set forth figures which were utterly irreconcilable with the charities' own reporting. For instance, while OCCS reported it raised only $242,640 for CAD in 1991, CAD reported it received more than $400,000 from OCCS that same year.

In its statement of decision, the court found, inter alia:

The defendants conducted their business unlawfully;

The defendants raised money for restricted charitable purposes. The funds were impressed with a restricted charitable trust, but defendants failed to keep separate accounts of the funds, did not use them for the specified purposes, and, in fact, used them for other purposes; and

OCCS failed to file an accounting of fundraising activities for charities in 1993. Its inaccurate reports of activities in 1990, 1991 and 1992 contained multimillion-dollar discrepancies.

In its eight-page judgment, the court enjoined appellants from making various false or misleading representations to prospective donors, directed them to make specified affirmative representations, barred them from soliciting for organizations which had not authorized them to do so, imposed certain reporting duties on appellants, and directed them to account for their fundraising activities in Columbia up to the date of the judgment, including a full accounting for all funds received by them in the name of 11 different charitable programs. The court further enjoined appellants from commercial fundraising pending a complete accounting, and ordered them to register as commercial fundraisers and maintain all required bonds. It also imposed a charitable trust on monies recovered under the accounting provisions of the judgment. It imposed civil penalties against a number of individual defendants that were authorized under various statutes, based on violations of financial reporting obligations.

Virtually every aspect of the activities of charities and their commercial fundraisers is subject to comprehensive regulation. The assets of nonprofit corporations such as AVA and CAD, organized solely for charitable purposes, are impressed with a charitable trust which the Attorney General has a duty to protect. A complete range of equitable remedies vindicates the public interest in charitable assets; such remedies include injunctions to prevent and correct breach of fiduciary obligations arising from a trust.

Under the Uniform Act, commercial fundraisers for charitable purposes must register with the Attorney General and file financial reports of the money they raise for charities in Columbia and their fundraising costs. Government Code section 125. A commercial fundraiser for charitable purposes is defined as any individual, corporation, or legal entity who, for compensation, solicits funds in Columbia for charitable purposes or, as a result of a solicitation, receives or controls the funds. Commercial fundraisers are "constructive trustees" with respect to the funds they raise, and they have an affirmative, unqualified duty to report to the Attorney General. Commercial fundraisers must disclose to persons solicited, upon written or oral request, the percentage of the funds that goes to fundraising expenses. The fundraiser who fails to comply with the registration and financial reporting requirements of the statute may not solicit funds for charitable purposes, and failure to comply is grounds for an injunction against solicitation in this state for charitable purposes and other civil remedies provided by law.

The Attorney General's broad common law powers to oversee charities extends far beyond the Uniform Act. Under provisions of the Nonprofit Corporation Law, the Attorney General may obtain restitutionary relief and injunctive relief, and the remedies are cumulative to those available under other provisions of the law. Corporations Code section 6511.

A high hurdle must be overcome by appellants challenging the sufficiency of evidence. Where, as here, the court issues a statement of decision, it need only recite ultimate facts supporting the judgment being entered. The court's decision was supported by substantial evidence.

Appellant further contends the court misinterpreted Columbia's charitable trust laws and the fiduciary responsibilities of charitable trustees and went "well beyond any statutory authority" in its judgment. We are not persuaded.

The judgment is affirmed.

Attorney General v. Sidley Memorial Hospital

Columbia Supreme Court (1994)

The Attorney General filed suit against Sidley Memorial Hospital (Sidley), a Columbia charitable corporation, seeking its dissolution or, in the alternative, the appointment of a monitor to manage its day-to-day operations, subject to supervision by the trial court until the court should deem such supervision no longer needed. After a bench trial, the court entered judgment ordering Sidley's dissolution and putting in place a receiver to wind up its affairs. Sidley appealed. We now reverse the judgment and remand the matter to the trial court with directions to appoint a monitor.

The Attorney General brought this action, contending that various past and present members of Sidley's Board of Directors conspired to enrich themselves and certain financial institutions with which they were affiliated by favoring those institutions in financial dealings with Sidley, and that they breached their fiduciary duties of care and loyalty in the management of Sidley's funds. The complaint alleged violations of the Columbia Corporations Code, and violations of the Columbia Uniform Supervision of Trustees for Charitable Purposes Act. The evidence presented at trial told the following story.

In 1980, Sidley's Board of Directors revised the corporate bylaws in preparation for an expected increase in the volume and complexity of its operations following construction of a new building. Under the new bylaws, the Board was to consist of from 25 to 35 trustees, who were to meet at least twice each year. Between such meetings, an Executive Committee was to represent the Board, and was authorized, inter alia, to open checking and savings accounts, approve Sidley's budget, renew mortgages, and enter into contracts. A Finance Committee was created to review the budget and to report regularly on the amount of cash available for investment. Management of those investments was to be supervised by an Investment Committee, which was to work closely with the Finance Committee in such matters.

In fact, until 1988, Sidley's management was handled almost exclusively by two directors who were also officers: Dr. Adele Orem, Sidley's Administrator, and Mr. Lloyd Ernst, its Treasurer. Unlike most of their fellow directors, to whom membership on the Sidley Board was a charitable service incidental to their principal vocations, Orem and

Ernst were continuously involved on almost a daily basis in Sidley's affairs. They dominated the Board and its Executive Committee, which routinely accepted their recommendations and ratified their actions. Even more significantly, neither the Finance Committee nor the Investment Committee ever met or conducted business from the date of their creation until 1991, three years after the death of Dr. Orem. As a result, budgetary and investment decisions during this period, like most other management decisions affecting Sidley's finances, were handled by Orem and Ernst, receiving only cursory supervision from the Executive Committee and the full Board.

Dr. Orem's death obliged some of the other directors to play a more active role in running Sidley. The Executive Committee, and particularly Stacy Reed, as Chairman of the Board, President, and ex officio member of the Executive Committee, became more deeply involved in the day-to-day management while efforts were made to find a new Administrator. The person who was eventually selected for that office, Dr. Ralph Jarvis, had little managerial experience and his performance was not entirely satisfactory. Mr. Ernst still made most of the financial and investment decisions for Sidley, but his actions and failures to act came slowly under increasing scrutiny by several of the other directors.

Prompted by these difficulties, Mr. Reed decided to activate the Finance and Investment Committee in 1991. However, as Chairman of the Finance Committee and member of the Investment Committee as well as Treasurer, Mr. Ernst continued to exercise dominant control over investment decisions and, on several occasions, discouraged and flatly refused to respond to inquiries by other directors into such matters. It was only after the death of Mr. Ernst in 1992 that the other directors appear to have assumed an identifiable supervisory role over investment policy and Sidley's fiscal management in general.

Presented with this evidence, the trial court decided that dissolution of Sidley was appropriate. The court recognized that such a result was harsh, but stated that it believed that equity required the outcome in light of what it believed to be Sidley's abandonment of its charitable purpose in favor of allowing itself to become the acquiescent instrument of Dr. Orem and Mr. Ernst.

A decision by the trial court to dissolve a charitable corporation is reviewed for abuse of discretion. *Attorney General v. The Children's Trust* (Col. Supreme Ct., 1971). For the reasons that follow, we find that the trial court erred under that standard.

The function of equity is not to punish, but merely to take such action as may be necessary to prevent the recurrence of improper conduct. Where voluntary action has been taken in good faith to minimize such recurrence, this is a factor which the court can take into account in formulating relief.

In attempting to balance the equities under the circumstances shown by the record, there are factors that lead us to believe that dissolution of Sidley is not necessary. First, it is clear that the practices criticized by the Attorney General have, to a considerable extent, been corrected and that the directors who were principally responsible for lax handling of funds have died. Second, there is no indication that any of the other directors were involved in fraudulent practices or profited personally by lapses in proper fiscal supervision, and, indeed, the overall operation of Sidley in terms of low costs, efficient services, and quality patient care has been superior.

We are well aware that Sidley must take proper steps to insure a clean and final break between the past and the future. A recent greater awareness of past laxity is encouraging. To help it complete the task, the trial court should appoint a monitor to manage its day-to-day operations, subject to supervision until it may deem such supervision no longer needed. We remand the matter to that court with directions to do so.

Reversed and remanded.

SELECTED ANSWER 1

MEMORANDUM

TO: Sonia Sanchez
FROM: Applicant
DATE: July 30, 2013
RE: In re SIA

You have asked me to prepare an objective memorandum that discusses the potential remedies that the Attorney General (AG) could seek against SIA for five acts: cancelled or unscheduled seminars, payments for Klene Up Kroo janitorial services; unfiled Form 990s, expense account reimbursements to Vernon Ellis, and a cruise taken by board members. In addition, you asked me to discuss whether the AG could successfully seek a dissolution or a receivership of SIA.

SIA's Potential Liability

1. Cancelled or Unscheduled Seminars

Potential Remedies and Supporting Statutes

The AG has broad discretion to institute actions necessary to correct a charitable corporation's noncompliance with or departure from the trusts that the corporation has assumed and the purposes for which it was formed. Nonprofit Corporation Law Section 5250. The AG has broad powers under common and statutory law to carry out her charitable enforcement responsibilities. Uniform Act section 127(a). The AG may dispose of "[a] complete range of equitable remedies [to] vindicate the public interest in charitable assets" including "injunctions to prevent and correct breach of fiduciary obligations arising from a trust." *People v. Orange County Charitable Services*, (Col. Ct. App. 1998).

Beyond the statutory powers created by the Uniform Act, the Nonprofit Corporation Law contains broad common law powers that are cumulative to other remedies available under other provisions of the law. *Orange County Charitable Services*. A court may order "restitutionary and/or injunctive relief to compensate or protect members of the public who have been harmed by the corporation's violations of the law." Nonprofit Corporation Law Section 6511(c).

The remedies available under the Uniform Act and the Nonprofit Corporation Law have been broadly construed to include injunctions against engaging in specified activities, the imposition of reporting requirements, requirements to provide a full accounting of funds, the imposition of civil penalties, and the imposition of a constructive trust. *Orange County Charitable Services*.

With respect to the cancelled or unscheduled seminars, the AG might seek to impose an injunction halting the offering of seminars, restitution to individuals who sought and did not receive refunds, a full accounting of funds received for cancelled or unscheduled seminars, and the imposition of a constructive trust on monies recovered as a result of the accounting. See Nonprofit Corporation Law Section 6511(c); Uniform Act 127(c); *Orange County Charitable Services*.

Whether Facts Would Support Effort to Impose a Remedy

On July 15, 2013, the AG sent SIA a notice that its office had received a complaint regarding an unpaid refund for a cancelled seminar. Alice Rayburn had sent in a complaint to the AG stating that she had paid $895 for a class that subsequently was cancelled. Despite requesting a refund on at least four occasions, Rayburn has not received a refund in over six months.

Karen Barber, the newly-appointed Executive Director at SIA, has found indications that when seminars were cancelled, the prior Executive Director, Vernon Ellis, would send letters to individuals who had paid asking whether they wanted a refund or whether they were willing to make their payment a donation to SIA. When individuals requested a refund, Ellis would make out a check to them, but deposit the check in his own account

at Balfour Bank. Checks from the account at Balfour Bank were then written to Ellis's sister, Adele Stevens. A similar pattern of events occurred when seminars were publicly announced, but never actually planned. Approximately $18,000 in refund checks were deposited into Ellis's account in the past three years.

A court is likely to find that SIA has failed to comply with the trust it assumed or departed from the purposes for which it had been formed with respect to the cancelled or unscheduled seminars. Nonprofit Corporation Law Section 5250. As SIA's information sheet states, one of SIA's core services is to convene presentations and seminars to explain sensory integration disorder and its treatments to parents and family members and to provide updated information and research to professionals in the field. In cancelling a number of seminars and in failing even to schedule or plan others, SIA has been failing to comply with its trust or fulfill its purposes. Accordingly, the AG is empowered to initiate any proceeding necessary to correct SIA's noncompliance and departure. Nonprofit Corporation Law Section 5250.

In this case, a court likely will impose restitutionary relief to benefit those individuals, such as Rayburn, who requested but did not receive a refund. Nonprofit Corporation Law Section 6511(c). In addition, the facts suggest that other individuals may not have requested a refund, but instead made their payment a donation to SIA. This situation is somewhat similar to *People v. Orange County Charitable Services*. In that case, the court found that the defendant, a corporation that ostensibly raised money for charitable purposes, actually had failed to keep accounts of funds raised or to use them for specified purposes. In that case, the court ordered a full accounting of funds raised by the defendant and imposed a charitable trust on all monies recovered as part of the accounting. The court noted that had the charities involved not actually used the funds actually raised for charitable purposes, they might have been subject to similar injunctions and other relief. Similarly, here, SIA has collected funds for the purposes of holding seminars that were never actually held or planned, and therefore the funds that were raised were not actually used for the charitable purposes for which they were intended. The court likely will order an accounting for all the funds raised for the purposes of holding seminars and impose a constructive trust on any funds raised but

not refunded. Those funds might then be used to provide restitution to individuals harmed by SIA's violation of the law. Nonprofit Corporation Law Section 6511(c).

In *Orange County Charitable Services*, the court also enjoined the defendant from undertaking further commercial fundraising pending a complete accounting and barred the defendant from making misleading or false representations to prospective donors. Similarly, here, a court likely would bar SIA from advertising seminars pending an accounting and might enjoin SIA from scheduling seminars without actually planning or holding them.

2. Payments for Klene Up Kroo Janitorial Services

Potential Remedies and Supporting Statutes

A member of a charitable corporation's board of directors has a fiduciary obligation to avoid self-dealing transactions, that is, a transaction to which a corporation is a party and in which a director has a material financial interest. Nonprofit Corporation Law Section 5223(a), (e). If a self-interested transaction has taken place, the interested director may be required to pay compensation to the corporation. Nonprofit Corporation Law Section 5223(e).

As described above, the AG has broad equitable powers to ensure a charitable corporation's compliance with its trust. The AG has a "complete range of equitable remedies" at her disposal, and these include "injunctions to prevent and correct breach of fiduciary obligations arising from a trust." *Orange County Charitable Services*. Here, the AG might seek an injunction to prevent further payments to the Klene Up Kroo (KUK) and might seek an accounting of all payments made to KUK.

Facts Supporting Remedies

In this case, SIA appears to have paid KUK $22,000 over an 18-month period. Those checks were deposited into an account in Howard Klene's name, and then regular withdrawals were made to an account in Ellis's name at Arden Bank. Disbursements were then made from the Arden Bank account to Ellis and Alan Zackler, the Chair of

SIA's Budget and Finance Committee. It appears, at the very least, that a self-interested transaction occurred that benefitted Ellis and Zackler. There are no indications that an exception occurred – for example, the transaction was not compensation for either Ellis or Zackler, it was not a charitable purpose of SIA, and the contention that Ellis and Zackler were unaware of transfers in the amount of a total of $16,000 strains credulity. See Uniform Act Section 5233(b). Nor does it appear that the transaction was authorized by the board with knowledge of the material facts. Indeed, based on the Board meeting minutes the board appears to have relied solely on Zackler's assurances that expenditures were reasonable and legitimate. See Nonprofit Corporation Law Section 5231.

The AG's broad equitable powers would likely extend to an injunction barring SIA from further dealings with KUK or other self-interested transactions. In addition, the AG could likely obtain an accounting of all payments to KUK from SIA to permit the AG to pursue actions against the individual officers involved and to ensure that no further payments are made. Also, the AG might successfully seek a monitor, as discussed below in the section regarding the expense account reimbursements.

3. Unfiled Form 990s

Potential Remedies and Supporting Statutes

Every charitable corporation is required to file Form 990s annually with the Internal Revenue Service and to file a copy with the AG. Uniform Act Section 125(a). Form 990s include information about sources of income, salaries of key employees, board members and compensation, and consultant fees. *OCCS*.

The AG has the authority to seek civil penalties for the failure to file Form 990s. Uniform Act Section 125, 126(a), (b). If the failure to file the Form 990s was done with the intent to deceive or defraud, the civil penalty may be in an amount not to exceed $10,000. Uniform Act Section 126(a). Otherwise, the fine for a first offense is not to exceed $1,000 and the fine for any subsequent offense is not to exceed $2,500. Civil penalties may not be imposed where the trust has not received reasonable notice of the

violation and has not been given a reasonable opportunity to correct the violation. Uniform Act Section 126(d). In addition, the AG shall notify in writing a person who fails to file Form 990s that he or she has 30 days to correct the violation. *Id*.

The AG may also assess a late fee of $25 per month for each month or part of a month that an organization fails to file Form 990s. Uniform Act Section 125(c). However, if the AG seeks a civil penalty, she may not also assess a late fee for the same offense. Uniform Act Section 126(e).

The AG may also refuse to register or may suspend or revoke the registration of any charitable corporation that has violated a provision of the Uniform Act, including a charitable corporation that has failed to file required Form 990s. Uniform Act Section 127(b).

Facts Supporting Remedies

According to Barber, original Form 990s for the years 2010, 2011, and 2012 were found in Ellis's desk. In addition, Ellis had sent memos to the Board indicating that the forms for those years had been timely filed. Zackler also assured the Board at the January 15, 2013 meeting that all reporting requirements, including IRS reporting requirements, had been met.

Despite this, Barber also found a letter from the IRS to Zackler indicating that Form 990s for 2010 and 2011 had not been received by the IRS. The letter had a handwritten note from Zackler asking Ellis to handle it. In addition, Barber reports that the Forms she found did not appear to list all of the major donors and appeared to contain overstated operational expenses.

It is not entirely clear based on these facts whether the required Form 990s actually were provided either to the IRS or to the AG. It is possible that the forms were filed after the letter from the IRS was received. In addition, the AG has not sent SIA a notification of a failure to file required Form 990s. Prior to seeking civil penalties, the

AG will have to send a notification giving SIA 30 days to correct the deficiency. Uniform Act Section 126(d).

However, if it is the case, as it appears to be, that the Form 990s for 2010 and 2011 have not been filed as required, the AG likely could seek penalties after giving SIA an opportunity to correct the deficiency. In addition, there are facts from which the court could find that the failure to report was made with the intent to deceive or defraud. It appears that the Board has been misled about SIA's compliance with reporting requirements and the forms appear to have been filled out incorrectly. The AG could make a strong case that the higher civil penalty of up to $10,000 is warranted. Uniform Act 126(a).

In addition, if the AG does not seek the higher penalty, the AG likely will be able to recover up to $1000 for the failure to file the 2010 990 and up to $2500 for the failure to file the 2011 990. SIA received reasonable notice of the violation when the IRS sent a notification that it had not received the forms and also has had more than two years to correct that failure. Uniform Act Section 126(d). In the alternative, the AG could seek late fees in the amount of $25 for every late month, of $300 per year, for a total of $900 for the 2010 form and $600 for the 2011 form.

The AG might also seek to revoke or suspend SIA's registration for its failure to file the required forms. Uniform Act Section 127(b).

4. Expense Account Reimbursements to Vernon Ellis

Remedies Available and Statutes

A director is required to act in the best interests of the corporation and to take such care as a reasonably prudent person would in conducting his or her own business. Nonprofit Corporation Law Section 5231(a). Directors can rely on statements presented by an officer or employee whom the director believes to be reliable, or a committee of the board on which the director does not serve as to matters in its authority as long as the director acts in good faith after reasonable inquiry and without knowledge of proprieties.

Nonprofit Corporation Law Section 5231(b). If a director complies with that duty, he is shielded from liability. Nonprofit Corporation Law Section 5231(c).

However, as described above, the AG has broad equitable powers to ensure a charitable corporation's compliance with its trust. Nonprofit Corporation Law Section 5250. The AG has a "complete range of equitable remedies" at her disposal, and these include "injunctions to prevent and correct breach of fiduciary obligations arising from a trust." *Orange County Charitable Services*. These include the ability to seek any partial relief from a court for violations of trust duties that may be equitable. Nonprofit Corporations Law Section 6115(c).

With respect to the expense account reimbursements to Ellis, the AG might seek to impose reporting and accounting requirements on SIA for all expenses paid out to officers and board members, might appoint a monitor to supervise SIA's day-to-day operations subject to supervision, and might enjoin further expense account reimbursements without authorization from a monitor.

Facts Supporting Remedies

Barber has reported that Ellis essentially double-billed for expenses to SIA. When paying for travel and entertainment, Ellis would use SIA funds and then, separately, submit the check or bill for personal reimbursement. In addition, Ellis was reimbursed for approximately $12,500 in expenses in 2011, only $4,000 of which was supported by receipts. Although some members of the Board expressed some discomfort, on September 15, 2011, the Board accepted the assurances of Zackler, the chair of the budget and finance committee, that the expenditures were bona fide.

Although it likely is the case that the Board was entitled to rely on the representations of Zackler so as to escape personal liability, see Nonprofit Corporations Law Section 5231(b), (c), nevertheless, the failure to appropriately audit expense accounts and to ensure that only valid reimbursements are made would likely permit the AG to seek a monitor to ensure that similar improper conduct does not occur in the future. In *Attorney General v. Sidley Memorial Hospital*, the Columbia Supreme Court found it appropriate

to appoint a monitor to oversee then defendant's day-to-day operations where a previous director and officer had received only cursory supervision from the board and, as a result, had engaged in numerous self-dealing transactions. Similarly, here, SIA's board appears to have only cursorily supervised the actions of Ellis and Zackler, who have engaged in self-dealing through KUK and the improper reimbursements. The court, here, would likely find a monitor similarly appropriate.

5. Board Member Cruise

Remedies and Statutes

As discussed above, directors violate their fiduciary duties by engaging in self-interested transactions and in failing to act as a reasonably prudent person in their dealings with the corporation. The AG has broad equitable powers to ensure a charitable corporation's compliance with its trust. Nonprofit Corporation Law Section 5250. The AG has a "complete range of equitable remedies" at her disposal, and these include "injunctions to prevent and correct breach of fiduciary obligations arising from a trust." *Orange County Charitable Services*.

With respect to the board members' cruise, the AG might seek an accounting to determine whether the board members involved on the cruise actually engaged in long-range planning, might enjoin further expenditures of this sort, and might appoint a monitor to oversee operations and ensure that officers and directors no longer engage in self-dealing transactions. Nonprofit Corporation Law Section 6511(c).

Facts Supporting Remedies

Barber indicates that Ellis, Zackler, and Wanderly embarked on a 10-day cruise along with their spouses. Although it was described as a long-range planning meeting, the agenda only prescribed one hour of planning per day. In addition, the trip was booked through Wanderly Travel Service, owned by Melanie Wanderly, a member of the Board and one of the individuals invited on the cruise. The cruise was not inexpensive -- the payment to Wanderly was a total of $70,000 for ten days.

The AG would likely be able to demonstrate that this was a self-interested transaction that benefitted Wanderly. In addition, in the absence of any proof that there was a valid corporate purpose for the trip, the AG might be able to demonstrate that the funds were improperly diverted from the trust purpose. Indeed, the fact that Zackler described these as legitimate travel expenses to the board suggests some wrongdoing or at least extremely poor management. The court is likely to find that the appointment of a monitor is appropriate, as discussed above, to ensure that further self-interested transactions do not occur. In addition, AG might be successful in seeking to enjoin any future self-interested transactions, whether ratified by the board or not, due to the rampant misuse of SIA funds by directors and officers in the past.

Whether AG Could Successfully Seek Dissolution or a Receivership

The AG can seek to dissolve a charitable corporation on any of the three following grounds: (1) the corporation has seriously offended any of the statutes regulating corporations or charitable organizations; (2) the corporation has fraudulently abused or usurped corporate powers; or (3) the corporation has violated any provision of law by any act or default which under the law is ground for forfeiture of corporate existence. Nonprofit Corporation Law Section 6511(a).

Prior to seeking the dissolution of a charitable corporation, the AG must give 30-days prior notice of the act done or omitted to be done and the corporation must have failed to institute proceedings to correct the error within 30 days or failed after that to take the required corrective action. Nonprofit Corporation Law Section 6511(b).

The court may order dissolution if it deems dissolution "just and expedient." Nonprofit Corporation Law Section 6511(c). The court may also place the corporation under receivership to wind up the affairs of the corporation or order the board to wind up the corporation under court supervision. *Id*.

The decision whether to dissolve a charitable corporation is within the discretion of the trial court. *Attorney General v. Sidley Memorial Hospital* (Col. Supreme Ct. 1994) (citing *Attorney General v. The Children's Trust* (Col. Supreme Ct. 1971).

In determining whether dissolution is appropriate, a court should consider that the purpose of equity "is not to punish, but merely to take such action as may be necessary to prevent the recurrence of improper conduct." *Sidley Memorial Hospital*. The court can consider whether "voluntary action has been taken in good faith to minimize such conduct." *Id*.

Here, the court is likely to find that SIA has seriously offended a number of statutes regulating charitable organizations. It has failed to make required accountings under Uniform Act Section 125, its officers and directors have engaged in numerous self-dealing transactions under Nonprofit Corporation Law Section 5233, it has failed to comply with its trusts or departed from its purposes under Nonprofit Corporation Law Section 5250 by failing to hold and cancelling seminars, and it has harmed members of the public by failing to refund money as requested. The court might well find that grounds would exist for dissolution and receivership.

However, the court is not likely to dissolve SIA at this stage because it would not be just or expedient. The court likely will compare SIA's situation to the case in *Sidley Memorial Hospital*. In that case, two directors who were also officers took complete control of the management of the hospital and conspired to enrich themselves by favoring financial institutions with which they were affiliated. The rest of the board essentially abdicated its supervisory role. However, the Columbia Supreme Court found that dissolution was inappropriate in light of two factors. First, the practices identified by the AG were corrected and the directors involved in the wrongdoing had died. Second, there was no indication that any of the other directors were involved in fraudulent practices or profited personally from the failure of supervision; in fact, the charity was overall running well.

Similarly, here, the two individuals chiefly involve in the wrongdoing are either dead (Ellis) or stepping down (Zackler). In addition, the only other board member who appears to have profited from the failure of supervision, Wanderly, also is leaving the board. Two new board members have been nominated and new officers and a committee chair will be selected. In addition, a new Executive Director has been appointed who appears committed to changing the way SIA is operated. Finally, Barber reports that, like the defendant in *Sidley Memorial Hospital*, SIA is financially healthy, with a healthy reserve and many sources of revenue. In order to avoid dissolution, Barber should take further steps to remediate the wrongs done by Ellis and Zackler.

SELECTED ANSWER 2

TO: Sonia Sanchez
FROM: Applicant
DATE: July 30, 2013
RE: Objective Memorandum- re SIA

Ms. Sanchez:

This memorandum explains the potential liability that Sensory Integration Alliance, Inc. (SIA) faces as a result of the facts referenced below. Per your request, this memorandum does not address any of the Attorney General's (AG) possible remedies against individual transgressors.

I. Relevant Acts

SIA is a non-profit corporation that fundraises directly without the assistance of commercial fundraisers. Recently, several acts, including canceled and unscheduled seminars; questionable payments to Klene Up Kroo (KUK) Janitorial Services; unfiled Form 990s; questionable expense account reimbursements to Vernon Ellis (VE); and a cruise taken by board members have been identified as potential issues by the new executive Director, Karen Barber (KB). In addressing SIA's potential liabilities, it is necessary to have a general understanding of the state organizations with oversight over non-profit corporations.

The primary responsibility for supervising charitable organizations and ensuring compliance resides in the Attorney General (AG). *Charitable Purposes Act Section (CPAS)* 127. The AG has broad powers, including the ability to implement a charitable trust. *Id*. The AG may refuse to register or may revoke or suspend the registration of a charitable corporation or trustee or commercial fundraiser whenever there is a finding that said organization has violated the provisions of the *CPA*. Additionally, the AG can take other equitable actions.

Additionally, the AG can bring an action against a corporation in the name of the people on the basis of its own information or a complaint filed by a private party to procure a judgment dissolving the corporation and annulling, vacating or forfeiting its corporate existence. *CCCS* 6511.

Here, a complaint was submitted regarding SIA's failure to reimburse a client for a canceled seminar, providing the basis for the AG to potentially move forward. To do so, the AG must show that the corporation has seriously violated statutes regulating corporations or charitable organizations; the corporation has fraudulently abused or usurped corporate privileges or powers; or the corporation has violated a law by act or omission which is ground for forfeiture. *Id*.

Despite these potential remedies against SIA, if a problem can be corrected with an amendment to the articles or by other corporate action, no suit will be maintained unless the AG has given notice to the corporation within 30 days prior to the suit; and the corporation has failed to institute proceedings to correct it within the 30 day period, or fails to duly and properly take such action. *Id* at (b). Here, SIA has received proper notice and has two weeks to respond to avoid further investigation and action by the AG.

A. Canceled or Unscheduled Seminars

1. *Remedies & Statute*

A corporation is subject at all times to examination by the AG to ascertain the condition of its affairs, including to determine if it has departed from the purposes for which it was formed. *CCCS* 5250. In the case of failing to perform its purposes, the AG can take action necessary against a corporation to obtain compliance. *Id*. Under statutory law, the court can order restitutionary and/or injunctive relief to compensate or protect members of the public who have been harmed by the corporation's violations. *CCCS* 6511(c). The court can also order dissolution and/or appoint a receiver for winding up. *Id*. Finally, under the *CPAS* 127, the AG has the power to institute charitable trusts, to

refuse to register and/or may revoke or suspend the registration of a charitable corporation.

Under case law, a violating corporation may be subject to other potential remedies for the individual violations made by its directors in defrauding the public. General remedies for vindicating the public interest in charitable assets include injunctions to prevent and correct breach of fiduciary obligations arising from a trust. In *OCCS*, the court enjoined a commercial fundraiser from making various false or misleading representations to prospective donors, directed them to make specified affirmative representations to prospective donors, barred them from soliciting for organizations which had not authorized them to do so, imposed certain reporting duties, directed them to account for their fundraising activities up to the date of judgment, enjoined them from commercial fundraising until a complete accounting was given, and required them to register as commercial fundraisers. Additionally, the court imposed a charitable trust on monies recovered under the accounting provisions of the judgment.

Directors and officers are agents of a corporation, meaning that a corporation can be liable for their actions. *See generally Sidley Memorial Hospital (SMH)*. Under the *Columbia Corporations Code Section (CCCS)* 5231, a director has a duty of loyalty to act in good faith in the best interest of the corporation as an ordinarily prudent person in like circumstances would. In executing these duties, a director can rely on information and opinions provided by counsel, independent accountants and other persons believed to be reliable and competent in the matters presented; or on a committee which the director does not sit on, if she relies in good faith and after reasonable inquiry. *CCCS* 5231(b).

2. Likelihood of Remedy Being Imposed

Here, Vernon Ellis (VE) was the former executive director for SIA. Additionally, Alan Zackler (AZ) was a member of SIA's board and the Chair of the Budget and Finance Committee. Therefore, as a general matter both of them are agents for SIA and their actions can make SIA liable for damages, injunction, and potentially dissolution. *See OCCS & SMH*.

For the course of three years, VE was organizing and in some cases fraudulently purporting to organize seminars to fulfill the charitable purposes of SIA. The complaint initiating the AG's potential investigation into SIA was triggered by SIA's failure to report such an action. Recently KB discovered that VE had been writing reimbursement checks and depositing them into a personal account in Balfour Bank, a bank not used by SIA. VE's taking of $18,000 in refund checks over the course of three years violates his duty of loyalty to the corporation because an ordinarily prudent person would not steal from the corporation or from those attempting to participate in its seminars. Additionally, AZ, being aware of this, repeatedly hid these issues from the Board during their quarterly meetings in 2010, 2011, and 2012, violating his duty of loyalty. Thus, both VE and AZ have violated their duty of loyalty under the statute and potentially opened the rest of the board and SIA up to liability.

However, other directors and therefore the company are permitted to rely on the representations made by counsel, independent Accountants, or other persons competent. *CCCS* 5231(b). Additionally, directors are allowed to rely on a committee as long as the Board acts in good faith after reasonable inquiry when the circumstances warrant it. *Id*.

Here, as a defense, the Board and therefore the company can assert that they made reasonable inquiry into potential problems in financial reports. In 2011, Directors Garcia and Dunne questioned certain expenditures. Upon this questioning, AZ responded that he had reviewed each expenditure and that each was bona fide. In 2012, Director Dunne led a discussion about a concern of an apparent increase in staff travel reimbursements. AZ, as chair of the budget committee, explained the legitimacy of the expenses associated with this increase. Finally, in 2013, several directors expressed serious concern over the fact that the annual budget had not been prepared and over the Form 990s being filed, and again AZ assured them all was taken care of. While it is possible that a court would find these inquiries insufficient, at least those made after two years of concerns in 2013, they would likely hold up in protecting the corporation from liability on the failure of these directors. Therefore, it is unlikely that SIA could be held

liable for the failure of these directors. However, SIA can still be held liable for the violation of statutes and abuse of corporate powers committed by VE and AZ.

Based on the potential remedies available to the AG and the specific harm caused by VE and AZ related to the embezzlement of charitable funds, SIA will likely face multiple remedies. These remedies will likely include restitutionary damages to those that paid for the seminars and were not reimbursed, possibly in the form of a constructive trust, and a potential injunction from engaging in charitable solicitations until a full accounting of these reimbursements has been assured to the AG. Additionally, SIA faces a potential suspension or indefinite revocation of their registration as a charitable corporation.

B. Payments for Klene Up Kroo Janitorial Services

1. Remedies & Statute

Please see the remedies listed in A(1) above.

2. Likelihood of Remedy Being Imposed

Here, VE and AZ were involved in breaching their duty of loyalty owed to the corporation. However, this action was not fraud against the public, but fraud against the company in the multiple misrepresentations made during the 2011-2013 quarterly meetings. A self-dealing transaction is one where one or more of the directors have a material financial interest, and where the transaction was: 1) entered into by the corporation for its own benefit; 2) the transaction was fair and reasonable; or 3) pre-transaction, the Board approved it in good faith by a majority of the directors in the office with knowledge of the material facts. *CCCS* 5233(a), (d).

Here, bank records supported a finding that VE wrote checks to a company, KUK, for janitorial services totaling $22,000. The facts show that while the checks were made out to Howard Klene, withdrawals from his account were then deposited into VE's personal account in Arden Bank. Disbursements from this account were regularly made to VE and AZ, showing again that they breached their fiduciary duties owed to the

corporation by self-dealing. Records show that each of them absconded with $8,000, money SIA might be able to recover later. Because there is no indication that SIA received the benefit of said janitorial services or that there was any board approval, VE and AZ will remain in violation of their fiduciary duties.

There is an exception to self-dealing. It will not apply when the transaction is a part of a public charitable program of the corporation if it is approved or authorized in good faith without unjustified favoritism, and if it results in the benefit of one or more directors or their families because they are in the class of persons to be benefited by the public or charitable program. *CCCS 5223*(b). Because there is no indication that janitorial services are relevant to SIA's purposes of helping those with sensory disabilities, this exception does not apply. Therefore, VE and AZ remain liable for their breaches of fiduciary duties.

While these violations did not harm the public directly, SIA will still be liable for VE and AZ's violation of statute and abuse of corporate power. Because there was no harm to the public, it is unlikely that restitutionary or other damages will be implemented by the AG. However, as will be explained below, such actions may lead to other injunctive relief, or dissolution. Other injunctive relief might include an injunction from raising charitable funds until there is evidence that such fiduciary problems no longer pose a risk. *See SMH*.

C. Unfiled Form 990s

1. Remedies & Statute

Public benefit corporations and commercial fundraisers must file annual reports, including Form 990, an informational tax return filed with the IRS annually. *Charitable Purposes Act Section (CPAS)* 125(a); *OC Charitable Services (OCCS)* (1998). This form must be filed no later than four months and fifteen days after the close of the first fiscal year upon registration. *Id*. at (b). Said corporations may be fined $25 for each month or part month it fails to file its first and subsequent 990 forms. *Id*. at (c). The contents include information about sources and amounts of income, salaries for key

employees, a list of board members and their compensation, and the top five consultant fees. *Id*.

2. Likelihood of Remedy Being Imposed

Here, SIA faces liability for VE's failure to file Form 990 for the years of 2010, 2011, and 2012. This violation is straightforward in terms of SIA's liability. At a minimum, SIA will be liable for a $25/month fee for the three years it has failed to file the form. The IRS has contacted SIA putting them on notice that they had not received the required forms, eliminating any likelihood of reasonable excuse. Additionally, their other concerns include the inaccuracy contained in the statements. If SIA were to submit inaccurate statements, it would be committing fraud and exposing itself to more severe actions by the AG. *See OCCS*. Potential remedies for filing false reports would be an injunction from fundraising for charitable purposes until there was a correct accounting. *Id*. Therefore, SIA should seek to find the correct information to report to the IRS.

Finally, as stated above, this failure may be considered in the overall determination of whether the AG will seek to take injunctive action or be justified in seeking a dissolution of SIA. However, alone it will not merit an injunction.

D. Expense Account Reimbursements to Vernon Ellis

1. Remedies & Statute

Please see the remedies listed in A(1) above.

2. Likelihood of Remedy Being Imposed

Here, again VE and AZ engaged in violations of their fiduciary duties by breaching their duty of loyalty to SIA by self-dealing. Evidence demonstrates that VE used SIA funds for non-charitable purposes, including personal dinner parties, cocktails, and other things. Particularly egregious was the fact that VE would use the company credit card to pay for these things and then seek personal reimbursement (double-dipping).

While these breaches of fiduciary duties will not expose SIA to restitutionary or other damages, they will likely be a factor in determining whether the AG will bring an injunction of some kind or seek dissolution of SIA.

E. Cruise taken By Board Members

1. Remedies & Statute

Please see the remedies listed in A(1) above.

2. Likelihood of Remedy Being Imposed

In this instance, VE, AZ, Melanie Wanderly (MW), and their spouses appeared to have possibly used corporate funds to take a $70,000 ten-day cruise. Because there is no evidence that any actual business discussions or purposes took place on that trip, it is likely another breach of fiduciary duty by all three. This time, another member of the Board, MW, is involved. All three of these directors breached their duty of loyalty by using corporate funds for personal recreation absent a reasonable business purpose, failing to act as a reasonably prudent director would. Additionally, the fact that the check was made to Wanderly Travel Service suggests self-dealing on the part of MW. Therefore, all three of these directors breached these duties, making SIA potentially liable for the abuse of corporate powers.

Again, these breaches will not likely result in any kind of restitutionary or other damages, but will be relevant in the determination of an injunction or the potential forced dissolution of SIA.

II. Attorney General's (AG) Likelihood of Obtaining A Receivership or Dissolution of SIA

As stated above, a corporation is subject at all times to examination by the AG to ascertain the condition of its affairs, including to determine if it has departed from the purposes for which it was formed. *CCCS* 5250. In the case of failing to perform its

purposes, the AG can take action necessary against a corporation to obtain compliance. *Id.* Under statutory law, the court can order restitutionary and/or injunctive relief to compensate or protect members of the public who have been harmed by the corporation's violations. *CCCS* 6511(c). The court can also order dissolution and/or appoint a receiver for winding up. *Id*.

According to the court in *Sidley Memorial Hospital (SMH)*, the function of equity is not to punish but merely to take such action as may be necessary to prevent the recurrence of improper conduct. (1994). A court will consider voluntary action taken in good faith to minimize such recurrences. *Id*. In *SMH*, the court found that forcing a dissolution was too harsh where there was a severe and continuous breach of fiduciary duties by two controlling officers. *Id*. Instead, the court appointed a monitor to manage the company's day-to-day operations until the court determined such supervision was no longer necessary. *Id*.

Here, the situation involving VE and AZ, and to a lesser extent, MW, is similar to *SMH*. In both situations there were rogue directors taking actions in breach of their fiduciary duties, and in some cases, deceiving and defrauding the public. The directors in *SMH* breached their fiduciary duties and violated Columbia statutes in the *CCC* and *CPA*. VE, and AZ to the extent that he covered up VE's violations of the *CPA*, also violated these acts. Despite all of this the court decided not to dissolve the corporation at issue in *SMH*. The court's reasons were several, including the fact that the directors creating the problems and violating the laws were no longer a part of the organization. Further, the new directors were making good faith efforts to account for the errors of their predecessors. *SMH*. In other words, voluntary action was taken in good faith to remedy and prevent the recurrence of similar improper conduct. *Id*. Finally, there was no indication that other directors were participating in the fraudulent conduct.

Based off the reasoning in *SMH*, it is unlikely that a court would uphold a remedy seeking dissolution and receivership by the AG because SIA has acted similar to *SMH*. Specifically, VE, AZ, and MW are no longer members of the board, VE having died and AZ and MW having finished their terms. Additionally, the new directors, including KB

are making good faith efforts to remedy the previous violations and get SIA back on track. That said, while it is unlikely for a dissolution to be granted, SIA does face the potential that the court will appoint a monitor to manage its day-to-day actions.

III. Conclusion

In conclusion, SIA may be liable for restitutionary damages, likely in the form of a charitable trust, to the members of the public that were defrauded by VE for his cancellation of seminars. Additionally, SIA will likely be subject to some kind of injunction in fundraising for VE's violations of their charitable purpose. While it is possible for the AG to seek a suspension or revocation of SIA's registration as a charitable corporation, it is unlikely given the precedent in *OCCS*, where the corporate actions were far more egregious and did not result in such a suspension or revocation. Finally, the AG will likely not be successful in bringing an action for dissolution, but the court may appoint a monitor.

If you have any follow-up questions or other concerns regarding this matter, please let me know how I can be of assistance.

Sincerely,
The Applicant

July 2013

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

PEOPLE v. DRAPER

FILE

PEOPLE v. DRAPER

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

MEMORANDUM

TO: Applicant

FROM: Deputy District Attorney Milo Ward

DATE: August 1, 2013

RE: People v. Draper

Our office is prosecuting a domestic battery case against Horace Draper. Mr. Draper allegedly struck his wife, Sarah Morris, causing serious injuries. While Ms. Morris's initial statement to the 911 Dispatcher supported the charge of battery of a spouse, Ms. Morris has since changed her story, and now states that her injuries were accidental.

As you know, our office will continue with prosecutions even when the complaining witness declines to cooperate when we believe there is sufficient evidence. Thus, we are proceeding to trial on this case. We intend to call a domestic violence expert, Professor Pamela Simoni, to explain that it is typical in battering situations for women to recant. The defense requested an evidentiary hearing under Evidence Code section 402. We just completed that hearing where we called Professor Simoni as a witness to preview her testimony at trial. The judge wants briefing on the admissibility of Professor Simoni's testimony.

Please draft a memo in which you analyze which portions of Professor Simoni's testimony are admissible, and which portions are not. I will use the memo to help me draft the post-hearing brief requested by the judge.

Do not write a separate Statement of Facts, but incorporate the facts into your analysis where appropriate.

TRANSCRIPT OF HEARING

JUDGE LELAND PARKER (JUDGE): We're back in session in the matter of People v. Draper. Counsel, I'd like the record to reflect that we are conducting this hearing outside the presence of the jury. In its pretrial disclosures, the People indicated that they would be calling a domestic violence expert witness at trial. The defense has objected on several grounds, and I am holding this evidentiary hearing to be followed by submission of simultaneous briefs by the People and by the defense. I will issue my ruling in time for us to proceed with trial on Monday. Counsel, please state your appearances.

AMY FORTNER (DA): Amy Fortner, Deputy District Attorney, for the People, Your Honor.

NAOMI REVELLE (PD): Naomi Revelle, Your Honor, Deputy Public Defender, representing the defendant, Horace Draper.

JUDGE: Ms. Fortner, please proceed.

DA: Thank you, Your Honor. The People would like to play a 911 tape recorded at about 7:00 a.m. on June 5, 2012.

PD: The Defense stipulates that this is an authentic recording and that the voice of the caller is that of Sarah Morris, the Defendant's wife.

JUDGE: Please play the tape.

[Clerk plays the tape.]

Dispatcher: This is 911. How can I help you?

Caller: My husband hit me. I'm bleeding. I can't breathe.

Dispatcher: Ma'am, try to calm down. Where are you bleeding?

Caller: My mouth.

Dispatcher: Do you feel faint?

Caller: No, it just hurts and there's blood everywhere.

Dispatcher: Is there a way you can get to the hospital?

Caller: No, I can't. My husband took my car keys.

Dispatcher: Ma'am, what's your name?

Caller: Sarah Morris.

Dispatcher: Who hurt you?

Caller: My husband.

Dispatcher: What's his name?

Caller: Horace Draper.

Dispatcher: Is he still there?

Caller: No, he must have taken my car.

Dispatcher: Do you have any idea where he went?

Caller: No, I don't.

Dispatcher: Sarah, are you calling from 765 Fordham Lane?

Caller: Yes, I am.

Dispatcher: The police are on their way. Do you need an ambulance?

Caller: No, I think it's just my mouth. I'm going to see if someone can take me to the dentist.

Dispatcher: Sarah, please wait until the police arrive, okay?

Caller: Okay.

Dispatcher: Stay on the line with me until they arrive, okay?

Caller: Okay.

[End of tape.]

DA: The People call Paul Morris.

[The witness is sworn.]

DA: Mr. Morris, are you related to the Defendant, Horace Draper?

PAUL MORRIS (W-1): Yes, he's my brother-in-law. He's married to my sister, Sarah Morris.

DA: On June 5, 2012, did you go to your sister and brother-in-law's house at 765 Fordham Lane?

W-1: Yes, I did.

DA: What happened when you got there?

W-1: As I approached the house, Horace Draper came running out.

DA: What happened next?

W-1: He said that there had been an accident.

DA: Did he say anything else?

W-1: He said that he and Sarah were arguing because he had taken $120 from her purse to pay the gardener. He said that Sarah then swung her purse at him, and when he tried to calm her down, she accidentally got hit in the mouth. I asked Horace if Sarah was all right and he said that he didn't know.

DA: Then what?

W-1: Horace said that all she did after that was glare at him and run into the bathroom. He said that she was probably okay. Before I could say anything else, Horace ran off to Sarah's car and drove away.

DA: What did you do then?

W-1: I ran inside and up to Sarah's room. I heard her in the bathroom and ran to the door. She was there with a towel trying to stop the bleeding from her mouth and face.

DA: What did you see?

W-1: Sarah had a bloody mouth and a large bruise on her neck and shoulder area. She put up her hand and said, "I've already called 911; the police are coming."

DA: Then what?

W-1: We waited for the police. They were there at the house for about half an hour. After they left, Sarah asked me to take her to the dentist.

DA: And is that what you did?

W-1: Yes, we went there in my car and I was there with her for five hours.

DA: Mr. Morris, do you know Horace Draper well?

W-1: Yes, I live in the neighborhood and go over there a lot -- at least once a week.

DA: Had Horace and your sister's financial situation changed in the six months before this incident?

W-1: Yes, Horace had lost his job and hadn't been able to find a new one.

DA: What about Sarah?

W-1: She had just gotten a promotion to office manager where she works.

DA: How did Horace feel about this?

W-1: He was a lot moodier and got upset a lot more after he lost his job. He said he wanted Sarah to quit her job. He also said that he was making her give him all her paychecks because he couldn't trust her any more.

DA: Have you talked to your sister about this?

W-1: Yes.

DA: When's the last time?

W-1: About a month before this happened. She said she was feeling horrible, anxious and depressed. She said she felt like she couldn't do anything right.

DA: I have nothing further for Mr. Morris, Your Honor.

JUDGE: Do you have any questions?

PD: We have no questions.

JUDGE: Call your next witness.

DA: The People call Dr. Cathy Tucker.

[The witness is sworn.]

DA: Dr. Tucker, do you know Sarah Morris?

CATHY TUCKER (W-2): Yes, I do.

DA: How do you know her?

W-2: She is a patient of mine in my dental practice.

DA: When did you last see her?

W-2: Ms. Morris came into my office on June 5, 2012 at around 10:00 a.m. She had a pretty badly split lip, a significantly swollen mouth, extensive bleeding, and a loose tooth. I gave her emergency treatment, consisting of an exam, x-rays, a tooth extraction, a root canal, and insertion of a stay plate. The treatment took four and one-half hours.

DA: Dr. Tucker, do you have experience with these kinds of injuries?

W-2: Yes, I have observed and treated about 200 impact injuries. I believe that Ms. Morris's injuries were caused by a high-impact blow, rather than a low-impact blow.

DA: We have nothing further for Dr. Tucker.

JUDGE: Any questions for this witness, Ms. Revelle?

PD: No, Your Honor.

JUDGE: Call your next witness.

DA: The People call Professor Pamela Simoni.

[The witness is sworn.]

DA: Your Honor, we are calling Professor Simoni to testify on the eight following subjects: (1) the typical profile of a batterer; (2) patterns of behavior of batterers and battering victims; (3) the cycle of violence; (4) recantation; (5) behavior right after the abuse; (6) the so-called "window" and why it closes; (7) why victims return to the relationship; and, (8) the posing of a hypothetical. Professor Simoni, please tell the Court a little about your background.

PAMELA SIMONI (W-3): I am an attorney and a law professor. I have practiced in the area of domestic violence law for almost 30 years. Right out of law school I began a project at the Franklin County Legal Aid Society that trained advocates about how to work with victims of domestic violence. I also designed and conducted training programs for law enforcement agencies on the nature of domestic violence. After that, I worked for five years as the legal director for a program that was part of a larger domestic violence agency in Oakmont in Sanford County.

I have been teaching a Domestic Violence Seminar at the University of Columbia School of Law since 1990. I am the author of a textbook on the subject that is used in many undergraduate and law schools in the country.

I also served on the board of the Columbia Partnership to End Domestic Violence, where I helped draft and work toward the passage of legislation benefiting victims of domestic violence and their children. I currently consult and testify as an expert witness on domestic violence in criminal prosecution, defense, family law, asylum, and tort cases.

DA: Professor Simoni, how many times have you testified as an expert?

W-3: At least 60 times.

DA: Professor Simoni, have you ever met the defendant Horace Draper, or his spouse, Sarah Morris?

W-3: No, I have not.

DA: Approximately how many victims of domestic violence have you worked with?

W-3: About 1000, I would say.

DA: Of these 1000 domestic violence victims, how many have been women?

W-3: All but a handful.

DA: Professor Simoni, based on your extensive work with domestic violence victims and your familiarity with the literature, is it your opinion that there is a typical profile of a battering male?

W-3: There is no typical profile in terms of socioeconomic status or race of a male batterer. All classes and races are represented. I will say that there are commonly recurring characteristics of batterers. For instance, a typical male batterer, in the beginning of a relationship, will be charming, romantic and intense. He will also, however, be rigid in his views regarding how men and women should behave in a relationship. Men who batter are frequently jealous. In addition, 50 to 60 percent of cases involving a batterer involve the use of alcohol or drugs. The male batterer will make his partner dependent and attack her self-esteem.

DA: Your Honor, the People request that Professor Simoni be qualified as an expert in this case.

PD: We have no objection to Professor Simoni's qualifications and we agree that in appropriate cases the nature of domestic violence is the proper subject matter for expert testimony. We object to this testimony in this case, however. There is no evidence that Mr. Draper fits the male batterer profile or that Ms. Morris suffers from battered woman's syndrome. The evidence will show that this is the first injury that Ms. Morris has ever suffered during her marriage.

JUDGE: The witness is qualified as an expert. Counsel, your objections are preserved. I will rule on the admissibility of Professor Simoni's testimony after this hearing and after reading your briefs.

DA: Thank you, Your Honor. Professor Simoni, are there typical patterns of behavior exhibited by male batterers and female battering victims?

W-3: Yes. Typically, the woman begins to believe that she can't trust her friends; that her family interferes; that her male friends are only after sex; that she's fat, stupid, ugly, and incompetent; that she's crazy, hypersensitive, and hysterical all the time; that nobody would ever want her; and that she's really, really lucky to be in this relationship with this guy. The man will start to blame the woman for everything that goes on around him. He will use coercion, threats and intimidation to maintain control of his partner. A batterer will sometimes coerce the woman into sexual acts. He may force her to watch pornographic movies and ask her to engage in some of the activities portrayed in the

films. If she does not wish to engage in the sexual activities, he will tell her that she is not normal sexually. A batterer will try to get his partner to do some things that sort of cross her own bottom line. And when he's able to do that, he's able to get her to feel guilty and ashamed about things that are going on in their relationship, things that she's uncomfortable with; then he begins to make threats.

DA: Professor Simoni, can you describe the cycle of violence in the context of domestic violence?

W-3: Yes, once a woman has committed to a relationship with a batterer, a cycle of violence begins. The batterer has an absolute need for power and control over his female partner. The relationship usually follows a three-phase cycle. The first and longest phase is referred to as the "tension-building period." The second phase involves actual physical violence. Finally, there is a "honeymoon" or "hooking back" phase.

DA: Can you describe the tension-building phase?

W-3: During the tension-building period, the batterer criticizes his partner. When she becomes upset, he says he was only joking and she is being hysterical. Although the relationship may appear to be going well, the man will start to emotionally abuse his partner by calling her names and insulting her. The batterer will then isolate the woman from her friends, co-workers, and family. Economic control is a common element in abusive relationships and it does not matter whether the man or woman is earning the greater amount of money. Not every one of these factors is present in every relationship. Each batterer tends to have a favorite tactic.

DA: Can you talk about your experiences with women who report a first incident of violence?

W-3: Yes, about 80 percent of the time a woman who has been "initially assaulted" by a boyfriend, husband or lover will recant, change or minimize her story. This recanting does not happen only after there has been a continuing pattern of abuse. In fact, depending on the severity of the incident, it is more likely to occur after a first incident. A woman will tend to minimize and deny the incident. The woman will engage in "self-blame" and sort of recharacterize the incident, especially if the relationship is going to continue. It's the most common reaction of anybody who's been victimized in an intimate relationship.

DA: Do you ever see instances when the first incidence of violence in an intimate relationship occurs years after the marriage began?

W-3: Yes, I am describing typical patterns, but every battering relationship is different. I would say that you describe an unusual, but not rare, situation.

DA: Can you explain a bit more about the typical behavior of the victim of the abuse right after the abuse occurs?

W-3: She begins to feel guilty and responsible. When a violent act takes place, she is usually terrified and shocked. The woman never expected this person that she loves -- this wonderful, romantic, charming guy she's in love with -- to physically hurt her. When the actual violent event occurs, the woman is able to feel and recall the details of the event. This short period is referred to as a “window." However, the window will stay open only if the woman leaves the relationship and has support in the outside community. If the woman has contact with the batterer, the window will close.

DA: Why does the window close?

W-3: The batterer will start a “honeymoon” period and will tell the woman he loves her, that the incident was an accident, and that he never meant to hurt her. The batterer will make the woman promise she will not talk to anyone about the incident, that she will not go to court, and that she will tell the police she lied about the violence.

DA: Are there other reasons why the window closes?

W-3: This window may close for financial reasons, because of the woman's lack of self-esteem, or because of her loneliness. The woman will lose sight of what actually happened and begin to believe the batterer's version of events. She may become angry with prosecutors, the judge, and everyone else in the courtroom. She begins to think of her attacker as the one who is misunderstood.

DA: Would you expand a bit on recantation among domestic violence victims?

W-3: Generally, when an abused woman discusses a battering event, she will tell a "different story" by recanting or minimizing the event. If a woman wishes the relationship with her batterer to continue, she will tell the police and the prosecutor that the violent incident never occurred. A woman will react in this manner more commonly after the first event because she really wants to believe that the person who committed the act of violence is not the man she is in love with.

DA: And do you find when these women are removed from contact with the abuser or the abuser's family, they tend to be honest about what's happened or are they still reluctant once they have been separated from that situation?

W-3: Much more likely to be honest.

DA: Now you're not saying every battered woman tells the truth all the time, are you?

W-3: No, of course not.

DA: In fact, don't they lie on occasion?

W-3: Yes, they do.

DA: And you find, based on the statements that you just made, that they're more likely to be honest within 24 to 48 hours after the incident?

W-3: Yes.

DA: Do battered women, in your experience, go back to their abusers?

W-3: Yes, they do.

DA: Why do they go back, based on your training and experience?

W-3: Because they love them; they're not sure how they can survive on their own; pressure from family and friends; or because their children want to be with their father.

DA: I'd like to pose a hypothetical question to you, Professor. If a single incidence of violence in an intimate relationship is preceded by the loss of a job by the husband three months before the violence and is accompanied by a job promotion to the wife, increased moodiness in the husband, and demands by the husband that the wife quit her job and turn over her paychecks to him, are these occurrences typical of the "tension-building" stage of the cycle of violence?

W-3: Yes, I would say so. I would also say that these behaviors are consistent with the "power and control wheel" -- a model developed to describe typical kinds of behaviors or characteristics that are present in abusive relationships. At the center of the wheel are the words "power and control." The battering partner's goal is to exert control over the victim partner. To do so, he or she may use a variety of methods, including demeaning and humiliating the other partner, monitoring and controlling their access to other people, minimizing the seriousness of the abuse, and denying the other partner access to money.

DA: Thank you, Professor Simoni. Your Honor, I have nothing further.

JUDGE: Thank you, Professor. You are excused. Counsel, I would like both of you to submit briefs, due tomorrow at noon. I will rule on both the admissibility of Professor Simoni's testimony, as well as any limits on the scope of that testimony if I permit it. We are now in recess.

July 2013

California Bar Examination

Performance Test B
LIBRARY

PEOPLE v. DRAPER

LIBRARY

Selected Provisions of the Columbia Evidence Code

Section 352.

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Section 402.

(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

Section 801.

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

People v. Gould

Columbia Court of Appeal (2002)

In this case, we decide expert testimony regarding battered woman's syndrome is not relevant unless there is sufficient factual evidence that the victim is a battered woman.

A jury found Daniel R. Gould (Gould) guilty of assault against his wife, Mary Dean (Dean), under circumstances involving domestic violence.

Gould contends the trial court erred when it allowed the prosecutor to present expert testimony regarding battered woman's syndrome. He argues this expert testimony was irrelevant because no evidence showed the victim in this case was suffering from battered woman's syndrome. He further asserts the evidence was highly prejudicial and its admission requires reversal of his convictions. We agree and reverse the judgment.

Prior to trial, the prosecutor indicated she intended to present expert testimony regarding battered woman's syndrome. The expert, Gail Peale (Peale), is the director of a domestic abuse center. The prosecutor asserted Peale's testimony was necessary to show "why women who have been assaulted by their husbands or boyfriends later recant, minimize, suffer memory lapses due to post-traumatic stress, and decline to 'prosecute' their assailants, especially after the first incident of violence."

Outside the presence of the jury the court conducted an evidentiary hearing pursuant to Evidence Code section 402. After the hearing, the trial court indicated it would allow the testimony on a limited basis. The court stated, "I want to limit the issues. This is an expert on domestic violence. The testimony should be limited to how victims of domestic violence minimize the violence, recant and decline to prosecute. I want you to avoid the use of the words 'battered woman's syndrome,' because I don't think there's been any evidence that she had any previous battering." The court concluded, "This witness is admitted as an expert on people who cohabitate as husband and wife, and to explain what they do, whether they've ever been battered before or not."

Peale testified she had never met Dean or Gould. Peale gave a lengthy explanation of the typical "male batterer." She also testified about the "three phases of domestic violence."

Gould contends that the expert's testimony regarding battered woman's syndrome was irrelevant because there was no evidence Dean had suffered ongoing abuse or battering. He argues the evidence was highly prejudicial under Evidence Code section 352, and its admission requires reversal of his convictions. The trial court stated the evidence would not be based on a finding that this was a battered woman but would be admitted only to assist the jury to understand that in a cohabitation situation, the women generally decline to prosecute, especially when they're going to go back to the man. The People contend the expert's testimony was relevant and properly admitted for a limited purpose. They further assert that if any error occurred, it was harmless.

DISCUSSION

1. Since There Was No Evidence Dean Had Suffered Ongoing Abuse of Battering, Peale's Testimony Was Irrelevant.

Whether expert testimony regarding battered woman's syndrome is admissible in a particular case initially depends on whether that evidence is relevant. In making a determination of relevancy, the court must first decide whether the evidence in the particular case supports a contention that the petitioner suffered ongoing abuse or battering. Expert testimony on battered woman's syndrome is irrelevant unless there is a sufficient factual basis for the fact that petitioner experienced ongoing abuse or battering.

Unlike the situation where there are multiple incidents of physical violence, or acts of psychological or emotional abuse, in the present case there is no evidence, with the exception of the present incident, to indicate Dean is in a battering relationship. There was no evidence that Gould had previously battered Dean or that they were engaged in an ongoing abusive relationship.

The People assert it was not necessary to show Dean had previously been abused by Gould. They refer to Peale's testimony that it is especially likely a woman will recant, minimize or completely deny the first violent incident.

That may be true, but the mere fact that Dean might have minimized or denied a single instance of violence or abuse does not mean she suffers from battered woman's syndrome. Battered woman's syndrome is a series of characteristics which appear in women who have been abused physically and psychologically over a period of time. A single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from battered woman's syndrome.

Here, other than evidence of the present incident, there is no evidence indicating that Gould abused or behaved violently toward Dean. There is no evidence that Gould fit the profile of a batterer, or that Dean and Gould were engaged in a "battering" relationship. On this record, Peale's testimony regarding battered woman's syndrome was irrelevant.

The People must present proper foundational evidence before they may use expert testimony regarding battered woman's syndrome to explain why a woman may recant, minimize or completely deny a violent incident. In the present case, Peale's testimony regarding battered woman's syndrome was irrelevant and the trial court erred in admitting it.

2. <u>Admission of the Expert's Testimony Was Prejudicial</u>.

We cannot ignore Peale's powerful testimony and its likely effect on the jury. Peale's testimony was authoritative. She was presented as a highly qualified expert. Her testimony was lengthy and dramatic. She explained in detail the several cycles of a typical battering relationship. She extensively described the male batterer, explaining how he first charms, then demeans and insults his partner. Peale described a battering man as someone who both psychologically and physically brutalizes a woman to satisfy his need for power and control. She compared the relationship between a battering man and a battered woman to a condition called the "Stockholm Syndrome" which occurs when a hostage begins to view her "attacker" as "the good guy." Peale testified a batterer is often referred to as a "Dr. Jekyll and Mr. Hyde."

Both the trial court and the prosecutor emphasized Peale's inflammatory testimony. Our review of the whole record indicates it is reasonably probable that the

jury would have reached a result more favorable to Gould had the court excluded Peale's testimony.

The judgment is reversed.

People v. Bowen

Columbia Court of Appeal (2004)

At defendant Michael Bowen's trial on charges relating to domestic violence, the prosecution offered testimony from an expert witness to explain that domestic violence victims often later deny or minimize the assailant's conduct. Defendant objected. He contended such testimony did not fall within the scope of Evidence Code section 801, which authorizes expert testimony. He argued the prosecution had failed to show that the victim here was a battered woman because it offered no proof that defendant had abused her on more than one occasion. The trial court overruled the objection and admitted the evidence. Defendant was convicted and appealed.

We conclude that in this case the evidence was admissible under Evidence Code section 801, because it would assist the trier of fact in evaluating the credibility of the victim's trial testimony and earlier statements to the police, by providing relevant information about the tendency of victims of domestic violence later to recant or minimize their description of that violence.

Defendant and Kimberly Laforge (Laforge), the victim, had been dating on and off for about 11 years. On April 17, 2001, they were living together in an apartment with Laforge's four children and Carrie Miller (Miller), a woman who took care of the children when Laforge worked.

Laforge rented the apartment from Leland Jones (Jones), Defendant's cousin. At 2 a.m. on April 17, Jones came to the apartment to demand payment of back rent. When Laforge refused because Jones had not fixed the water system, Jones told Laforge to vacate the apartment. After Jones left, Laforge and Defendant began arguing. Laforge was upset because she thought Defendant should have taken her side in the argument with Jones.

Shortly thereafter, Deputy Sheriff James Wheeler responded to a telephone call from Laforge and found her with Carrie Miller in a parked car near the apartment. Laforge told Deputy Wheeler she had been assaulted. She said she tried to leave the apartment after an argument with Defendant but he put his arm around her neck and dragged her to the bedroom. Defendant then went to the living room and returned to the bedroom with a steak knife and a barbecue fork, telling Laforge he would kill her if

she left. She was afraid. When she said she wanted to leave, Defendant replied, "I don't want you having my baby," and punched her in the stomach. Miller told Deputy Wheeler that Defendant had threatened to kill both her and Laforge if they left. He also threatened to have some women come over to beat up Miller and Laforge. Deputy Wheeler arrested Defendant and found the steak knife where Laforge said it was.

Laforge's trial testimony differed from what she had told Deputy Wheeler earlier. At trial she said that when she started to leave the apartment, Defendant took hold of her arm, not her neck, and pulled her back to the bedroom. She lay down for a while, then when she got up to leave again he slapped her in the stomach. Defendant had never struck her before. She lay down again for a few minutes, then she woke Miller up, went with Miller and the children to the car, drove a short distance, and called the police. Laforge said that Defendant never threatened her.

Laforge testified that when she went into the apartment with the police, the officers said they did not have "enough to go on." Laforge then picked up the knife and fork and said Defendant had "poked" them at her. Laforge said she did this so Defendant would get arrested; in fact, he did not threaten her with the knife and fork. When asked whether Defendant was doing anything against her will, Laforge replied, "Not to the full extent, no."

Carrie Miller was not available to testify at the trial, so the prosecutor read to the jury Miller's testimony from the preliminary hearing. There Miller testified that she was asleep until Laforge woke her just before they left the apartment, so she did not know what happened between Laforge and Defendant. Laforge denied that Defendant had ever threatened her.

Jeri Parker (Parker), Program Manager of the Arnett Valley Domestic Violence Council, testified as an expert witness for the prosecution. Before permitting the jury to consider Parker's testimony, the trial court instructed: "This evidence is not going to be received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged." Parker testified: Domestic violence victims, after describing the violence to the police, often later repudiate their description. There is typically "anywhere between 24 and 48 hours where victims will be truthful about what occurred because they're still angry; they're still scared." But "after they have had time to think about it ... it is not uncommon for them to change their

mind." About 80 to 85 percent of victims "actually recant at some point in the process." Some victims will say they lied to the police; almost all will attempt to minimize their experience.

Parker explained why victims of domestic violence may give conflicting statements: They may be financially dependent on the defendant. They may be pressured, or even threatened, by the defendant or other family members. They may still love the defendant and hope that things will get better.

Defendant objected to the admission of Parker's testimony.

The jury convicted Defendant on three counts: threatening to commit a crime that would result in death or great bodily injury against Laforge; false imprisonment by violence against Laforge; and misdemeanor battery against Laforge.

Evidence Code section 801, subdivision (a), permits the introduction of testimony by a qualified expert when that testimony may "assist the trier of fact." Expert testimony is admissible on any subject "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness. And when the victim's trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant's favor. These are common notions about domestic violence victims.

At trial, expert witness Jeri Parker described the tendency of domestic violence victims to recant previous allegations of abuse as part of the particular behavior patterns commonly observed in abusive relationships. Most abusive relationships begin with a struggle for power and control between the abuser and the victim that later escalates to physical abuse. The initial "tension-building stage" of the “cycle of violence” can appear in deceptively mundane ways, such as complaints about the cleanliness of the house. Often the abuser uses psychological, emotional, or verbal abuse to control the victim. When the victim tries to leave or to assert control over the situation, the abuser may turn to violence as an attempt to maintain control. Later, even if there has been no other episode of violence, the victim may change her mind about prosecuting the abuser and may recant her previous statements.

Here, there was an adequate foundation for that expert testimony, because evidence presented at trial suggested the possibility that Defendant and Kimberly Laforge were in a "cycle of violence" of the type described by expert Jeri Parker. Laforge told Deputy Wheeler that Defendant had complained about the cleanliness of the apartment on the evening of the assault. There was also evidence that Laforge and Defendant also argued that evening about Defendant's failure to take her side in an argument with his cousin (their landlord) regarding the rent, that Defendant told Laforge that if she did not pay the rent she would have to move out, and that he later threatened to kill her if she did leave. Finally, there was evidence that when Laforge actually tried to leave the apartment, Defendant assaulted her. To assist the jury in evaluating this evidence, the trial court properly admitted the expert testimony by Parker.

Defendant asserts that the argument for admitting expert testimony after a single incident of violence is circular, because the jury must first find the preliminary fact of abuse to be true before it may consider the expert evidence. We do not share that view. The argument that evidence relating to credibility cannot be admitted until the underlying charge has been found true was rejected in other domestic violence cases. To be sure, this kind of evidence cannot be admitted to prove the occurrence of the charged crimes. There must be independent evidence of domestic violence -- otherwise the expert testimony about how victims of domestic violence behave would lack foundation. Here, such evidence was supplied by both Laforge's trial testimony in court and by her earlier statement to Deputy Wheeler.

Once there is evidence from which the trier of fact could find the charges true, evidence relating to the credibility of the witnesses becomes relevant and admissible. There is no rule requiring a preliminary finding that the charged act of abuse occurred before the jury can consider the evidence relating to credibility.

We therefore conclude that the trial court did not err in admitting expert testimony concerning the behavior of victims of domestic violence even though the evidence showed only one violent incident.

Affirmed.

People v. Slater

Columbia Court of Appeal (2008)

A jury convicted defendant, John Slater, of three serious felonies based on an incident in which he broke his wife's leg. He was convicted of inflicting corporal injury on a spouse, and assault with force likely to cause great bodily injury both with enhancements for personally inflicting great bodily injury in circumstances involving domestic violence. Defendant was sentenced to nine years and eight months in prison.

On appeal he contends it was error to admit evidence of battered woman's syndrome.

FACTS

In the early morning of May 13, 2001, Officer Brandon Bean was dispatched to the Roseville Medical Center emergency room on a report of spousal abuse. There he found Sonia Slater (Sonia). She smelled slightly of alcohol and was in pain. Her right bicep and her right ankle were bruised.

Sonia had a fractured dislocation of the fibula just below the knee and the strong ligament was torn apart. The injury required surgery in which a screw was inserted. Sonia had six weeks of painful rehabilitation and still had some pain at the time of trial.

In May 2001, Sonia had been married to Defendant for three years. They had two children together and she had a daughter from a previous relationship. Their marriage had a lot of friction and was often violent. At trial, Sonia testified to four acts of domestic violence by Defendant. In January 1999, Sonia's daughter wanted to watch television and Defendant objected. He called the girl names. Sonia stood up for her daughter and Defendant got angry. He choked Sonia and hit her with his fists, calling her a fat, worthless whore. Sonia called the police and Defendant left. Defendant was convicted of misdemeanor spousal abuse.

Sonia got back together with Defendant because she was pregnant with their second child. Defendant worked and Sonia stayed home with the children. In May 2000, Sonia was watching television with a friend. Defendant did not like the show they were watching. He grabbed Sonia and she thought he was going to kiss her. Instead, he bit through her lip, leaving a scar. Sonia did not report the incident because she was afraid of Defendant.

On May 4, 2001, Sonia went to a friend's house after dinner. Defendant told her to be home at 8:00 or 9:00 p.m. She got home between 10:00 and 11:00 p.m. and went to bed. At 1:00 a.m. she awoke with Defendant on top of her, choking her. Sonia woke her daughter, who called 911. When the police arrived, Sonia told them not to arrest Defendant because she did not want to be on welfare.

The police officer who responded to the call testified that Sonia was under the influence of alcohol. The closet doors were smashed. When he tried to take a statement, Sonia was distracted and got up to wash dishes or check on the children, who were confused. Sonia told the officer she was fed up and wanted Defendant out of there because he was “screwing around” on her. Defendant returned and told the officer that Sonia started the fight when she came home, accusing Defendant of cheating on her. In frustration, Defendant pounded the closet doors. He went to the couch and Sonia followed and hit him. He then followed her to the bedroom where he may have choked her. There was no trauma visible on Sonia's neck; she had a bruise on her arm. Defendant had bruises, scratches and a bite mark. The officer determined Defendant was the primary aggressor, but referred the case for further investigation because there might be cause to arrest Sonia.

After the May 4th incident, Sonia decided she had had enough abuse and left Defendant. Defendant wanted to reconcile and called her constantly. On May 12th, Sonia went to a barbecue in Roseville, where she had three or four beers. Afterwards she went to the Onyx Bar.

Later Defendant came in the bar and asked her, "Are you with this jerk now?" She told him, "Screw you!" and left the bar and walked towards her car. Defendant grabbed her by the arm and told her he was taking her home. He took her keys and tried to get her to drink some tequila. He threw her to the ground and kicked her. Three men came to Sonia's rescue. They got her keys and chased Defendant off.

Sonia drove to a friend's house. She called another friend, who took her to the hospital. The hospital staff called the police.

After she was released from the hospital, Sonia heard from her mother and Defendant that if she did not drop the charges, Defendant would do things to her. She obtained a restraining order. Defendant still called her. Sometimes he said he loved

her and wanted to get back together. Other times he told her she was a worthless whore who would get AIDS. He offered her money for the kids and wanted her to drop the restraining order.

On June 22nd, Sonia reported her car window was broken. She told the officer that Defendant called and said his sister broke it. He told Sonia he would fix her window if she dropped the divorce and the restraining order. He also offered to help with her bills.

On cross-examination, defense counsel attacked Sonia's credibility. Sonia did not tell Officer Bean that Defendant kicked her; she told him Defendant had grabbed her arm and pushed her down. Counsel questioned why Sonia's story was getting worse; now she claimed Defendant stomped on her leg. Sonia's version of the May 4th incident also did not match the officer's version. Sonia said she may have "sugar-coated" reports to the police.

The defense succeeded in portraying Sonia in a negative light. Sonia denied having an affair while married and later admitted it. She admitted she drank and used drugs, including using methamphetamine. Sonia denied making a throat-slashing motion while a witness was testifying in another case. A court reporter saw it.

In an interview with the police, Defendant admitted going to the Onyx Bar and talking to Sonia. He claimed Sonia was drunk and she stumbled and fell. He denied he pushed her.

Over defense objection, Linda Barnard (Dr. Barnard), a licensed marriage/family therapist, testified at length on domestic violence and the battered woman's syndrome. Dr. Barnard testified that domestic violence is the physical, emotional, sexual or verbal abuse between two persons in an intimate relationship. She explained various myths and misconceptions about domestic violence and battered women. Many believe the woman is masochistic and enjoys the abuse, which is not true. Women stay in abusive relationships for many reasons, including emotional dependency, financial dependency, concern for their children, religious beliefs and family pressure. The primary reasons for staying are love and fear. Many believe the violence stops if a woman leaves, but that is not true, as 75 percent are abused after they leave. It is a myth that domestic violence is limited. It is very underreported, with only 10 to 25 percent of victims

reporting, and 95 percent of victims are women. Only 2 percent of reports are false. According to studies, domestic violence affects 1.4 million women per year. One-third to one-half of women will be physically assaulted at some time by an intimate partner.

Mutual combat is a myth; when women hit, it is usually in self-defense and women are normally more seriously injured. It is a myth that women are quick to call the police. In fact, they avoid reporting abuse for the same reasons they stay in abusive relationships. Also, they may be embarrassed. It is a misconception that battered women are passive. Some are, but most fight back at some point and some fight back all the time. The battered woman may precipitate violence in order to have some control.

The cycle of violence has three stages: tension building, an acute episode, and a honeymoon or tranquility stage. In one-third of the cases, there is no honeymoon stage, only tension and aggression.

The characteristics of a battered woman are anxiety, depression, minimizing, denial, sleep disturbances, fear, symptoms similar to post-traumatic stress disorder, hypervigilance and a high startle response. Battered women frequently self-medicate with drugs or alcohol. Dr. Barnard described battered women as exhibiting a "flat affect," that is, they show no emotion. It may be triggered by disassociation in traumatic situations. They also exhibit piecemeal memory, that is, remembering events only pieces at a time.

The prosecution gave Dr. Barnard a hypothetical situation: There is a three-year relationship with numerous incidents of domestic violence, some reported and some not, culminating in a broken leg. During rehabilitation, the victim gets a restraining order and then receives calls that the batterer is wasting money on drugs. The victim then calls him, using foul language, and comments that he is not supplying diapers and food and that he is using the drug, ecstasy. Would that be surprising behavior from a battered woman? Dr. Barnard said, no. If the battered woman is safe, she may initiate serious anger toward the batterer.

DISCUSSION

The People sought to admit evidence of battered woman's syndrome (BWS). The defense demanded that the prosecution identify the specific myth or misconception such evidence would address. The court held a hearing under Evidence Code section 402 to consider the relevance of the evidence. The prosecutor identified three areas of BWS the expert would address: why women stay, the myth that victims are always meek and mild, and the cycle of violence.

Dr. Barnard testified at length at the hearing. The defense identified ten points she had raised and argued all of them were irrelevant and not supported by evidence. The ten points were: (1) why women stay; (2) the myth that victims are always meek and mild; (3) the cycle of violence; (4) what happens when women leave; (5) control issues; (6) post-traumatic stress disorder; (7) the effect of drugs and alcohol; (8) the myth of mutual combat; (9) a profile of batterers; and, (10) a hypothetical. The trial court ruled all the BWS testimony was admissible, except as relating to post-traumatic stress disorder and profiling.

There are two major components of a relevance analysis in admitting BWS testimony. First, there must be sufficient evidence to support the contention that BWS applies to the woman involved. Here, there was evidence to support a finding that Sonia was a battered woman. She testified her marriage to Defendant was characterized by friction and violence. And she testified about four specific incidents of domestic violence.

Second, in order for BWS testimony to be admissible, there must be a contested issue as to which it is probative. BWS testimony is admissible to disabuse the jury of widely held misconceptions or popular myths. It is often admitted to address recantation and reunion by the battered woman, especially where such actions are used to attack the victim's credibility.

Defendant contends the trial court erred in "blithely" finding that the wholesale introduction of BWS expert testimony is warranted in every case. This contention misreads the record. Rather than simply admit all BWS testimony, the court held a hearing and ruled which portions were admissible, excluding proffered testimony on

post-traumatic stress disorder and profiling of batterers. It is not an abuse of discretion to permit some leeway in prosecution questioning of a BWS expert. When BWS testimony is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed for BWS to be understood. To the extent that the expert testimony suggests hypothetical abuse that is worse than the case at trial, it may even work to the defendant's advantage. In any event, limiting the testimony to the victim's state of mind without some explanation of the types of behaviors that trigger BWS could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct.

Defendant contends testimony about the myth that battered women are passive was irrelevant because the evidence showed that Sonia was not passive. Defendant misunderstands the point of the expert's testimony. Dr. Barnard testified that most battered women fight back some of the time and some do all of the time. The evidence that Sonia fought back on occasion fit into this described syndrome.

Defendant contends evidence about the cycle of violence was irrelevant as there was no evidence about such a cycle in this case. This evidence provides the type of explanation that is necessary for BWS to be understood.

Defendant objects to the testimony about mutual combat. Dr. Barnard's testimony in the Section 402 hearing on this subject was confusing as she seemed to suggest there was almost never mutual combat because men are stronger. She testified men are the primary aggressors 95 percent of the time. At trial she testified a battered woman usually engages in serious violence, other than pushing and shoving, only to defend herself, and research has shown men are the predominant aggressors. Thus, the actual BWS testimony was less objectionable than that proffered. Moreover, any error in admitting this testimony was harmless because there was no evidence to suggest the broken leg incident was the result of mutual combat.

Defendant contends it was error to permit Dr. Barnard to testify that drug and alcohol abuse escalates domestic violence and that a batterer may encourage the victim to use drugs and alcohol. Defendant contends there was no evidence that Defendant caused Sonia to use drugs and alcohol. There was evidence that Sonia had used drugs with Defendant, but there was ample evidence that she drank heavily in his

absence. The most pertinent portion of Dr. Barnard's testimony on this point was that battered women often self-medicate with drugs or alcohol.

Finally, Defendant contends the BWS testimony served as a testimonial to Sonia's credibility. Although the trial court excluded any testimony about post-traumatic stress disorder, Dr. Barnard used the terms "flat affect" and "piecemeal memory" to explain why Sonia did not tell anyone at the hospital about Defendant "stomping" or "kicking" her leg.

We find no error in the admission of the BWS testimony. There was evidence Sonia was a battered woman and the testimony was relevant to explain some of her behavior, such as her failure to leave Defendant sooner and to minimize some early violence.

The judgment is affirmed.

SELECTED ANSWER 1

MEMORANDUM

TO: Deputy District Attorney Milo Ward

FROM: Applicant

DATE: August 1, 2013

RE: People v. Draper

Admissibility of the Testimony of the Expert Witness Professor Simoni

The people in the current case of People v. Draper intend to call a domestic violence expert, Professor Pamela Simoni, to explain that it is typical in battering situations for women to recant. Professor Simoni plans to do this by discussing battered women's syndrome (BWS). Per the defense's request, there was an evidentiary hearing under Evidence Code Section 402 to determine the admissibility of Professor Simoni's testimony. It is important to note that Professor Simoni was qualified as an expert under Evidence Code Section 801.

Professor Simoni's testimony will only be admissible if it is found to be (1) relevant and (2) if the court does not exclude the evidence based on the fact that its probative value is substantially outweighed by the danger of undue prejudice.

Relevance

According to People v. Slater, there are two major components of a relevance analysis in admitting BWS testimony. First, there must be sufficient evidence to support the contention that BWS applies to the woman involved. Second, in order for BWS testimony to be admissible, there must be a contested issue as to which it is probative.

(a) Sufficiency of Evidence Supporting the Contention that BWS Applies to Victim Sarah Morris

In order for BWS testimony to be found relevant, there must be sufficient evidence to support the contention that BWS applies to the woman involved. In other words, there must be sufficient factual evidence to form a foundation that the victim is a nattered woman. Gould. The factual evidence that the victim is a battered woman does not need to be based on proven evidence of abuse. Bowen. Rather, any evidence of prior battery is admissible, and then BWS can be used to assess the credibility of the victim and related evidence of abuse. Bowen.

In People v. Slater, the alleged victim testified to four acts of domestic violence by the defendant. According to the court, that was sufficient factual evidence to form a foundation that the victim was a battered woman, as she testified that her marriage to the defendant was characterized by friction and violence and testified about four specific incidents of domestic violence.

In Gould, however, the court held that expert testimony regarding battered woman's syndrome was inadmissible as irrelevant, because no evidence showed the victim in the case was suffering from battered women's syndrome. The court in Gould based this holding on the fact that this was the first time a battery had been reported, and as such, there was no evidence of a previous battering.

However, in People v. Bowen, the court came to the opposite conclusion. In that case, the concern was that admission of BWS testimony, which goes to the credibility of the victim and helps to explain her story, has the potential to be highly prejudicial to the defendant. Therefore, the defendant argued that evidence of prior battery must be proven before it can be used as a foundation for the admission of BWS testimony. However, the court reasoned that once there is evidence from which the trier of fact can find the charges true, then evidence relating to the credibility of the witnesses becomes relevant and admissible. There is no rule requiring a preliminary finding that the charged act of abuse occurred before the jury can consider the evidence relating to

credibility. Therefore, the court held the lower court did not err in admitting expert testimony concerning the behavior of victims of domestic violence even though the evidence showed only one violent incident.

In Bowen, the court found there was an adequate foundation for expert testimony regarding battered woman's syndrome, because evidence presented at trial suggested the possibility that defendant and the alleged victim were in a "cycle of violence" of the type described by the expert. The court based this on the fact that the alleged victim had told the deputy that the defendant had complained about the cleanliness of the apartment on the evening of the assault. There was also evidence that the alleged victim and the defendant argued that evening about the defendant's failure to take her side in an argument with his cousin (their landlord) regarding the rent, that the defendant had told the alleged victim that if she did not pay the rent she would have to move out, and that the defendant later threatened to kill the alleged victim if she did in fact leave. Finally, the court based this on evidence that when the alleged victim actually tried to leave the apartment, the defendant assaulted her. Ultimately, the court felt the expert testimony was relevant because of this evidentiary foundation of a "cycle of violence" and admitted the expert testimony to assist the jury in evaluating the evidence.

The court further explained that it is not necessary that the jury first find the preliminary fact of abuse to be true before it may consider the expert evidence, as the argument that evidence relating to credibility cannot be admitted until the underlying charge has been found true has been rejected in other domestic violence cases. While the court did acknowledge that evidence of this kind cannot be admitted to prove the occurrence of the charged crimes, it also stated that that there must be independent evidence of domestic violence to give foundation for the admission of the expert testimony.

Here, the court held that evidence is to be supplied by both the alleged victim's trial testimony in court and by her earlier statement to the deputy. The court explained that the evidence would assist the trier of fact in evaluating the credibility of the victim's trial testimony and earlier statements to the police, by providing relevant information about

the tendency of victims of domestic violence later to recant or minimize their description of that violence.

In the current case, like in Slater, there is evidence that the victim and defendant's marriage is characterized by friction. In the 402 hearing, the victim's brother testified that the defendant recently lost his job and was a lot moodier and got upset a lot more. He explained that he wanted the victim to quit her job and that he was making the victim give him all of her paychecks because he couldn't trust her anymore. The victim's brother also testified to the fact that the victim was recently feeling horrible, anxious and depressed and, because of the defendant's behavior, that she couldn't do anything right. This is also similar to the constant complaining about cleanliness of the house which was found to be sufficient in Bowen. In Bowen, the court also considered the testimonial evidence from the event at issue, holding that it went to evidence of a "cycle of violence." Here, there is the evidence from the 911 call, as well as the victim's brother's testimony about the night in question. There is also the testimonial evidence from the victim's dentist, Dr. Tucker, who testified that the victim's injury was from a high-impact blow, not a low-impact blow.

On the whole, given the testimony as to the night in question, as well as evidence of a marriage characterized by friction, there is likely sufficient evidence supporting the contention that the victim, Sarah Morris, is a battered woman. As such, the evidence is likely sufficient to show that BWS does in fact apply to her.

(b) Existence of a Contested Issue as to Which the BWS Testimony is Probative

Under People v. Slater, in order for BWS testimony to be admissible, there must be a contested issue as to which it is probative. The court in Slater did not feel it is appropriate to admit all BWS testimony, but rather to hold a 402 hearing to rule on which portions are admissible, as here. However, the court did not feel it is an abuse of discretion to permit some leeway in prosecution questioning of a BWS expert. In fact, the court explained BWS testimony is admissible to disabuse the jury of widely held

misconceptions or popular myths. It is often admitted to address recantation and reunion by the battered woman, especially where such actions are used to attack the victim's credibility. In Slater, the court found the BWS testimony evidence was relevant to explain some of the victim's behavior, such as her failure to leave the defendant sooner and to minimize some early violence. However, it did make sure to exclude BWS testimony relating to post-traumatic stress disorder and profiling.

In the current case, expert Professor Simoni's testimony regarding BWS covered eight different topics: (1) The Typical Profile of a Batterer; (2) Patterns of behavior of batterers and battering victims; (3) The cycle of violence; (4) Recantation; (5) Behavior right after the abuse; (6) The So-Called "Window" and Why it closes; (7) Why victims return to the relationship; and (8) The posing of a hypothetical. Each will be admissible only if it is probative as to a contested issue, as long as it is not later excluded under CEC 252 for undue prejudice.

(1) The Typical Profile of a Batterer

In Slater, the court excluded this testimony as an inadmissible portion of the expert's testimony regarding BWS. Here, Professor Simoni explained in her testimony there was no typical profile in terms of socioeconomic status or race of a male batterer, as all classes and races are represented. While this testimony actually explains that there is no typical profile, it will still likely be inadmissible as not probative of a contested issue, as was done in Slater. Profiling has a high potential for creating undue influence on the jury and is not an issue in this case.

(2) Patterns of behavior of batterers and battering victims

Here, Professor Simoni went into great depth explaining the patterns of behavior seen in both batterers and battering victims. While the patterns of behavior seen in batterers may be considered to fall into the category of profiling and thus be excluded, that is unlikely. Rather, the court will likely follow the reasoning used in Slater as to character traits and patterns of behavior. The court reasoned that, even where a victim does not

possess a particular trait of BWS, or only possesses that trait to a small extent, it is relevant to help the jury ultimately determine whether the victim does in fact suffer from BWS. Following that reasoning, the court admitted evidence that battered women are passive, despite the defendant's argument this was irrelevant, as the alleged victim did not possess that trait. This is because there was evidence that the alleged victim exhibited this behavior sometimes and therefore fit into the described syndrome.

Here, evidence as to battering victim's patterns of behavior, under that reasoning, is definitely relevant to determine whether Sarah Morris fits into the described syndrome. Furthermore, the court is likely to find that evidence as to batterer patterns of behavior is admissible to also aid in determining whether the victim fits into a described syndrome. This is because the victim's behavior may be a response to typical batterer behavior and help to explain or illuminate typical battering victim behavior in Sarah Morris. Ultimately, then, the jury will better be able to determine whether BWS applies in the current case.

(3) The cycle of violence

Here, Professor Simoni described in her BWS testimony the "cycle of violence" that typically occurs once a woman has committed to a relationship with a batterer. In Slater, the court held this evidence describing the cycle of violence provides the type of explanation that is necessary for BWS to be understood. Here, Professor gave a very similar explanation to the one used in Slater. As such, this evidence is likely admissible as probative of a contested issue in the case.

(4) Recantation

In her testimony regarding BWS, Professor Simoni explained the phenomenon of "recanting," wherein about 80 percent of the time, a woman who has been initially assaulted will recant, change or minimize her story. She further explained that this does not happen only after there has been a continuing pattern of abuse and is actually more likely to occur after the first imncident. This information is highly probative of a

contested issue, as Sarah Morris has in fact recanted on her story. As such, the testimony is likely admissible.

(5) Behavior right after the abuse

Here, Professor Simoni described in her testimony the typical behavior of the victim of the abuse right after the abuse occurs, which usually involves terror and shock. In Slater, while the court did not allow evidence of PTSD, it did allow use of the terms "flat affect" and "piecemeal memory" to explain why the victim did not tell anyone at the hospital about the defendant injuring her. As such, here, as long as Professor Simoni does not go as far as to include testimony regarding PTSD, but rather limits hre testimony to an explanation of the victim's behavior as a possible side effect of BWS, the testimony is likely admissible

(6) The So-Called "Window" and Why it closes

After describing typical victim behavior right after the abuse, Professor Simoni explained the idea of the "window." Specifically, when the actual violent event occurs, the victim is able to feel and recall the details of the event for a short period. That short window tends to stay open only if the woman leaves the relationship and has support in the outside community. However, Professor Simoni went on to explain that the window will in fact close when the woman has contact with the batterer. She also gave many reasons for the closing, such as kind treatment from the batterer, threats if she talks about the event, and even financial fears. If a victim wishes for the relationship to continue, she will change the story to sound less harsh and even lie about the event. Because of this phenomenon, women are most likely to be honest within the first 24-48 hours after the incident.

This information is highly probative of a contested issue here. This is because Sarah Morris did in fact change her story after the "window" closed – claiming later that the violence was accidental – and she returned to her husband. As such, the testimony is likely admissible.

(7) Why victims return to the relationship

Here, Professor Simoni explained that women do tend to return to their abusers and why. Again, here, because, Sarah Morris did in fact return to the relationship, this testimony is highly probative as to a contested issue and is likely admissible.

(8) The posing of a hypothetical

Professor Simoni also responded to a hypothetical from the judge. According to Slater, when BWS testimony is properly admitted, testimony about the hypothetical abuser and hypothetical vivctim is needed for BWS to be understood. To the extent that the expert testimony suggests hypothetical abuse that is worse than the case at trial, it may even work to the defendant's advantage. In any event, limiting testimony to the victim's state of mind without some explanation of the types of behaviors that trigger BWS could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct. Here, then, the posing of the hypothetical to expert Professor Simoni was equally needed for BWS to be understood and as such, admissible.

CEC 352 Exclusion for Undue Prejudice

Under Evidence Code Section 352, the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

In People v. Gould, the court excluded all BWS testimony, finding it to be both irrelevant under the first prong and also posing the danger of undue influence. The court found the testimony to be powerful, authoritative and likely to have an effect on the jury. The expert was presented as a highly qualified expert and gave a lengthy and dramatic testimony. She also explained in detail the several cycles of a typical battering relationship. She extensively described the male batterer, explaining how he first

charms, then demeans and insults his partner. She described that he is someone who both psychologically and physically brutalizes a woman to satisfy his need for power and control. Finally, she compared the relationship between a battering man and a battered woman to "Stockholm Syndrome," a condition which occurs when a hostage begins to view her "attacker" as a "good guy." She even went so far as to state that a batterer is often referred to as a "Dr. Jekyll and Mr. Hyde." Given the inflammatory nature of the expert's testimony, the court found the testimony to be highly prejudicial, ultimately concluding that the jury was reasonably likely to reach a result more favorable to the alleged battered had the court originally excluded the expert's testimony regarding battered woman's syndrome.

Here, there are the same concerns. Professor Simoni's testimony certainly poses a high risk of the danger of undue influence on the jury outweighing the probative value. She extensively described typical behavior patterns in the batterer and the victim. That being said, the testimony in Gould, first of all, was found to have very little probative value in that case. Here, as explained above, the portions of Professor Simoni's testimony deemed to be admissible under the relevance test are highly probative of a contested issue. Furthermore, Professor Simoni did not dramatize BWS in the way that was done by the expert in Gould and which worried the court in that case. She made no inflammatory comparisons, and certainly wasn't overly dramatic, which would pose a danger of unduly influencing the jury. Rather, she took care to speak matter-of-factly and present the syndrome in a way that goes to the contested issues, without doing so at the expense of inflaming the jury.

Additionally, the court may work to prevent the risk of undue influence by giving jury instructions limiting the use of the testimony, as was done in People v. Bowen.

Conclusion

Ultimately, it is likely that Professor Simoni's testimony will be found both relevant, except as to the profiling testimony, and not risking the danger of undue influence outweighing probative value. As such, the evidence is likely to be admissible.

SELECTED ANSWER 2

TO: Deputy District Attorney Milo Ward

FROM: Applicant

DATE: August 1, 2013

RE: People v. Draper draft memorandum (internal memo)

You have asked me to draft a memo in which I analyze which portions of Professor Simoni's testimony are admissible, and which portions are not. You have informed me that you will use this internal memo to help you draft the post-hearing brief requested by the judge. I have attached the draft of the memo you requested. Please let me know if you have any questions.

I. Relevance of the Battered Woman's Syndrome Testimony

Evidence Code Section 801 permits the introduction of testimony by a qualified expert when that testimony may "assist the trier of fact." Expert testimony is admissible on any subject "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Section 801. (The defendant has not contested our expert's qualifications, according to the transcript of the hearing.)

There are two major components of a relevance analysis in admitting battered woman's syndrome (BWS) expert testimony. First, "there must be sufficient evidence to support the contention that BWS applies to the woman involved." Second, "there must be a contested issue as to which [BWS testimony] is probative." People v. Slater.

The defendant objects to the subject matter of the expert's testimony because "there is no evidence that Mr. Draper fits the male batterer profile or that Ms. Morris suffers from battered woman's syndrome."

A. Sufficient Evidence to Support That BWS Applies To Sarah Morris in This Case

Whether expert testimony regarding battered woman's syndrome is admissible in a particular case initially depends on whether that evidence is relevant. Therefore, in making a determination of relevancy, the evidence must support in this particular case "a contention that the petitioner suffered ongoing abuse or battering." People v. Gould. The Gould court held that expert testimony on BWS is relevant if there is a sufficient "factual basis for the fact that petitioner experienced ongoing abuse or battering." Gould. When the existence of a preliminary fact, such as this one regarding ongoing abuse or battering, is disputed, "its existence or nonexistence" must be determined. Columbia Evidence Code Section 402.

Furthermore, the Bowen court stated that "the argument that evidence relating to credibility cannot be admitted until the underlying charge has been found true was rejected in other domestic violence cases." This kind of expert testimony cannot be admitted to prove the occurrence of the charged crimes; there "must be independent evidence of domestic violence—otherwise the expert testimony about how victims of domestic violence behave would lack foundation." Bowen

In the Bowen case, the court found that there was "an adequate foundation" for the BWS expert testimony because evidence presented at trial "suggested the possibility that Defendant and [victim] were in a 'cycle of violence' of the type described" by the expert. The victim had told a police officer that the defendant had complained about the cleanliness of the apartment on the evening of the assault. There was also evidence in the Bowen case that the victim and the defendant had also argued that evening about defendant's failures to support the victim. In the same argument, the defendant had also told the victim that she had to pay rent or move out and then the defendant later threatened to kill the victim. Lastly, there was evidence in the Bowen case to show that when the victim had tried to leave, the defendant assaulted her. All of this evidence is drawn from various, different incidents and occurrences from the same evening. Bowen.

This instant case is comparable to Bowen and shares several similarities in the amount of evidence suggesting a "cycle of violence." See Bowen. On the 911 tape, from June

5, 2012, which was played during the hearing, we see evidence that Horace Draper (Draper) hit Sarah Morris (Morris) in the mouth, causing her to bleed and not be able to breathe. Just like the victim in Bowen told the police officer about defendant's complaining about the cleanliness of the apartment, Sarah had told the 911 dispatcher about her husband's hitting her. The 911 tape also shows Sarah telling the dispatcher that her husband not only hit her but then took away the car keys and took the car. Later testimony from Morris's brother also shows evidence of Morris having a "bloody mouth and a large bruise on her neck and shoulder area."

The testimony of Morris's dentist, Cathy Tucker, also corroborates the brother's testimony: "Ms. Morris came into my office on June 5, 2012 at around 10 a.m. She had a pretty badly split lip, a significantly swollen mouth, extensive bleeding, and a loose tooth . . . The treatment took four and one-half hours." The dentist also testified that the injuries were likely caused by a high-impact blow.

In addition, just as the Bowen court found that the victim and defendant's arguing showed evidence of a "cycle of violence," the court in this case will likely find that Draper and Morris's arguing is evidence of a cycle of violence. According to the testimony of Paul Morris, Draper and his wife, Sarah Morris, had been arguing on that same June 5, 2012 morning, before the assault and incident. Draper and his wife had been arguing because Draper had taken $120 from her purse to pay the gardener.

There is also evidence tending to show an intent by Draper to control Morris based on Paul Morris's testimony. The brother testified that ever since Draper lost his job and Sarah Morris got promoted, Draper was a lot moodier and got upset a lot more and demanded that Sarah Morris quit her job. Draper had told Paul Morris, Sarah's brother, that he was making her give him all her paychecks because he couldn't trust her any more. Sarah Morris had also told her brother about a month before the June 5, 2012 incident that she was feeling "horrible, anxious and depressed." Sarah Morris said she felt like "she couldn't do anything right."

This case is even stronger than the one in Bowen because the evidence and testimony suggests a longer cycle and pattern of abuse and jealousy seems to have spanned more than a month at least, and Morris and Draper have been in a cycle of argument, jealousy, and control since Draper had been fired and Morris got promoted. Whereas the Bowen court analyzed the cycle and events within one evening, the evidence shows a cycle of at least a month. See Bowen. This case is also similar to Slater, where the court also found sufficient evidence to establish a foundation for a cycle of violence.

The evidence in this case would tend to form the basis for a cycle of violence, which our expert will testify as when "the batterer has an absolute need for power and control over his female partner," where the relationship usually follows a three-phase cycle of "tension-building," "actual physical violence," and a "honeymoon" phase.

.

Therefore, there is likely to be a sufficient "factual basis for the fact that petitioner experienced ongoing abuse or battering." Gould. Just as in Bowen, there is an "adequate foundation" for the BWS expert testimony because evidence can be presented to "suggest the possibility that" Draper and Morris were in a cycle of violence of the type described by our expert.

Furthermore, this case is different and distinguishable from Gould because the court in that case found that there was "no evidence, with the exception of the present incident, to indicate [victim] is in a battering relationship." Gould. "A single violent incident, without evidence of other psychological abuse, is not sufficient to establish that a woman suffers from battered woman's syndrome." Gould. Even though Gould and Bowen may seem irreconcilable, Bowen conforms with the Gould court's holding because the incidents in Gould were multiple in the same evening—thus, showing a "cycle." Here, there is evidence to suggest such a cycle because Morris's brother, Paul, has testified that ever since Draper lost his job and Morris got promoted, Draper was a lot moodier and got upset a lot more and told Morris to quit her job and even withheld her paychecks from her because "he couldn't trust her." In addition, Morris had also displayed signs of abuse when she said she felt horrible, anxious and depressed. Such

incidents and behavior patterns over at least a month's span are different than just one incident in one night, such as the one in Gould.

B. Contested Issue as to Which BWS Testimony Is Probative

In order for BWS testimony to be admissible, there must be a contested issue as to which it is probative. BWS testimony is admissible to disabuse the jury of widely held misconceptions or popular myths. It is often admitted to address "recantation and reunion by the battered woman, especially where such actions are used to attack the victim's credibility." Slater.

The Slate court found that the BWS testimony was also admissible because there was a contested issue as to which testimony was probative. In Slater, the BWS testimony was admissible to disabuse the jury of widely held misconceptions or popular beliefs, such as "recantation and reunion" by the battered woman.

The instant case is likely similar because a jury or common observers may not find Sarah Morris's previous telephone call to the dispatcher or her conversations with her brother on June 5, 2012, to be credible because she has changed her story. As you have told me, Morris has since changed her story and now states that her injuries were accidental. The BWS testimony of our expert would be probative to help disabuse the jury of common myths or misunderstandings regarding recantation or reunion, just like in Slater and Bowen. Such expert testimony could help explain Sarah Morris's subsequent actions, behavior, and testimony. As the Bowen court wrote: "When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness." Bowen.

C. Unfair Prejudice

Section 352 of the Evidence Code states that a court in its discretion may "exclude evidence if its probative value is substantially outweighed by the probability that its

admission will. . .create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The expert testimony of Simoni should only be used to bolster the credibility of Morris's past statements, not to serve as evidence "to prove the occurrence of the charged crimes." Bowen. The instant case may require a jury instruction or limiting instruction of some sort like the ones in Bowen and Slater.

II. Admissible and Inadmissible Portions of Simoni's Testimony

You have asked me to analyze which portions of Professor Simoni's (Simoni) testimony are admissible, and which portions are not. Based on the evidentiary hearing, Simoni will attempt to testify on the eight following subjects: 1) the typical profile of a batterer; 2) patterns of behavior of batterers and battering victims; 3) the cycle of violence; 4) recantation; 5) behavior right after the abuse; 6) the so-called "window" and why it closes; 7) why victims return to the relationship; and 8) the posing of a hypothetical.

Based on the analysis of the case law and evidence code, there is likely evidence to support testimony on all these topics, except for the first topic, the typical profile of a batterer.

A. The Typical Profile of a Batterer

As stated before, a court in its discretion may "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . .create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Section 352.

The trial court did not admit such in Slater and the court of appeals affirmed the trial court's holding. Slater. It is not clear from the Slater opinion why the trial court did not admit such expert testimony, but the Gould opinion suggests that such testimony is inadmissible because it would be too prejudicial under Section 352. Gould.

In Gould, the court held that "we cannot ignore" the expert's "powerful testimony and its likely effect on the jury." The expert was presented as authoritative. She had extensively described the profile of the prototypical "male batterer," explaining how "he first charms, then demeans and insults his partner." The expert in Gould described a typical battering man as someone who both psychologically and physically "brutalizes a woman to satisfy his need for power and control." The Gould court found this type of testimony to be too prejudicial.

Our expert, Professor Simoni, is going to give similar expert testimony about the batterer's "typical profile." She said during the preliminary hearing that "there are commonly recurring characteristics of batterers," and that the typical batterer will at first be "charming, romantic and intense." The typical male batterer will also make his partner dependent and attack her self-esteem, just like the expert in Gould said the batterer would brutalize the woman to satisfy his need for power and control.

Our expert also has similar credentials to the one in Gould. The Gould expert was the director of a domestic abuse center, just like Simoni worked as a legal director for a program that was part of a larger domestic violence agency in Oakmont in Sanford County. She also served on several boards that promoted an end to domestic violence. Therefore, based on the Slater and Gould cases, Simoni's testimony regarding any profile of a typical batterer will likely not be admissible because it will be too prejudicial under Section 352 and could mislead the jury.

B. Patterns of Bhavior of Batterers and Battering Victims

See above.

Expert testimony is permitted when the expert is qualified and the testimony may assist the trier of fact and when the testimony is on a subject "beyond common experience." Section 801.

In Bowen, the expert was allowed to testify on particular behavior patterns "commonly observed in abusive relationships." The expert testified that the abuser often uses psychological, emotional, or verbal abuse to control the victim. When the victim tries to leave or to assert control over the situation, the abuser may turn to violence as an attempt to maintain control. Later, even if there has been no other episode of violence, the victim may change her mind about prosecuting the abuser and may recant." Bowen. The court found this evidence relevant, on topic, and not too unfairly prejudicial.

Here, our expert will also testify to similar patterns of behavior of batterers and battering victims. She will testify that the man will start to blame the woman for everything that goes on around him. He will also use "coercion, threats, and intimidation to maintain control of his partner." The pattern of behavior may lead to forcing the female to watch pornographic movies and engage in sexual activities that make the female partner feel guilty—"cross her bottom line." He's able to get her to feel ashamed about things that are going on in the relationship, things that she's "uncomfortable with; then he begins to make threats."

Therefore, because the expert testimony in Bowen and here will be sufficiently similar, a vcourt should likely find this portion admissible.

C. The Cycle of Violence

See above.

The courts in Slater and Bowen admitted similar evidence regarding the cycle of violence. In Slater, the court affirmed the trial court's admission of this evidence. In Bowen, the expert testified that the cycle of violence has an initial "tension building stage," where the male may make small complaints here and there about, for example, the cleanliness of the house.

Our expert will also give a similar testimony regarding the cycle of violence and the "tension building stage." She stated in her hearing that "during the tension building stage, the batterer criticizes his partner." The man will start to emotionally abuse his partner by calling her names and insulting her. The batterer will then isolate the woman from her friends, coworkers, and family. Economic control is a common element.

Therefore, based on the holdings in Slater and Bowen, a court will likely find that the cycle of violence testimony is also admissible.

D. Recantation

See above.

In Bowen, the expert explained why victims of domestic violence may give conflicting statements: "They may be financially dependent on the defendant. They may be pressured or even threatened, by the defendant or other family members. They may still love the defendant and hope that things will get better." The victim may then change her mind about prosecuting the abuser and may recant her previous statements to the police. The woman will also likely minimize the incident. Bowen. About 80-85 percent of victims actually recant at some point.

Just as in Bowen, Simoni will also give similar testimony about recantation. She will say that "this recanting . . . is more likely to occur after a first incident." A woman will tend to minimize and deny the incident. The woman will engage in self-blame and sort of recast the incident, especially if the relationship continues. The victim also begins to feel guilty and responsible.

Thus, because our expert will give similar testimony in a similar case to that of Bowen, the court will likely also admit this testimony regarding recantation.

E. Behavior Right After the Abuse

See above.

The behavior right after the abuse will be admissible because it is probative and will help the jury to understand why Morris made certain recantations or reunions to her husband. A jury may not totally understand why a woman would return to an abusive spouse, but testimony like our expert's can help them understand and demystify common myths.

F. The "Window" for Truthfulness and Why It Closes

See above.

The expert in Bowen testified that there is typically anywhere between 24 and 48 hours where victims will be truthful about what occurred because they're still angry; they're still scared. But "after they have had time to think about it . . . it is not uncommon for them to change their mind and . . . actually recant at some point in the process." Some victims will lie to the police and attempt to minimize the experience.

Our expert will also give similar testimony regarding the window of truthfulness that can close. The window will stay open "however long the woman has support in the outside community" and "only if she leaves the relationship." "The woman never expected this person that she loves . . . to physically hurt her." The window closes because the batterer starts the honeymoon period. The woman may also lose sight of what actually happened.

Therefore, because the expert testimony about the window closing will be based on similar types of information and patterns of behavior, a court will also likely admit this evidence.

G. Why Victims Return to the Relationship

See above.

In Slater, the court allowed the admission of evidence regarding why women stay and return to the relationship. Also see above in Section D. Our expert will also testify that victims typically and often go back to their abusive lover because "they love them; they're not sure how they can survive on their own; pressure from family and friends; or because their children want to be with their father." The expert's testimony regarding why victims return will also be helpful in disabusing common misconceptions and beliefs by the jury because it would help them understand why Morris would want to return. Thus, the court will likely also admit this testimony because of the similarities between the testimony in Bowen and in this case.

H. The Posing of a Hypothetical

In Slater, the expert was allowed to respond to a hypothetical posed by the prosecutor. The hypothetical was very specific to the alleged facts that actually happened in the Slater case. Similar to the Slater case, our expert will likely be able to testify on the hypothetical posed to her that are similar to the facts in our case. The hypothetical can be helpful to the jury because it ties up all the behaviors and common misconceptions regarding a typical victim who is battered.

The court may say that this testimony is too prejudicial though because it could mislead the jury as to believing that the facts and actions of Draper were in conformity with the hypothetical. A limiting instruction may be needed.

III. Conclusion

Therefore, the testimony is generally admissible and relevant and not too prejudicial if a limiting instruction is given. However, the testimony on a typical batterer's profile will likely not be admitted.

California Bar Examination

Performance Tests and Selected Answers

February 2014

THE STATE BAR OF CALIFORNIA
COMMITTEE OF BAR EXAMINERS/OFFICE OF ADMISSIONS

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2014 California Bar Examination and two selected answers for each test.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

CONTENTS

February 2014

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

ADAMS v. KUSTOM SPAS, INC.

ADAMS v. KUSTOM SPAS, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

MALLIN, BAINES & ARTHUR

ATTORNEYS AT LAW

Midvale, Columbia

MEMORANDUM

TO: Applicant

FROM: William C. Baines

DATE: February 25, 2014

SUBJECT: Brianna Adams & Associates v. Kustom Spas, Inc.

Our client, Brianna Adams, is a licensed broker who specializes in finding buyers for small businesses for sale in Columbia. Ms. Adams entered into a six-month listing agreement with Kustom Spas, Inc. to find a buyer for the business at a 10% commission. She was unable to put a deal together within the six-month term of the agreement, but several months later she learned that Kustom Spas was sold for $1.75 million to a person whom she had introduced to the transaction and that the broker who had handled the closing of that deal was Charles Smith. Both brokers lodged demands for a commission on the sale with the escrow office where the deal was pending. The deal closed, with the escrow agency holding in trust $175,000, just enough to cover Ms. Adams's commission, pending resolution of the contending claims of Adams and Smith.

We have just concluded an arbitration hearing. The issues are: (1) whether a commission is due; (2) who, if anyone, should receive a commission; and, (3) if a commission is due, how much should the commission be.

What I need from you is a draft of a post-hearing arbitration brief that persuades the arbitrator that Ms. Adams is entitled to a commission of $175,000 because she was the procuring cause of the sale, and that her claim is superior to Smith's claim. Please follow the format and guidance specified in the attached office memorandum regarding persuasive briefs. Although you will have to apply the facts in the Argument section of the brief, there is no need for an extensive Statement of Facts. Since we have just

finished the hearing, the Arbitrator is quite familiar with the facts, so a fact statement of five or six sentences will suffice.

MALLIN, BAINES & ARTHUR

ATTORNEYS AT LAW

Midvale, Columbia

MEMORANDUM

September 14, 2013

SUBJECT: Persuasive Briefs

Unless otherwise instructed, attorneys shall include in all briefs a Statement of Facts written in such a way as to persuade the tribunal that the facts support our client's position. The Statement of Facts is not an indiscriminate recitation of all the facts in the case. Although the facts must be stated accurately, careful selection of the ones pertinent to the legal arguments and that support our client is not improper.

The Argument section of the brief should contain separate segments, each labeled with carefully crafted headings that summarize the argument in the ensuing segment. Do not write a brief that contains only a single broad heading. Each heading should succinctly state the reasons why the tribunal should adopt the position you are advocating and not merely a bare legal or factual proposition.

The body of each argument should match the relevant facts to the legal authorities and argue persuasively how the facts as applied to those authorities support our client's position. Authority that favors our client should be emphasized, but contrary authority should be addressed in the argument and distinguished or explained. Do not reserve argument for reply or supplemental briefs.

You need not prepare a table of contents, a table of cases, a summary of the argument, or an index. These will be prepared after the draft is approved.

EXCERPTS FROM TRANSCRIPT OF ARBITRATION HEARING

Brianna Adams & Associates and Charles Smith, Claimants

v.

Kustom Spas, Inc.

DIRECT EXAMINATION OF CLAIMANT BRIANNA ADAMS by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Ms. Adams, please explain to the Arbitrator the nature of your business.

ADAMS: I'm the owner and principal of Brianna Adams and Associates in Midvale, Columbia. I'm a business broker. By that I mean that I represent companies or individuals who want to buy or sell a business, and I put the buyer and seller together and help them work out a satisfactory purchase and sale arrangement.

BAINES: How do you get paid for your services?

ADAMS: Usually it's by commission — a percentage of the price, varying from 5% to 10%, depending on the dollar magnitude of the deal.

BAINES: Which party to the transaction pays the commission — the buyer or the seller?

ADAMS: That depends on which side I'm representing. If my client is the buyer, the buyer usually pays, and vice versa if my client is the seller. In this case, I represented the seller, Kustom Spas, so that's who was supposed to pay me.

BAINES: At what point in the transaction do you get paid?

ADAMS: Ordinarily, it's at the time of the closing of the deal. The usual practice is to open an escrow with a bank or other fiduciary early in the process, and, as contract documents, escrow instructions, stock certificates, money, and other components of the deal are forthcoming, they are deposited in the escrow. And when the parties agree that the deal is ready to close, the escrow holder notifies everyone concerned. At that point, I file a formal written demand for my commission, and I'm paid from the proceeds of the sale.

BAINES: Okay, now, when did you undertake to represent Kustom Spas — that is, to find a buyer for that company?

ADAMS: Back in January 2013, I was in the bar at my country club, and I overheard two members talking about how one had sold his business and retired. The other one, Billy Koster — the owner of Kustom Spas — said he was trying to do the same thing but wasn't sure how to go about disposing of his business. I struck up a conversation with Billy, and one thing led to another.

BAINES: Tell us what happened after that.

ADAMS: Well, I told him that I was in the brokerage business specializing in small businesses and that maybe I could help him. We agreed to meet at his office on the next day — January 22, 2013.

BAINES: What happened then?

ADAMS: We met as planned. I asked a lot of questions, looked at his books of account, got an idea about the history of the business, and that sort of thing. He told me how much he hoped to sell for — $2.5 million cash. After we'd talked for some time, Billy — Mr. Koster — asked me what kind of arrangement I'd need in order to go forward.

BAINES: What did you tell him?

ADAMS: I said we'd need to sign my standard listing contract giving me the exclusive right to market his business for, say, six months or a year. The first thing I'd want to do after that would be to get a formal appraisal of the business. That would give both of us an idea of what the market for a spa manufacturing business would bear and what my commission range would be. He told me to go ahead and get things started.

BAINES: What did you do next?

ADAMS: First, I contacted an independent appraiser I usually work with – Martin Apple – and asked him to do an appraisal of Kustom Spas as soon as he could and to keep it confidential. He looked at comparables in the last year, examined Kustom Spas' books, made some inquiries about the company's market reputation, and came back with an appraisal of $1.75 million, including the company's good will and going-concern value. The company was debt-free except for trade creditors, so it looked like it would be a fairly clean deal without involving banks, lenders, and secured creditors.

BAINES: Why did you tell Mr. Apple to keep his work confidential?

ADAMS: Because, until the deal is made public, you don't want the news to hit the trade journals – to keep the wolves away. I mean keep other brokers from trying to horn in on the deal.

BAINES: Okay. What was the next step?

ADAMS: I met again with Mr. Koster. I knew he was going to be disappointed in the appraisal. It's not uncommon for sellers to overestimate the value of their businesses. Three things happened at this meeting that sent up red flags for me. First, he said he didn't want to give me an exclusive listing; second, he wouldn't agree to a one-year representation period; and third, he wouldn't budge from his $2.5 million price.

BAINES: Did Mr. Koster tell you why he didn't want to give you an exclusive listing or give you a one-year contract?

ADAMS: It was sort of vague – just that he didn't like to be tied down in case some other opportunity came along and that, if I had a one-year contract, he was concerned that I'd drag things out.

BAINES: Did you try to persuade him otherwise on any of those points?

ADAMS: No, not really. I've learned that it's not a good idea to start out the relationship by arguing with the client. Reality about the market and price range usually sets in later when the offers start coming in and negotiations start. So I said, "All right, let's go with a nonexclusive agreement for a six-month period and I'll do my best to market the company at your price."

BAINES: Let me show you a document we've marked in evidence as Exhibit A. Can you tell me what it is?

ADAMS: Yes. It's the listing contract Mr. Koster and I signed on February 1, 2013. It was for a six-month representation period ending July 31, 2013. It's my standard form, and, based on the size of the deal, we agreed to a 10% commission.

BAINES: Did Mr. Koster balk at all at the 10% commission?

ADAMS: Yes. He said he thought it was too high, but I said that is my standard commission for a deal of this size. I told him I might reduce it later if the deal didn't come in as high as he wanted. He grumbled but said okay.

BAINES: I notice that there's nothing in the contract concerning your right to receive a commission after the end of the representation period. Is that customary in the contracts you enter into?

ADAMS: No, I usually include an extension clause. That's a clause that covers the situation where a sale is made to someone I introduced to the deal after my contract is up. This time, however, I decided not to.

BAINES: Why is that?

ADAMS: Well, I sensed that Mr. Koster was going to be a hard sell – his asking price was just too high. And he was pretty clear that he didn't want to give me a contract for more than six months. He complained about the 10% commission. I was concerned that an extension clause in the contract might look to him like a back door effort to sneak in a representation period of more than six months. So I just settled for the language in paragraph 4B, which he didn't object to. It left it open-ended and I felt that I'd be in a position to claim a commission if I turned out to be the procuring cause of any sale, even if it happened after my contract expired.

BAINES: All right; how did you go about generating interest in buyers for Kustom Spas?

ADAMS: I advertised in the trade journals, you know, an ad describing the opportunity and stating, "See Brianna Adams and Associates for details." I contacted people I knew from prior deals who had expressed interest in buying a business. I also followed some leads Mr. Koster gave me – acquaintances of his who he said were hot prospects.

BAINES: Did your efforts generate any interest?

ADAMS: At first, beginning about the middle of February, there was the usual flurry of activity with maybe a dozen inquiries, but nothing very serious. The only one that seemed to hold any promise was from Artie Baylor, owner of Midvale Pool and Spa Service. In late April, a broker representing Mr. Baylor came to me and said that Mr. Baylor had been thinking about getting into the manufacturing end of the business and might be interested if the price was right. It was a fairly serious inquiry, and I really thought it was going to produce a deal.

BAINES: You said that, when you met with Mr. Koster, he gave you some leads of possible buyers. Was Mr. Baylor one of those leads?

ADAMS: No. As far as I know, Mr. Baylor and his broker responded to one of the ads I had placed in the trade journals.

BAINES: What happened next?

ADAMS: Well, I gave Mr. Baylor's broker the details about the company and the $2.5 million asking price, I introduced him to Mr. Koster, negotiated a confidentiality agreement, and made arrangements for Mr. Baylor's accountants to examine the company's books. A few weeks later, Mr. Baylor's broker came back to me with an appraisal he obtained – that appraisal valued the business at $1.5 million. That was lower than my appraisal of $1.75 million.

BAINES: Did you keep Mr. Koster informed of what was going on?

ADAMS: Oh yes, every step of the way. We had frequent telephone conversations. I told him I was continuing to solicit offers but that, so far, the only credible prospect was from Midvale Pool and Spa. I told him about Baylor's $1.5 million appraisal, but that I was confident I could get him off that figure. So, Mr. Koster told me to keep negotiating — but he reminded me of his $2.5 million asking price and that he wasn't going to drop very much off that number, especially since my commission was so high.

BAINES: What did you do after that?

ADAMS: I got into some very intense negotiations with Mr. Baylor and his broker. I argued that my appraisal was more realistic than theirs, that their appraisal had not taken good will into account. I told them that, even if there was a bit of a premium in the $1.75 million appraisal, it was worth it to Mr. Baylor because Kustom Spas was a going concern, and he could capitalize on his existing connections in the spa industry.

BAINES: Did you make any headway?

ADAMS: Not at first. We kept talking intermittently through about mid-June. Mr. Baylor said he wasn't unalterably opposed to making an offer of $1.75 million, but the real problem was that he just couldn't get the bank financing to swing such a deal. I told him and his broker that I had some financing sources and that I might be able to help solve that problem. They told me to go ahead and see what I could do.

BAINES: Were you able to do anything?

ADAMS: Yes, I arranged for a loan broker I worked with a lot – Vinny Maniscalco Loan Company and Forcible Collection Agency – to commit to making Baylor a loan on fairly favorable terms. With that loan commitment in hand, Mr. Baylor agreed to make an offer of $1.75 million.

BAINES: Did you think there was any chance that Mr. Koster would accept such an offer?

ADAMS: Yeah, I thought there was a chance. I had kept him informed all along and told him that Baylor was the only serious prospect we had and that I didn't think he was going to meet the asking price.

BAINES: What did he say to that?

ADAMS: He was noncommittal. He said to bring him the best offer I could get and he'd consider it.

BAINES: What did you do next?

ADAMS: I helped Baylor's broker write up the offer at $1.75 million cash. I worked with Mr. Koster's attorney to draft some transfer documents, and then I took the whole package to Mr. Koster. Also, I opened an escrow at Columbia Title Company. That was about the end of June.

BAINES: What next?

ADAMS: I took the offer to Mr. Koster, and we discussed it at length. He said he wasn't happy with it and, if that was the best I could do, he was disappointed. I tried to convince him that the appraisal I had obtained was reliable and was probably the best he was going to be able to do. He told me that he was firm on his $2.5 million price and to go negotiate some more.

BAINES: Did you?

ADAMS: Yes, but I didn't get anywhere. Baylor just couldn't get the financing. It looked pretty much like a dead end, and no other prospects had developed. From that point on, I kept trying to call Mr. Koster – maybe six or seven times – to see if he'd had any second thoughts, but he wouldn't return my phone calls. July 31st came and went and my contract ran out.

BAINES: Is that your last contact with the transaction?

ADAMS: For a while it was. Then, in early November 2013, I heard through the grapevine that there was a deal pending between Kustom Spas and Midvale Pool and Spa Service. I called Mr. Baylor's broker, but he wouldn't tell me anything other than that Baylor had ended up contracting to buy the company and that he would receive his commission from Mr. Baylor. I found out that Columbia Title Company still had an escrow pending and filed a written demand for my 10% commission. In fact, I was surprised to learn that the escrow number was the same one I had opened back in June 2013.

BAINES: Let me show you a document we've marked as Exhibit B. Can you tell me what that is?

ADAMS: Yes. That's the demand I filed with Columbia Title Company for my commission.

BAINES: Tell us what more you heard about how the deal had gone down.

Objection by ANDREW WELLS, attorney for Claimant, Charles Smith: Objection, Ms. Arbitrator. That calls for hearsay.

ARBITRATOR: That's correct. Mr. Baines, how do you respond?

BAINES: I'll withdraw the question for now, Ms. Arbitrator. I believe we can get in the evidence we need through Charles Smith and William Koster, who are going to be called as witnesses. No further questions of Ms. Adams.

ARBITRATOR: Mr. Wells, do you wish to cross-examine Ms. Adams?

WELLS: Just a few questions, Ms. Arbitrator.

CROSS-EXAMINATION OF CLAIMANT BRIANNA ADAMS by Andrew Wells, attorney for Claimant Charles Smith:

WELLS: Ms. Adams, you testified that Mr. Koster declined to give you a contract term of more than six months — from February 1 to July 31, 2013. Is that right?

ADAMS: Yes, that's right.

WELLS: So, that must mean that you expected and understood that your representation of Kustom Spas completely ended on July 31st. Correct?

ADAMS: Yes.

WELLS: And that, after that date, you no longer had the contractual or agency power to deal with anyone regarding the sale of Kustom Spas?

ADAMS: I guess that's correct, but there was certainly nothing to stop me from following up or referring potential buyers to Mr. Koster after July 31st.

WELLS: Well, as a matter of fact, you never did refer anyone to him after July 31st, did you?

ADAMS: Not exactly, but he ended up selling to Mr. Baylor. I had worked up the deal and referred Mr. Baylor to Mr. Koster during my representation period.

WELLS: But it's true, isn't it, that you completely lost contact with the transaction and had absolutely nothing to do with referring Mr. Baylor after July 31st ?

ADAMS: That's right, but so what?

WELLS: No further questions.

DIRECT EXAMINATION OF CLAIMANT CHARLES SMITH by Andrew Wells, attorney for Claimant Charles Smith:

WELLS: Mr. Smith, will you please explain to the Arbitrator how you became involved in the purchase and sale transaction between Midvale Pool and Spa and Kustom Spas?

SMITH: Yes. I'm old friends with Artie Baylor, the owner of Midvale Pool and Spa. Back in September 2013, we met for lunch one day, and Artie started telling me about how he had tried to buy Kustom Spas but that he couldn't meet Mr. Koster's price. He said he'd still like to buy the company but that his own broker didn't hold out much hope. Anyway, I said that I knew Billy Koster and maybe I could talk to him.

WELLS: Are you a broker?

SMITH: Well, not in the business brokerage end of things. I'm actually a licensed real estate broker, but I've done business deals before.

WELLS: Did you make any effort to contact Mr. Koster?

SMITH: Yes. I had heard that Mr. Koster's wife had been very ill and that she had died recently. I figured he might be ready to reduce his price and get out of the business. So, on September 3, 2013, I met with him and we talked about that.

WELLS: Did you tell him that you had talked to Mr. Baylor?

SMITH: No, not at first. I told him I was sorry to hear about his wife and asked him about whether he had given any more thought to selling Kustom Spas. He said yes and, now that his wife was gone, he was ready to move on. I said I could probably help him and that I'd be willing to try to market his company.

WELLS: What did he say?

SMITH: He told me he had come pretty close to a deal with Artie Baylor, the owner of Midvale Pool and Spa, but that it had fallen through because of price. Back then, he was asking $2.5 million, but Artie had offered only $1.75 million. He said he wasn't sure if Mr. Baylor was still interested but that he — Mr. Koster — was now ready to drop his price.

WELLS: Did he say what his new price would be?

SMITH: No. He was pretty cagey about it. He said only that he'd drop it by "some."

WELLS: Did you tell Mr. Koster that you had talked to Mr. Baylor?

SMITH: No, not right then. I wanted to get my representation contract signed and sealed so I could be sure of a commission. Mr. Koster agreed to sign a 30-day exclusive representation agreement with me, so I went back to my office, prepared a contract, and faxed it to Mr. Koster for signature.

WELLS: Let me show you a document that's been marked as Exhibit C. Is this your contract with Kustom Spas?

SMITH: Yes. We both signed it. It ran from September 4, 2013 through October 4, 2013. Mr. Koster said the exclusive part of the agreement was okay. My usual commission was 8%, but we negotiated a 5% commission. He said that, since he was reducing his price, he thought 5% was fair. I went along.

WELLS: What happened next?

SMITH: I went back and met with Mr. Baylor and his broker. Mr. Baylor's broker said he still had all the paperwork from the first round of negotiations with Mr. Koster

and that he still had a $1.75 million loan commitment from a loan broker named Vinny Maniscalco. He said he was prepared to make the same offer he had before.

WELLS: Did you take an offer from Baylor back to Mr. Koster?

SMITH: Well, sort of. There wasn't much for me to do, so I told Mr. Baylor and his broker to set up a meeting with Mr. Koster and make the offer. Actually, around September 15th, I called Mr. Koster and left a voicemail message for him telling him that Artie Baylor's broker was going to present a $1.75 million offer.

WELLS: Did you do anything else?

SMITH: Yes. I called Columbia Title Company about opening an escrow. The escrow officer I spoke with told me there was already an open escrow.

WELLS: Did you ask who had set up that escrow?

SMITH: No. I assumed that Artie Baylor's broker had done it.

WELLS: Did you stay in contact with the parties?

SMITH: Not really. I just assumed that Mr. Baylor or his broker would keep me in the loop. Besides, I was very busy with other deals.

WELLS: All right. Did there come a time when you learned that a sale had taken place between Midvale Pool and Spa and Kustom Spas?

SMITH: Yes. About October 24th I ran into Artie Baylor, and he told me Mr. Koster had accepted his offer of $1.75 million just the day before, October 23rd, and that they were about to close the deal. He said Mr. Koster had dragged out the negotiations and had told him he didn't want to close until after mid-October.

WELLS: What did you do next?

SMITH: Tried to get hold of Mr. Koster, but he wouldn't return my phone calls and I couldn't find him at his home. I got hold of the escrow officer at Columbia Title Company; found out the escrow number. The escrow officer told me that the escrow instructions didn't say anything about a commission being due me. So, I filed my demand for my 5% commission anyway.

WELLS: Is this document that's been marked as Exhibit D the demand you filed?

SMITH: Yes.

WELLS: No further questions.

ARBITRATOR: Cross-examination, Mr. Baines?

BAINES: Thank you. Yes, Ms. Arbitrator.

CROSS-EXAMINATION OF CLAIMANT CHARLES SMITH by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Mr. Smith, from the time in September 2013 when you first talked to Mr. Baylor about his continuing interest in buying Kustom Spas to the time in late October 2013 when you learned that he had in fact bought the company, did you do anything, other than the steps you described in your direct examination, to bring the parties together and aid in the consummation of the transaction?

SMITH: No. I've told you everything I did. I was the person who referred Mr. Baylor to Mr. Koster.

BAINES: How many times did you meet with Mr. Koster over the course of your representation of him and his company?

SMITH: Just the one time – September 3rd.

BAINES: And how long did that meeting last?

SMITH: Forty-five minutes to an hour.

BAINES: Did there ever come a time when you learned that my client, Ms. Adams, had represented Mr. Koster and Kustom Spas in an earlier effort to sell the company?

SMITH: Only when I learned that we had both filed demands with Columbia Title Company.

BAINES: In other words, you never asked anyone, correct?

SMITH: That's right. And no one ever told me, either. I mean, I assumed that the only other broker in the picture was Mr. Baylor's broker, and I knew he was being paid by Mr. Baylor. I also assume that Mr. Koster would have told me about Ms. Adams's involvement in the earlier failed deal if he thought it was important.

BAINES: As I understand your direct testimony, the offer that Mr. Baylor made in September or October of 2013 was exactly the same offer he had made back in June 2013 — $1.75 million — using the same documentation and with the same loan commitment he had obtained earlier. Is that right?

SMITH: I guess they had to update the documentation, but, yes, that's the way I understand it.

BAINES: So, your claim for a commission is based on the following facts: number one, you learned from Mr. Baylor that he had earlier tried to buy Kustom Spas; number two, Mr. Koster, without knowing you had talked to Mr. Baylor, told you the same thing and asked you to see if you could renew Mr. Baylor's interest; and number three, you told Mr. Baylor's broker to set up a meeting with Mr. Koster and renew his $1.75 million offer. Is that right?

SMITH: Yes, that's pretty much it. But don't forget -- If it hadn't been for my personal contacts and my reenergizing Mr. Baylor's interest and referring him to Mr. Koster, there would never have been a deal.

BAINES: In fact, Mr. Smith, the deal didn't happened during the period of your contract with Kustom Spas, did it?

SMITH: No, but I don't see what difference that makes. The extension clause in my contract gave me the right to a commission because the buyer turned out to be someone I had referred to Kustom Spas. I'm the one who referred Mr. Baylor, and the sale happened within a couple of weeks after the end of my contract. So, I don't see why there's any question about it.

BAINES: No further questions.

EXAMINATION OF RESPONDENT WILLIAM A. KOSTER by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Mr. Koster, when did you and Mr. Baylor actually come to an agreement regarding the sale of your business to Midvale Pool and Spa?

KOSTER: On October 23, 2013.

BAINES: When did he first make the offer that you ended up accepting?

KOSTER: Well, I can't be sure. We did a lot of negotiating when his broker first brought me the offer, but it was sometime in the last half of September 2013.

BAINES: And, isn't it correct that the offer he had submitted to you and that you accepted was exactly the offer he had submitted back in June 2013 through Ms. Adams? That is, $1.75 million and based on the same documentation?

KOSTER: Well, we had to update the paperwork, but, yeah, it was pretty much identical.

BAINES: Now, you have refused to authorize the title company to disburse any of the $175,000 the title company is holding in escrow to either one of the claimants – Ms. Adams and Mr. Smith – correct?

KOSTER: Absolutely. Neither one of them did me any good at all. Ms. Adams couldn't produce a buyer at my asking price because she wasn't a very effective negotiator. I should have just fired her, but she saved me the trouble when she just lost interest and let her contract run out. As for Mr. Smith, he didn't do anything other than send me someone I told him about. And, even then, all he did was send me an offer I had already rejected.

BAINES: You never told Mr. Smith that Ms. Adams worked on and presented Mr. Baylor's offer to you, did you?

KOSTER: No, I didn't see why that mattered, and Smith never asked.

BAINES: Regarding Ms. Adams, you knew, didn't you, that she's the one who found Mr. Baylor as an interested buyer, that she had done all the work to put the deal together, and negotiated on your behalf?

KOSTER: Well, I heard her testimony about all the work she says she did to put together the offer, and I have no reason to doubt any of it. All I know is that she didn't make it happen.

BAINES: In the final analysis, however, you ended up selling to a person she had referred to you and done all the work on and for the same price she had gotten for you, right?

KOSTER: Yeah, but no thanks to her. And it was under totally different circumstances. My wife had died in the meantime, so I was more motivated to take a lower price and get out of the business.

BAINES: No further questions.

EXHIBIT A

SELLER/BROKER AGREEMENT – NONEXCLUSIVE

Right to Represent

1. **Nonexclusive Right to Represent:** Kustom Spas, Inc. and William A. Koster ("Seller") grant to Brianna Adams & Associates ("Broker") for the representation period beginning on February 1, 2013 and ending at 11:59 p.m. on July 31, 2013 the nonexclusive irrevocable right to represent Seller in selling all corporate stock, assets and liabilities, including but not limited to land, buildings, equipment, accounts, and good will of the manufacturing business known as Kustom Spas, Inc. located at 1422 E. Industrial Parkway, Midvale, Columbia (hereinafter, "the property").

* * *

4. **Compensation to Broker:** Broker's compensation shall be on the following terms:
   - **A. Amount:** Broker shall be entitled to a commission of 10% of the gross sale price of the property.
   - **B. Broker Right to Compensation:** Broker shall be entitled to compensation specified in paragraph 4A if Seller enters into a binding agreement to sell the property for the $2.5 million cash asking price or on other terms agreeable to the Seller and the Buyer, if the Buyer of the property is a person or entity secured through the efforts of Broker.
   - **C. Payment of Compensation:** Compensation shall be payable upon completion of any transaction described in paragraph B and upon close of the escrow relating to said transaction.

* * *

9. **Dispute Resolution:** Seller and Broker agree that any dispute or claim arising between them and relating to this Agreement shall be resolved by final and binding arbitration pursuant to the Rules of the Columbia Association of Commissioned Brokers.

EXHIBIT B

Brianna Adams & Associates
Small Business Brokers

224 Fremont Place, Suite 129
Midvale, Columbia

November 4, 2013

Columbia Title Company
Attn: Harold Fraser, Escrow Officer
1465 Norden Street
Midvale, Columbia

RE: Escrow No. 421-344B-13
Midvale Pool and Spa/Kustom Spas

To whom it may concern:

The undersigned, on behalf of Brianna Adams & Associates, files this demand in the above-referenced escrow for a commission of 10% of the gross sale price in the purchase and sale transaction between Midvale Pool and Spa and Kustom Spas. I attach a copy of the Seller/Broker Agreement I entered into for the sale of Kustom Spas and represent to you that I was the procuring cause of the sale to Midvale Pool and Spa.

I hereby notify you that I have authorized my attorneys to file suit against Columbia Title Company if you close the escrow and disburse the proceeds without paying my commission or setting aside the required 10% pending settlement of any dispute.

Very truly yours,
Brianna Adams & Associates

By___*Brianna Adams* _____
Brianna Adams, Owner/Principal

EXHIBIT C

SELLER/BROKER AGREEMENT –EXCLUSIVE

Right to Represent

1. **Exclusive Right to Represent:** Kustom Spas, Inc. and William A. Koster ("Seller") grant to Charles Smith ("Broker") for the representation period beginning on September 4, 2013 and ending at 11:59 p.m. on October 4, 2013 the exclusive irrevocable right to represent Seller in selling Kustom Spas, Inc., including its corporate stock, assets, liabilities, land, buildings, equipment, accounts, and good will. Kustom Spas, Inc. is located at 1422 E. Industrial Parkway, Midvale, Columbia (hereinafter, "the property").

* * *

4. **Compensation to Broker:** Broker's compensation shall be on the following terms:

A. **Amount:** Broker shall be entitled to a commission of 5% of the gross sale price of the property.

B. **Broker Right to Compensation:** Broker shall be entitled to compensation specified in paragraph 4A if Seller enters into a binding agreement during the representation period or within 180 days thereafter to sell the property on other terms agreeable to the Seller and the Buyer, if the Buyer of the property is a person or entity referred to Seller by Broker.

C. **Payment of Compensation:** Compensation shall be payable upon completion of any transaction described in paragraph B and upon close of the escrow relating to said transaction.

* * *

10. **Dispute Resolution:** Seller and Broker agree that any dispute or claim arising between them and relating to this Agreement shall be resolved by final and binding arbitration pursuant to the Rules of the Columbia Association of Brokers.

EXHIBIT D

Charles Smith
Broker/Realtor

42 Empire Place
Midvale, Columbia

October 24, 2013

Columbia Title Company
Attn: Harold Fraser, Escrow Officer
1465 Norden Street
Midvale, Columbia

RE: Escrow No. 421-344B-13
Midvale Pool and Spa/Kustom Spas

Dear Mr. Fraser:

This is to advise you that I am entitled to a commission of 5% of the gross sale price in the above-referenced transaction. I enclose a copy of my representation contract with Kustom Spas; that contract is the basis of my claim. I hereby demand that you disburse said sum to me upon the close of escrow.

Sincerely,

Charles Smith

February 2014

California Bar Examination

Performance Test A

LIBRARY

ADAMS v. KUSTOM SPAS, INC.

LIBRARY

Quincy Sales v. North America Machinery Corp.
Columbia Court of Appeal (2004)……..……

Ellis Realty, Inc. v. Gable Holdings, LLC
United States Court of Appeals, 15th Circuit (2005)..……

AAA Business Brokers v. Wicks
Columbia Supreme Court (2004)…….……

Columbia Association of Commissioned Brokers
Guidelines for Arbitrators in Commission Disputes
Between and Among Brokers...……..…….

QUINCY SALES v. NORTH AMERICA MACHINERY CORP.

Columbia Court of Appeal (2004)

Defendant, North America Machinery Corp. (NAM), appeals the entry of summary judgment in favor of Quincy Sales (Quincy). The case involves a dispute over unpaid post-termination commissions.

NAM manufactures industrial equipment to its customers' specifications. Quincy, an independent sales representative, acts as agent for various manufacturers to sell the manufacturers' products to third parties. In December 1994, NAM, through its vice president Richard Sears, and Quincy, through its owner James Quincy, entered into an oral agency agreement terminable at the will of either party. The parties agree that the only terms of the agency contract concerning payment were that Quincy's standard commission would be 5% and that Quincy would not get paid until NAM got paid. They also agree that, in making their oral agreement, the issue of post-termination commissions never came up.

During the agency relationship, Quincy approached Dorco, a Columbia company, and got Dorco interested in purchasing three machines from NAM. Quincy consulted with NAM, assisted Dorco in drawing up the specifications for the machinery, and negotiated a price and a delivery schedule. Because the machinery required by Dorco was expensive and technologically complicated, NAM was reluctant to commit to three machines at once. NAM's concern was that the machines might not perform as expected by Dorco.

As a result, in June 1998, Quincy negotiated the following arrangement: Dorco would purchase one machine, lease a second one with the option to purchase or return it if it did not perform well, and have the option to purchase a third machine. As an incentive to Dorco to exercise the options to purchase the second and third machines, Quincy offered with NAM's approval to sell those machines at discounted prices. Quincy prepared the necessary purchase, sale, and lease documents, caused Dorco to execute them, and delivered them to NAM. As part of the negotiation, Quincy agreed to reduce his sales commission on all three machines from the customary 5% to 4%. The first two machines were delivered to Dorco during 1999; it paid cash for the first one and

commenced making payments on the second machine on which the lease was to run through March 2001. In December 2000, Quincy terminated his agency relationship with NAM, citing "bad blood" between him and certain NAM personnel. In April 2001, Dorco purchased the second machine, thus ending the lease, and, in January 2002, Dorco exercised its option and purchased the third machine. NAM paid Quincy the commissions on the sale of the first machine and on the lease payments through December 2000, which was when Quincy quit, but refused to pay commissions on the lease payments and sales that occurred after that. Quincy filed suit seeking to recover the commissions for the remaining lease payments and for the sales of the second and third machines.

Quincy's theory of recovery rests on the procuring cause rule. The procuring cause rule allows a salesperson, in whatever field of endeavor, to recover commissions on sales made after the termination of the agency relationship if the salesperson procured the sales through his or her activities prior to the termination of the relationship. It is a common law, equitable doctrine designed to protect a salesperson who, although no longer an agent or employee when the sale is made, has done substantially everything necessary to effect the sale. The procuring cause rule does not apply, however, when the contract between the parties specifies whether and when post-termination commissions are earned, which is not the case here.

NAM argues that Quincy cannot avail himself of the procuring cause doctrine because Quincy, not NAM, terminated the agency relationship. NAM's theory is that the procuring cause doctrine is designed to protect salespeople who are discharged by their employers to avoid paying them a commission. We find little support for this proposition either in the authorities or in logic. Once the agent has put in motion the chain of events that lead to a sale and has done everything within his power and authority to bring about that result, it is irrelevant which party terminated the relationship.

NAM next contends that Quincy was not the *efficient* cause of the sale but, rather, that it was NAM's efforts that brought about the sales of the second and third machines. That is, NAM continued to provide services to Dorco after it had bought the first machine and leased the second, and it was through those services and the

attention given by NAM, not by Quincy, that Dorco ended up buying the second and third machines.

We do not find that argument persuasive. First, Quincy's job was to sell NAM's machines, not to become engaged in post-sale service. Sears' deposition testimony established clearly that post-sales customer relations and service were the responsibility of NAM, not Quincy. Moreover, Sears could not identify anything that Quincy failed to do to bring about the sale. Also, it must be remembered that Quincy brought to NAM a buyer that was ready, willing, and able to buy three machines at the inception but that it was NAM who, albeit for legitimate reasons, declined to sell the three machines at once. Quincy negotiated the sale-option-lease terms, prepared the documentation to conform to the altered transaction, and caused Dorco to execute all the necessary papers. The structure of the deal, by which Quincy agreed to reduce his commission to 4% on all three machines, clearly contemplated that Quincy would receive commissions on the second and third machines.

Thus, we conclude that Quincy was the procuring cause of the sales to Dorco, and we affirm the lower court's judgment.

ELLIS REALTY, INC. v. GABLE HOLDINGS, LLC

United States Court of Appeals, 15th Circuit (2005)

Ellis Realty (Ellis) agreed to be the exclusive broker for Gable Holdings, LLC (Gable) in trying to lease the Highland Tower Office Building (the Tower), a commercial property owned by Gable in Bay City, Columbia. Their written brokerage agreement provided that Ellis would receive a commission on all leases signed *during* the term of the agreement and that Ellis would receive a commission on all leases signed *after* the termination of the agreement so long as within 90 days of termination "negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis negotiated."

Barry Farley, a broker employed by Ellis, served as Gable's primary brokerage agent and, in the fall of 2001, was in negotiations with Firebridge Tire Co. (Firebridge), a potential tenant of the Tower. When Farley left his employment with Ellis in December 2001, Gable terminated its agreement with Ellis. Nine months later, Gable signed a lease with Firebridge, prompting Ellis to demand a commission under the terms of the brokerage contract.

The district court, applying its interpretation of Columbia law in this diversity case, granted summary judgment in favor of Gable, concluding that Columbia common law required Ellis to show that it was the "procuring cause" of the lease and that this tenet of Columbia law trumped any contrary terms in the brokerage contract, including the continuation-of-negotiations-within-90-days-of-termination provision. In our view, Columbia law places no such constraint on the rights of contracting parties to determine whether a commission is or is not due under a brokerage agreement, and, accordingly, we reverse.

On March 29, 2001, Gable signed an exclusive-brokerage agreement with Ellis to negotiate and consummate leases for office space in the Tower. Among other provisions, the agreement contained the following terms:

6. *Agreement to Refer Offers and Inquiries*. During the term of this agreement, Gable agrees to refer to Ellis any and all offers and inquiries by prospective

tenants, and Ellis agrees to investigate and develop such offers and inquiries and to employ its best efforts to lease space in the Tower.

7. *Owner's Reservation to Preempt Broker*. Gable reserves the right to preempt Ellis and deal directly with the prospective tenant with the understanding that, should Gable exercise such right, any commission otherwise payable under this agreement shall remain payable.

8. *Broker's Commission*. Gable agrees to pay Ellis a commission if, within 90 days after the expiration or termination of this agreement, the property is leased or negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis has negotiated or to whom the property has been introduced prior to the expiration or termination of this agreement.

In October 2001, Firebridge, a tenant of another property owned by Gable, made a proposal to Gable to rent space in the Tower. In accordance with section 6 of the agreement, Gable referred the inquiry to Barry Farley. Later that month, Firebridge's broker, Joseph Cherry, contacted Gable and requested that Gable negotiate directly with Firebridge because of their existing relationship. Gable agreed and informed Farley that Gable would be exercising its right under section 7 of the Ellis/Gable agreement to negotiate directly with Firebridge but that Gable would need Farley to "work behind the scenes" to bring the deal to a conclusion.

The parties agree on the following chronology of events: On November 19, 2001, Cherry sent Gable a lease proposal which contemplated that Firebridge would lease 140,000 square feet in the Tower and renew its existing lease in the other Gable property. Gable sent the proposal to Farley for his "input." On November 25, 2001, Farley submitted to Gable a "proposal" that he recommended and said should be presented to Firebridge. On November 30, 2001, Farley announced his intention to leave Ellis, and he became essentially *incommunicado* over the course of the next month, failing to respond to e-mails and phone calls. Gable continued to negotiate with

Cherry and Firebridge during this period. Gable sent a letter to Ellis properly exercising its right to terminate their brokerage agreement effective as of February 3, 2002.

At this point, the parties part ways over what happened next. Gable claims that negotiations between Gable and Firebridge regarding the two-pronged lease proposal ended on March 20, 2002 and that the 90-day period during which negotiations must have resumed in order for Ellis to obtain a commission ended on May 3, 2002. Gable asserts that it did not resume negotiations with Firebridge until May 15, 2002, and that these new negotiations "took on a materially different character from the prior negotiations," i.e., that Firebridge would lease 65,000 square feet in the Tower and sublease additional space from the Columbia Redevelopment Agency, one of Gable's existing tenants. On September 6, 2002, Gable and Firebridge signed a lease on these new terms.

Ellis, on the other hand, asserts that negotiations between Gable and Firebridge "continued unabated from November 2001 until the deal was formalized by a June 5, 2002 letter of intent" and that the final lease was consistent with a proposal that Barry Farley had prepared and submitted to Gable in November 2001.

Without reference to the parties' differing presentations of the events or to the 90-day provision of the agreement, the district court held that Columbia law "establishes that a real estate broker earns a commission by actually consummating the transaction or by showing that his or her efforts were the procuring cause of the transaction." It then determined that Ellis was not the procuring cause of the Firebridge lease and granted Gable's motion for summary judgment.

Columbia common law clearly incorporates the doctrine that a contractually retained real estate agent is entitled to a commission if he or she is the "proximate, efficient, and procuring cause of the sale or lease." But it is not a sword that property owners may use to deprive brokers of a contractually guaranteed commission. Rather, it is a shield designed to protect brokers from being stripped of their commissions by sharp-elbowed property owners who fraudulently or in bad faith delay the consummation of a real estate transaction until after a brokerage agreement has ended.

The opposing contentions of the parties are these. Ellis argues that the district court erred by failing to appreciate the difference between Ellis's *contractual*

commission claim and a common law claim. That is, asserts Ellis, the district court gratuitously wrote a procuring cause requirement into an unambiguously worded contract.

Gable, on the other hand, argues that, under Columbia law, a procuring cause requirement overshadows all brokerage contracts and prohibits a commission from being awarded unless the claiming broker was the procuring cause.

The relevant terms of the contract at issue in this case leave little room for interpretation regarding the right to a commission after the agreement has ended. Section 8 states that:

> Gable agrees to pay Ellis a commission if, within 90 days after the expiration or termination of this agreement, the property is leased or negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis has negotiated [directly or through another broker] . . . prior to the expiration or termination of this agreement.

By its terms, this provision gives Ellis the right to a commission so long as "within 90 days after the termination . . . negotiations continue[d] or resume[d] leading to the execution of a lease." There is nothing in the agreement that requires Ellis to establish that it was the procuring cause of the signed lease. To the contrary, Section 7 of the agreement requires Gable to pay a commission even if Gable itself "preempted" Ellis and conducted all the negotiations itself.

Thus, the factual issues inherent in the differing chronologies argued by the parties must be resolved. If the trier of fact finds that the negotiations that resumed after Ellis's contract expired on May 3, 2002 were, as Gable contends, new and of "a materially different character from the prior negotiations," then Gable would prevail. On the other hand, if the trier of fact found, as Ellis contends, that they were merely a continuation of the same negotiations that Ellis had commenced, then Ellis would prevail.

The proper forum for such a resolution is the district court, to which we remand with instructions to proceed in accordance with this opinion.

AAA BUSINESS BROKERS v. WICKS

Columbia Supreme Court (2004)

AAA Business Brokers (AAA) provides brokerage services to buyers and sellers of businesses, similar to the services of a real estate broker. Arnold Wicks, a Belmont, Columbia businessman, owned Homeguard Security Services (Homeguard), a company that provided antitheft and antiburglary security services for homes and businesses.

David Green, the general manager of Electronic Systems, Inc., a competitor of Homeguard, learned through an acquaintance that Wicks wanted to retire from business and was putting Homeguard up for sale. Green got in touch with Joy Jones, a broker employed by AAA and told her that he was interested in buying a home security business and that he understood that Homeguard was for sale. Based on the tip from Green, Jones contacted Wicks, confirmed that, indeed, he wanted to sell his company, and offered to assist him with the sale.

On behalf of AAA, Jones executed a listing agreement with Wicks for the sale of Homeguard. The contract was a nonexclusive agreement, the term of which was January 25, 2002 through March 24, 2002. It provided that, if Jones produced a ready, willing, and able buyer at $600,000, Wicks would pay AAA a commission of 10% of the sale price. The agreement also contained an "extension clause" that stated, "Seller agrees to pay the full commission to Broker in the event the property is within one year after termination of this agreement sold, traded, or otherwise conveyed to anyone referred to Seller by Broker and with whom Seller negotiated during the term of this agreement."

On January 26, 2002, Jones told Green she had confirmed that Wicks wanted to sell Homeguard – a fact that Green already knew – and directed Green to get in touch with Wicks and negotiate the deal. Green began negotiations with Wicks, but, because of a non-competition agreement in Green's employment contract with Electronic Systems, Inc., Green was constrained to consummate a sale until the end of his non-compete period. Green and Wicks eventually entered into a contract of sale, which closed on July 14, 2002.

Jones's involvement in the transaction consisted of spending about 45 minutes with Wicks on January 25, the day they executed the AAA listing agreement, exchanging two letters regarding the "confidentiality" terms of the transaction, telling two potential buyers, including Green, by telephone that Homeguard was for sale for $600,000, and encouraging them to bid on the property.

Shortly before the close of escrow, AAA submitted a demand in the escrow for a 10% commission. Wicks refused to pay it, asserting that AAA had no right to a commission because AAA was not the procuring cause of the sale. AAA sued for breach of contract, and the trial court, holding that the inquiry began and ended with the "extension clause," entered judgment for AAA.

Wicks appealed, contending that the trial court erred in ruling for AAA because AAA did not establish that it was the efficient procuring cause of the sale. AAA's response is that it was not required to prove that it was the procuring cause because, under the "extension clause" of its contract with Wicks, the evidence established clearly that a sale to a person who AAA had "referred" to Wicks closed within a year after the end of the contract term.

The general rule, adopted by the courts of Columbia, is that the parties to a listing contract are free to frame their agreement in whatever terms they see fit, including a term that makes a broker's right to a commission conditional upon the occurrence of a particular set of circumstances even if the broker is not the procurer of the purchaser. The common law "procuring cause" doctrine – i.e., *a cause originating with a series of events, which, without break in continuity, result in procuring a purchaser ready, willing, and able to buy on the owner's terms* – applies only if the contract between the parties is silent on the issue of consummation of a sale after the expiration of the listing agreement. In other words, "procuring cause" is the default rule.

We agree with the general rule and hold that, because the listing agreement contained an extension clause, AAA need not prove that it was the efficient procuring cause. But that does not end the inquiry. The question remains whether AAA complied with the requirement in the listing agreement that the purchaser be a person who was "*referred* to Seller by Broker."

The term "referred" is nowhere defined in the contract, and the contract does not set out the conditions under which the broker will be deemed to have referred the buyer to the seller. The majority of the authorities in Columbia and other jurisdictions interpreting vague terms in listing agreements such as "refer," "solicit," or "introduce," and similar words have found that such terms necessarily incorporate an unexpressed but inferentially essential requirement that the broker do more than merely send or direct a potential purchaser to a seller. In other words, the majority rule is that, even with the existence of an extension clause, the broker must show that there was at least a *minimal causal connection* between him and the ultimate sale before the broker becomes entitled to a commission.

We adopt the majority rule and hold that a broker seeking to recover under an extension clause must establish some causal connection between the broker's efforts and the eventual sale. This might include negotiations between the parties, facilitating the flow of information, or actual assistance with the closing of the sale. It is not necessary that the broker seeking the commission dominate the transaction, but the broker's participation must be palpable and something more than a mere incidental or contributing influence. A rule that would allow recovery for merely soliciting a buyer without a causal connection with the sale would burden the owner's right to dispose of the property, and we also believe it would be poor public policy to reward brokers with substantial commissions for merely notifying potential buyers of the possibility of a sale without requiring them to exert diligent efforts toward conclusion of the sale.[1]

---

[1] AAA alludes in its briefs to the Guidelines for Arbitrators promulgated by the Columbia Association of Commissioned Brokers and argues that AAA should not be completely foreclosed from claiming at least a portion of the commission for having had *some* involvement in the transaction. The court is cognizant of those Guidelines. They are inapposite here for two reasons: First, this case does not arise in the context of an arbitration. Second, those guidelines deal with disputes *between* brokers competing for the same commission, which is not the case here. An arbitrator has broad discretion under the Guidelines to invoke the equities to apportion the commission between the competing brokers, and the court's holding in this case is not to be read as a rule that

In the present case, AAA's involvement through Jones was at best tangential. She was not involved in any negotiations or the closing of the sale. All she did was tell Green what he already knew and left the rest up to him. Although valid, the extension clause in the AAA contract cannot be interpreted to confer upon a broker a windfall commission so that the broker could simply content herself with sitting back and letting the other parties to the transaction do all the work.

We reverse and remand.

---

infringes upon that discretion. The facts of this case do not lend themselves to apportionment of the commission.

COLUMBIA ASSOCIATION OF COMMISSIONED BROKERS

Guidelines for Arbitrators in Commission Disputes Between and Among Brokers

It is not uncommon in brokerage transactions that disputes arise between a broker who initiated the series of events leading to consummation of the transaction ("Introducing Broker") and another broker who entered the transaction later and closed the transaction ("Closing Broker"). The Columbia Association of Commissioned Brokers ("CACB"), by whose rules all licensed brokers in the State of Columbia agree to be bound, has promulgated the following guidelines for use by Arbitrators in such disputes. There is no predetermined rule or standard that prescribes which of the brokers is entitled to an arbitration award. All awards are based on the facts of a particular transaction. It often turns on the precise terms of the brokerage contract between the broker and the client. It frequently involves the principles of procuring cause, a doctrine defined and recognized by the courts of Columbia. The following factors reflect common characteristics that arise during the course of such disputes and are intended to serve as guidance to Arbitrators to aid them in reaching their decisions. Not all factors are applicable to all cases, but those that are applicable are to be considered as a whole. The factors are not necessarily weighted equally, nor is the outcome necessarily determined by a simple numerical weighting of the factors in favor of one or the other of the brokers. The Arbitrator has broad discretion, based on the law and the equities, in deciding which broker should prevail or whether the brokers should share in the commission.

GUIDELINES FOR ARBITRATORS IN PROCURING CAUSE CASES

Relevant Factor	Favors Intro Broker	Favors Closing Broker	Comments
1. Buyer is first introduced to the property by the Intro Broker.	Yes		
2. Closing Broker never showed the property.	Yes		
3. Closing Broker wrote and submitted an offer on the property on behalf of the client that was substantially similar to an offer written by Intro Broker within the short period of time.			If the two offers are close in substance or time, this factor moves to neutral.
4. A significant amount of time elapsed between the time Intro Broker showed the property and Closing Broker wrote an offer on the same property.		Yes	
5. Intro Broker provided significant information about the specific property, the neighborhood, value of the property, and other characteristics over a period of time.	Yes		Amount of time spent is not the determining factor; rather, it is the nature and usefulness of the information furnished in inducing the buyer's interest in the property.
6. Intro Broker fails to maintain contact with the client.		Yes	Consideration should be given to whether Intro Broker tried to maintain contact but the client did not respond.

Relevant Factor	Favors Intro Broker	Favors Closing Broker	Comments
7. Client expresses dissatisfaction with Intro Broker's professional abilities or conduct. For example: misrepresentations, lack of disclosure, lack of knowledge of the area and the property, nonresponsiveness to client's inquiries, self-dealing, lack of negotiating skills.		Yes	Where client's dissatisfaction does not rise to the level of "just cause" to end the relationship, the arbitrator can consider awarding the Intro Broker an amount in the nature of a "referral fee."
8. Closing Broker asked about client's relationship with another broker early in the process and determined that there was no existing contractual or exclusive relationship between client and any other broker.		Yes	Brokers failing to inquire about existing relationship do so at the risk of losing the commission. If Closing Broker asked about client's relationship with other broker late in the process, this factor would then favor Intro Broker.

PT-A: SELECTED ANSWER 1

MEMORANDUM

TO: Arbitrator

FROM: Applicant

DATE: February 25, 2014

SUBJECT: Brianna Adams & Associates v. Kustom Spas, Inc.

STATEMENT OF FACTS

Ms. Adams and Mr. Koster of Kustom Spas entered into an agreement for the period of February 1, 2013 through July 31, 2013 whereby Ms. Adams was given a nonexclusive irrevocable right to represent Kustom Spas, Inc. in deals to sell the business. Ms. Adams generated interest in buyers for Kustom Spas by advertising in trade journals, contacting people she knew from prior deals, and by following up with leads Mr. Koster gave her. Once Mr. Baylor of Midvale Pool and Spa Service expressed serious interest, Ms. Adams worked to secure a deal between Mr. Baylor and Mr. Koster by negotiating with Mr. Baylor to offer 1.75 million rather than the 1.5 million that Baylor's appraisal came back at, as well as by arranging for a loan commitment for Mr. Baylor, assisting Mr. Baylor's broker in writing up the 1.75 million dollar offer, working with Mr. Koster's attorney to draft documents, and then opening escrow at Columbia. However, Mr. Koster did not accept the offer and then stopped taking anymore of Ms. Adams' calls. In September, Mr. Smith, a real estate broker, entered into an exclusive agreement with Mr. Koster for the period of September 4, 2013 through October 4, 2013. During this time, he found out Mr. Koster would drop his price and so told Mr. Baylor's broker to make the $1.75 million offer again. The deal closed between the parties on October 23, 2013.

ARGUMENT

1. Even though the period of contract has ended, Ms. Adams is still entitled to a commission because she was the procuring cause of the sale as the agent who had done substantially everything to effect the sale.

Procuring cause doctrine governs

In Columbia, the "procuring cause" doctrine is the "default rule." AAA Business Brokers. In Columbia, parties are free to contract to determine how a brokerage fee will be paid: the procuring cause rule will not necessarily trump an agreement between the parties. See Ellis Realty. According to AAA Business Brokers, the procuring cause doctrine applies "only if the contract between the parties is silent on the issue of consummation of a sale after the expiration of the listing agreement." Here, while the contract between Koster and Adams had a termination date, it was silent on the issue of consummation of a sale after the expiration date. Rather, their contract states that the broker should be entitled to compensation if seller enters into a contract to sell the property for the 2.5 million asking price or on to her terms agreeable to the seller and the buyer was secured by the broker's efforts. There is no extension clause so there actually is not a definitive time period for when the broker is no longer entitled to commission. As such, Ms. Adams can rely on the procuring cause doctrine to enforce her claim against Mr. Koster and in arguing her claim is superior to Smith's. Since Ms. Adams's efforts did secure the contract that was ultimately entered into, she is entitled to compensation.

Substantially everything to effect the sale

Under the procuring cause doctrine, a salesperson is able to "recover commissions on sales made after the termination of the agency relationship if the salesperson procured the sales through his or her activities prior to the termination of the relationship." Quincy Sales. The purpose of this doctrine is to protect a salesperson who has "done substantially everything necessary to effect the sale." In this case, Ms. Adams'

activities, done prior to the termination of the relationship, procured the sale. She had done "substantially everything" to effect the sale. Ms. Adams had first met with Mr. Koster to understand his business and what he hoped to sell it for. She looked at his books, learned about the history, etc. She then secured an appraisal, which valued the business at 1.75 million, including goodwill and going-concern value. She then advertised in trade journals, contacted people she knew, and followed up with acquaintances. The only credible offer ended up being from Mr. Baylor of Midvale Pool and Spa Service in April. Ms. Adams then introduced Baylor and Koster and made arrangements for Baylor's accountants to examine the company's books. After these meetings, Mr. Baylor's appraisal valued the company at 1.5 million. Through Ms. Adams' skill at negotiation, she convinced Mr. Baylor to pay the $1.75, 25 million more than his appraisal valued the business at, and helped to draw up the necessary paperwork to close the deal. She even went so far as to secure financing for him through Vinny Maniscalco Loan Company, because Baylor was having trouble getting the financing for the higher offer price. She opened escrow at Columbia Title Company. Ms. Adams clearly worked to cause the sale between Kustom Spas and Mr. Baylor.

Mr. Koster argued that she is not entitled to the commission because she did him "no good at all" because she was not an effective negotiator. This is a similar argument to NAM's argument in Quincy when NAM argues that Quincy was not the efficient cause of the sale because of the services NAM supplied to DORCO and that these services led to the subsequent sale. However, in this case, as described above, she convinced Mr. Baylor to pay 25 million dollars more than his appraisal came back for. She did this even though there were no other credible offers, so she did not have any leverage in the negotiations. Though Mr. Koster made this sweeping, vague allegation about her lack of effectiveness, he failed to state anything specific she did not do in the course of her representation. In fact, he later finally accepted the offer she wrote up because his wife had died and he was more motivated to take a lower price. In Quincy Sales, the court noted that Sears, NAM's VP, could not "identify anything that Quincy failed to do to bring about the sale [of the machines]" when analyzing NAM's claim that Quincy was

not owed full commission. Similarly, Mr. Koster cannot identify anything that Ms. Adams failed to do to bring about the sale. Indeed, she had done "substantially everything to effect the sale" and the only thing that had actually changed was his willingness to sell.

Public Policy and equity favor Ms. Adams

Finally, in support of the position that a commission is due and it is due to Ms. Adams based on Columbia's doctrine of procuring cause, is the court's own justification for the doctrine in Ellis Realty. The court makes clear the policy reasons for this important doctrine. It is meant to be "a shield" and "to protect brokers from being stripped of their commissions by sharp-elbowed property owners who fraudulently or in bad faith delay the consummation of a real estate transaction..." Ms. Adams testified that she knew that she was not including an extension clause in the contract, because Koster had been so tough about even paying her the commission and about her representation being exclusive. She was therefore left to rely on this equitable doctrine that says she will be protected if she had done the work to procure the sale and then is stripped of her commission in bad faith. Here, Koster just kept telling her to negotiate after she brought him the Baylor deal and then, before her contract ran out, stopped taking her calls. He offered her no explanation as to why he stopped taking her calls nor gave her any information about what more she could do to close the deal. He even admits that he has no reason to doubt that she did "all the work she says she did to put together the offer." Yet, because she "didn't make it happen" he refuses to pay her anything. Ms. Adams, as the party who did "all of the work...to put together the offer" is entitled to compensation as the procuring cause of the sale.

2. Ms. Adams, rather than Mr. Smith, is due the full commission, despite his extension clause, because under Columbia law he did not actually "refer" the buyer to the seller since there is not even a minimal causal connection between him and the ultimate sale.

Smith's Extension Clause

As explained above, Columbia allows parties to include extension clauses to contract out of the procuring sale doctrine. In Smith's agreement with Koster, he has an extension clause that provides if seller enters into a binding agreement to sell within a period 180 days after the contract, he is entitled to compensation if he referred the buyer to the seller. In this case, Smith had a valid extension clause and the sale took place within the 180 days it allowed. His contract ended on October 4 and the sale took place at the end of the same month, well within the 180 day period. Smith, on these facts, is in the position to argue that he has a valid claim on the commission. However, for the reasoning below, he still is not entitled to commission, because he did not actually "refer" the buyer to the seller.

Referred

Under Columbia law, the term "referred" means more than a "minimal causal connection between him and the ultimate sale." In this case, there is only a minimal causal connection between Smith and the parties. Smith only told the parties essentially what they already knew, which is similar to what occurred in AAA where the court explained that a broker seeing to "recover under an extension clause must establish some causal connection between the broker's efforts and the eventual sale." In this case, Smith heard that Koster had come close to a deal for the sale with Baylor and was now willing to drop his price based on his losing his wife. After entering into a Seller/Broker Agreement with Koster, Smith went back to Baylor and found out Baylor was still willing to do the deal. As Smith admits, "There wasn't much for me to do" so he just told Baylor to meet with Koster do make the deal. After that, he just let Koster know that Baylor would make the deal. After his, he did nothing else to secure the deal and didn't find out until afterward that it had even occurred. Similar to the agent in AAA, Smith was not involved in any negotiations. Therefore, this is only a minimal causal connection between Smith and the final sale.

The courts in Columbia require that a broker's participation "be palpable and do something more than a mere incidental or contributing influence." On cross-examination, Smith admits that he only met with Koster once, for 45 minutes. This is hardly a palpable impact, especially in contrast to Adams' ongoing, multiple meeting relationship with him. He also admitted that he used the same documentation and loan commitment, with minor updates. Therefore, Smith's influence is much better characterized as "incidental" and Ms. Adams is the actual referring broker who is responsible for the sale. Mr. Smith argues, though, that without his contacts the deal would not have occurred. However, the court seeks to guard against this very situation in AAA when it says that more is required than "merely notifying potential buyers of the possibility of a sale without requiring them to exert diligent efforts toward conclusion of the sale." If Smith were to receive commission in this case, he would be getting a "windfall commission" by just sitting back and "letting the other parties to the transaction do all the work" which is what the Columbia Court specifically found to be unfair in AAA.

3. The commission due to Ms. Adams is the full $175,000 because there are no relevant factors for reducing it.

Guidelines

In Columbia, when a claim arises in the context of arbitration and involves a dispute between brokers competing for the same fee, the Guidelines for Arbitrators are relevant. See AAA Business. Here, both of these criteria are met because the case is in arbitration and Ms. Adams and Mr. Smith are competing for a broker's fee. Therefore, the guidelines are relevant to the arbitrators in reaching their decision. While no one factor is determinative and arbitrators have broad discretion, in this particular case, all of the factors suggest strongly that Ms. Adams has the superior claim and is entitled to full compensation.

Buyer introduced to property by Intro Broker (Ms. Adams)

According to the guidelines, this factors weighs in favor of the intro broker. Here, Ms. Adams introduced Koster and Baylor after Mr. Baylor's broker contacted her.

Closing Broker never showed the property

According to the guidelines, this factor also weighs in favor of the intro broker. Here, by Smith's own admission, Smith only met with Koster once, for about 45 minutes and never showed Koster's property to Baylor. In contrast, Ms. Adams who set up a meeting between the men and arranged for Baylor's accountant to review the books. She also arranged for an appraisal of Koster's business. Therefore, this factor weighs heavily in favor of Ms. Adams.

Closing broker's offer was substantially similar to intro broker's offer within a short period of time

While the rules state that if the offers are close in substance or time, the factor is neutral, Ms. Adams has a strong argument that since the offers are the exact same, she is favored by this rule. In this case, the offers are not substantially similar; they are the exact same offer. They use the same documentation and the same loan commitment. In fact, they also use the same escrow account. Mr. Smith did not have to do any work to prepare the offer; he had no terms to tweak based on any negotiating he carried out. As he said "There wasn't much for me to do" in order to make the sale because Mr. Baylor was willing to make the same offer that Ms. Adams had already drawn up. So Smith used the same loan commitment and the same escrow account. Therefore, while this factor would usually be neutral, in this case, it weighs toward Ms. Adams because the offers are identical.

Significant time between Intro Broker showed property and closing broker wrote offer

This is a factor that could favor Mr. Smith, but, in this case does not because there was not a significant time and Mr. Smith did not write the offer. Here, Mr. Smith did not actually "write" the offer because he just relied on Baylor making the offer that Adams had already written up. Also there were only a few months between the deal.

Intro Broker provided significant information

As already established, Ms. Adams did this through her extensive meetings with the parties. She convinced Baylor to make the offer for more than the appraisal.

Intro broker fails to maintain client contact

While this did occur in the case, the rules state that consideration should be given when broker tries to maintain contact but client stopped responding. This is what occurred in this case. Also, Smith, the closing broker failed to maintain contact with Koster; he did not even know that the offer had gone through until he "ran into Artie Baylor" the day after.

Client expresses dissatisfaction with Intro Broker

Here, Koster expressed dissatisfaction with Adams' negotiating skills. While this does favor the closing broker according to the rules, it does not do so in this case. Here, Koster also expressed dissatisfaction with Smith and actually seeks not to pay either of them. Also, he did not substantiate his claim with any factual basis. Moreover, he ended up taking the deal that Adams wrote up, which undermines his argument extensively.

Closing broker asking about client's other broker relationship

Here, Smith did not ask about the relationship at all, so while this factor could favor Smith, here it does not. It favors Adams because Smith never asked about the prior relationship, despite the fact that the escrow company told him there was an open escrow.

Since the arbitrator has broad discretion in which broker should prevail and what is equitable, in this case, the entire fee should be awarded to Ms. Adams. Mr. Smith's claim should not be enforced under the above analysis and a weighing of the factors all suggest Ms. Adams is the broker who should receive the full payment. Mr. Koster cannot seek to avoid paying either broker by blaming them for doing nothing and then ultimately accepting the fee.

PT-A: SELECTED ANSWER 2

TO: William C. Baines
FROM: Applicant
DATE: February 25, 2014
SUBJECT: Post- Hearing Arbitration Brief

Mr. Baines, I have reviewed your memo and our client, Brianna Adams' case file. I have prepared a draft of a persuasive post-arbitration brief for the arbitrator. I have included it below for your review. Thank You.

I. STATEMENT OF FACTS

Brianna Adams, a licensed broker who specializes in finding buyers for small businesses for sale in Columbia, entered into a six-month listing agreement with Kustom Spas, Inc. to find a buyer for the business at a 10% commission. Ms. Adams expended significant time and effort to procure a ready, willing and able buyer for Kustom Spas. Despite her efforts, a deal was unable to be reached during the six-month listing agreement due to the owner, Mr. Koster's, refusal to accept the buyer's offer based solely on price. However, only a few months after the six-month listing end date, Kustom Spas, using a different broker, Mr. Smith, was sold to the same buyer, based on an offer on the same terms, price and documentation as the original offer that Ms. Adams had procured during her agreement period. Currently, Ms. Adams and Mr. Smith each claim entitlement to a commission of the gross sales price, based on their respective brokerage agreements with Kustom Spas, while Mr. Koster claims that neither is entitled to any commission based on the sale.

II. ARGUMENT

A. MS. ADAMS IS ENTITLED TO A COMMISSION BECAUSE SHE IS THE PROCURING CAUSE OF THE DEAL BETWEEN BAYLOR AND KUSTOM SPAS; AND COMMON LAW APPLIES BECAUSE THERE IS NO PROVISION TO THE CONTRARY IN THE AGREEMENT

The procuring cause rule allows a salesperson, in whatever field of endeavor, to recover commissions on sales made after the termination of the agency relationship if the salesperson procured the sales through his or her activities prior to the termination of the relationship. Quincy Sales v North America Machinery Corp. Moreover, the court in Quincy Sales held that once the agent has put in motion the chain of events that lead to a sale and has done everything in his power and authority to bring about that result, it is irrelevant which party terminated the relationship.

Here, Adams entered into a brokerage agreement with Koster to procure a ready and willing buyer and consummate a sale of his business, Kustom Spas. During her six month term, she did everything that she could to procure a ready and willing buyer.

She met with Koster several times over the course of a six month period. They discussed what Koster wanted to get in price for the property. Adams arranged to have a formal appraisal of the business conducted. This appraisal involved looking at comparables, examining Kustom's books, inquiries into the business' reputation, etc. Adams advertised about the property in trade journals, contacted people she knew from prior deals who had expressed interest in buying a business, and also followed up leads given by Koster himself. The amount of time spent is not determinative but it is the nature and usefulness of the information furnished in inducing the buyer's interest in the property. This is demonstrated by the fact that all of these efforts garnished interest from at least a dozen inquiries, and led to the serious interest of Baylor.

After Baylor entered the picture, Adams entered into intense negotiations with him and his broker. Adams made arrangements for Baylor to obtain a loan that would provide him with the financing to complete the deal. She worked with Koster's attorney to draft transfer documents, and also opened an escrow account at Columbia Title Company. And finally, after Koster refused to accept the deal, after extensive rounds of renegotiation on Adams' and Baylor's part, Adams tried to keep in contact with Koster to make the deal work, but Koster refused to return her phone calls. Despite all of her best efforts, the deal could not be completed during her six month agreement with Koster.

This situation is similar to that in Quincy Sales, where the court determined that the defendant could not identify anything that plaintiff had failed to do to bring about the sale. Plaintiff procured a ready and willing buyer, and it was the defendant who declined. There, the plaintiff negotiated the agreement and prepared the documentation. The deal clearly stated that the plaintiff was to receive commission based on such a sale. Thus, the court held that the plaintiff, as the procuring cause of the sale, was still entitled to receive his commission on the sale even though it was finally consummated after the termination of the agency relationship.

Here, Koster is unable to point to anything that Adams failed to do to bring about the sale. Indeed, he admits to the extensive and significant amount of work that Adams did in fact do on the deal. She engaged in all negotiations and prepared all necessary documents. Moreover, like the defendant in Quincy Sales, it was Foster here who declined to consummate the deal. Finally, the agreement with Adams clearly states that she is entitled to receive a 10% commission of the gross sale of the property, and that she is to receive this commission if the property is sold to a buyer procured through the efforts of Adams.

The procuring cause doctrine does not apply where the agreement between the parties specifically states whether and when post-termination commissions are earned. But here, just as in the Quincy Sales case, the agreement between Koster and Adams does not specify whether and when post-termination commissions are earned. Although

Adams usually includes such a provision, she did not in this case. Accordingly, the procuring cause doctrine does apply.

Thus, despite the fact that the sale between Kustom Spas and Baylor was consummated after the brokerage agreement between Koster and Adams had expired, the common law procuring cause doctrine should apply and allow her to recover the commission that she is rightfully entitled to. Adams procured a ready and willing buyer and did everything she could to bring about the sale to Baylor; the sale didn't occur through no fault of her own, but rather due to Koster declining, and the agreement specifically states that she is entitled to a commission if the sale is consummated with a buyer that she procures.

Thus, Adams is the procuring cause of the sale to Baylor and she is entitled to receive her 10% commission of $175,000.

B. MR. SMITH IS NOT ENTITLED TO A COMMISSION BASED ON THE EXTENSION PROVISION BECAUSE BAYLOR WAS NOT A BUYER "REFERRED TO" KUSTOM SPAS BY SMITH AS SMITH CAN SHOW NO MINIMAL CAUSAL CONNECTION BETWEEN HIM AND THE ULTIMATE SALE

The procuring cause doctrine at common law does not apply to place a restraint on the party's right to contract to determine whether a commission is or is not due under a brokerage agreement. Thus, where the parties include an agreement specifically allowing for a commission to be received after the termination of that agreement then the contract provision control and the procuring cause doctrine does not. Ellis Realty Inc. v Gable Holdings LLC.

Here, the agreement between Smith and Koster included such a provision, stating that Smith would be entitled to his commission if Koster entered into an agreement during the representation or within 180 days to sell the property, if the buyer of the property was a person referred to Koster by Smith.

However, in order to be entitled to receive his commission under this provision, Smith must have "referred" Baylor to Koster.

In AAA Business Brokers v Wicks, the court held that even though a contract contains an extension clause, as is the case here, the inquiry does not end there; the question remains whether the broker complied with the requirement that the purchaser be a person who was "referred to seller by the broker."

The majority of authorities in Columbia and other jurisdictions interpreting vague terms in listing agreements such as "refer" and similar words have found that such terms necessarily incorporate an unexpressed but inferentially essential requirement that the broker do more than merely send or direct a potential purchaser to a seller. In other words, the majority rule is that, even with the existence of an extension clause, the broker must show that there was at least a minimal causal connection between him and the ultimate sale before the broker becomes entitled to a commission.

The court in AAA held that a minimal causal connection can be established by showing negotiations between the parties, facilitating the flow of information, or actual assistance with the closing of the sale. It is not necessary that the broker seeking commission dominate the transaction, but the broker's participation must be palpable and something more than a mere incidental or contributing influence. This is because a rule that would allow recovery for merely soliciting a buyer without a causal connection with the sale would burden the owner's right to dispose of the property, and it would be poor public policy to reward brokers with substantial commissions for merely notifying potential buyers of the possibility of a sale without requiring them to exert diligent efforts towards conclusion of the sale.

In AAA, the court found that the plaintiff failed to demonstrate a sufficient causal connection, stating that all she did was tell the party what he already knew and left everything up to him. Thus, the court was unwilling to allow the broker to collect a

commission for simply sitting back and letting the other parties to the transaction do all the work.

This case is similar to AAA, in that no causal connection exists between Smith and the ultimate sale to Baylor, such that he should be entitled to a commission under the extension clause.

Koster himself told Smith that he had come pretty close to a deal with Baylor and that it had fallen through due to price. Thus, this is a similar case to AAA, in that Smith did not procure a new buyer that Koster was unaware of. Koster already knew that Baylor was interested in purchasing the property based on his previous offer. Koster could have easily reached out to Baylor on his own to see if he was still interested in the property; he did not need Smith to accomplish this or the subsequent sale.

Moreover, Smith did absolutely no work with respect to the sale. He called the Columbia Title Company, but did not have to proceed any further because he decided to use the escrow account already set up by Adams for the deal. He admits that he did not stay in contact with the parties because he "assumed Baylor's broker would keep him in the loop"; he did not engage in any negotiations or prepare any documentation. Indeed, he simply used the paperwork from the first round of negotiations with Adams. All of the terms of the agreement were the same and Baylor used the same loan commitment that he acquired through Adams' efforts. Smith admits that there "wasn't much for me to do", stating that he only left a voicemail message for Koster stating that Baylor was going to present him a $1.75 million offer. This was not new to Koster, as Baylor had already once before made this identical offer. Finally, Koster even admits that Smith did nothing at all, except send him an offer that he had already once rejected.

Thus, based on this information it is clear that no causal connection exists between Smith and the ultimate sale. Smith was simply a passive person who informed Koster of an offer of which he was already aware of, and had in fact already rejected. He did

not actively participate in the negotiations or prepare any paperwork. He admits that he failed to even keep in contact with the parties. Indeed, he was only aware the sale had even been consummated when he coincidentally ran into Baylor and Baylor told him that the sale had gone through. Thus, he had absolutely no part of the actual closing itself.

Thus, the holding in AAA clearly dictates that Baylor was not "referred to" Koster by Smith. Accordingly, Smith should not be entitled to any commission based on the extension provision in the agreement.

C. MS. ADAMS IS ENTITLED TO HER ENTIRE COMMISSION OF $175,000 BECAUSE THE FACTORS OF THE COLUMBIA ASSOCIATION OF COMMISSIONED BROKERS ("CACB") GUIDELINES FOR ARBITRATORS IN COMMISSION DISPUTES BETWEEN AND AMONG BROKERS WEIGH IN HER FAVOR

Unlike AAA Business Brokers, this dispute arises in the context of an arbitration and is a dispute between brokers competing for the same commission. Thus, the CACB applies. The CACB states that there is no predetermined rule or standard that prescribes which of the brokers is entitled to an arbitration award. The following factors reflect common characteristics that arise during the course of such disputes and are intended to serve as guidance to arbitrators in aiding them to reach a decision as to how to award each or either broker.

An arbitrator has broad discretion under the guidelines to invoke the equities to apportion the commission between competing brokers. Here, almost all of the 8 factors weigh in favor of Ms. Adams and thus she should be entitled to her entire commission of $175,000. As discussed above, Smith is not entitled to receive a commission based on the extension provision because he did not "refer" Baylor to Koster. Moreover, even if Smith were somehow entitled to any sort of a commission, as discussed below, the 8

factors weigh in favor of Adams, and equity should require that she be awarded her full commission, while Smith should not be entitled to share in any of it.

Relevant Factors

1. Buyer is first introduced to the property by the Intro broker

Here, Baylor was first introduced to the property by Adams. Indeed, Baylor's broker responded to one of the ads that Adams had placed in the trade journals about Kustom Spas. Even though Mr. Koster has provided Adams with several leads of potential buyers, Baylor was not one of them.

Thus, this factor weighs in Adams' favor.

2. Closing Broker never showed the property

Here, there is no evidence that Smith ever showed Baylor the property. Indeed, it is likely that Smith did not have to, as Baylor would have likely already been shown the property by Adams during the extensive prior negotiations and meetings that were conducted.

Thus, if Adams had in fact showed Baylor the property, this factor would weigh in Adams' favor.

3. Closing broker wrote and submitted an offer on the property on behalf of the client that was substantially similar to an offer written by the Intro broker within a short period of time

Here, the offer that was submitted by Mr. Smith was identical to the offer submitted by Adams. Indeed, Smith, Adams and Koster all admit that the same paperwork was used, although it had to be slightly updated. Moreover, the same terms of the offer governed;

it was for the same price; the parties made use of the same escrow account that Adams had initially opened for the deal; and Baylor used the same loan commitment from Vinny that Adams was able to obtain for him. Although the documents had to be updated, Smith submitted an offer that was not only substantially similar, but identical, to the offer submitted by Adams. And the offer was submitted only a few months after Adams had first submitted it.

Thus, this factor weighs in Adams' favor.

4. A significant amount of time elapsed between the time the Intro broker showed the property and the Closing broker wrote an offer on the same property

Here, as discussed above, only a few months of time elapsed between the time that Adams showed the property and the time that Smith wrote an offer on the same property.

Thus, this factor weighs in Adams' favor.

5. Intro broker provided significant information about the specific property, the neighborhood, value of the property, and other characteristics over a period of time

Here, Adams expended significant time and effort in providing information about the specific property, the neighborhood, the value and other characteristics over a period of time. She met with Koster several times over the course of a six-month period. They discussed what Koster wanted to get in price for the property. Adams arranged to have a formal appraisal of the business conducted. This appraisal involved looking at comparables, examining Kustom's books, inquiries into the business' reputation, etc. Adams advertised about the property in trade journals, contacted people she knew from prior deals who had expressed interest in buying a business, and also followed up leads given by Koster himself. The amount of time spent is not determinative but it is the nature and usefulness of the information furnished in inducing the buyer's interest in the

property. This is demonstrated by the fact that all of these efforts garnished interest from at least a dozen inquiries, and led to the serious interest of Baylor.

Thus, this factor weighs in Adams' favor.

6. Intro broker fails to maintain contact with the client

Here, Adams lost contact with Koster after July 31st, 2013. However, this was only due to his inability to get into contact with Koster. Adams tried several, six or seven times, to contact Koster, but he would not return any of her phone calls. Thus, any failure to maintain communication was not the fault of Adams.

Thus, this factor weighs in Adams' favor.

7. Client expresses dissatisfaction with Intro broker's professional conduct or abilities

Here, although Koster did express dissatisfaction with Adams' work, he also expressed the same with Baylor's. Moreover, his only complaint with Adams was that she did not procure a buyer willing to pay $2.5 million. Koster's dissatisfaction can be regarded not as Adams' incompetence, but rather his unrealistic expectation of what the market would bear and what price his business would command in a sale. Adams presented more than enough information that was accurate and demonstrated that Koster's expectations in price were unrealistic based on the value of his business and market conditions.

Thus, this factor weighs in Adams' favor.

8. Closing broker asked about client's relationship with another broker early in the process and determined that there was no existing contractual or exclusive relationship between the client and any broker

Here, although Smith was unaware of any prior relationship that Koster may have had with another broker, including Adams, this was due to his willful ignorance. Smith did not even make a cursory investigation as to whether any such relationship did or had existed. And based on the fact that Koster specifically told him that he had gotten a previous offer from Baylor that came very close to working out, this should have at least placed Smith on notice that Koster might have used a broker for the transaction at which point he could have inquired into the situation with very little effort. Both Koster and Smith repeatedly state that they did not reveal the relationship with Adams or did not ask about it because they did not see how it mattered. However, this information is clearly relevant given the fact that the agreement with Adams could have given her a right to a commission based on the sale between Baylor and Kustom Spas, as it in fact did.

Thus, this factor weighs in Adams' favor.

Since all, if not the majority of these factors weighs in Adams' favor, equity should require that Adams be awarded her full commission of $175,000. There is nothing to suggest that Smith, equitably, has any right to share in the commission money. Thus, since the escrow account contains only enough money for Adams, she is entitled to the entire $175,000.

III. CONCLUSION

Ms. Adams did all of the work in this deal. She expended significant time and effort to procure a ready, willing and able buyer for Kustom Spas at a price that was fair and indicative of the business' value and what the market would bear. She engaged in all negotiations and prepared all documents. The deal would have gone through, but for Koster's decline of a Baylor's good faith offer. Despite the fact that the deal was not consummated during Adams' six-month agreement, she was the procuring cause of the sale under common law, and as such she is entitled to her commission because the agreement did not specify otherwise to bring it outside the common law scope.

Mr. Smith has sat back and let everyone else do all of the work. The only thing that he did was bring Koster an offer than he had already declined and that he was already well aware of. Mr. Koster did not need Smith to consummate any sale with Baylor. It would be poor public policy to reward brokers with substantial commissions for merely notifying buyers of the possibility of a sale without requiring them to exert diligent efforts towards its conclusion. Thus, any award of a commission to Smith would constitute a windfall commission.

As between Adams and Smith, even if Smith were allowed to collect any type of commission equity would require that in a dispute between them, Adams be awarded the entire amount of the commission. Here, there is only enough money in the escrow account to cover Adams' commission. She is entitled to collect her entire commission and should not have to share this amount with Smith at all. Although an arbitrator has broad discretion under the guidelines to invoke the equities to apportion the commission between competing brokers, all of the factors weigh in favor of Adams and against Smith.

Thus, Adams is entitled to recover the entire $175,000 amount of her 10% commission. The property was sold for $1.75 million and under her agreement she was entitled to a 10% commission; thus $175,000 is her commission. And Smith is not entitled to share in the proceeds of the escrow account.

February 2014

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

ROCK v. DAVIS

ROCK v. DAVIS

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

ANDREWS and OUELLETTE

Attorneys at Law

12 Jordan Lane

Grafton, Columbia

MEMORANDUM

TO: Applicant

FROM: Penny Andrews

RE: Rock v. Davis and Bond

DATE: February 27, 2014

Our firm represents Gerald Rock in an action against detectives of the Grafton City Police Department for violation of his civil rights. Defense counsel filed a motion *in limine* to have certain evidence excluded at trial as hearsay. I need to prepare our position, in anticipation of defendants' argument supporting their motion.

Before I write my reply, please draft an objective memorandum that identifies and discusses the arguments, resolution of which will determine whether the evidence in question should be admitted. Ultimately, motions *in limine* are won or lost on how well we use the facts. Therefore, your objective memorandum should relate specific facts to the potential arguments and conclude how your analysis establishes whether the evidence will be admitted.

United States District Court

Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 COMPLAINT AND DEMAND FOR JURY TRIAL

JURISDICTION

1. Plaintiff, Gerald Rock, is a citizen of the State of Columbia and a resident of Grafton City, Columbia.
2. Jurisdiction is based on 42 U.S.C. §§ 1983 and 1988. The amount in controversy exceeds $75,000.00 excluding costs and attorneys' fees.

CLAIM I

3. Defendant, Detective Richard Davis, was and is an employee of the Grafton City Police Department.
4. Defendant, Detective Thomas Bond, was and is an employee of the Grafton City Police Department.
5. On August 29, 2011, Plaintiff was lawfully present in the Grafton City Courthouse in the State of Columbia.
6. While at the Grafton County Courthouse on August 29, 2011, Plaintiff was unlawfully and without just cause, falsely arrested and imprisoned by Defendants.
7. Each Defendant acted maliciously, willfully and wantonly, and outside the scope of his jurisdiction, although under color of law, and violated the right of Plaintiff to

be free from unreasonable search and seizure, from warrantless search and seizure, and from summary punishment without trial and due process of law.

8. Defendants, by their conduct, intentionally, willfully and without justification, and under color of law, did deprive Plaintiff of his rights, privileges and immunities secured to him by the Constitution and the laws of the United States, and by 42 U.S.C. §§ 1983 and 1988.

CLAIM II

9. Plaintiff realleges and incorporates by reference the facts contained in paragraphs 1 through 8.
10. That after the accosting of Plaintiff by Defendants, Plaintiff was falsely arrested and imprisoned while awaiting trial for approximately nine months by the City of Grafton.

CLAIM III

11. Plaintiff realleges and incorporates the facts contained in paragraphs 1 through 10.
12. After the false arrest, imprisonment and violation of his civil rights, Plaintiff was maliciously prosecuted by the Defendants in Grafton County Superior Court.
13. Defendants knew the prosecution was false when commenced.
14. The false charge was eventually dismissed by Judge Charles Heffernan June 11, 2012.

WHEREFORE, Plaintiff prays judgment as follows:

1. General and special damages in the amount of fifteen million dollars ($15,000,000);
2. Punitive and exemplary damages in an amount that this Court shall consider to be just and fair;
3. Attorneys' fees in an amount that this Court shall consider just and fair; and

4. Costs and disbursements of this action and such other and further relief as this Court may deem just and proper.

ANDREWS and OUELLETTE

By: ____*Penny Andrews*_____
Penny Andrews
Attorney for Plaintiff

Dated: June 3, 2013

United States District Court

Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 ANSWER TO COMPLAINT

ANSWER

1. Defendants deny each and every allegation in paragraphs 1 and 6-14, except admit that Plaintiff was arrested by Defendants, subsequently tried and acquitted.
2. Defendants admit to the allegations in paragraphs 3-5.
3. Defendants lack sufficient information and belief of the allegations in paragraph 1 and therefore deny each and every allegation.
4. Defendants deny each and every allegation in paragraph 2, except admit that Plaintiff purports to invoke the jurisdiction of this court as stated therein.

FIRST AFFIRMATIVE DEFENSE

5. The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

6. Any injury alleged to have been sustained resulted from Plaintiff's own culpable or negligent conduct and/or the intervening culpable or negligent conduct of others and was not the proximate result of any act of Defendants.

THIRD AFFIRMATIVE DEFENSE

7. There was probable cause for Plaintiff's arrest and prosecution.

FOURTH AFFIRMATIVE DEFENSE

8. Defendants have not violated any clearly established constitutional or statutory right of which a reasonable person should have known, and therefore are protected by qualified immunity.

FIFTH AFFIRMATIVE DEFENSE

9. At all times relevant to the incident, Defendants acted reasonably and in the proper and lawful exercise of their discretion.

WHEREFORE, Defendants request judgment dismissing the complaint in its entirety, together with the costs and disbursements of this action and such other and further relief as the Court may deem just and proper.

____*Mary Lynch*_____

Mary Lynch
Attorney for Defendants

Dated: July 5, 2013

United States District Court

Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 NOTICE OF MOTION *IN LIMINE*

PLEASE TAKE NOTICE that, upon all previous papers and proceedings in this matter, the undersigned will move this Court at the Courthouse located at 677 Pearl Street, Columbia, on March 6, 2014 at 9:00 a.m., or as soon thereafter as counsel can be heard, for an order:

> Excluding as hearsay, evidence of all transcripts or testimony concerning the prior testimony of the witness Joe Watts in the criminal trial of Plaintiff, out of which Plaintiff alleges his cause of action arose.

____*Mary Lynch*_____

Mary Lynch
Attorney for Defendants

Dated: February 26, 2014

EXCERPTS OF INTERVIEW BETWEEN PENNY ANDREWS AND CRIMINAL DEFENSE ATTORNEY DIDI HILL

March 1, 2013

. . . . .

HILL: Thanks for agreeing to meet with me, Penny.

ANDREWS: No problem. So, I understand you want to talk about a client of yours.

HILL: Yes, actually a former client, I guess. I know you'll have to talk directly to him, but he asked me to run this by you first. He's a little wary of the justice system at the moment.

ANDREWS: No problem.

HILL: I represented Gerald Rock in a criminal matter. He was charged with shooting someone, was acquitted, and now I think he may have a good civil claim against two of the police detectives involved.

ANDREWS: You aren't interested in taking it?

HILL: Not really. You know my partner died last year and he handled the civil stuff in the office. I am pretty much sticking to the criminal side.

ANDREWS: Okay, so tell me what happened?

HILL: On August 29, 2011, a shooting took place at the Grafton County Courthouse. Apparently a stray bullet struck and wounded a fifteen-year-old girl, Margaret Terry.

ANDREWS: Was this at night?

HILL: No. It was about 5:00 p.m.

ANDREWS: Who was this Margaret Terry?

HILL: That's part of the tragedy. She was just an innocent bystander who never saw the person who shot her.

ANDREWS: Okay, so then what happened?

HILL: The shooting was investigated by a couple of detectives named Richard Davis and Thomas Bond. The story is that someone called 911 and eventually Davis and

Bond were assigned to investigate. Bond went to the scene to interview any witnesses and Davis went to pick up a guy named Joe Watts.

ANDREWS: Why Watts?

HILL: The detectives claimed later that the 911 caller, anonymous of course, said he might have seen Watts at the scene.

ANDREWS: I assume Watts has issues with the police?

HILL: Yeah, mostly petty stuff, but he was clearly on the police radar screen.

ANDREWS: So, then what happened?

HILL: Bond went to the crime scene and Davis found Watts and took him to the police station, where he interviewed him.

ANDREWS: Let me guess. He denied everything.

HILL: Close. He admitted he was near the courthouse at the time of the shooting, but denied being involved. The problem was he identified Rock as one of the shooters. Rock was then arrested and he called me.

ANDREWS: Go on.

HILL: The grand jury indicted Rock, charging him with various counts of assault, reckless endangerment, and criminal possession of a weapon.

ANDREWS: Did Watts testify at the grand jury?

HILL: Yes, and he again said my client was one of the shooters.

ANDREWS: What happened at trial?

HILL: Watts recanted his prior statements, both to Davis and the grand jury, identifying Rock as a shooter. Long story short, my client was released approximately nine months after his arrest.

ANDREWS: I assume this surprised you.

HILL: The renunciation? No. All along we claimed Davis and Bond coerced Watts into falsely accusing Rock as one of the shooters on the day of the shooting, and then pressured Watts into repeating the false accusation before the grand jury.

ANDREWS: So what is the story with Watts?

HILL: At trial, Watts, the sole witness against my client by the way, recanted under oath and in open court before the jury, and stated that the detectives had forced him to falsely testify against my guy.

ANDREWS: The District Attorney must not have been happy. Did the DA get in the grand jury testimony or try to rehabilitate Watts in any way?

HILL: The District Attorney made no effort to rehabilitate him with his grand jury testimony, despite prompting from the Court. I've got the trial transcript right here.

ANDREWS: Thanks. Why would the DA do nothing?

HILL: You're never sure what the other side is thinking, but my best guess is that he knew the case was lost and he just wanted it to end. There certainly were a lot of dirty looks between the DA and the two detectives. I think the DA just wanted to cut his losses before Watts could say anything more that could subject the city to civil liability.

ANDREWS: Okay, so back to Davis questioning Watts. After Watts fingered your guy, what happened?

HILL: After interviewing Watts, Davis called Bond at the crime scene. Davis told Bond that Rock was a suspect in the investigation and should be apprehended, which he was.

ANDREWS: Did Davis and Bond testify at trial?

HILL: No, neither testified at the criminal trial.

ANDREWS: Who signed the criminal complaint?

HILL: Detective Davis.

ANDREWS: You said your theory all along was that Watts was coerced. What led you to that theory?

HILL: Well, of course, to begin with you look at Watts's motivation. He was at the scene. He had a criminal record; given, it was minor. He had to be scared and was looking for a way to get Davis off his back. But then something else happened.

ANDREWS: What?

HILL: I got a phone call from Watts on my answering machine. He said he needed to talk to me. I called him back and he told me that he had been pressured to identify someone, so he did. He denied ever seeing Rock shoot a gun that day. I've got transcripts of those conversations I can give you.

ANDREWS: Thanks. When did this happen?

HILL: It was a couple of days after the grand jury indicted Rock.

ANDREWS: Where is Watts now?

HILL: Well, that's a problem. Rock tried to contact Watts to thank him for being a stand-up guy, but he found out Watts died last week in a liquor store robbery.

. . . . .

STATE OF COLUMBIA

GRAFTON COUNTY
SUPERIOR COURT

State of Columbia, v. Gerald Rock	Criminal Division 2011-2341

TRIAL TRANSCRIPT

BY THE DISTRICT ATTORNEY: The State calls Joe Watts.

. . . . .

DIRECT EXAMINATION OF **JOE WATTS** BY THE DISTRICT ATTORNEY:

. . . . .

DA: Are you now telling us you did not see the defendant shoot the victim?

WATTS: Yes.

DA: After you were arrested, did you give a statement to the police?

WATTS: Yes, sir.

DA: What did you tell the police?

WATTS: I told them I had nothing to do with it.

DA: Did you give them any other statements?

WATTS: Yes, sir.

DA: What else did you tell them?

WATTS: What happened -- I told them what they wanted to hear, sir.

DA: What was that?

WATTS: That I had nothing to do with it.

DA: What did you -- what did you think they wanted to hear?

WATTS: Who did the shooting.

DA: Did you tell them?

WATTS: Yes.

DA: Who did you tell them did the shooting?

WATTS: I said I saw one of them and it was Gerry Rock.

DA: You told them you saw defendant do the shooting?

WATTS: Yes, sir.

DA: Why did you testify to that?

WATTS: Because I was forced under pressure, sir.

DA: Were you lying then?

WATTS: Yes, sir.

DA: I have no further questions, your honor.

. . . . .

CROSS-EXAMINATION BY DEFENSE COUNSEL DIDI HILL:

HILL: Is it your testimony here in Court under oath that you did not see Mr. Rock with a gun. Is that correct?

WATTS: Yes, ma'am.

HILL: Is it your testimony here under oath that you did not see Mr. Rock place a gun in the car. Is that correct?

WATTS: I didn't see him do anything like that.

HILL: But did you ever tell that to the police?

WATTS: Yes, ma'am.

HILL: When you were questioned by the police, did you feel pressured by the police?

WATTS: Yes, ma'am.

HILL: Tell us how you felt pressured by the police?

WATTS: Because they said my mom's house could get –

BY THE DISTRICT ATTORNEY: Objection.

. . . . .

BY DEFENSE COUNSEL:

HILL: You called my office the day after your grand jury appearance. Is that correct?

WATTS: Yes

HILL: You left a voice message?

WATTS: Yes.

HILL: I then returned your phone call. Correct?

WATTS: Yes.

BY DEFENSE COUNSEL: Your honor, at this point we would like to introduce what have been previously marked as Defense Exhibits 1 and 2. They are transcripts of the audio recordings of both the voice message left by Mr. Watts and our subsequent phone conversation. The prosecution has previously stipulated to the accuracy of these recordings.

BY THE COURT: I think we should excuse the jury for a few minutes. Bailiff, will you please escort the jury back to the jury room? . . . . . The jury has been removed, so let's hear those tapes. . . . Well, now that we have heard those tapes — let me just say for the record that the jury is still out of the courtroom -- let me ask the government, where are you going after this witness?

DA: This is our last witness.

THE COURT: Do you have any other evidence at all?

DA: No, your honor.

THE COURT: Then if defense counsel is done with Mr. Watts, the prosecution will rest?

DA: Yes.

THE COURT: I assume the defense is done with Mr. Watts. Correct?

HILL: Yes.

THE COURT: And the prosecution rests? Your only witness is Watts?

DA: Yes.

THE COURT: Let me go out on a limb here now and guess that defense counsel wants to make a motion for a directed verdict. Is that safe to say?

HILL: Yes, your honor.

THE COURT: Granted.

DEFENSE EXHIBIT 1

TRANSCRIPT OF VOICE MAIL MESSAGE LEFT BY JOE WATTS TO DEFENSE ATTORNEY DIDI HILL, SEPTEMBER 9, 2011

BY JOE WATTS: Um, you know um, this is Joe Watts. I'm the guy who was arrested and the police took me down to the station. I, um, am the one who fingered Gerry for the shooting. I told them the wrong story. They were trying to blame me. They said that I needed to confess or tell them who did it. They were trying to use my story against my friend and it's not true. Now I just testified at the grand jury and I get the same pressure before I go in and, um, I lied again. I told them it was Gerry that did it. So I just want to correct my story because the police told it wrong. Can you call me back, please?

DEFENSE EXHIBIT 2

TRANSCRIPT OF TELEPHONE CONVERSATION BETWEEN JOE WATTS AND DEFENSE ATTORNEY DIDI HILL, SEPTEMBER 9, 2011

. . . . .

HILL: So you saw someone in your backyard shoot toward the courthouse?

WATTS: Yeah.

HILL: Was it Gerald who fired the gun?

WATTS: I never even saw him. I never saw him there. I couldn't even see him down the block, even if he was down the block.

HILL: Now I'm confused. You didn't see who?

WATTS: Um, Gerry.

HILL: He wasn't in the backyard?

WATTS: Nah.

HILL: Did you ever see Gerald Rock fire a shot?

WATTS: No.

. . . . .

HILL: Okay, just so I make sure that there's nothing bad going on. Are you being threatened by anybody? Is anyone telling you to say something?

WATTS: Yes.

HILL: Tell me about that.

WATTS: The detective, ma‘am.

HILL: What did the detective say?

WATTS: He said, “Oh, I know what happened -- blah, blah, blah,” and told me, “You better start talking -- blah, blah, blah,” and he slapped me.

HILL: Really?

WATTS: Yeah.

. . . . .

HILL: Okay. Are you being threatened at all -- I just have to ask you this -- by Gerald?

WATTS: No.

February 2014

California Bar Examination

Performance Test B

LIBRARY

ROCK v. DAVIS

LIBRARY

Selected Provisions of the Federal Rules of Evidence

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

. . . . .

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

. . . . .

Rule 804. Exceptions to the Rule Against Hearsay -- When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: . . . . .

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or . . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to

develop it by direct, cross, or redirect examination.

. . . . .

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

. . . . .

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Hannah v. City Of Overland

United States Court of Appeals, Fifteenth Circuit (1986)

Plaintiff, David Hannah, filed suit under 42 U.S.C. § 1983, against the City of Overland and two members of its police force alleging that he was arrested and detained without probable cause on a capital murder charge and that the arresting officers used unreasonable and excessive force in arresting him. The District Court found in favor of all defendants. On appeal Hannah contends that the District Court erred in excluding the deposition testimony of two persons not parties to the action.

Robert “Red” Musgrove was murdered on June 18, 1981, in the City of Overland. Evidence was introduced that a life insurance policy on the victim's life had been purchased just prior to the murder, and that the named beneficiary under the policy was the victim's estranged wife, Sharon Musgrove. Mrs. Musgrove's boyfriend at the time of the murder was David Hannah.

The two police officer defendants interviewed Danny Beede as part of their investigation into the murder. Beede told the police officers that on June 27, 1981, he was drinking at a local bar with David Hannah. According to Beede, Hannah had told him that he had shot a man four times in the chest with a .38 from an alley, and had silenced the shots by placing a baby bottle nipple over the revolver. Based in large part on Beede's statement, a grand jury indictment was obtained and Hannah was arrested and charged with capital murder.

As part of its continuing investigation following Hannah’s arrest, the Overland police interviewed Robert Mesko. During that interview Mesko provided evidence corroborating Beede’s version of his conversation with Hannah.

Subsequent to the police interview, Hannah’s defense counsel deposed Mesko. Overland’s city prosecutor was present at the taking of that deposition.

Hannah was detained in the Overland jail for approximately eleven months until the criminal charge was dropped on June 25, 1982. According to the city prosecutor's office, the capital murder charge was dropped when Danny Beede refused to testify or cooperate with the prosecutor unless he was given some kind of “deal” regarding a prison sentence he then was serving in Ohio on an unrelated conviction.

Citing Federal Rule of Evidence 804(b)(1), Hannah sought to introduce the deposition testimony of Mesko. Mesko stated in his deposition that he felt he was "pressured" and "threatened" by Overland police officers to cooperate in the Musgrove investigation and to implicate Hannah in the murder. Hannah sought to admit the deposition into evidence to establish defendants' bad faith in arresting and detaining him. Mesko himself died just before this action was commenced. Hannah's counsel stated at trial that the deposition "will show that the police did their damnedest to put David Hannah in jail in spite of the fact that Mesko said he wasn't guilty...." Hannah argues that the jury reasonably could infer that police officers who were willing to threaten third parties to gain evidence against Hannah acted in bad faith.

We affirm the District Court's exclusion of the deposition testimony of Mesko. Under Rule 804(b)(1), former deposition testimony taken in another proceeding is not excluded by the hearsay rule if, in a civil action, a "predecessor in interest had an opportunity and *similar motive* to develop the testimony by direct, cross, or redirect examination." (emphasis added)

The proper approach, therefore, in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.

An attorney from the Overland prosecutor's office represented the State at the depositions. There were no representatives on behalf of any of the defendants herein present. Assuming *arguendo* that the State was a "predecessor in interest" of the defendants in the present action -- a proposition that is by no means clear -- the prosecutor did have an "opportunity" to develop the testimony of Mesko. We do not believe, however, that he had a "similar motive" to develop his testimony.

When the deposition was taken, Hannah already had been indicted by a grand jury for capital murder, and was awaiting trial in the criminal prosecution. The State's

case rested in large part on the testimony of Danny Beede. The fact Mesko testified he was “threatened” and “pressured” by the police to implicate Hannah in the murder was of little, if any, concern to the State at that time. The State apparently thought it had sufficient credible evidence to prove Hannah's guilt beyond a reasonable doubt. The testimony of Mesko posed little danger, if any, to the State's case against Hannah. We do not believe that the State had any significant motive, much less a “similar” motive, to develop the testimony of Mesko regarding threats by the police. It follows that the deposition testimony of Mesko would not have been admissible under Rule 804(b)(1).

Affirmed.

United States v. Cabrera

United States Court of Appeals, Fifteenth Circuit (2004)

Luis G. Cabrera was found guilty of two counts of first-degree murder and now appeals.

In January, 1996, a pedestrian discovered the bodies of Brandon Saunders and Vaughn Rowe in a wooded area of Rockford National Park. Investigators eventually regarded the defendant, Luis Cabrera, as a suspect. Several items of physical evidence linked Cabrera to the victims, including a belt seized from the Cabrera residence.

Dr. Richard Callery testified that during the autopsy of Mr. Rowe he observed an injury that resembled the imprint of a belt buckle. The government then introduced expert testimony that drew a connection between the patterned injuries observed on Rowe and the belt seized from Cabrera's residence. Finally, regarding the belt, Milly Mathis testified at trial that she met Cabrera in 1994 and had sporadic sexual encounters with him over the course of several years. Mathis testified that she was familiar with Cabrera's clothing style and identified a distinctive belt seized from his residence as one that he likely would have worn. She also stated, however, that she did not specifically recognize the belt.

Several months after his conviction, Cabrera moved for a new trial based on post-trial, out-of-court statements made by Milly Mathis. In statements given to Cabrera's counsel after trial, Mathis purported to recant her testimony and claimed that she had been coerced into giving perjured testimony at trial. At an evidentiary hearing on the motion for a new trial conducted by the trial judge, Mathis declined to testify on grounds of self-incrimination. Thus, she became “unavailable” as a witness.

Cabrera's attorneys then sought to introduce Mathis' post-conviction statements. Those statements of the unavailable declarant, Mathis, constitute hearsay because they were offered to prove the truth of their contents. The question before the trial judge, therefore, was whether the post-conviction statements should be admitted under either of two exceptions to the hearsay rule: Federal Rule of Evidence 804(b)(3) that pertains to statements against interest, and Rule 807, the “residual exception” relating to

statements not covered by other exceptions “but having equivalent circumstantial guarantees of trustworthiness.”

The trial judge ruled that Cabrera failed to carry this burden sufficiently to justify a new trial because the hearsay statements were inadmissible and the other evidence at the hearing suggested that it was Mathis' recantation, and not her trial testimony, that was false. Thus, the key issue is whether the trial judge abused his discretion in refusing to admit Mathis' post-conviction statements in evidence.

Hearsay statements are generally not admissible unless the statement falls within a recognized exception to the hearsay rule. Rule 804(b)(3) allows the admission of a statement against interest if the declarant is unavailable to testify as a witness. Rule 804(b)(3) also imposes two conditions to the admissibility of hearsay evidence in addition to the declarant's unavailability. First, a statement against interest will be admissible only if it so far tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. Second, a statement tending to expose the declarant to criminal liability and offered to exculpate the accused may be admitted only if corroborating circumstances clearly indicate the trustworthiness of the statement.

Mathis became unavailable to testify when she invoked her Fifth Amendment privilege at the evidentiary hearing. Mathis' statement that she did not testify truthfully at trial was against her penal interest because it amounted to a squarely self-inculpatory confession. A reasonable person would know that admitting to giving false testimony would subject the person to criminal liability for perjury. In addition, the government had not offered Mathis immunity from any potential perjury charges and had even threatened to bring perjury charges against her if she recanted her trial testimony.

Mathis' statements, nonetheless, fail the test of admissibility under Rule 804(b)(3) because they lack corroborating evidence. The trial judge also focused on the fact that Mathis' recanting statement was made more than six months after she testified at trial. Mathis corresponded with Cabrera numerous times before meeting with his attorney. Thus, Mathis' recantation was not spontaneous, but was part of her attempt to build a relationship with Cabrera. The trial judge concluded that such a large temporal gap and lack of spontaneity did not support the admissibility of the statement.

The District Court did not abuse its discretion by finding that Mathis' statement was inadmissible under Rule 804(b)(3). Cabrera failed to meet his burden of clearly demonstrating with corroborating circumstances the trustworthiness of the statement.

Mathis' statements also were not admissible under Rule 807. That Rule provides an exception to the hearsay rule where a statement has sufficient circumstantial guarantees of trustworthiness if the court determines (1) the statement is offered as evidence of a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The requirements are construed narrowly so that the exception does not swallow the hearsay rule. Mathis' post-trial statements fail to satisfy the requirement that the evidence have circumstantial guarantees of trustworthiness for the same reasons that they were not admissible under Rule 804(3)—they were not supported by sufficient corroborating evidence. In addition, excluding the evidence does not pose a great risk of miscarriage of justice, because Mathis' trial testimony was weak and related to only one small link among several implicating Cabrera in the crime. The District Court did not abuse its discretion by denying Cabrera's motion for a new trial because it had no admissible evidence on which to base the granting of a new trial.

Affirmed.

United States v. Bryce

United States Court of Appeals, Fifteenth Circuit (2000)

Ewan Bryce appeals from the judgment of the United States District Court convicting him, after a jury trial, of (i) conspiracy to possess with intent to distribute, and distribution of, cocaine; and (ii) possession with intent to distribute, and distribution of, cocaine.

In 1997, federal law enforcement officers in Connecticut conducted surveillance of several persons suspected of narcotics trafficking, including the appellant, Ewan Bryce, and his co-defendant, Darren Johnson. On August 5 and 6, 1997, agents intercepted and recorded a number of telephone conversations, eight of which are relevant to this case: seven calls between Bryce and Johnson (the Bryce–Johnson tapes), and one between Johnson and another individual, Edwin Gomez (the Johnson–Gomez tape).

During their conversations, Bryce and Johnson used guarded and coded phrases to arrange a transaction in which Bryce would sell powder cocaine to Johnson for $22,500 per kilogram. In their initial call on August 5, Bryce claimed to possess a quantity of what he called "straight." Johnson expressed interest in buying some of this "straight," and Bryce told Johnson to call him back later that night, presumably to arrange a meeting. But when Johnson called Bryce's cellular phone, there was no answer.

In a call early the next morning, August 6, Bryce told Johnson that he had already "let off" "like 6 of 'em . . . at 22–5." Approximately three hours later, Johnson telephoned Gomez and informed him, in less cryptic language, that Bryce was selling "straight powder" for "deuce deuce" and had "off'ed 7 of 'em yesterday [August 5]." Johnson and Gomez expressed concern that the price being quoted would depress the price in other transactions.

After discussing matters with Gomez, Johnson called Bryce back and said he would buy "two," to which Bryce responded: "Okay. Alright I'm gonna, um, call you back then." Two minutes later, before Bryce could return Johnson's call, Johnson called Bryce again and told him that he would actually buy more than two, so long as Bryce

was indeed selling “straight.” They agreed to meet at Bryce's home in fifteen minutes. That meeting apparently never happened, however, because Bryce called Johnson several hours later to say that he really only had “one” left, and that he did not “really wanna get rid of this one,” but Johnson (by now quite put out) pleaded with Bryce to sell the “one” to him. Reluctantly, Bryce agreed, and they arranged to meet later that day. It is apparent that this meeting also never happened, because Johnson called Bryce on August 11 and asked him whether he still had “it.” Bryce said he did, and they again agreed to meet.

On August 26, 1997, federal agents arrested Johnson and another individual, one Michael McCausland. The next day, Bryce terminated the service on his pager; less than a month later, he began using a new cellular telephone. Soon thereafter, Bryce was also arrested.

Bryce and Johnson were charged in a two-count indictment. Count One alleged that the two conspired together and with others to possess with intent to distribute, and to distribute, cocaine; Count Two alleged that between, on, or about August 5 and 6, 1997, Bryce possessed with intent to distribute, and distributed, cocaine.

A jury convicted Bryce on both counts. The district court then sentenced Bryce to 124 months of imprisonment on each count (to be served concurrently) and five years of supervised release, plus a fine and an assessment.

Bryce challenges his conviction on the ground that the district court erred in admitting certain hearsay evidence—specifically, the Johnson–Gomez tape, on which Johnson repeats Bryce's claim that he has cocaine for sale and has already distributed some to others. The district court admitted the tape pursuant to the catch-all exception to the hearsay rule, Fed.R.Evid. 807, which permits admission of hearsay if (i) it is particularly trustworthy; (ii) it bears on a material fact; (iii) it is the most probative evidence addressing that fact; (iv) its admission is consistent with the rules of evidence and advances the interests of justice; and (v) its proffer follows adequate notice to the adverse party.

Bryce does not dispute that the statements in the Johnson–Gomez tape were material, that the declarants were unable to testify, or that the government complied

with the Rule's notice requirement. The resolution of this argument is therefore linked most importantly to an evaluation of trustworthiness or reliability.

Under the hearsay rules, courts must evaluate the totality of the circumstances to determine whether a statement contains particular guarantees of trustworthiness that make the declaration especially worthy of belief. The Court listed several factors to consider in determining reliability including 1) the spontaneity of the statement; 2) the consistency of the statement; 3) the lack of motive to fabricate; 4) the reason the declarant will not testify; and 5) the voluntariness of the statement.

The statements at issue in the Johnson–Gomez tape have a high degree of trustworthiness. As we noted in *United States v. Matthews* (15th Cir. 1994):

> [O]rdinarily, a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption. On the other hand, if the statement is made to a person whom the declarant believes is an ally rather than a law enforcement official, and if the circumstances surrounding the portion of the statement that inculpates the defendant provide no reason to suspect that that inculpatory portion is any less trustworthy than the part of the statement that directly incriminates the declarant, the trustworthiness of the portion that inculpates the defendant may well be sufficiently established that its admission does not violate the hearsay rule.

Several factors prove particularly relevant in this case: (i) the statements were obtained via a covert wiretap of which neither Johnson nor Gomez was aware; (ii) the statements were made during the same time period that Johnson was conversing with Bryce; (iii) Johnson's statements implicated both himself and Bryce as participants in a narcotics conspiracy; and (iv) Gomez was Johnson's colleague in the narcotics trade. Based on these factors, there is little reason to believe that Johnson and Gomez had any motive to lie, or were lying, during this telephone conversation. Accordingly, the district court's decision to admit the Johnson–Gomez tape was proper under Rule 807.

Affirmed.

PT-B: SELECTED ANSWER 1

MEMORANDUM

TO: Penny Andrews
FROM: Applicant
RE: Rock v. Davis and Bond
DATE: February 27, 2014

The General Rule Regarding Hearsay

Under Rule 801 of the Federal Rules of Evidence (FRE), a statement made by a declarant at any other time besides while testifying at the current trial may not be admitted as evidence to prove the truth of the matter asserted in the statement unless a federal statute, the FRE, or other rules prescribed by the Supreme Court otherwise provide. We seek to introduce the trial transcript, voice mail message transcript, and transcript of the telephone conversation between Mr. Watts and Ms. Hill for the truth of the statements asserted therein. That is, we seek to admit them as evidence that Mr. Watts did not, in fact, see Mr. Rock shoot anybody and that his contrary assertions during the police investigation and to the grand jury were coerced by Officers Davis and Bond. Therefore, in order for the evidence to be admissible, it must fall within an exception to the hearsay rules. There are three relevant hearsay exceptions that might apply to the transcripts at issue here: the exception for former testimony of an unavailable declarant, the exception for a statement against interest of an unavailable declarant, and the residual exception. I will address each in turn.

Former Testimony Exception

Under FRE 804, when a declarant is unavailable, a declarant's former testimony, given as a witness at a trial, hearing, or lawful deposition, is admissible if it is now offered against a party — or in a civil case like ours, a predecessor in interest — who had an

opportunity and similar motive to develop the testimony. Thus, in order to offer hearsay under this rule a party must show that (1) the declarant is unavailable; (2) the declarant made the statements at issue when he was a witness at a trial, hearing, or lawful deposition; (3) the evidence is being offered against the same party or a predecessor in interest who (4) had an opportunity and (5) similar motive to develop the testimony.

Unavailability

Rule 804 provides that that former testimony exception applies to a witness who is unavailable because he has died. Mr. Watts died in a liquor store robbery, and therefore is unavailable within the meaning of the Rule.

Statements at Issue Were Made While a Witness

The statements of Mr. Watts at Mr. Rock's trial were made while a witness during a trial. Therefore, if they meet the other criteria for admissibility under this exception, they are admissible thereunder. The statements made on Ms. Hill's voicemail, however, as well as those Mr. Watts made in conversation with Ms. Hill, were not trial, hearing, or deposition testimony. Therefore, they cannot be admitted under the exception for former testimony.

Same Party or Predecessor in Interest

As noted above, Rule 804 provides that to be admissible under this exception, the former testimony must be offered against the same party or a predecessor in interest who had a prior opportunity and motive to develop it. Defense counsel will likely argue that the prosecutor in Mr. Rock's criminal trial was not a predecessor in interest to the police defendants in the present action. In doing so, defendants will probably rely on the Fifteenth Circuit's opinion in Hannah v. City of Overland. Similar to Mr. Rock's case, the plaintiff in that case after being unsuccessfully criminally prosecuted brought a civil action against the City and the police for conduct related to his arrest and detention. He

sought to introduce in his civil case, under the former testimony exception, a deposition of a declarant who had died. The deposition was taken by the plaintiff's criminal defense counsel in advance of his criminal trial. The prosecutor was present at the deposition, but no representatives of the police officers, who were defendants in the civil case, were present. In deciding that the deposition was inadmissible, the Fifteenth Circuit assumed without deciding that the prosecutor was a predecessor in interest of the civil defendants, but noted that that proposition was "by no means clear." (*Hannah 7*). Defendants will likely attempt to capitalize on the doubt created by the Fifteenth Circuit, and argue that the prosecutor in Mr. Rock's trial was not a predecessor in interest to Detectives Davis and Bond.

There are several arguments with which this contention can be countered. First and most importantly, the Fifteenth Circuit decided Hannah on other grounds. It explicitly did not decide the question of whether a prosecutor can be considered a predecessor in interest of civil defendant police officers. Therefore, it is dicta that offers little guidance. Furthermore, although the Circuit did state that the issue was unclear, it also assumed that the prosecutor was, in fact, a predecessor in interest. In addition, the circumstances of this case suggest that the prosecutor was a predecessor in interest of the civil defendants here, even if that is not always the case. The court of appeals in *Hannah* noted that there were no representatives of the defendants in that case present when the deposition testimony at issue was offered. That is not the case here. Ms. Hill told you in your interview with her that the prosecutor gave the detectives dirty looks when Mr. Watts recanted, indicating that the detectives were present in the courtroom. In addition, Ms. Hill speculated that the prosecutor did not attempt to rehabilitate Mr. Watts because he was worried about subjecting the city to civil liability. If this is true — a question you might seek to explore further before — then the prosecutor was considering civil liability in his conduct — precisely the liability at issue here. As the detectives' employer, the city's liability will likely stem from that of the detectives.

In sum, I think there is a reasonable argument that despite the dicta in Hannah, the district attorney in this case can be considered a predecessor in interest of the detectives. However, this argument may be a difficult one.

Opportunity to Develop Testimony

Even if the district attorney can be considered the detectives' successor in interest, in order for the trial transcript to be admissible as former testimony, he must have had an opportunity to develop Mr. Watts' testimony through direct, cross-examination, or redirect examination. Here, although the district attorney made no effort to rehabilitate Mr. Watts, he certainly had the opportunity to do so. Mr. Watts retracted his testimony on direct examination, which the prosecutor could have continued had he wished to do so. In fact, Ms. Hill stated that the court prompted the district attorney and still he did not develop Mr. Watts' testimony further. The trial testimony thus satisfies this component of the exception.

Motive to Develop Testimony

In order for Mr. Watts' trial testimony to be admitted, you will have to demonstrate that the district attorney had a similar motive to develop the testimony that the detective defendants have now.

Defense counsel will likely argue, relying on *Hannah*, that the district attorney did not have a similar motive as the detective defendants in Mr. Rock's case. In *Hannah*, the court of appeals held that the deposition testimony at issue could not be admitted under the former testimony exception because the prosecutor had no significant motive, let alone a similar motive, to develop the testimony of the declarant. The circumstances in *Hannah*, however, were quite different than those during Mr. Rock's criminal trial. In *Hannah*, the prosecution's case relied in large part on the testimony of one witness. The *Hannah* plaintiff sought to admit deposition testimony of a *different* witness, stating that his initial statements were coerced by the police. But, because the prosecution was

relying almost entirely on another witness, these statements were "of little, if any, concern to the State at" the time. (*Hannah 7*). That is, the prosecutor in that case had little, if any motive, to cross-examine that witness because his statements were largely irrelevant to the case — therefore, whether they were coerced did not matter.

Here, in contrast, Mr. Watts was the sole witness against Mr. Rock. Therefore, once Mr. Watts recanted, the success of Mr. Rock's prosecution hinged entirely on whether Mr. Watts was being truthful about his recantation and the coercion by the police. Therefore, the district attorney had a strong motive to try to rehabilitate his testimony, if he believed he could do so. That he did not do so is much more likely evidence that he believed Mr. Watts that his testimony was, in fact, coerced, and not that he lacked motive to develop Mr. Watts' testimony. Furthermore, the reason he did not develop Mr. Watts' testimony may, as noted, have been a fear of civil liability — that is, knowledge that Mr. Watts testimony was likely coerced and a fear of a civil suit, like this one, based on such coercion. Whether the development of Mr. Watts' testimony would lead to civil liability is the same consideration the counsel for the detectives in Mr. Rock's civil suit would likely rely on to determine whether to further question Mr. Watts. However, whether the district was in fact considering civil liability is mere supposition. To strongly support an argument that the district attorney had a sufficiently similar motive, more evidence of this consideration would likely be needed.

The Fifteenth Circuit, in *Hannah*, stated that to assess similarity of motive, a court should determine whether "the party resisting the offered testimony" previously had "an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue." (*Hannah 6*). The court explained that the "nature of the two proceedings — both what is at stake and the applicable burden of proof" as well as, but to a lesser extent, the cross-examination at the first proceeding "will be relevant though not conclusive." (*Id*.) Here, the two proceedings at issue had different stakes, but as noted you could argue that the district attorney was considering civil liability as well, and therefore the nature of the proceedings is not as different as it may seem. The question of the burden of proof, however, may be trickier. Defense counsel will likely argue that

the district attorney did not further develop Mr. Watts' testimony because he believed that even with rehabilitation, he could not overcome the burden of proof required to convict Mr. Rock. The burden of proof in Mr. Rock's civil case is likely to be much lower than that of the defense attorney. With respect to the cross-examination factors, the district attorney did not cross-examine Mr. Rock at all, and forewent any opportunity to develop his testimony. Defense counsel will likely argue that based on these factors, even if the district attorney had a similar motive to disprove Mr. Watts' testimony, his interest was not of a substantially similar intensity to that of the defendant detectives. The district attorney, defense counsel may argue, may have had an interest not only in convicting Mr. Rock but also in avoiding civil liability. But he may have thought once Mr. Watts recanted, conviction was impossible given the burden of proof. In addition, because, unlike the detective defendants, he would not be the one held civilly liable, his interest in avoiding civil liability would not be as strong as that of the detectives. Although there is a reasonable argument that the district attorney's interest in disproving Mr. Watts' recantation is substantially similar to the interest of the defendant detectives, the argument that that interest is of substantially similar intensity to that of the detectives is weaker.

In conclusion, given the difficulty of demonstrating a substantially similar interest of a substantially similar intensity, and because only trial testimony can be admitted under this exception, other exceptions provide better options for the admissibility of the transcripts.

Statement Against Interest Exception

FRE Rule 804(b) provides that where a declarant is unavailable, the declarant's hearsay statement may be admissible if (1) it is "so contrary to the declarant's" pecuniary or penal interests that a reasonable person would not have made the statement unless it was true; and (2) if it is offered in a criminal case as a statement that "tends to expose the declarant to criminal liability," it must be "supported by corroborating circumstances

that clearly indicate its trustworthiness." As noted above, because Mr. Watts is dead, he is considered unavailable within the meaning of the FRE.

Contrary to Declarant's Pecuniary or Penal Interest

Mr. Watts' statements in each of the transcripts you seek to admit would likely be considered contrary to his penal interest. The Fifteenth Circuit has explained that "[a] reasonable person would know that admitting to give false testimony would subject the person to criminal liability for perjury." (Cabrera 10). Here, Mr. Watts testified in front of the grand jury that he had seen Mr. Rock committing the shooting. Mr. Watts' recantation at trial, his statements on Ms. Hill's voicemail that his previous statements and testimony inculpating Mr. Rock were "not true," and his similar statements in his telephone conversation with Ms. Hill all directly contradict Mr. Watts' testimony under oath at the grand jury proceeding. Indeed, Mr. Watts' statements in the transcript admit that he lied under oath. As noted by the Fifteenth Circuit, such statements would subject him to criminal liability such that a reasonable person would not have made them if they were not true. In considering precisely the same circumstances — a witness who gave inculpatory testimony under oath against a defendant and then later stated that her testimony was untrue and coerced — the Fifteenth Circuit in United States v. Cabrera stated that the later statements were clearly against the declarant's penal interest as required to fulfill the statement against interest exception. It is important to note that the Fifteenth Circuit decided Cabrera on other grounds. However, the Circuit fully explained its reasoning for characterizing as against penal interest statements in which a declarant admits previous testimony was untrue. In addition, the Circuit was definitive in its statement. Therefore, it is useful support for the argument that Watts' statements in all three of the transcripts you seek to admit are against penal interest. In any event, there should be little difficulty demonstrating that Watts' statements were against penal interest.

Corroborating Evidence, if Offered in a Criminal Case

As noted above Rule 804(b) provides that, "if it is offered in a criminal case," a statement against the declarant's penal interest and tending to exculpate the accused is only admissible if there are corroborating circumstances that indicate the truthfulness of the statement. (FRE Rule 804(b)(3)(B) (emphasis added)). Defense counsel may argue that there is insufficient corroborating circumstances to indicate the truthfulness of Watts' statements at trial or in the post-trial voicemail and phone conversation. But Rule 804(b) explicitly states that such corroborating circumstances are required only if the hearsay statement is being offered in a criminal case. Mr. Rock's case is civil. Therefore, under the language of the Rule, the transcripts should be admissible in Mr. Rock's case against the detectives regardless of whether there are corroborating circumstances that indicate the truthfulness of the statements.

Residual Exception

Rule 807 of the FRE provides an exception to hearsay statements not otherwise admissible under the FRE. That rule provides that a hearsay statement is admissible if: (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice.

The transcripts at issue likely satisfy the second and third prongs of this exception. If the police coerced Mr. Watts' statements at their interview and in front of the grand jury, then they knew they did not have probable cause to arrest and detain him. As Mr. Rock is claiming false arrest and imprisonment (among other things), this is central to his case. In addition, the only other evidence Mr. Rock can likely obtain on this point is the detectives' testimony, and that testimony is likely to be self-serving. Mr. Watts' statements, on the other hand, could subject him to criminal liability for perjury.

Therefore, Mr. Watts' statements in the transcript are more probative on the point than any other testimony Mr. Rock can likely obtain through reasonable efforts.

You may have difficulty, however, satisfying the requirement that there be circumstantial guarantees of trustworthiness. The Fifteenth Circuit has approved a district court opinion which relied on several factors in assessing trustworthiness. Those factors include the spontaneity of the statement; the consistency of the statement; the lack of motive to fabricate; the reason the declarant is unavailable; and the voluntariness of the statement. Here, Watts' statement appears to be spontaneous and voluntary. Watts initiated the phone call to Mr. Rock's counsel, and there is no indication he was coerced into doing so — indeed, he specifically denied such coercion. In addition, his unavailability does not cast suspicion on his testimony; he cannot testify because of his death. These factors weigh in favor of admitting the statement. However, it appears that Watts was friends with Mr. Rock. This indicates a possible motive to fabricate. However, given that his recantation subjected him to criminal liability, any motive to fabricate based on his friendship is likely to be overcome by the motive not to make statements against penal interest unless truthful. The most difficult problem you face in demonstrating that there are circumstantial guarantees of trustworthiness, however, is that some of the details of Mr. Watts' story changed as he recounted it. First, of course, is the problem that he initially testified at the grand jury (and stated during the police investigation) that Mr. Rock committed the shooting. Perhaps more importantly, even once he recanted he kept changing the reason he felt coerced: At trial he stated that the pressure he felt from the police related somehow to his mom's house, but on the voicemail message to Ms. Hill he stated that the pressure was because the police were trying to blame him, and in his phone conversation with Ms. Hill, he stated that the detective slapped him. Defense counsel will likely argue that this changing story is evidence that Mr. Watts' statements are untrustworthy. You could argue that his statements were different, but not inconsistent — detectives could have threatened his mom's house, blamed him, and hit him. It is unlikely however that a truthful declarant would give different reasons for different statements. You could also argue that these matters are collateral — Mr. Watts' basic statement that the police coerced him into

testifying falsely has remained unchanged throughout. This may, however, be a difficult argument.

Furthermore, in addition to demonstrating that there are circumstantial guarantees of trustworthiness, to admit Watts' statements, you'd need also demonstrate that there would be a risk of miscarriage of justice if the statements are not admitted. Although these statements are more important to Watts' civil case than statements the Fifteenth Circuit has previously excluded (see *Hannah*), the failure to impose civil liability is less of a miscarriage of justice than a wrongful conviction. Therefore, though I think you can successfully argue that admission of the transcripts are in the interest of justice, the interest is not as strong as if it were a criminal case.

The Fifteenth Circuit has held that the requirements of this hearsay exception is to be "construed narrowly." (*Hannah*) Because of the inconsistency of Mr. Watts' statements, I think you will have trouble admitting them under the exception if it is narrowly construed.

Conclusion

As explained above, the hearsay exception for statements against interest is likely to be the most successful argument for admission of all the transcripts.

PT-B: SELECTED ANSWER 2

To: Penny Andrews
From: Applicant
Date: Feb 27, 2014

Re: Rock v. Davis and Bond, Objective Memorandum on Defendants' Motion in Limine

Summary

We represent Plaintiff Gerald Rock (Rock) in his civil suit against Defendants Richard Davis (Davis) and Thomas Bond (Bond) for false arrest and imprisonment and malicious prosecution. A large portion of our evidence relates to testimony from a witness, Joe Watts (Watts), in Rock's prior criminal case for a shooting. In particular, Watts initially implicated Rock as the shooter and identified Rock in a grand jury proceeding, but then recanted his statement in a phone call to the defense attorney as well as in court.

Defendants have denied each of our claims, asserted affirmative defenses, and moved *in limine* to exclude, as hearsay, evidence of all transcripts or testimony concerning the prior testimony of Watts. The hearing is set for March 6, 2014 at 9:00 a.m.

Per your request, this objective memorandum identifies and discusses each of defendants' likely assertions for the motion *in limine,* our possible counter arguments, and the likely result. Specifically, defendants will argue that Watts' statements: (I) are hearsay, (II) do not qualify under Fed R. Evid. 804(b)(1) as a former testimony exception, (III) do not qualify under Fed. R. Evid. 804(b)(3) as a statement against interest, and (IV) do not qualify under Fed. R. Evid. 807(a)'s residual exception. Each of these arguments is discussed in turn.

Analysis

I. Whether Rock's Statements Are Hearsay

a. Watts' Testimony

Defendants have moved *in limine* to exclude Watts' testimony as hearsay. In particular, Watts' prior testimony includes:

--Testimony from the trial transcript in the case of State of Columbia v. Rock. For example, in response to the DA's question, "Are you now telling us you did not see the defendant shoot the victim?" Watts replies, "Yes." Then when asked why Watts told the police that he saw Rock shoot the victim, Watts responds, "Because I was forced under pressure, sir."

--Trial transcript testimony, Defense Exhibit 1 (Exhibit 1), which is a transcript of the voice mail message left by Watts to Defense Attorney Didi Hill on September 9, 2011. For example, Watts says he "fingered Gerry for the shooting" at both his initial discussion with the police and in his grand jury testimony because the police "were trying to blame [him]" and pressured him.

--Trial transcript testimony, Defense Exhibit 2 (Exhibit 2), which is a transcript of a telephone conversation between Watts and Defense Attorney Hill on September 9, 2011. For example, the transcript says Watts never saw Gerald shoot towards the courthouse. Watts also says the detective told him to say something and said, "You better start talking . . ." and then slapped him.

b. Rule Against Hearsay

Pursuant to Fed. R. Evid. 801, hearsay is a (1) statement by a declarant, other than a statement made while testifying at the current trial or hearing, that is (2) offered to prove

the truth of the matter asserted in the statement. Unless otherwise provided for in a federal statute, the rules, or other Supreme Court rules, hearsay is not admissible.

(1) Statement made by a declarant other than at trial

Here, the statements are made by Watts, a person declarant, not while he is testifying in the current case.

(2) Statement offered to prove the truth of the matter asserted

Here, the statements would be offered to show that Rock did not shoot the victim and that Davis and Bond were coercing Watts to implicate Rock. This will support our claim that Rock was falsely arrested and imprisoned, that Defendants acted maliciously and willfully, and that Rock was maliciously prosecuted by Defendants. This will also negate Defendants' affirmative defenses that there was probable cause for the arrest, that Rock's injuries stemmed from his own culpable conduct, and that Defendants acted reasonably and under qualified immunity.

Thus, the testimony is hearsay and is inadmissible unless otherwise provided for in a federal rule (assuming no supreme court rules or statutes apply). Here, it is possible that the statements fall under exceptions for former testimony, statements against interest, or residual.

II. Whether Rock's Statements Fall Under the Former Testimony Exception

a. Unavailable

The former testimony exception only applies if the declarant cannot be present or testify at trial or hearing due to, *inter alia*, death. Here, Watts died last week and thus is unavailable to testify.

b. Former Testimony

Pursuant to Fed. R. Evid. 804(b)(1), hearsay is admissible under the former testimony exception if it (1) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one, and (2) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross, or redirect examination.

(1) Trial, hearing, or lawful deposition

Here, under the first prong of the test, the direct examination of Watts was testimony at a prior hearing. Thus, those statements satisfy the first element of the prior testimony exception. However, Exhibit 1 was a voice mail message outside of a trial, hearing, deposition or similar proceeding. Likewise, Exhibit 2 is a telephone conversation outside of a trial or hearing. Thus, the exhibits do not satisfy the former hearsay exception.

(2) Against a party who had an opportunity and similar motive to develop the testimony

Opportunity:

The second prong of the former testimony exception requires both an opportunity and a similar motive to develop testimony. For example, in *Hannah*, the Fifteenth Circuit affirmed denial of deposition testimony in a section 1983 suit against the city and police force when the deposition stated that the witness implicated the plaintiff (and former arrestee) because he was "pressured" and "threatened' by the police to cooperate. The court noted that, although the prosecutor's office represented the State at the depositions, there were no representatives for the defendants. Nonetheless, the court assumed, arguendo, that the prosecutor was the police personnel's "predecessor in interest" and that the prosecutor had an "opportunity" to develop the testimony.

Here, there is no evidence that Davis' or Bond's attorneys were present for Watts' trial proceedings. Rather, the DA gave the direct examination of Watts and attorney Hill gave the cross-examination. Thus, like Hannah, we would need to argue that the DA was a predecessor in interest for Davis and Bond. While the Hannah court noted the proposition was unclear, it went forward with this assumption. If the court does the same thing as in Hannah, we would be able to show that the DA had an opportunity to develop the testimony because the DA gave the direct examination and could have rebutted Hill's line of questioning. Thus, this part of the test is satisfied.

Motive:

Similar motive requires a substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. Hannah. The nature of the two proceedings — both what is at stake and the applicable burden of proof — and, to a lesser extent, the cross-examination at the prior proceeding — both what was undertaken and what was available but forgone — are relevant, although not conclusive. In Hannah, the court found the prosecutor did not have a "similar motive" to develop the testimony because the testimony was not of great importance to the case. For instance, the court highlighted the fact that the plaintiff had already been arrested and indicted by a grand jury and that the State's case rested largely upon testimony of another witness, Beede. In fact, Beede testified that the plaintiff had admitted guilt to him, and the witness's deposition testimony merely corroborated Beede's statements. Thus, the statements that the witness had been "threatened" and "pressured" were of little concern to the State, and thus the State did not have a significant or "similar" motive to develop the testimony.

Here, Defendants will argue that, like Hannah, the DA did not have the same interests in developing the testimony. Defendants will likely argue that the DA's motives are not similar, potentially because the DA's time and resources are limited; whereas, Defendants' livelihoods and reputations are at stake. Therefore, Defendants may have

had a stronger motive to develop Watts' testimony. In fact, attorney Hill noted that Defendants and the DA exchanged "a lot of dirty looks" when the DA did not rehabilitate Watts after Watts said that he had lied. Therefore, Defendants will argue that the statements regarding threats or pressure to implicate a certain person should be inadmissible hearsay, as in Hannah.

However, our case is distinguishable from *Hannah* on several facts. Here, Rock was arrested after (and likely because of) Watts' identification. Prior to that identification, Defendants only had an anonymous 911 call about Watts at the scene of the crime. Further, Watts identified Rock as the shooter at the grand jury proceedings. Thus, unlike Hannah, Rock's arrest and indictment rest largely on, or potentially solely on, Watts' testimony. By contrast, *Hannah* involved evidence from another witness and a prior, independent arrest and indictment.

Moreover, the court in Hannah highlighted that the State did not have a substantial motive to develop the deposition testimony about police misconduct because there was other substantial evidence implicating the accused. Here, however, the DA did not have any other evidence after Watts' trial testimony; and the DA's only witness was Watts. Without anything further, the court granted Hill's motion for a directed verdict. Thus, the DA had a significant motive to develop Watts' testimony because the case rested upon it.

Finally, Fed. R. Evid. 804(b)(1) does not require the same motive, but only similar motive. Given this language, as well as the comparisons with Hannah, a court will likely conclude that this element is satisfied. The DA's motive was to rehabilitate Watts with earlier testimony as its only witness, and Defendants' motive would have been to rehabilitate Watts because Watts' two prior identifications support their defense in the current case.

Thus, the court will likely not admit Exhibit 1 or 2 under the former testimony exception because the voicemail and telephone conversation were not at prior trials proceedings

or hearings. However, if the court finds the DA to be a predecessor in interest to Defendants, then the court will likely admit the trial transcript under the former testimony proceeding given the importance of Watts' earlier testimony and the DA's corresponding similar motive to develop that testimony.

III. Whether Rock's Statements Fall Under the Statement Against Interest Exception

a. Unavailable

The statement against interest exception applies if the declarant is unavailable. As noted above, Watts is unavailable due to death.

b. Statement Against Interest

Pursuant to Fed. R. Evid. 804(b)(3), hearsay is admissible under the statement against interest exception if (1) a reasonable person in the declarant's position would have made the statement only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability, and (2) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

1. Statement against civil or criminal liability so that a reasonable person would not have made the statement unless believing it to be true

In *Cabrera*, the Fifteenth Circuit found that a statement that a witness did not testify truthfully at trial was against penal interest because it amounted to a "squarely self-inculpatory confession." In other words, a reasonable person would not have made the statement unless believing it to be truth because she would know that admitting to

giving false testimony would subject the person to criminal liability for perjury, especially absent any grant of immunity. Specifically, in that case, a witness testified at trial that a belt used in a murder likely belonged to the defendant. Then several months later, after the trial, the witness sought to recant her testimony on the grounds that she was coerced into giving perjured testimony.

Applying *Cabrera,* the determination of whether a statement is against penal interest (i.e., because it will subject the speaker to criminal liability), depends on whether the defendant would be subject to perjury for making false statements. Perjury generally requires a false statement of material fact made under oath. Thus, Watts' statements should be divided up between his grand jury statements, which were presumably under oath, and his other statements.

Statement leading to arrest:

After Davis went to pick up Watts, Watts identified Rock as one of the shooters. Rock was then arrested. These statements were likely not under oath. Thus, these statements to Davis likely do not fall under this application of the statement against hearsay exception. Thus, the trial transcript portions which discuss the statements made to the police up to the point of the grand jury proceeding are not admissible under this rule. This includes the trial transcript portions where Watts said he lied and said that the shooter was Rock and that he said that because he was forced under pressure and was lying.

However, these statements could be statements against penal interest if they were incorporated into Watts' statements to the grand jury (see below).

Statement at grand jury proceeding:

Watts also gave statements in the grand jury proceedings, and those statements likely were under oath. Thus, those statements will likely fall under the statement against

interest exception. For example, in Exhibit 1, Watts says he just testified at the grand jury and got the same pressure and that he lied again, telling them Rock did the shooting. If Watts' statements at the grand jury proceeding were under oath, then his statements in Exhibit 1 would be against his penal interest because he would be subject to perjury for lying in the grand jury proceeding. Thus, this exception likely applies to these statements.

Statements about post-grand jury proceedings:

In Exhibit 2, Watts talks about discussions with the detective and that he said, "Oh, I know what happened" and "You better start talking." Those statements were not under oath, and likely do not fall under the statement against interest exception.

Other types of interests:

We could also argue that Watts' statements were made against another type of interest, other than a penal interest. However, Watts did not appear to be at risk for any other type of civil or proprietary liability for making his statements regarding pressure from Defendants to implicate Rock. Thus, this argument will likely fail.

2. Corroborating circumstances

In *Cabrera,* the court did not admit hearsay under the statement against interest exception because it found lack of corroborating circumstances. In particular, it noted that the recanting statement was made more than six months after the trial testimony; this large temporal gap and lack of spontaneity did not support the admissibility of the statement.

Here, Defendants may argue that there are no corroborating circumstances because nothing else seems to support Watts' statements that he was pressured into implicating Rock. However, under the language of Fed. R. Evid. 804(b)(3), the corroborating

circumstances requirement only comes into play if the statement is made in a criminal case and tends to expose the declarant to criminal liability. For example, in Cabrera, the case was United States v. Cabrera, a criminal case seeking a new trial. Here, by contrast, Rock's lawsuit against Defendants is a civil suit for general, special, and punitive damages. Thus, corroborating circumstances are not required.

If they were required, however, our case is also distinguishable from Cabrera because that case involved a recanting statement more than six months after trial testimony. Here, however, Watts wanted to recant his statements during a trial proceeding. Further, the arrest occurred on August 29, 2011; Watts left the voicemail and spoke with attorney Hill (Exhibits 1 and 2) on September 9, 2011. Thus, the statements are likely corroborated by their proximity in time and apparent spontaneity. Cabrera.

IV. Whether Rock's Statements Fall Under the Residual Exception

Pursuant to Fed. R. Evid. 807, hearsay is not excluded under the residual exception if (1) the statement has circumstantial guarantees of trustworthiness, (2) it is offered as evidence of a material fact, (3) it is more probative on the point for which it is offered than any other evidence the proponent can obtain through reasonable efforts, and (4) admitting it will serve the purposes of the rules and the interests of justice. Additionally, (5) the proponent must give the adverse party reasonable notice of the intent to offer the statement before trial or hearing.

a. Residual Exception

The residual

1. Circumstantial guarantees of trustworthiness

Circumstantial guarantees of trustworthiness are similar to the corroborating circumstances requirement for the statement against interest exception. See Cabrera

(denying admission under the residual exception for the same reasons that it denied it under the statement against interest exception). More specifically, in determining trustworthiness or reliability, the court may consider several factors, including (1) the spontaneity of the statement, (2) the consistency of the statement, (3) the lack of motive to fabricate, (4) the reason the declarant will not testify, and (5) the voluntariness of the statement.

Spontaneity:

Here, Watts' statements in Exhibit 1 and 2 were spontaneous and made upon his own accord. By contrast, Defendants would argue that the statements in the trial proceeding were prompted by the DA. Thus, the former statements are more spontaneous and more likely to be admissible under this exception than the latter statements. Also, as noted above, this case is distinguishable from *Cabrera*, in which the declarant waited six months to recant her statement. Here, Watts wanted to recant his statement no more than one month after he said he had lied.

Consistency:

Here, there is consistency between the statements in Exhibit 1, Exhibit 2, and the trial transcript. Specifically, Exhibit 1 says that Watts said Rock did the shooting but that he lied; the police were trying to blame him, and they pressured him at the time of the arrest and prior to the grand jury proceeding. Similarly, Exhibit 2 says he never saw Rock at the courthouse, did not see him shoot; he also said that the detectives were threatening him. In the trial transcript, Rock likewise testifies that he did not see Rock shoot the victim and that he lied before because he was forced into his testimony under pressure. Further, when asked how the police were questioning him, Watts says (before being cut off), that the police said his mom's house could get . . ."

Thus, there is consistency in the statements that Watts did see Rock shoot the victim and that he made previous statements because of police pressure. Thus, this element sides with inclusion of the statements.
Lack of motive to lie:

In *Matthews*, the court noted that a confession of an accomplice from a police interrogation cannot ordinarily be introduced as evidence of guilt of an accused. However, if a statement is made to a person who is viewed as an ally, rather than a law enforcement official, and if the circumstances surrounding the portion that inculpates the defendant provide no reason to suspect that the inculpatory portion is any less trustworthy than the part that directly incriminates the declarant, then trustworthiness may be sufficiently established.

For example, in *Bryce*, the Fifteenth Circuit admitted hearsay statements from a phone call between two supposed co-conspirators. In doing so, it noted several "particularly relevant" facts, including the fact that the statements were made by a covert wiretap of which neither speaker was aware, the statements were made during the same time period as other admitted statements, the statements implicated the speaker and the defendant, and the speaker and defendant were colleagues. Accordingly, the court found there was little reason for either party to have the motive to lie.

Here, Defendants will likely argue that the trial transcript testimony was not voluntary because it was made in court after DA questioning; thus, this would fall under the general rule not allowing confessions in response to police interrogation. Defendants will likely win this argument.

However, we have a strong response that Exhibits 1 and 2 were voluntary and not made in response to police interrogation or anything similar. In fact, Exhibit 1 includes Watts' completely voluntary voice mail left to attorney Hill; there was no prompting from Hill or the government. Further, Watts may have viewed Hill as an "ally" because she was representing Rock against the government, and Watts wanted to protect Rock and

speak out against the government. While Hill was not the same type of ally as the drug co-conspirator in Bryce (as Defendants might point out), Hill is likely viewed more as an ally than an adversarial police. Also, like *Bryce*, Watts likely did not know his telephone conversation was recorded; while he knew the voice mail in Exhibit 1 was recorded, he probably did not know that either Exhibit 1 or 2 would be used in court when he made the statements. Additionally, like Bryce, Watts' statements implicated himself as well as Defendants because Watts could be later tried for perjury. Thus, the Exhibits 1 and 2 demonstrate no motive to lie, and thus have circumstantial guarantees of trustworthiness.

Reason declarant will not testify:

Here, Watts will not testify due to his death; thus, this element favors inclusion of the testimony.

Voluntariness:

As analyzed in the section above for motive to lie, the statements made in the trial proceeding were not voluntary because they were in response to DA questioning; however, the Exhibit 1 and 2 statements were voluntarily made.

2. Material fact

The statements are material facts concerning whether Defendants coerced Watts into lying and are therefore liable for improper arrest, imprisonment, and malicious prosecutions.

3. More probative than other evidence

Watts' statements are more probative than other evidence. No other similar evidence is indicated, and Watts can no longer be retained because he is dead.

4. Interests of justice

The residual exception is "construed narrowly" so that it does not swallow the hearsay rule. Cabrera. For example, excluding evidence would not pose a great risk of miscarriage of justice if it was weak and related to only one small link among several implicating factors. Id. (finding statement that witness lied at a trial six months prior not admissible under the residual exception because there were other implicating factors, including other physical evidence and expert testimony connecting defendant to the scene of the crime).

b. Notice

If the statements are to be used, we would need to give the proper notice to Defendants.

Thus, Exhibits 1 and 2 likely fall under the residual exception because they are material and evidence circumstantial guarantees of trustworthiness.

Conclusion

For the aforementioned reasons, we have strong arguments in reply to Defendants' motion *in limine* to exclude Watts' statements as hearsay. Specifically, the trial testimony likely falls under the former testimony and statement against interest exceptions. The statements in Exhibit 1 and 2 may be admissible under the residual exception if the court finds that in the interests.

California Bar Examination

Performance Tests and Selected Answers

July 2014

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2014 California Bar Examination and two selected answers for each test.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

CONTENTS

July 2014

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

TEHAMA COUNTY V. TEPEE CAMPGROUND

TEHAMA COUNTY V. TEPEE CAMPGROUND

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

APEL & ESTEPE

Attorneys at Law

MEMORANDUM

TO: Applicant

FROM: Lou Estepe

SUBJECT: Tehama County v. Tepee Campground

DATE: July 29, 2014

We represent Jane Maya, who owns and operates Tepee Campground. Jane was served with a Notice to Abate by the County Attorney's Office of Tehama County. We have an abatement hearing scheduled. The abatement hearing is a trial before an independent administrative law judge.

Before I write my brief, please draft an objective memorandum that discusses and analyzes the charges made in the Notice to Abate, and evaluates our chances of prevailing against each charge. Take into consideration arguments likely to be made by the County. A separate statement of facts is not necessary. Instead, use the facts in your analysis of the charges.

TEHAMA COUNTY, COLUMBIA

Al Read
County Attorney
P.O. Box 1000
200 King Street
Short Mill, Columbia

June 13, 2014

Jane Maya
Tepee Campground
78200 West Bank Road
Tehama County, Columbia

NOTICE TO ABATE

Property Address:

Recreational Park Trailers at Tepee Campground
78200 West Bank Road
Tehama County, Columbia

NOTICE IS HEREBY GIVEN that the following conditions, activities, or uses exist at Tepee Campground, 78200 West Bank Road, Tehama County, Columbia, in violation of the following Tehama County Land Development Regulations (LDRs): 54 recreational park trailers (RPTs) present in a district zoned rural/residential.

1. The RPTs are permanent structures in violation of LDR, Section 222.1; and

2. The RPTs are an enlargement, expansion, or material increase in intensity of a nonconforming use; or a change to another nonconforming use that is not a materially less intense use -- in violation of LDR, Sections 541.1, 541.2, and 541.3.

Required Corrective Action: Removal of all RPTs within 10 days of receipt of this Notice, or by June 30, 2014, whichever date is later.

Please comply promptly with this Notice or I will refer the matter for an immediate abatement hearing.

Sincerely,

Al Read

County Attorney, Tehama County

NEWSPAPER ARTICLE

North Country Boomerang

June 19, 2014

GLAMPING DEBUTS ON WEST BANK ROAD

Jane Maya Rolls in 54 Recreational Park Trailers to Provide a Glamorous Camping Experience.

by Damon Suarez, Boomerang Reporter

Last Monday, a red GMC Denali towing a white recreational trailer rolled down the Tepee Campground drive toward the rental office, past a row of new modern wood-paneled cabins.

The sport utility vehicle was pushed down in the back by the weight of the trailer. Jane Maya, owner of Tepee Campground, guessed the SUV and trailer measured about 55 feet, still shy of the campsite's limit of 78 feet for recreational vehicles (RVs).

"That's not even as big as the biggest RV trailers," she said, noting the Denali and trailer didn't compare to the mega land yachts that come to her campground on West Bank Road.

After parking, the owner turned on a gas-powered generator to run his air conditioner and appliances. The loud hum was expected to reverberate throughout the campground until his departure.

In contrast, Maya's new mobile "cabins" -- which are called recreational park trailers or RPTs -- took up just 39 feet of each RV slot on which they sat. They too are on wheels, and were towed by light-duty pickup trucks. But with electricity already hooked up, there were no noisy generators needed.

Guests at some of the new cabins sat on the front porch, sipping soda.

“This is so much more subdued and quiet, like being in the outdoors was meant to be,” Maya said of the cabins, which she trucked in last week. “But it’s the same use.”

With the arrival of the mobile cabins, Maya estimates the number of guests such as those driving the big diesel Denali and trailer will decrease by hundreds. In doing so, she will transition her decades-old Tepee Campground to a resort called “Solitude.” She said Solitude Resort will be a new “glampground” where guests can still camp under the stars, albeit in a mobile cabin with creature comforts -- running water, high-definition TV, and feathered pillows.

“This is the evolution of camping,” she said. “Glamping is in between staying in a hotel and camping. It’s glamorous camping.”

With diesel prices at more than $4 a gallon, it’s no wonder that occupancy of these cabins is nearly full every night and rentals on her RV slots are down about 40 percent. “I don’t think we’d stay open another 5 years just renting to RVs and tent campers,” she said. “But with recreational park trailers, we expect full occupancy year-round.”

Campgrounds across the country are parking these units on-site, according to Maya. “It’s the future for campgrounds,” said Maya. She added, “And we go from gas guzzling motor homes to families who arrive in hybrids or public transportation to stay in certified green trailers.”

Maya said that she will only accept short-term rental, no permanent or long-time tenants, but does expect to rent the trailers year-round. “We always have,” she said.

Maya’s trailers are 12-feet wide, built on a chassis, 39-feet long and measure about 395 square feet. “Everything is built onto the trailer,” said Maya. “I personally made sure that they fit the federal government’s definition of an RV.” Maya added, “No sheds or decks attached, like you see at mobile home parks.”

Maya's cabins are paneled with reclaimed mountain snow fencing and each comes with a fireplace, hardwood floors, and wireless internet. Outside, guests have a deck with a grill and a private outdoor campfire lawn.

In the kitchen, guests will find a stove, refrigerator, microwave oven, and dishwasher. Bathrooms come with a sink, granite countertops, and large stand-up shower.

The queen-size plush-top mattresses are covered with luxury linens, goose down pillows, and European-style bed covers. Furniture and all-wood fixtures were built from pine-beetle-killed trees.

Maya charges $175 to $300 a night to rent one of her glampers.

NEWSPAPER ARTICLE

Tehama Times Eagle

June 24, 2014

TEPEE CAMPGROUND GOING ROGUE?

It's an RV, It's a Cabin, It's a Modular Home.

by Zena Owens, Times Eagle Correspondent

Though enmeshed in a legal battle with Tehama County about whether she needs permission to use cabins-on-wheels, Jane Maya, owner of Tepee Campground, decided to bring the units in anyway. She believes they are allowed, while the County Planning Department says she needs a special permit for them.

Recreational park trailers, or RPTs as they are known in the trade, are a fast-growing trend in the camping community. They bear little resemblance to a typical RV. They look more like modular cabins.

"Jane says these RPTs are just like RVs. I don't agree," said Planning Director Jason Drulard.

County land regulations do not allow permanent structures in campgrounds without the permission of the County. Two months ago, Maya sought permission to bring RPTs on 54 of her RV sites.

Drulard acknowledged that Maya at first tried to work with the County. "I really regret what has happened," Drulard said. "We persuaded Jane to seek a conditional use permit, but then her neighbors flooded the County Commissioners with complaints, and they temporarily suspended the process."

Drulard admits that government does not move at the pace of commerce, but says he is just following protocol. "I am absolutely appreciative of her frustration right now," Drulard added.

Drulard pleaded with Maya to hang in there. “She’s come so close with this application. To bail now, it’s a shame,” Drulard said. “But at this point, given that she has withdrawn her application for a conditional use permit, we can’t just let her bring the units in.”

The delay was the last straw for Maya. “I was at the end of my rope,” she said.

“I had them built, ready for delivery, and even booked, when the County Commissioners decided not to hear my case,” Maya exclaimed.

Maya is moving RPTs onto her site as quickly as they can build them in Red Bluff. Maya herself designed the cabins with a builder of prefabricated modular homes.

“Just because I made these cool, I shouldn’t be persecuted for that,” Maya said. “If they looked tacky, I would probably have gotten approval.”

Everything Maya wants to do hinges on the County’s definition of an RPT.

“The Planning Department and the County Commission never got to decide whether an RPT is a structure. Now a judge will do it,” lamented Drulard. If the units are in violation, fines and legal action could result.

What will Maya do if she loses?

“If they want to defeat this project, then they are going to have the Wild West out here,” Maya warned. “We can pack this place with aluminum-sided trailers. I can rent these sites for $600 a month and fill every one. It’s going to be filled with people rebuilding their dirt bikes out front. So if they want to see that, game on.”

CONDITIONAL USE PERMIT APPLICATION
STAFF REPORT

BY JASON DRULARD, PLANNING DIRECTOR, TEHAMA COUNTY

April 30, 2014

APPLICANT: Tepee Campground

OWNER: Jane Maya

REQUEST: Conditional Use Permit to use Recreational Park Trailers (RPTs) on 50% of the current campsites, to be located on the site year-round and rented for visitor use on a short-term basis.

PLANNING DEPARTMENT STAFF FINDINGS:

PROJECT HISTORY

Tepee Campground has been in existence since the mid-1970s. Thereafter, when the County adopted its first land use regulations, the campground was a permitted nonconforming or a "grandfathered" use.

In 1994, the current Tehama County Land Development Regulations (LDRs) were adopted and all properties within Tehama County were rezoned. As part of that rezone, the Tepee Campground property was located in a district zoned rural/residential. Within the rural/residential zoning district, campgrounds are a permitted use requiring a Conditional Use Permit (CUP). Since this was a campground that existed prior to the current zoning regulations and would require a CUP under the current LDRs if newly proposed, the existing campground is considered a permitted nonconforming use per the definition of Nonconforming Use (LDR, Section 540).

In 1979, the campground had a total of 142 campsites (33 tent sites and 109 RV, i.e., recreational vehicle, sites) on 7.6 acres, and structures (A-frame office, residential duplex, shed and store) totaling 5,100 square feet. Under current

permitted density ratios for campsites, Tepee Campground would have the same number of sites as it has now.

The current site consist of 33 tent sites, 109 RV sites, and related structures.

ISSUES

Issue 1: Are RPTs recreational vehicles (RVs) or are they structures being used as lodging?

Recreational park trailer (RPT) use is not defined in the LDRs generally or in the campground definition. The LDRs, when written, could not have contemplated all uses or inventions. Campgrounds are defined in the LDRs as "establishments providing overnight or short-term sites for recreational vehicles, trailers, campers or tents, that have no permanent structures. . . . " LDR, Section 222.1.

Classification depends on whether RPTs are considered recreational vehicles (RVs) or structures. The County Building Department has not treated RPTs, or RVs, as buildings in the past. (See attached Building Department Memorandum.)

RVs, in general, are defined in, although not regulated by, federal regulations (24 C.F.R. Section 3282.8 (g)). The RPT industry claims that RPTs fit within the criteria of RVs. The RPT industry has established construction standards for RPTs. To meet the standards, RPTs must be limited to 400 square feet, built on a single chassis, mounted on wheels, and must comply with various requirements for electrical, plumbing, and heating systems. If certified under the RPT industry standards, many states treat RPTs as vehicles; for example, by taxing them as vehicles. (See attached Recreational Park Trailer Industry Association letter.)

Although RPTs are hauled to their ultimate resting place on wheels, they hook up to sewer systems, draw power from the grid, and feature running water and refrigeration.

If classified as structures, RPTs could not be placed in a campground (LDR, Section 222.1); they would require building permits and would be subject to the County Building Code requirements for buildings. Neither short-term rentals of

lodging, nor mobile home parks, which are intended for long-term occupancy, would be permitted in a rural/residential zone without a conditional use permit.

Issue 2: Are RPTs an enlargement, expansion, or material increase in intensity of a nonconforming use, or a change to another nonconforming use?

This change is not a new development in a rural/residential zone, but rather it is a change in the operational characteristics of what exists on the property. The overall proposed development, as an existing nonconforming use, may not be compatible with the surrounding uses (a campground among rural residences).

The applicant describes the use as a form of campground use, and thus identical to the existing non-conforming use. The fact that customers stay for short periods of time, that the vehicles may meet the federal definition of recreational vehicles (RVs), and that the owner intends no expansion of the existing pads lends support to this view.

By affixing the so-called trailers to her land and attaching them to services, however, has the applicant changed the use of her property? No longer is she charging visitors $27.50 per night to park vehicles in a campsite. Instead, she will be charging more than $175 per night for a room.

Staff notes significant differences between campgrounds and a property equipped with RPTs. In the former, the patron brings a vehicle to the property and removes it when leaving. In the latter, the landowner maintains the vehicle on the property, rents it to a patron and repairs, maintains, and cleans it between occupancies. The use may be very similar to a motel unit in that a guest comes to the campground in a passenger vehicle, stays a limited time, leaves, and the campground staff cleans the unit to prepare it for the next guest. As noted above, short-term rentals, such as a motel or hotel, would not be permitted in the rural/residential district.

A common complaint from neighbors is that the campground has expanded the number of sites over time, and that the introduction of RPTs will further increase

site density. Staff cannot substantiate either claim. The County's historical aerial photography indicates that the campground's current configuration is almost identical to the 1978 layout, suggesting little, if any, expansion has occurred over the years in terms of site development. This application seeks to replace one-half of the current RV sites with RPT sites. There would be no increase in the number of sites.

RPTs will be no bigger than many, if not most, RVs. The maximum length of RPTs is 40 feet, although they may be wider, at 12 feet versus 8 feet for most RVs. In general, the footprint or structure floor area of the pads will be smaller than the current pads. The bulk of current RVs, in total, may be greater than proposed RPTs.

Some neighbors and nearby businesses have supported the appearance of the attractive wood-sided RPTs and the enhanced landscaping.

The County Transportation Department estimates a slight reduction in traffic entering and leaving the campground, more importantly, replacing the less nimble fuel-inefficient RVs with passenger cars. The Traffic Impact Assessment is attached.

Applicant also asserts other benefits mitigating or minimizing potential adverse impacts to neighboring properties, such as benefits to air quality and fuel consumption. (See attached Air Quality & Fuel Consumption Analysis submitted by the applicant.)

The campground is one block from a county bus shelter, and across from the extensive network of pathways for hiking and biking. The site has safe, convenient, and direct access to public transportation.

From comments and community complaints, it is probable that there has been a small amount of long-term use on the property for many years. Long-term use would be an established, historical use. Applicant could probably convert part or all of the campground into a mobile home park.

Applicant has proposed a 30-day stay limit for the entire campground -- all RPTs, RVs, and tent campers. Current uses by long-term renters would go away. If the CUP is granted, staff recommends that it be limited so that only short-term

rentals are allowed at the campground, not only for RPTs, but for all users. Precluding continuation of long-term use at this campground, located as it is in the rural/residential zone, has significant benefit for the character of the surrounding neighborhood, by preventing RPTs from becoming in effect a mobile home park.

MEMORANDUM

TO: County Commissioners

FROM: Director, Building Department

DATE: April 21, 2014

RE: Recreational Park Trailers

The Tehama County Building Code has no provisions on recreational park trailers (RPTs) or any other recreational vehicles (RVs). We have never issued a building permit for one, nor inspected an RPT before or after installation.

The Building Code does not make a distinction between types of RVs, whether fifth wheels, towable trailers, or motor homes; it considers them all to be RVs. While the building code recognizes RVs, it does not regulate them.

I checked with Peter Mendez of the HUD Office on Manufactured Housing, and he said that RPTs are not being regulated by HUD.

If the Commissioners decide that RPTs are structures, then of course the full Building Code regime of permits for construction, code standards, and inspection would be applicable.

In the opinion of the Tehama County Building Department, RPTs pose less of a risk to the public than a conventional RV and therefore should not be subject to anything that we are not willing to require of fifth wheels, towable trailers or motor homes, provided the property was located in an area zoned for such use.

RECREATIONAL PARK TRAILER INDUSTRY ASSOCIATION, INC.
Washington, D.C.
recreationalparktrailers.com

April 15, 2014

Dear Commissioners:

The Recreational Park Trailer Industry Association (RPTIA) is the national trade association representing the manufacturers of recreational vehicle park trailers and their related suppliers. The Association also represents allied retailers, RV parks and resorts.

We submit this letter in support of the application from Tepee Campground for a conditional use permit.

Recreational park trailers (RPTs) are RVs primarily designed as temporary living quarters for recreation, camping or seasonal use. They are built on a single chassis, mounted on wheels, and have a gross trailer area not exceeding 400 square feet in the set-up mode. One type is less than 8'6" in width and designed for frequent travel on highways, while the other and more popular type is usually 12' in width, must be transported with special movement permits from state highway departments, and are usually sited in a resort or RV park for an extended term, typically several years.

A determination by your county that these vehicles are "structures" would have a catastrophic impact on the campground industry and businesses related thereto. All RVs in the United States have been classified by the states and federal government using the criteria outlined above. If Tehama County were able to classify one of these RV units as a "structure" and require it to meet local building codes as a "structure," this same logic could then be applied to all other RVs, including folding camping trailers, travel trailers, fifth wheel travel trailers, and motor homes. Local building codes are designed for structures that are rigid, not for

vehicles that are designed for transport on roads and highways. While the RPT might look like a building, it is not. It is a vehicle.

Respectfully submitted,

George Rubottom
Executive Director

TRAFFIC IMPACT ASSESSMENT

TEPEE CAMPGROUND

For TEHAMA COUNTY PLANNING DEPARTMENT

By Lopez-Granada Engineering

Big City, Columbia

April 21, 2014

Summary:

This traffic impact assessment is a narrowly focused examination of a proposed change to the operational characteristics on the existing recreational vehicle site. While RVs would still visit the site, one-half of the use would shift to patrons coming in SUVs and passenger cars. The proposed development will slightly reduce vehicle traffic flow on West Bank Road, introduce no increase in traffic impacts, and provide more than adequate vehicular site access. The change would have the benefit of replacing the less nimble fuel-inefficient RVs with passenger cars. The applicant's proposal would likely increase the number of patrons, yet decrease the number of recreational vehicles accessing and exiting the property.

AIR QUALITY & FUEL CONSUMPTION ANALYSIS FOR RECREATIONAL VEHICLE SITE REPLACEMENT WITH RECREATIONAL PARK TRAILERS

Report prepared for Tepee Campground

By Science for Hire

April 10, 2014

ABSTRACT

Tepee Campground is seeking to diversify a portion of its inventory to include recreational park trailers (RPTs) on premises. By swapping out a subset of existing recreational vehicle (RV) spaces for RPT sites, the Campground will be positioned to offer visitors an ecologically friendly alternative to driving or towing their lodging, which is inherent to RV travel.

Our study has shown that replacing one traditional RV site with one RPT site could save approximately 9,500 gallons of fuel and reduce the CO2 emissions released into the atmosphere by 363,000 pounds each year. If Tepee Campground replaced 54 RV sites with RPT sites, it would save 513,000 gallons of fuel consumption and reduce carbon emissions by 19,602,000 pounds or 9,801 tons annually.

July 2014

California Bar Examination

Performance Test A

LIBRARY

TEHAMA COUNTY v. TEPEE CAMPGROUND

LIBRARY

SELECTED TEHAMA COUNTY
LAND DEVELOPMENT REGULATIONS

DIVISION 200: ZONING DISTRICT REGULATIONS

The purpose of this article is to establish zoning districts and uses that regulate the type and density of land uses within the county to:

A. Ensure the protection of the desired community character of each zoning district;

B. Promote adequate housing and business activity within the county;

C. Promote stability of existing land uses and protect them from inharmonious influences and harmful intrusions; and

D. Ensure that uses and structures enhance their sites and are compatible with the natural beauty of the county's setting and critical natural resources.

DIVISION 220: ZONING DISTRICTS USES

* * * * *

Section 222. Campgrounds

222.1. Campground use means establishments providing overnight or short-term sites for recreational vehicles, trailers, campers or tents, that have no permanent structures other than a management office, laundry, small grocery, storage facility, and sanitary facilities that shall be solely for the occupants of the campground.

222.2. Camping Sites. Each camping site in the campground shall consist of a camp pad that provides adequate parking, the camp site (including a fireplace or barbecue, and a table), a pole for hanging food stores or bear proof boxes, where appropriate, and a surrounding active recreational area.

* * * * *

Section 540. Nonconforming Use

Nonconforming use means any use of land, building or structure which was established pursuant to the zoning and building laws in effect at the time of its development, but which use is not permitted by these Land Development Regulations for the zoning district in which it is located. A use permitted by right at the time of its development, but now designated as a nonconforming use for the zoning district in which it is located, is a permitted nonconforming use. A Conditional Use Permit is not required to continue the existing use, but a Conditional Use Permit is required for any change of use.

Section 541. Change in Use or Characteristics

541.1. A nonconforming use shall not be enlarged or expanded in areas of structure or land occupied.

541.2. A nonconforming use shall not be materially increased in intensity.

541.3. A nonconforming use shall not be changed to another nonconforming use unless any new use is a materially less intense nonconforming use.

541.4. The determination of the level of intensity shall include consideration of traffic generated, perceived level of activity, operational characteristics and potentially adverse impacts on neighboring lands.

TALL TIMBERS RESORT V. OREGON CONSTRUCTION DEPARTMENT

Appellate Division (2010)

On November 30, 2008, the Commissioner of the State of Oregon Construction Department (Commissioner or Department) adopted a new set of regulations, which determined that recreational park trailers (RPTs) are subject to the State Uniform Construction Code (Construction Code).

Appellants, who are a seller of RPTs, the owner of a campground in which RPTs are installed, and the owners of an RPT, challenge the validity of these regulations on the ground the Construction Code Act does not confer authority upon the Department to regulate RPTs under the Construction Code.

The applicable administrative regulation defines a "recreational park trailer" (RPT) as a trailer-type unit that is primarily designed to provide temporary living quarters for recreational, camping, or seasonal use, that meets the following criteria:

1. Is built on a single chassis mounted on wheels;
2. Has a gross trailer area not exceeding 400 square feet in setup mode, and, if less than 320 square feet in the setup mode, would require a special movement permit for highway transit; and
3. Is certified by the manufacturer as complying with standards set by the recreational park industry.

In proposing the adoption of the challenged regulation, the Department stated:

> Commonly referred to as "park models," recreational park trailers (RPTs) are types of recreational vehicles (RVs) that are installed in recreational vehicle parks or condominium campgrounds based upon long-term ground leases, or ownership in the case of condominium campgrounds. Site built appurtenances such as decks, sunrooms, and others are often attached to the recreational park trailers. They are typically used as vacation homes.

RPTs are constructed in generally the same manner as single family dwellings and incorporate the same types of electrical, plumbing, and mechanical systems as dwellings.

An RPT is closed construction, which means that it arrives at the site already assembled so that most building, plumbing, mechanical and electrical systems cannot be inspected because they are already concealed.

RPTs may be found sited in campgrounds, in mobile home or manufactured home parks or on individual lots. Wherever they are and whether they are used for vacation purposes or as permanent residences, they are subject to the requirements of the Construction Code.

The Department received extensive comments regarding its proposals for adoption of the regulation. Those comments and the Department's responses mirror to a substantial extent the arguments presented in this appeal.

The purposes of the Oregon Construction Code Act include "providing requirements for construction and construction materials consistent with nationally recognized standards" and "insuring adequate maintenance of buildings and structures throughout the State and adequately protecting the health, safety and welfare of the people." To accomplish the legislative objective of protecting the health, safety, and welfare of occupants of buildings and structures, the Legislature delegated authority to the Commissioner of the Department to "adopt a State Construction Code for the purpose of regulating the structural design, construction, maintenance and use of buildings or structures to be erected, and the alteration, renovation, rehabilitation, repair, maintenance, removal or demolition of buildings or structures already erected."

Our Supreme Court has indicated that the Construction Code Act is remedial in nature, and designed to address directly matters affecting health, safety and welfare. By its own terms, the Construction Code Act's provisions must receive liberal construction to advance its purposes.

The key terms of the Construction Code that the Legislature authorized the Department to adopt are "structure" and "building." The Commissioner of the

Department has interpreted "structure" and "building" to include RPTs. The Commissioner cited various reasons supporting this interpretation, including:

- A recreational park trailer (RPT) is a combination of the same types of materials used in any home and it involves all the same safety issues as a home.
- It is intended for the same type of occupancy as any other vacation home.
- A recreational park trailer (RPT) is a structure that is enclosed with exterior walls -- walls identical in construction to those of any dwelling.
- It is clearly designed for housing or shelter and it is arranged for the support of individuals.
- It is equipped with plumbing, electrical and mechanical systems just as is any dwelling.

Appellants challenge the Commissioner's interpretation that RPTs are "structures," arguing that they should be classified as recreational vehicles (RVs). Appellants rely on the definition of RVs contained in the regulations of the Federal Manufactured Home Construction & Safety Standards Act. The Act governs "manufactured homes." The regulations issued pursuant to the Act expressly exclude "recreational vehicles" from the category of "manufactured homes." In the federal regulations, "recreational vehicles" are defined as: (1) built on a single chassis; (2) 400 square feet or less when measured at the largest horizontal projection; (3) self-propelled or permanently towable by a light duty truck; and (4) designed primarily not for use as a permanent dwelling, but as temporary living quarters for recreational, camping, travel, or seasonal use. 24 CFR, Section 3282.8(g).

Appellants contend that RPTs fit the federal definition of an RV. An RPT, however, can be distinguished from a conventional RV. It is a special type of RV that is intended for installation in a "park." They are built under a different standard than conventional RVs. The principal difference between the national consensus standard

for RVs and the standards for RPTs, is that the RPT standard covers all types of the requirements typically found in a building code while the RV standard does not.

Appellants cite other distinctions between RPTs and manufactured homes, or most other homes, to support their contention that RPTs are not structures. In their view, both a manufactured or other home is a structure because it is constructed, erected, or attached to something with *a fixed location on the ground*. For example, RPTs have a fifth wheel for hauling and are designed for greater mobility and movement than a manufactured home. An RPT is not manufactured to HUD specifications for a manufactured home and has a maximum area of 400 square feet. The wheels are not removed from the chassis of an RPT, as are wheels from a manufactured home, and an RPT is not placed on a permanent foundation. An RPT is left on its wheels and parked on a recreational vehicle pad. RPTs remain readily movable.

The federal definition of RVs also contains a standard that is entirely dependent upon its intended use, i.e., "designed primarily not for use as a permanent dwelling, but as temporary living quarters for recreational, camping, travel, or seasonal use." 24 C.F.R, Section 3282.8(g)(4). Appellants say the standard is an objective one, and that a reasonably prudent person would use as a temporary dwelling what was designed for temporary use, although such temporary dwelling also may be used for permanent living quarters for one or more families or individuals. Appellants contend that the objective design of the trailer for normal use controls, rather than the subjective *intent* of the user. Thus, travel and recreational design determines the temporary nature of the trailer, notwithstanding that there may be those individuals who may use it as a permanent dwelling.

However, the appellants' contentions, whether they are correct or not, miss the point. We do not need to classify RPTs as either manufactured homes or RVs. The Department has determined that RPTs are structures, even if primarily designed to provide temporary living quarters for recreational, camping, or seasonal use.

The Department's determination that RPTs fall within the Construction Code's definition of "structure" is not plainly unreasonable and therefore must be upheld.

Affirmed.

COUNTY OF LOS BANOS V. LESKIEWICZ

Columbia Court of Appeal (2000)

The County of Los Banos (County) commenced an abatement proceeding to enjoin the defendant-landowners from renting space for recreational vehicles and other camping trailers to members of the public. Defendants own a 14-acre tract of land in Los Banos County, made up of three separate parcels. It is located in a rural-agricultural district, which does not permit the uses made by Defendants of renting camping sites.

Prior to the adoption of the county zoning ordinance, Defendants had improved the 14-acre tract by trimming trees, removing and burning brush, grading, erecting retaining walls, building a road, installing a cesspool, and erecting an outhouse. They also built two tents, a picnic area, and a camping trailer; the trailer was there for about three weeks. During the time, Defendants rented the facilities to the public for camping. For one or two years, the "picnic area-campground" operated in summers to permit outdoor visits for two to four families at a time.

Thereafter, the County adopted its zoning ordinance which did not permit commercial uses, such as campgrounds, in the rural-agricultural district.

Over several years, Defendants erected a building to provide sanitation services for picnickers and campers. The record does not indicate whether Defendants obtained a building permit for the building. Defendants expanded their business to allow the rental of sites for camping trailers and tents. Gradually more sites were added, eventually growing to about 20 picnic-camping sites.

Defendants then started to erect additional sanitary facilities, consisting of toilets and showers, on the land and more grading and landscaping to further increase the capacity for more camping sites, and larger sites for bigger recreational vehicles. Defendants were informed by the County Planning Department that, because a business use was involved, the building permit could not be issued until a Conditional Use Permit was applied for and obtained from the County Commission. Defendants

sought the Conditional Use Permit, and were eventually granted a variance, recognizing that the campground use was a legal nonconforming use which Defendants had a right to continue, but concluding that Defendants had no right to enlarge its camping operation.

Defendants challenged that determination. The County also brought an abatement proceeding. In the consolidated cases, the trial court upheld the County's determination.

It is well-recognized law that, if before the adoption of the zoning ordinance, the defendants had established a use as a picnic and camping park, they acquired a vested right to continue that use thereafter as a nonconforming use.

A legal nonconforming use has been defined as authority granted to the owner to use his property in a manner otherwise violative of the zoning regulations. In other words, it is in the nature of a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose. Over the ensuing years Defendants have properly relied on the nonconforming use, thus acquiring a vested right which could not be affected or changed after the nonconforming use was granted.

Having thus acquired a nonconforming use to use their 14-acre tract as a picnic and camping park, any regulation of the county zoning ordinance which would prevent that use did not apply to Defendants' 14-acre tract.

Hence the issue presented on this appeal, which is whether Defendants can rent space for recreational vehicles and other camping trailers, cannot be resolved by a determination of whether such trailers come within the zoning ordinance that regulates the use of "trailers and/or mobile homes" in this district of the County. Rather, the issue is whether the use of such trailers is a method ordinarily and reasonably adopted to make the original use granted to Defendants available to them without constituting a substantial change in the nature and purpose of that original use, or whether, on the contrary, the use of these trailers would constitute such a departure from the original use as to constitute a new and impermissible use.

The burden of establishing that the use in question is fundamentally the same use and not a new and impermissible one is on the party asserting it. This is in

accordance with the general policy of zoning to carefully limit the extension and enlargement of nonconforming uses. However, the use cannot be interpreted in such a way as to unlawfully reduce the original vested interest acquired by the nonconforming use.

We feel that some amount of latitude must be allowed a nonconforming use for reasonable expansion and the maintenance of accessory uses. Businesses should not be prevented from staying competitive in their respective markets by expanding or evolving in the modern world. The fact that improved and more efficient or different instrumentalities are used in the operation of the use does not preclude the use made from being a continuation of the prior nonconforming use, provided that such means are ordinarily and reasonably adapted to make the established use available to the owners and so long as the original nature and purpose of the undertaking remain unchanged.

The determination of whether the use challenged is substantially the same kind of use as that which was originally obtained is necessarily based in large measure on the facts and circumstances of the particular case. In deciding whether the particular activity is within the scope of the established or acquired nonconforming use, consideration may be given to, among others, the following factors:

(1) To what extent does the use in question reflect the nature and purpose of the prevailing nonconforming use?

(2) Is it merely a different manner of utilizing the same use or does it constitute a use different in character, nature, and kind?

(3) Does this use have a substantially different effect on the neighborhood?

The degree to which the original nature and purpose of the undertaking remains unchanged largely determines whether there has been a change in the preexisting use.

We are unable to say on the record before us that the decision of the trial court was based on a finding and ruling that the renting of spaces by Defendants on their 14-acre tract for more and larger recreational vehicles would constitute such a change in, or enlargement of, the use of their land for the granted use of a picnic and camping park

as to amount to the substitution of a new and different use. The case is remanded for disposition in accordance with the principles enunciated in this opinion.

Reversed and remanded.

PT-A: SELECTED ANSWER 1

MEMORANDUM

TO: Lou Estepe

FROM: Applicant

SUBJECT: Tehama County v. Tepee Campground

DATE: July 29, 2014

Introduction

This memorandum is an objective analysis as to the legal issues raised by the Notice to Abate filed by Tehama County Attorney Al Read against our client, Jane Maya. The analysis below will discuss the charges raised in the Notice to Abate. Additionally, the analysis below will examine the controlling law and apply the facts of this matter to such law. Moreover, in anticipation of opposing counsel's arguments, the weight of the best opposing views shall be made in order to fully assess the strength and likelihood of success of arguments that are advantageous to our client and arguments that are adverse.

Analysis

I. WHETHER RECREATIONAL PARK TRAILERS WILL BE CLASSIFIED ALONG THE LINES OF A RECREATIONAL VEHICLE OR A STRUCTURE, SUBJECT TO THE BUILDING CODE.

The first charge in the Notice to Abate is that the Recreational Park Trailers (RPTs) owned by Maya are permanent structures, in violation of the Land Development Regulation (LDR) § 222.1. According to LDR § 222.1, campgrounds are defined as "establishments providing overnight or short-term sites for recreational vehicles, campers or tents, that have no permanent structures other than a management office, laundry, small grocery, storage facility, and sanitary facilities that shall be solely for the occupants of the campground." At issue, as stated by the record, is whether an RPT can be considered a permanent structure.

There appear to be two methods of analysis in terms of determining the characterization of an RPT: (1) that the RPT should be governed by the same standards as the RV; or (2) that the RPT is a permanent structure or manufactured home and should be treated as such. Clearly Maya will advocate for the first argument, while the County will advocate for the second argument.

A. RPTs Appear to Have Similar Use and Structure to Recreational Vehicles, Which Are Not Classified as Permanent Structures.

The Federal Manufacturered Home Construction & Safety Standards Act does not classify RVs as regulated by the federal government as structures or manufactured homes. 24 C.F.R. § 3282.8(g). The definition that the federal statute uses in defining RVs is: (1) built on a single chassis; (2) 400 square feet or less when measured at the largest horizontal projection; (3) self-propelled or permanently towable by a light duty truck; (4) designed primarily not for use as a permanent dwelling, but as a temporary living quarters for recreational, camping, travel, or seasonal use. Id.

In Tall Timbers Resort v. Oregon Construction Department (2010), the court dealt with a very similar matter and ultimately ended up holding that the Oregon Construction Department's determination as to the classification of an RPT deserved deference. There, the Department adopted new regulations which determined that RPTs were subject to the state's construction code. In suit brought by a seller of RPTs,

the owner of a campground in which RPTs were installed, and the owners of an RPT, the parties sought to have that decision overturned by the court. As part of its reasoning, the court noted that the Construction Code provisions must receive liberal construction to advance its purposes, generally centered in matters affecting health, safety, and welfare.

The parties bringing challenge notes that RPTs meet many of the same standards as promulgated by the federal RV standards in 24 C.F.R. § 3282.8(g). Moreover, they noted that the principal difference between the RPT and RVC is that the RPT covers all requirements found in the building code but the RV does not. However, the court noted that there is a significant difference between an RV and an RPT; namely, that an RPT is "intended for installation in a 'park.'" Tall Timbers at 8. Moreover, the court, after hearing arguments regarding whether or not an RPT should or should not be classified as a structure, ultimately deferred to the finding of the Department. The court stated that "the Department has determined that RPTs are structures, even if primarily designed to provide temporary living quarters for recreational, camping, or seasonal use." Id. at 8-9. Accordingly, since the court deemed the finding reasonable, the court upheld that decision.

Here, the first argument that Maya will want to make is establishing the status quo as it pertains to the regulation of RPTs within Tehama County. First, she will want to argue that the Planning Department and County Commission never decided whether or not an RPT is a structure. Thus, while the court in Tall Timbers was deferential to the finding of the Department, no such deference should be afforded here because there is no finding upon which to rely. Second, she will want to argue that the Tehama County Building Code has no provisions on RPTs or RVs at all. In fact, the Tehama County Building Department has never issued a building permit or inspected an RPT before or after installation. Moreover, the building code does not make any distinctions between the types of RVs, irrespective whether they are fifth wheels, towable trailers, or motor homes: it considers them all RVs. In addition, in a memo from the Director of the Building Department within Tehama County, the Director states that RPTs pose less of

a risk to the public than RVs. Further, the Director goes on to advocate that RPTs should not be subject to any regulations that the County is not willing to subject RVs to. As a result, based on the status quo, Maya has a reasonable argument that, in light of the absence of any provisions in Tehama County that are applicable to this situation, the federal regulations regarding RVs should control.

To that end, under 24 C.F.R. § 3282.8(g), Maya can argue that the RPTs at issue also meet the guidelines promulgated by the statute. First, the facts indicate that Maya's RPTs are built on a single chassis. Second, based on the measurements provided, Maya's RPTs are 395 square feet. Third, the RPTs have wheels and can be towed by light-duty pickup trucks. This fact is supported by the Recreational Park Trailer Industry Association's letter, in which their Executive Director makes clear that RPTs are able to be transported on roads and highways. Finally, as indicated by the facts, Maya intends to have the RPT leased for short-term camping use, as opposed to long term or permanent residence. Using Tall Timbers as an example, Maya will also have to overcome the distinction between an objective or subjective use of the dwelling. Under either standard, Maya will have a compelling argument. Under the objective standard, Maya can argue that the RPT only lends itself to short-term leases because it is not designed nor created to be a permanent dwelling. Indeed, the RPTs are nice and come with nicer amenities than a typical RV. However, the fact remains that these are not intended or designed to be used for permanent residences, particularly with installation at a campground. Moreover, while she does intend to rent them out year long, she will have to argue that this is a showing of successive short-term residences, rather than one long-term, permanent residence. This is supported by the fact that the unit would consistently be turned over for the next guest after the prior guest vacates. Additionally, under the subjective analysis, Maya can argue that, as the individual leasing the RPTs out, she does not have the subjective intent to make the RPTs a permanent residence for anyone.

As a result, since Maya is able to satisfy both the requirements in Tehama County and show that her RPTs meet federal standards for RVs, she has a reasonable argument that Tehama County should recognize her RPTs as RVs.

B. RPTs Have Many Similar Qualities to Manufactured Homes and Could be Considered Structures.

On the other hand, the County has a reasonable argument that they should treat RPTs as structures. While the County will have to concede that its building code does not cover RPTs or RVs, the thrust of their argument will rely on the fact that the RPT shares many common characteristics with a permanent structure and should be regulated as such.

The County will have to rely on Tall Timbers, mainly because its holding is advantageous. There, in arguing that an RPT should be treated as a structure, the Oregon Department of Construction argued that an RPT had the following characteristics: (1) has a combination of the same types of materials used in any home and involves all the same safety issues as a home; (2) intended for the same type of occupancy as any other vacation home; (3) structure with enclosed exterial walls; (4) clearly designed for housing or shelter and it is arranged for the support of individuals; and (5) it is equipped with plumbing, electrical, and mechanical systems just as is any dwelling. Id. at 7. Moreover, the court noted the findings of the Department in that RPTs were "generally constructed in the same manner as single family dwellings," "arrives already assembled," and usually found in the location in which they are parked for an extended duration of time. Id. at 6.

Here, the County will point to what is known of Maya's RPTs. First, Maya's RPTs present a lot of the same features as a home would have: a fully functioning kitchen, bathroom, bedrooms, and even a fireplace. The County will highlight the fact that such a structure should be subject to building codes for the safety of those inside, particularly if a fireplace is involved. Second, the County will argue that an RPT is intended for the

same type of dwelling as a vacation home, regardless of the term of lease. They will attempt to distinguish this from an RV, which necessitates that the individual drive the vehicle to the desired location. Here, like any other rental home, the structure is already present and the individuals who seek to use the RPT must come to the RPT itself. The County will argue this is operatively no different than having a vacation home. Moreover, the County will have to point to the findings of the Staff Report for the CUP in that the RPT presents a similar situation as a motel, mainly because they arrive in a passenger vehicle, stay a limited time, leave, and the RPT is then cleaned out and turned over for the next guest. Third, the County will argue that the paneling on the outside of the RPT has the tendency of showing that it is more like a home than a vehicle. This argument may not be that compelling, as RVs certainly have paneling as well. Fourth, as already shown, the existence of amenities gives off the impression that it is for shelter. In fact, Maya indicates that she intends the RPTs to create an environment in which guests are "camping" but really still have "comforts" such as running water, high definition TV, and feathered pillows. The County will argue that those are indicative of a shelter, rather than an RV. Finally, it is undisputed that an RPT hooks into sewer systems and draws power from the electrical grid. Unlike RVs which carry their own generator and have their own power support, the County will argue that an RPT is no different than a home which essentially plops down and begins utilizing resources for the purposes of permanent establishment.

Ultimately, in the absence of additional legal authority, this issue could really go either way. The court in Tall Timbers was really deferential as to the finding of the Department. In the absence of such a finding here, the court is going to need to make a determination on its own. The major advantage that Maya has for her argument is the amount of support she has from various groups: including the Director of the Building Department and the Recreational Trailer Park Industry Association. Moreover, since the status quo appears to have a gap in the statutory framework regarding the regulation of RVs and RPTs, the fact that federal legislation is present can be instructive for the court. As a result, it is likely that the court sides with Maya in viewing the RPTs

as having similar use to RVs, thereby avoiding regulation as structures under the building code.

II. WHETHER MAYA'S USE OF RPTS CONSTITUTES AN ENLARGEMENT OF A NONCONFORMING USE, AN IMPERMISSIBLE MATERIAL INCREASE OF INTENSITY IN THE NONCONFORMING USE, OR A CHANGE TO ANOTHER NONCONFORMING USE THAT IS NOT MATERIALLY LESS IN INTENSITY.

It is well-recognized law that, if before the adoption of a zoning ordinance, a party had established a use as a camping park, they acquired a vested right to continue that use thereafter as a nonconforming use. County of Los Banos v. Leskiewicz (2000). Generally a legal nonconforming use has been defined as authority granted to the owner to use his property in a manner otherwise violative of the zoning regulations. Id.

Here, in 1994, the current Tehama LDRs were adopted and all properties within the County were rezoned. As part of this rezoning process, the Tepee Campground was zoned into an area that was zoned rural/residential. Within such zoning districts, any campgrounds that wanted to be created after the zoning districts were created requires a Conditional Use Permit (CUP). However, since Tepee Campground had been in existence since the mid-1970s, they were permitted to be a nonconforming use under LDR § 540. In 1979, Tepee Campground had a total of 142 campsites, with 33 tent sites and 109 RV sites on 7.9 acres, with other minor structures totaling 5,100 square feet. To date, the facts indicate that Tepee Campground is essentially unchanged with regards to its size or the number of its respective camp or RV sites.

The Notice of Abate has three potential violations of the Tepee Campground nonconforming use: (1) that the RPTs are an enlargement of the nonconforming use; (2) the use of RPTs is a nonconforming use that has materially increased in intensity; or (3) that the nonconforming use has been substituted for another nonconforming use and

such new nonconforming use is not materially less intense than the prior nonconforming use. Each shall be analyzed separately.

A. The Use of RPTs at Tepee Campground Cannot and Will Not Be Viewed as an Enlargement of the Nonconforming Use.

This argument is by far the weakest on behalf of the County. As stated above, from 1979 to the present date, Tepee Campground has essentially remained unchanged. They have not acquired any new land and have not expanded beyond the original 7.9 acres that they originally inhabited in 1979. In fact, in the Staff Report, the County essentially concedes that aerial photography indicates the current configuration of the campground is almost identical to the 1978 layout. Moreover, the facts are clear as it pertains to the use of RPTs. Maya is only using the RPTs on 54 of the 109 sites that she has. She is not adding 54 more spots to her 109. Moreover, her use of less than half of the slots she already has available cannot possibly be considered an expansion of her already existing nonconforming use. Additionally, the fact that the slots are used for the very same purpose of short-term camping, while also maintaining some sort of recreational vehicle on the land, does not expand the use of her property because the activity is occurring on lots that were already present. In addition, the RPTs are no bigger than many, if not most RVs. As a result, the actual footprint or the structure floor area of the pads need not expand and in some cases, may actually shrink in size. Finally, there is nothing in the factual record that indicates that Maya intends to expand her existing pads.

As a result, it is likely beyond dispute that the use of her already existing RV lots for the purposes of RPTs does not constitute an enlargement of her nonconforming use.

B. The Use of RPTs Will Likely Not Constitute a Material Increase in Intensity.

Generally, this is a fact intensive inquiry guided by LDR § 541.4 which states that intensity shall "include a consideration of traffic generated, perceived level of activity, operational characteristics, and potentially adverse impacts on neighboring lands."

1. Traffic Generated

Here, Maya may offer the traffic impact assessment that was provided with her application. In this assessment, it is stated that the proposed use of RPTs on Tepee Campground will slightly reduce vehicle traffic flow on the West Bank Road, introduce no increase in traffic impacts, and provide more than adequate vehicular site access. Moreover, the assessment indicates that the number of recreational vehicles accessing and exiting the property would likely decrease. There does not appear to be any evidence contained in the factual record with which the County will be able to rebut this perceived benefit. As a result, Maya should be able to show that there will be no traffic increase as a result of the use of RPTs.

2. Perceived Level of Activity

Here, the County could present the remainder of the traffic impact assessment which asserts that there will be an increase in the number of overall patrons at Tepee Campground. Moreover, based on the increase of foot traffic, there is a concern raised by the Staff Report for the CUP that was later withdrawn, that Maya would be able to, at some point down the road, convert part or all of the campground into a mobile home park. This could drastically increase the perceived level of activity and be a direct violation of the zoning ordinance. Ultimately, since the concerns here are only speculative, and there does not appear to be any evidence in the record that affirmatively establishes that the perceived level of activity is something that is adverse to the interests of the zoning ordinance, this should not be a bar to Maya using RPTs on her property.

3. Operational Characteristics

Here, as mentioned above, Maya can show that her overall footprint with the use of RPTs will be less than that of using RVs. She is already using 54 of her lots and RPTs take up considerably less space than that of her RVs. However, the County can argue that since an RPT must be plugged into the power grid and use the sewage system, that its operation is more of a burden than an RV, which would be a stand alone entity. Moreover, the County will argue that she is changing the operational characteristics of her land by essentially changing what was a campground into a resort. The facts indicate that she was charging $27.50 a night for guests to park their RV. Now, in order to park their RPT, she will be charging anywhere from $175 to $300 per night to rent an RPT. The County will argue that this is a change in operational characteristics such that it should be impermissible. However, it is difficult to see how the cost per patron will increase the intensity of the nonconforming use. Ultimately, in light of the argument below, it is likely that Maya will also prevail on this argument since she is not really changing her operational structure to accommodate for the RPTs.

4. Adverse Impacts on Neighboring Lands

Here, Maya will be able to point to the Air Quality and Fuel Consumption Analysis for RPTs prepared by Science for Hire. The report indicates that replacing one traditional RV site with one RPT site could save approximately 9,500 gallons of fuel and reduce the CO2 emissions in the atmosphere by 363,000 pounds a year. Scaled to accommodate for the replacement of 54 sites with RPTs, it would save 513,000 gallons of fuel and reduce carbon emissions by 9,801 tons annually. There is no doubt that the reduction of carbon emissions into the atmosphere is a beneficial aspect to neighboring lands, as opposed to an adverse impact. Moreover, Maya will argue that since there is public transportation nearby, it is likely that these figures could increase as people will take public transit to Tepee Campground.

As a result, since the facts tend to indicate that the use of RPTs is not a nonconforming use that materially increases in intensity, Maya should be able to carry the burden of satisfying LDR § 541.2.

C. Whether the Change to RPTs Will Be Considered a Change to a Different Nonconforming Use.

The final charge by the County is that Maya's use of RPTs is a change from an authorized nonconforming use to another nonconforming use in violation of LDR § 541.3. A plain reading of the statute indicates two showings that must be made: (1) whether a change occurred; and (2) whether that change is materially less intense than the prior nonconforming use.

Generally, "the burden of establishing that the use in question is fundamentally the same use and not a new and impermissible one is on the party asserting it." Los Banos at 13. As a result, Maya will have the burden of establishing that the use of RPTs on Tepee Campground is the same nonconforming use or, at the very least, a change that is permissible because it is materially less intense.

1. Has a Change Occurred?

In Los Banos, the court grappled with whether a present nonconforming use had been substantially changed to another nonconforming use. There, after a zoning ordinance, the defendants had improved a 14 acre land by trimming trees, removing and burning brush, grading, erecting retaining walls, building a road, installing a cesspool, and erecting an outhouse. After their business expanded, they let individuals rent land for bringing camping trailers and tents. The County brought action asserting that such use expanded their nonconforming use and alternatively, that it was a material change in the property. The appellate court ultimately remanded for further investigation and development of the facts. However, in so doing, the court listed three factors as a guide to determining whether the nonconforming use had been

substantially changed: (1) to what extent does the use in question reflect the nature and purpose of the prevailing nonconforming use; (2) is it merely a different manner of utilizing the same use or does it constitute a use different in character, nature and kind; and (3) does the use have a substantially different effect on the neighborhood. Id. at 13. Moreover, the court articulated that "the degree to which the original nature and purpose of the undertaking remains unchanged largely determines whether there has been a change in the preexisting use." Id. at 14.

Here, Maya will argue that the use of RPTs does not change the nature of the nonconforming use of Tepee Campground. First, she will argue that the use of RPTs is a direct reflection of the nonconforming use, which is ultimately a campground. She will point to the original plot of land that was used as Tepee Campground to show that the same 109 RV slots are the slots that are currently used to house the 54 RPTs. The essential characteristic of the land has not changed: she is allowing people to camp on her campground in recreational vehicles. Second, Maya will argue that it is the same use because there is operatively no difference between RVs and RPTs. As discussed in great length above, RPTs and RVs share many characteristics in terms of the way they are constructed. Moreover, the way they are utilized, as a recreational vehicle from which to camp from, is essentially the same. Finally, as articulated above, the use of RPTs does have a substantial effect on the neighborhood: one of providing a benefit. In fact, the facts clearly indicate that neighbors and nearby businesses "have supported the appearance of the attractive wood sided RPTs and the enhanced landscaping." Thus, in addition to the fact that the RPTs are, on the whole, better for the environment, they are also better to look at.

On the other hand, the County will argue everything to the contrary. First, the County will argue that the use of RPTs changes everything about the use of the campground. The County will point to the fact that Maya intends to create a resort named "Solitude," as opposed to maintaining a campground. Moreover, her vision is the creation of "Glamping," which is a form of glamorous camping, a cross between staying in a hotel and camping. This is a change of significance from the prevailing

nonconforming use, which would be primarily a campground. Second, there is a wholly new use for the property. The County will argue that when Maya was just using the spaces for RVs, she was charging $27.50 per night for visitors to park their RV at her campsite. Now, with the use of RPTs, she will be charging customers somewhere between $175 and $300 per night. The County will argue that this is more of a change to a resort than it is to maintaining a campsite. Finally, the County will rely on the fact that since RVs came with their own generators, the fact that RPTs have to be plugged into the grid and use the sewage system adversely affects the neighborhood.

As a result, the court will likely side with Maya in this argument. Although it is possible to see that the introduction of RPTs could constitute a material change to the former nonconforming use, the fact that Maya has not really altered any aspect of the land and that she is still using the campground as a campground should bolster her argument over the objections raised by the County. However, the disparity in cost between an RV and RPT rental is quite large and could prove to be dispositive.

2. Is the Change Materially Less Intense Than the Prior Nonconforming Use?

For many of the same reasons articulated above, this issue will turn on a determination as to which of the factors the court weighs in more heavily. Maya's best arguments are that the traffic in the area will decrease as a result of the use of RPTs and the carbon footprint and gas emissions will reduce substantially. The County will argue that this opens the door for Maya to essentially create a permanent trailer park and that the operational characteristics of using the RPTs will be a bigger toll on the public resources in the area. However the court comes out above will likely be how the court comes out on this issue as well.

As a result, since Maya is using the campground for much of the same purpose as she was prior to the introduction of RPTs, it is unlikely that the court will find her use of the land with RPTs to be a change in nonconforming use. Even if the court does find

that it is a new nonconforming use, based on the arguments presented, it is likely that the court will find that the new nonconforming use of using RPTs is materially less intense than the use of RVs. As a result, Maya's nonconforming use should be permissible.

III. CONCLUSION

Therefore, Maya has a pretty good argument that the RPT should be viewed as an RV in line with the federal statutes, in light of the absence of any regulations within Tehama County. Moreover, with the level of support she appears to get from various administrative agencies within Tehama County, she should be able to show that the court should side with the federal statutes, rather than give deference to an administrative body that has made no determination as to the classification of RPTs. While Tehama County does have an equally reasonable argument, based on the fact that RPTs share many characteristics with permanent structures, the absence of any local rules might prove fatal for their argument.

Additionally, Maya should be successful in rebutting the charge that her use of RPTs expands her nonconforming use because the facts unequivocally show that the campground has remained unchanged since 1978. Additionally, Maya has a reasonable argument on the merits that her use of the land with RPTs is not a material increase in intensity of the nonconforming use because RPTs take up less space, will result in less traffic, and are better for the environment. Finally, Maya should be able to show that her use of the RPTs does not substantially change her nonconforming use. However, if the court finds that it does, based on the same material increase in intensity analysis, Maya should be able to show that such use is permissible.

PT-A: SELECTED ANSWER 2

To: Lou Estepe
From: Applicant
Subject: Tehama County v. Tepee Campground
Date: July 29, 2014

MEMORANDUM

You asked me to write an objective memorandum discussing and analyzing the charges made in the Notice of Abatement. You also asked me to evaluate our chances of prevailing against each charge. I have provided such below.

There are two charges made in the Notice of Abatement: 1. That the Recreational Park Trailers (RPTs) are permanent structures in violation of the Land Development Regulations (LDR); and 2. That the RPTs are an enlargement, expansion, or material increase in intensity of a nonconforming use; or a change to another nonconforming use that is not a materially less intense use. I have addressed each charge separately below.

Charge One: The RPTs Are Permanent Structure in Violation of LDR

Section 222.1 states that "campground use means establishments providing overnight or short-term sites for recreational vehicles, trailers, campers or tents, that have no permanent structures other than a management office, laundry, small grocery, storage facility, and sanitary facilities that shall be solely for the occupants of the campground."

The County is likely to argue that RPTs are permanent structures that violate LDR Section 222.1 as the RPTs will not serve as a management office, laundry, small grocery, storage facility, or sanitary facility. The County is likely to cite to many of the arguments made in Tall Timbers Resort v. Oregon Construction Department that RPTs

were structures. The County is likely to argue that the fact that RPTs use the same type of materials as homes, serves the same function as any other vacation home, has exterior walls, and can act as a permanent home for individuals makes them structures.

The County is likely to rely heavily on the fact that the court in Tall Timbers ruled in favor of the Oregon Construction Department, who was arguing in favor of classifying an RPT as a structure. However, that case is distinguishable from the instant case in many ways. The first is the basis for the Court's decision. In ruling in favor for the Oregon Construction Department, the Court did not consider in great detail any of the factors presented by either side with respect to whether an RPT could be classified as a structure or manufactured home and therefore subject to the Construction Code. The Court was very clear in stating that its decision was based in substantial part on the fact that the Oregon Supreme Court had previously ruled that the Construction Code Act's provisions "must receive liberal construction to advance its purpose." Tall Timbers. In that case, the Construction Department itself had already determined that RPTs were subject to the State Uniform Construction Code. Since the Code was required to receive liberal construction, the court stated that its only job was to determine whether the determination that RPTs fall within the Construction Code's definition of "structure" was "plainly unreasonable" or not. The Court determined that it was not.

Further, this case is from Oregon, not Columbia. It therefore is only persuasive in nature and not binding authority. The County will find it difficult to demonstrate many similarities between Tall Timbers and the instant case. Unlike in Tall Timbers, the director of the Building Department in Tehama County does not make any distinction between RPTs and RVs, and therefore does not consider the Building Code to regulate RPTs. Additionally, the HUD Office on Manufacturered Housing also does not regulate RPTs in any fashion. Since there is no regulation of RPTs under either code, it will be difficult for the County to use the outcome in Tall Timbers to support their argument as there is no code here that must be given "liberal construction." The Columbia Supreme Court has not even made such a requirement, either. Since there is no clear definition of RPTs in Columbia, the court's decision will necessarily be determined on the facts.

As stated previously, the County is likely to argue that an RPT is a structure because it uses the same material as a house, it is connected to the ground, and it serves the same function as another vacation home.

Maya can counter by arguing that an RPT is more similar to an RV as the RPT construction standards set by the RPT industry fits all the criteria of RVs set forth by federal regulation 24 C.F.R Section 3282.8(g), namely an RPT must be "limited to 400 square feet, built on a single chassis, mounted on wheels, and must comply with various requirements for electrical, plumbing, and heating systems." Conditional Use Permit Application Staff Report. Additionally, Maya can use the arguments set forth by the Recreational Park Trailer Industry Association to support her argument that an RPT should be considered an RV and not a structure. In particular, Maya should point to the fact that a judicial finding that RPTs are "structures" could have mass impact on the campground industry across the nation. She can argue that such a decision would make it possible for other courts to approve restrictions on RVs as well, as there is no discernable distinction between RPTs and RVs.

Maya can also argue that there is already precedence to consider RPTs RVs in other states. She can note that, so long as an RPT meets industry standards, it is treated as a vehicle in other states. She can argue that this tendency for states to classify RPTs as RVs is a growing trend across the nation, and since the court in the instant case does not have any binding prior authority to draw from in Columbia state law, it should consider national trends.

The County here makes a strong argument for why RPTs should be considered a structure. However, Maya seems to have an almost equally strong argument for why they should be considered vehicles instead. Given that Maya has the additional arguments that a finding of an RPT as a structure could have a massive impact on the camping industry across the nation and that the national trend seems to be to recognize conforming RPTs as vehicles, it is likely that the court will hold that an RPT is not a

permanent structure within the meaning of the LDR and therefore does not violate Section 222.1

Charge Two: The RPTs Are An Enlargement, Expansion, or Material Increase in Intensity of a Nonconforming Use; or a Change to Another Nonconforming Use That is Not a Materially Less Intense Use

LDR Section 540 states that nonconforming use is any use of land which was established pursuant to the zoning and building laws in effect at the time of its development, but which use is not permitted by the current LDRs for the zoning district in which it is located. It states that those nonconforming uses that were permitted by right at the time of its development are permitted nonconforming uses. Section 540 goes on to state that a conditional use permit will not be required to continue the existing nonconforming use, however, a conditional use permit will be required for any change of use. LDR Section 541 lists the different ways, use, or characteristics of the activity can be changed. These ways are: 1. Enlarging or expanding in areas of structure or land occupied; 2. Materially increasing the intensity of the use; or 3. Changing the nonconforming use to another nonconforming use unless any new use is a materially less intense nonconforming use. The County is likely to argue each of these changes. I have addressed each individually below.

Has the Use of Recreational Park Trailers (RPTs) Enlarged or Expanded Maya's Nonconforming Use of Her Land?

The County is likely to argue that the use of RPTs will enlarge or expand the use of Tepee Campground as a camping location, and Maya therefore must obtain a CUP. The County will likely cite multiple complaints from neighbors that the campground has increased its number of sites over the years. The County may also try to argue enlargement or expansion because, unlike Recreational Vehicles (RVs), RPTs are permanent fixtures and connected to the ground. There will therefore be no point in time where these lots are empty.

Maya may counter by arguing that the county is unable to substantiate the neighbors' complaint about expansion, as aerial photography shows that the current layout is virtually identical to the layout when the camp opened in 1978. She will also argue that she is not adding any new campsites. Rather, she is replacing 54 RV sites with RPTs. She can also point out that RPTs take up significantly less space than RVs. RVs can be up to 78 feet long, whereas RPTs are only 39 feet long, 12 feet wide, and about 395 square feet. Therefore she is decreasing the size of the vehicles that are located in existing spots.

The County's point that the RPTs would be permanently located in the spots rather than RVs is a valid argument. This could prevail. However, given the fact that Maya is not adding any new sites, and that it is feasible (and likely, according to Maya) that RVs could occupy those spaces full time as well, it is more likely that the County's argument will fail. Therefore, the court is unlikely to consider the use of RPTs as enlarging or expanding Maya's nonconforming use of her land to the extent that she is required to obtain a CUP.

Has the Use of RPTs Materially Increased the Intensity of the Use?

Section 541.4 states that "the determination of the level of intensity shall include consideration of traffic generated, perceived level of activity, operational characteristics and potentially adverse impacts on neighboring lands."

The traffic impact assessment of the RPT change is likely to help our case. It states that the change to RPTs is likely to slightly reduce vehicle traffic flow into the campground as a result of a reduction in the number of RVs on the road and increase of passenger cars. The county may try to argue that it will negatively impact traffic because the change will likely increase the number of patrons using the campground. However, Maya can counter by pointing out that the use of RPTs will reduce the number of RVs that are in the area. Instead of RVs there will be passenger cars, which are easier to drive on the roads, making them safer. While there may be an increase in perceived

level of activity, it's unlikely that the increase in patrons using the land is sufficient to warrant a material increase that would require the need for a conditional use permit.

Nor is the change likely to have potentially adverse impacts on neighboring lands. The County can try to argue that there will be a negative impact because now the campgrounds will essentially be a mobile home park now, however Maya can counter by arguing that the lot is currently routinely filled by RVs which are substantially less aesthetically appealing than the RPTs. She can also argue that the switch to RPTs will have a positive impact on the local environment, since it is likely to save approximately 513,000 gallons of fuel a year and reduce the CO2 emissions released into the atmosphere by 19,602,000 pounds each year as a result of the decrease of RV use. Maya can also argue that, unlike RVs, RPTs do not make any noise, meaning that the neighbors will not have to deal with as much noise from the campground anymore.

Given that the change to RPTs is likely to decrease RV traffic, improve environmental conditions, and eradicate both visual and noise nuisance, it is unlikely that the county will be able to prove that the change to RPTs has materially increased the intensity of the use of the campground to the extent that Maya should be required to obtain a CUP.

Has the Use of RPTS Changed the Nonconforming Use to Another Nonconforming Use?

Generally, if any change converts a nonconforming use to another nonconforming use, the owner will need to obtain a conditional use permit before such use may be permitted. However if the use is fundamentally the same, a conditional use permit will not be necessary in order for the use to be permitted. The burden of establishing that the use in question is "fundamentally the same" use and not another nonconforming use is "on the party asserting it." We, therefore, bear the burden of showing that Maya's use of RPTS does not change the nonconforming use of Tepee Campground.

Tepee campground was created in the mid-1970s. It has continuously been used as a campground ever since. When the Tehama County adopted the current LDRs in 1994, Tepee Campground was located in a district zoned rural/residential. Since Tepee campground was already in existence, its use as a campground is considered a permitted nonconforming use that does not require a conditional use permit (CUP). So long as Tepee campground continues to be used for the same nonconforming use, it will not need to obtain a CUP. County of Los Banos v. Leskiewicz.

A new use of land will not be considered a change to another nonconforming use if the new use does not make a "substantial change in the nature and purpose of" the original use. Leskiewicz. To determine whether the new use is within the scope of the established nonconforming use, the following factors are considered: 1. the extent that the new use reflects the "nature and purpose of the prevailing nonconforming use"; 2. whether it is merely a different manner of making the same use or whether the new use is "different in character, nature, and kind"; and 3. whether the new use has a "substantially different effect" on the surrounding area. Leskiewicz. The greatest amount of weight is afforded to the first factor. Leskiewicz.

Maya can argue that using RPTs does not in any way change the nonconforming use of the campground. She can argue that the nonconforming use was to allow customers to come to the campground, stay for a few nights to camp, enjoying nature, and then leave. The RPTs do not change this purpose at all. It functions the same as if the customers were staying in tents. All it changes is how nice the tents are. The County is likely to argue that the use of RPTs completely changes the use of land, transforming it from a campground into a hotel or even a mobile home park, citing Maya's intentions to create a resort called "Solitude." The County will argue that a resort is not the same thing as camping; therefore it is a whole different nonconforming use.

However, this argument is likely to fail. It has been previously held that, in order for a new use to qualify under an already existing nonuse, it need not be exactly the same. Rather, some "latitude" must be afforded for "reasonable expansion." Leskiewicz.

Specifically, Leskiewicz held that a "business should not be prevented from staying competitive" by "expanding or evolving in the modern world." Maya can argue that this is exactly what she is doing. She will point out that she is unlikely to be able to stay open for many more years if she must continue to allow purely RVs as soaring gas prices will likely decrease RV use in the near future. They are therefore necessary in order for her to stay competitive in her industry, as many campsites across the country are starting to use RPTs. Her resort is a move into "glamping," the future that the camping industry is naturally moving towards. The County may try to argue that including modern creature comforts, such as indoor plumbing and a flat screen TV, defeat the purpose of camping, however the court is likely to disregard this argument as RVs already often make use of both technologies.

Maya will also emphasize that the RPTs are still meant for temporary visits, and that they allow customers to appreciate nature more than RVs ever could. Therefore RPTs are just a different way of making the most enjoying nature and camping, and is not different in character, nature, or kind. Maya will also argue that the new use does not have a substantially different effect on the surrounding area. Given these arguments, as well as the discussion concerning the effect this change will have on the surrounding community made in previous sections, Maya is likely to meet her burden here in showing that the new use of RPTs does not fundamentally change the use of Tepee Campgrounds into a use other than camping. It is very likely that the judge will not consider the use of RPTs a change to another nonconforming use here.

Conclusion

While the County does have a number of strong arguments to support their two charges, for the reasons and arguments stated above, it is likely that we will prevail against both charges. Please let me know if you would like me to conduct any further research on this matter.

July 2014

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

RILEY INSTRUMENTS V. LRI, INC.

RILEY INSTRUMENTS, INC. v. LRI, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

MARTIN, RIVERA & TRAN, LLP

Attorneys and Counselors at Law

Eagle Point, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant

FROM: Helen Rivera

RE: Riley Instruments, Inc. v. LRI, Inc.

DATE: July 31, 2014

On May 12, 2014, we received the Final Decision and Award of Arbitrator Stanley Warren ruling in favor of our client, Riley Instruments, Inc. Later we realized that Arbitrator Warren had failed to address one of the issues that we had submitted to him and that he had also failed to award us attorney's fees. We brought these matters to his attention on May 27, 2014. Over the objection of Mark Stilton, the attorney for the defendant LRI, Inc., Arbitrator Warren sent us an Amended Final Decision and Award, dated July 11, 2014, covering the omitted issue, awarding us our fees, and inviting us to file an application for fees.

LRI has filed a petition in the Superior Court to vacate the Amended Final Decision and Award. We now need to respond by opposing LRI's petition to vacate.

Please draft for my review a brief in opposition to LRI's petition. Be guided by our Office Memorandum on Persuasive Briefs. You must be sure to refute each of the points raised in LRI's petition and argue persuasively why the court should deny LRI's petition.

MARTIN, RIVERA & TRAN, LLP

Attorneys and Counselors at Law

Eagle Point, Columbia

MEMORANDUM

August 15, 2011

SUBJECT: Persuasive Briefs

Unless otherwise instructed, attorneys shall include in all briefs a short and concise Statement of Facts written in such a way as to persuade the tribunal that the facts support our client's position. The Statement of Facts is not an indiscriminate recitation of all the facts in the case. Although the facts must be stated accurately, careful selection of the ones pertinent to the legal arguments and that support our client is not improper.

The Argument section of the brief should contain separate segments, each labeled with carefully crafted headings that summarize the argument in the ensuing segment. Do not write a brief that contains only a single broad heading. Each heading should succinctly state the reasons why the tribunal should adopt the position you are advocating and not merely a bare legal or factual proposition.

The body of each argument should match the relevant facts to the legal authorities and argue persuasively how the facts as applied to those authorities support our client's position. Authority that favors our client should be emphasized, but contrary authority should be addressed in the argument and distinguished or explained. Do not reserve argument for reply or supplemental briefs.

You need not prepare a table of contents, a table of cases, a summary of the argument, or an index. These will be prepared after the draft is approved.

ARBITRATION PROCEEDINGS BEFORE
THE MANUFACTURERS ARBITRATION ASSOCIATION
PURSUANT TO THE AGREEMENT OF THE PARTIES

In the Matter of an Arbitration between RILEY INSTRUMENTS, INC., Plaintiff and LRI, INC., Defendant.	MAA Case No. 14-1322 **FINAL DECISION AND AWARD**
Including a counterclaim by LRI, Inc. for breach of contract to recover the contract price.	

I.

INTRODUCTION

Riley Instruments, Inc. (Riley) and LRI, Inc. (LRI) entered into a contract under which LRI agreed to manufacture and supply computer chips to Riley in accordance with Riley's specifications. This arbitration is pursuant to that contract, which provides, *inter alia*, that:

> **ARBITRATION OF DISPUTES.**
> In the event a dispute arises under this contract, which dispute the parties are unable to settle amicably, the parties agree that the dispute shall be submitted to final and binding arbitration to be conducted under the rules of the Manufacturers Arbitration Association. The arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute.

II.
THE ISSUES

At the commencement of the hearing in this matter, the parties agreed upon the following statement of the issues to be submitted to the Arbitrator for decision:

> Whether LRI breached its contract by failing to manufacture the cp426i series chip according to Riley's specifications and whether LRI intentionally concealed a manufacturing flaw in the production run of the chips delivered to Riley. If so, what shall be the appropriate remedy? If not, shall LRI recover the contract price on its counterclaim?

III.
CONCLUSIONS AND AWARD

The Arbitrator finds and concludes that LRI breached its contract as alleged by Riley and that Riley suffered damages from said breach. According to the proof, Riley's damages, consisting of lost profits, cost of cover for replacement goods, delays in delivery of product to its customers, and associated administrative expenses, totaled $875,650.

Accordingly, the Arbitrator makes the following AWARD:

1. LRI shall forthwith pay Riley $875,650 as contract damages;
2. Said amount shall bear interest at the legal rate from and after the date of this AWARD;
3. LRI shall pay Riley $12,133 as its costs in this matter;
4. LRI shall pay $7,500 as administrative and filing fees to the Manufacturers Arbitration Association.
5. LRI shall take nothing on its counterclaim.

Dated: May 9, 2014

_____*Stanley Warren*_____

Stanley Warren
Arbitrator

MARTIN, RIVERA & TRAN, LLP

Attorneys and Counselors at Law

35 Birdshot Plaza, Suite 1900

Eagle Point, Columbia

May 27, 2014

Stanley Warren
Law Offices of Stanley Warren
4289 Greyfeather Drive, Suite 430
Eagle Point, Columbia

Re: Riley Instruments, Inc. v. LRI, Inc.
Manufacturers Arbitration Association
Case No. 14-1322

Dear Arbitrator Warren:

I write on behalf of my client, Riley Instruments, Inc. On May 12, 2014, we received your Final Decision and Award dated May 9, 2014. We wish to point out to you what we believe are inadvertent omissions therein, and we request that you change the Award to cover the omissions.

First: The agreed-upon submission stated two issues: (1) whether LRI breached its contract and (2) whether LRI intentionally concealed a manufacturing flaw. Regarding the second point, we refer you to our post-hearing brief in which we recite the following evidence, fully supported by the testimony and documents in the record:

LRI's former Director of Manufacturing gave unrebutted testimony that he knew about a flaw in the computer chips manufactured for Riley and that he consciously decided not to disclose it because he knew it would cause Riley to reject the chips. Also, we presented unrebutted evidence that Riley spent $75,000 for an engineering analysis to determine why the chips were not performing as intended and that it was only after incurring that expense that Riley discovered the flaw. In our brief, we also argued for an award of punitive damages based on LRI's intentional concealment.

Your Final Decision and Award does not appear to have dealt with the concealment issue and the damages attributable thereto, as well as the punitive damages remedy.

Second: The contract pursuant to which this arbitration was conducted provides that: "The arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute."

Although you did not explicitly state in your Award that Riley was the prevailing party, it is clear that Riley did prevail in all respects over LRI and is therefore entitled to its attorney's fee.

Accordingly, we respectfully request that you change your Final Decision and Award to cover the intentional concealment, punitive damages, and attorney's fee issues.

Very truly yours,

MARTIN, RIVERA & TRAN, LLP

By_____*Helen Rivera*_____

Helen Rivera, Partner

cc: Mark Stilton, Attorney for LRI, Inc.

LAW OFFICES OF MARK STILTON

MARK STILTON

Attorney at Law

1823 Herrick Blvd., Suite 3

Eagle Point, Columbia

May 30, 2014

Stanley Warren
Law Offices of Stanley Warren
4289 Greyfeather Drive, Suite 430
Eagle Point, Columbia

Re: Riley Instruments, Inc. v. LRI, Inc.
Manufacturers Arbitration Association
Case No. 14-1322

Dear Arbitrator Warren:

I strenuously object, on behalf of my client, LRI, Inc., to the request by Riley Instruments, Inc. that you amend your Final Decision and Award in the above-referenced matter. Suffice it to say that, having issued your *Final* Decision and Award, you are without authority, power, or jurisdiction by reason of the doctrine of *functus officio* to do anything further with respect to that Award.

Sincerely,

Mark Stilton

cc: Helen Rivera

ARBITRATION PROCEEDINGS BEFORE
THE MANUFACTURERS ARBITRATION ASSOCIATION
PURSUANT TO THE AGREEMENT OF THE PARTIES

In the Matter of an Arbitration between RILEY INSTRUMENTS, INC., Plaintiff and LRI, INC., Defendant.	MAA Case No. 14-1322 **AMENDED FINAL DECISION AND AWARD**
Including a counterclaim by LRI, Inc. for breach of contract to recover the contract price.	

I.
INTRODUCTION

On May 29, 2014, the Arbitrator received Riley Instruments, Inc.'s May 27, 2014 letter requesting an amended Final Decision and Award, asserting that the Arbitrator had inadvertently omitted from his May 9, 2014 Final Decision and Award rulings on three issues:

1. Whether LRI intentionally concealed a manufacturing defect and, if so, what damages Riley Instruments should recover as a consequence;
2. Whether Riley Instruments should recover punitive damages on account of the intentional concealment; and
3. Whether Riley Instruments should recover its attorney's fees.

LRI's attorney responded on May 30, 2014 in opposition to Riley's request by asserting that the Arbitrator is *functus officio* and therefore has no power to amend the initial Final Decision and Award.

II.
DISCUSSION

Counsel for Riley Instruments is correct in her assertion that the omissions recited in her May 27, 2014 letter were entirely inadvertent. The Arbitrator has reviewed the record in this case, including the transcript of the hearing, the documentary evidence, and the arguments set out in the post-hearing briefs of the parties and concludes that an Amended Final Decision and Award is appropriate and within the Arbitrator's power to resolve ambiguities and correct omissions.

First, the Arbitrator intended, but neglected, to state specifically that LRI intentionally concealed from Riley Instruments the manufacturing defect and, therefore breached the term in the contract between the parties that provided explicitly that, "LRI shall monitor the production of the cp426i series chip and furnish Riley with periodic quality control reports." Implicit in that term is LRI's obligation to inform Riley Instruments of any problems. The monetary award of $875,650 that was recited in the Arbitrator's May 9, 2014 Final Decision and Award in fact includes the $75,000 that Riley Instruments incurred for the engineering study that led to the discovery of the flaw. It should have been itemized as follows: $800,650 for lost profits, cost of cover for replacement goods, delays in delivery of product to its customers, and associated administrative expenses; $75,000 for the engineering study to discover the manufacturing flaw.

The record, by reason of the unrebutted testimony of the Director of Manufacturing formerly employed by LRI, also supports Riley Instruments' assertion that LRI's concealment was intentional and with knowledge that, if disclosed, it would have caused Riley Instruments to reject the entire production run of computer chips. (See transcript at p. 327.) The Arbitrator, again inadvertently, neglected to make that finding explicit in the original Final Decision and Award and hereby corrects that

omission by making it explicit that LRI's concealment was intentional and with a motive to deceive. The Arbitrator finds he has the authority under the clear terms of the submission to determine the "appropriate remedy" and that LRI's intentional breach of contract warrants imposition of punitive damages to punish LRI for its unconscionable conduct. Accordingly, the Arbitrator awards $100,000 as punitive damages in favor of Riley Instruments and against LRI as prayed for in Riley Instruments' closing brief.

Finally, Riley Instruments is correct in its assertion that it is entitled to recover a reasonable attorney's fee in accordance with the arbitration provision of the parties' contract that states that "[t]he arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute." Obviously, Riley Instruments is the prevailing party. Thus, the Arbitrator hereby awards to Riley Instruments a reasonable attorney's fee.

III.
AMENDED AWARD

The Arbitrator incorporates herein by this reference his May 9, 2014 Final Decision and Award and issues the following AMENDED AWARD:

1. LRI shall forthwith pay Riley Instruments $800,650 as contract damages for lost profits, cost of cover for replacement goods, delays in delivery of product to its customers, and associated administrative expenses;
2. LRI shall forthwith pay Riley Instruments $75,000 as damages for the expense of an engineering study that led to the discovery of the manufacturing flaw;
3. LRI shall forthwith pay Riley Instruments $100,000 as punitive damages for the intentional concealment of the manufacturing flaw;
4. Said amounts shall bear interest at the legal rate from and after the date of this AMENDED AWARD;
5. LRI shall pay Riley $12,133 as its costs in this matter;
6. LRI shall pay $7,500 as administrative and filing fees to the Manufacturers Arbitration Association.
7. LRI shall take nothing on its counterclaim.

8. Riley Instruments, as the prevailing party in this dispute, shall recover a reasonable attorney's fee. Within 30 days of the date of this Amended Award, Riley Instruments shall lodge with the Arbitrator and serve upon LRI its application for attorney's fees, supported by billings and time records. Within 15 days thereafter, LRI shall lodge with the Arbitrator and serve upon Riley Instruments LRI's memorandum, if any, challenging Riley Instruments' application. The Arbitrator will then rule on the amount of fees based on the submissions of the parties.

Dated: July 11, 2014

_____*Stanley Warren*_____

Stanley Warren
Arbitrator

Mark Stilton
Law Offices of Mark Stilton
1823 Herrick Blvd., Suite 3
Eagle Point, Columbia

Attorney for LRI, Inc.

SUPERIOR COURT OF THE STATE OF COLUMBIA

RADLEY COUNTY

LRI, INC., Petitioner vs. RILEY INSTRUMENTS, INC., Respondent.	Civ. Case No. 14-44378 **PETITION TO VACATE ARBITRATOR'S AMENDED FINAL DECISION AND AWARD**
Including a counterclaim by LRI, Inc. for breach of contract to recover the contract price.	

An arbitration was conducted under the rules of the Manufacturers Arbitration Association pursuant to a contract between LRI, Inc. and Riley Instruments, Inc. On May 9, 2014, Arbitrator Stanley Warren issued a *Final* Decision and Award in favor of Riley Instruments. On May 27, 2014, Riley Instruments, in a letter to the arbitrator, asserted that the arbitrator had failed to rule on certain issues and requested that the arbitrator amend the May 9, 2014 award to include the allegedly omitted issues.

On July 11, 2014, Arbitrator Warren issued an Amended Final Decision and Award in which he purported to "correct" the earlier award. Both of the arbitrator's awards are attached hereto as exhibits.

LRI, Inc. moves on the following grounds to vacate the Amended Final Decision and Award.

1. Once he issued his Final Decision and Award, the arbitrator was *functus officio* and had no power whatsoever to amend or otherwise change the award. It is a fundamental common law principle that once an arbitrator has made and published an award, his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration. The policy that lies behind this is an unwillingness to permit one who is not a judicial officer, and who acts informally and sporadically, to reexamine a final decision that he has already rendered because of the potential evil of outside communication and unilateral influence which might affect a new conclusion. See, *Transport, Inc. v. National Petroleum Corp.*, Col. Ct. App. (1990).

2. The purported amendment and the request therefor were in any event untimely. Rule 46 of the Commercial Arbitration Rules of the Manufacturers Arbitration Association requires that the arbitrator must "dispose of the request [for a correction] within 20 days after service of the request." Also, Columbia Code of Procedure, Section 1284, requires that any request for a correction be made "not later than 10 days after service of a signed copy of the award on the applicant" and that the requested correction be made "not later than 30 days after service of a signed copy of the award on the applicant." On all counts, the requisite time limits were exceeded.

3. Both Rule 46 and the CCP Section 1286.6 allow the arbitrator to make "corrections" only for essentially clerical, typographical, or computational errors not affecting the merits of the award. The arbitrator clearly exceeded the scope of any power he may have had by (a) adding a finding, not made in the original award, regarding the alleged liability of LRI for an alleged intentional concealment, (b) recharacterizing the amount of the contract damages award, and (c) deciding that Riley Instruments is entitled to attorney's fees and claiming to retain the power to determine the amount. These are clearly substantive changes "affecting the merits of the award."

4. The arbitrator committed a grave error of law by awarding punitive damages in a contract case. It is a fundamental principle of law that punitive damages do not lie for breach of contract.

LRI, Inc. therefore moves the court to vacate the arbitrator's July 11, 2014 Amended Final Decision and Award.

Dated: July 16, 2014

Respectfully submitted,

LAW OFFICES OF MARK STILTON

By_____*Mark Stilton*_____

Mark Stilton
Attorney for LRI, Inc.

California
Bar
Examination

Performance Test B

LIBRARY

RILEY INSTRUMENTS, INC. v. LRI, INC.

LIBRARY

Commercial Arbitration Rules
Manufacturers Arbitration Association

Rule 43. Scope of Award

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.

*** * * * ***

Rule 46. Modification of Award

Within 10 days after the service of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The arbitrator shall dispose of the request within 20 days after service of the request to the arbitrator and any response thereto.

Columbia Arbitration Act
Columbia Code of Procedure (CCP)

Section 1283. Award

The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy.

Section 1284. Application for Correction

The arbitrators, upon written application of a party to the arbitration, may correct the award upon any of the grounds set forth in subdivisions (a) and (c) of Section 1286.6 not later than 30 days after service of a signed copy of the award on the applicant. Application for such correction shall be made not later than 10 days after service of a signed copy of the award on the applicant.

Section 1285. Petition to Confirm, Correct, or Vacate

Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award.

* * * * *

Section 1285.2. Response to Petition

A response to a petition under this chapter may request the court to dismiss the petition or to confirm, correct or vacate the award.

*** * * * ***

Section 1286.2. Grounds for Vacation

The court shall vacate the award if the court determines any of the following:

(a) The award was procured by corruption, fraud or other undue means.

(b) There was corruption in any of the arbitrators.

(c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.

(e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

* * * * *

Section 1286.6. Correction by Court

The court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Monroe v. Henson & Bailey

Columbia Supreme Court (1992)

Walter Monroe was employed as a lawyer by the law firm of Henson & Bailey under an employment contract that contained an agreement to submit "any dispute arising out of this contract to final and binding arbitration." There was a provision in the contract regarding allocation of attorney's fees in the event Monroe left the firm and took clients with him. When Monroe resigned, a number of clients followed him to his new practice, and a dispute arose over how to allocate the fees earned and to be earned. The parties submitted the dispute to an arbitrator, who essentially ruled against Monroe. Monroe petitioned the trial court to vacate the award. That court denied his petition.

We granted review and directed the parties to address the limited issue of whether and under what conditions a trial court may review an arbitrator's decision.

1. *The General Rule of Arbitral Finality*.

This case involves private, nonjudicial arbitration, which the parties submitted to an arbitrator pursuant to their written agreement. The Columbia Arbitration Act, found in the Code of Procedure (CCP), represents a comprehensive statutory scheme regulating private arbitration in this state and expresses a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.

The arbitration clause included in the employment agreement in this case specifically states that the arbitrator's decision would be both binding and final. The arbitrator's decision should be the end, not the beginning, of the dispute. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so.* The courts simply assure that the parties receive the benefit of that bargain by minimizing judicial intervention in the arbitration process.

Arbitrators may base their decisions upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. Moreover, they are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their

award according to what is just and good. Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.

In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable – first, because the parties have voluntarily and contractually agreed to bear that risk, and second, because by enacting the Columbia Arbitration Act, the Legislature has reduced the risk by providing for judicial review in circumstances involving serious problems with the award itself or with the fairness of the arbitration process. The Act sets forth the grounds for both vacation and correction of an award. See, CCP Sections 1286.2 and 1286.6.

In the present case, Monroe puts forth three exceptions to the general rule that he claims apply to his case. First, he claims a court may review an arbitrator's decision if an error of law is apparent on the face of the award and that error causes substantial injustice. Second, he claims the arbitrator exceeded his powers. Third, he argues courts will not enforce arbitration decisions that are illegal or violate public policy.

2. *Error of Law on the Face of the Arbitration Decision Does Not Warrant Judicial Review*.

As previously noted, the Legislature has set forth grounds for vacation and correction of an arbitration award, and an error of law is not one of the grounds.

Early cases, predating the Columbia Arbitration Act, followed the common law rule that arbitration awards were freely reviewable by the courts, particularly if the challenge to the award was based on an error of law. Later cases drew back on that view, especially in light of the passage of the Act, but even then the courts were reluctant to adopt a hands-off approach. Finally, this court pronounced that the merits of the controversy between the parties are not subject to judicial review. The form and sufficiency of the evidence and the credibility and good faith of the parties, in the absence of corruption, fraud or undue means in obtaining an award, are not matters for judicial review. In this way, this court suggested that the Columbia Arbitration Act – and not the common law – established the limits of judicial review of arbitration awards. Thus, we held that in the absence of some limiting clause in the arbitration agreement,

the merits of the award, either on questions of fact or of law, *may not be reviewed except as provided in the statute.*

The law has thus evolved from its common law origins and moved toward a more clearly delineated scheme rooted in statute. We adhere to the line of cases that limit judicial review of private arbitration awards to those cases in which there exists a statutory ground to vacate or correct the award. Those decisions permitting review of an award where an error of law appears on the face of the award causing substantial injustice have perpetuated a point of view that is inconsistent with the modern view of private arbitration and are therefore disapproved.

3. *The Arbitrator Did Not Exceed His Powers*.

Monroe argues that, in allocating the earned and to-be-earned fees as he did, the arbitrator exceeded his powers, but it is unclear what Monroe's theory is other than that the arbitrator's interpretation of the contract is erroneous. It is well settled that arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision. A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers. To the extent Monroe argues his case comes within CCP Section 1286.2, subdivision (d), merely because the arbitrator reached an erroneous decision, we reject the point.

It is within the "powers" of the arbitrator to resolve the entire "merits" of the "controversy submitted" by the parties. Obviously, the "merits" include all the contested issues of law and fact submitted to the arbitrator for decision. The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement. Monroe does not argue that the arbitrator's award strayed beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate. The agreement to arbitrate encompassed "any dispute arising out of" the employment contract. The parties' dispute over the allocation of attorney's fees following termination of employment clearly arose out of the employment contract; the arbitrator's award does no more than resolve that dispute. Under these circumstances, the arbitrator was within his "powers" in resolving the questions of law presented to him.

A related paramount principle that bears on the arbitrator's power to determine and resolve the merits is this: Unless the contract, the submission, or the rules governing the arbitration provide otherwise, an arbitrator's choice of relief awarded to the prevailing party does not exceed his or her powers so long as it bears a rational relationship to the underlying contract and to the breach thereof *as interpreted, expressly or impliedly, by the arbitrator.* This holds true as to any plausible theory of the arbitrator's interpretation of the contract. In this case, the logical connection of the nature of the relief fashioned by the arbitrator to the underlying contract is plain. Thus, the award is not subject to vacation or correction based on any of the statutory grounds asserted by Monroe.

We conclude that an award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in CCP Sections 1286.2 and 1286.6. Further, the existence of an error of law apparent on the face of the award, even one that causes substantial injustice, does not provide grounds for judicial review.

The judgment is affirmed.

Marco v. Chandler

Columbia Court of Appeals (1995)

Plaintiffs and appellants Joel Marco and Linda Marco (collectively, Marco) appeal a judgment insofar as it awards $19,575 in attorney's fees to defendant and respondent Dixie N. Chandler (Chandler). The essential issues are whether the arbitrator exceeded his powers by denying an award of attorney's fees to Chandler, and whether the trial court erred in awarding attorney's fees to Chandler for the underlying arbitration instead of remanding to the arbitrator for that purpose.

In March 1991, Marco entered into a real estate purchase contract to acquire certain property from Chandler. Marco subsequently filed an action for rescission. Because the contract contained an arbitration clause, the matter was referred to the Manufacturers Arbitration Association. In an award made January 9, 1992, the arbitrator denied Marco's claim against Chandler and denied all requests for attorney's fees. On April 20, 1992, Chandler filed a petition in the trial court to correct the arbitration award. Chandler contended that the arbitrator exceeded his power by not applying the attorney's fee provision and that the error appeared on the face of the record. The contract between the parties provided that "[i]n any action, proceeding or arbitration arising out of this agreement, the prevailing party shall be entitled to reasonable attorney's fees." The matter was heard May 22, 1992, at which time the trial court ordered the matter back to the arbitrator to clarify his denial of attorney's fees to Chandler.

On October 13, 1992, the arbitrator filed a clarification of the award, stating that Chandler prevailed against Marco but that, in rendering the award, he believed he had the discretion to deny the request for attorney's fees, notwithstanding the determination that Chandler was the prevailing party. He added, "If the arbitrator does not have that discretion and the prevailing parties are entitled to attorney's fees as a matter of right, attorneys' fees should be awarded to the prevailing parties to the degree such fees were incurred in arbitrating the claim upon which they prevailed."

On November 20, 1992, Chandler filed a second petition in the trial court to correct and to affirm the award as clarified by the arbitrator. In the petition, Chandler

sought a correction of the award to reflect her entitlement to reasonable attorney's fees as the prevailing party. Marco filed opposition papers, arguing that the petition was time-barred, that the trial court lacked the power to correct the award even if the petition were timely, that Chandler had failed to provide any admissible and competent evidence of whether the attorney's fees sought were reasonable or necessary, and that sanctions should be imposed against Chandler and her counsel.

Chandler's reply papers asserted the petition was timely. Chandler's counsel attached a copy of her prior bill in this matter, in the amount of $19,575, and asked the court to make a determination of the *amount* of fees Chandler was entitled to.

The trial court granted Chandler's motion and awarded Chandler $19,575 as a reasonable attorney's fee. Marco appealed.

1. *There is no merit to Marco's contention that the trial court was bound by the arbitrator's denial of an award of attorney's fees.*

Marco, citing the Columbia Supreme Court's decision in *Monroe v. Henson & Bailey*, contends the trial court was bound by the arbitrator's decision denying Chandler an award of attorney's fees, i.e., that the trial court had no power to review the arbitrator's decision. The argument lacks merit.

In *Monroe*, the Supreme Court clarified the law as to the limited scope of judicial review of arbitration awards. *Monroe* held an award rendered by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in the Columbia Arbitration Act.

Here, the arbitrator's decision to deny Chandler an award of attorney's fees, notwithstanding his finding Chandler was the prevailing party, exceeded his powers because the agreement provides that "the prevailing party *shall* be entitled to reasonable attorney's fees." (Italics added.)

Had the arbitrator found neither Marco nor Chandler was the prevailing party, the arbitrator properly could have declined to make any award of attorney's fees. But having made a finding Chandler was the prevailing party, the arbitrator was compelled by the terms of the agreement to award her reasonable attorney's fees and costs. That error was subject to correction because Section 1286.6(b) of the Columbia Arbitration

Act provides an award shall be corrected if "[*t*]*he arbitrators exceeded their powers* [and] the award may be corrected without affecting the merits of the decision …." (Italics added.)

2. *There is, however, merit to Marco's contention that the amount of attorney's fees to be awarded for the arbitration proceeding is to be determined by the arbitrator.*

The issue is whether the arbitrator should have been directed to decide the *amount* of attorney's fees to be awarded for the arbitration proceeding, or whether the issue of the amount of those fees was a matter for the trial court.

An award of attorney fees for the arbitration itself is within the arbitrator's purview. After the arbitrator declined to award Chandler her attorney's fees, notwithstanding his determination she was the prevailing party, the trial court was empowered to correct the award to provide for an award of attorney's fees to Chandler. However, the trial court should have remanded the matter to the arbitrator to determine the *amount* of attorney's fees to which Chandler was entitled for the arbitration proceeding, rather than making that determination at the trial court level. It is the arbitrator, not the trial court, who is best situated to determine the amount of reasonable attorney's fees to be awarded for the conduct of the arbitration proceeding. We remind the arbitrator that he is compelled by the parties' agreement to award reasonable attorney's fees to the prevailing party and that he lacks discretion to do otherwise.

The judgment is reversed insofar as it awards $19,575 in attorney's fees to Chandler, and the matter is remanded to the arbitrator for a determination of the amount of attorney's fees.

Transport, Inc. v. National Petroleum Corp.

Columbia Court of Appeals (1990)

This case involves an arbitration of a dispute between the petitioner, Transport, Inc. (Transport), and the respondent, National Petroleum Corp. (NPC), over the transportation of petroleum products. The issues that the parties initially submitted to the arbitrators for decision were: (1) whether NPC breached its contract by canceling the fourth shipment it had agreed to tender to Transport, and (2) if so, what damages Transport suffered. At the commencement of the arbitration, the parties agreed to bifurcate the liability and damages issues, requesting the arbitrators to issue first a "partial final award" on the question of liability, i.e., whether NPC breached the contract.

After issuance of a "partial final award" in which the panel of arbitrators found in favor of Transport on the issue of liability, one of the three arbitrators died. Transport sought in the court below to confirm the "partial final award" and requested the court to appoint a replacement for the deceased arbitrator and remand the matter to the reconstituted panel for a decision on the issue of damages.

NPC cross-petitioned the court to vacate the partial final award, require the parties to select a new panel of arbitrators, and commence the matter anew. The court below, exercising its authority under the Columbia Arbitration Act, appointed an arbitrator to replace the deceased one, confirmed the partial final award, and remanded the case to the reconstituted panel for decision on the issue of damages.

On this appeal, NPC argues that, notwithstanding that the ruling of the arbitrators here was titled "partial *final* award," the general rule is that an arbitral decision is not final unless it conclusively decides every point required by and included in the submission of the parties. That is in fact the general rule, but it must be assessed in light of two other pertinent principles: First, if the parties agree that the panel of arbitrators is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so. Second, once the arbitrators have finally decided the submitted issues, they are in common law parlance *functus officio*, meaning that their authority over those questions is ended.

The latter principles govern the present dispute. The parties agreed at the commencement of the arbitration to a bifurcated decision. They asked the panel to decide the issue of liability. Prior to the death of the third arbitrator, the panel ruled on that issue conclusively, deciding every point required by and included in the first part of the parties' submission. Thus, with respect to liability, the original panel was *functus officio*, so the reconstituted panel cannot be ordered to rearbitrate that issue.

The Columbia Arbitration Act makes specific provision for filling vacancies in arbitration panels: The court is authorized to do so upon application of a party if the agreement of the parties does not otherwise provide. This authority extends to pending arbitrations. The court below acted within its authority.

We affirm the judgment of the court below.

Classic Construction, Inc. v. Vladomir Development Co., et al.

Columbia Court of Appeals (1999)

Appellants Vladomir Development Company (Vladomir) and Mandeville Township (Mandeville) appeal from a judgment confirming an amended arbitration award in favor of respondent Classic Construction, Inc. (Classic). Vladomir and Mandeville contend that the arbitrator exceeded his powers by amending the award to determine an issue he had failed initially to decide. They contend that the trial court was required to vacate the amended award and order the entire dispute reheard by a new arbitrator.

Facts and Procedural Background

Classic, a subcontractor, performed asphalt work and other improvements for Vladomir at an elementary school in Mandeville. A dispute arose about the work. Classic stopped work and served a stop payment notice upon Mandeville, i.e., a notice that Mandeville should withhold payment pending settlement of the dispute. Classic then sued Vladomir and Mandeville for damages.

The parties stipulated that the entire dispute would be resolved by binding arbitration. They briefed the questions presented and introduced oral and documentary evidence on all issues. The parties each submitted proposed forms of judgment that addressed all the questions submitted to the arbitrator. The arbitrator issued his decision awarding Classic $42,051 in damages against Vladomir for breach of contract, but the award did not resolve the claim against Mandeville based upon the stop payment notice. The arbitrator did not, therefore, determine all the questions submitted.

After receiving the award, counsel for Classic wrote a letter to the arbitrator requesting that he amend the award to include a judgment against Mandeville based upon the stop payment notice. Counsel for Classic did not send a copy of this letter to the attorney representing both Vladomir and Mandeville.

Four days later, counsel for Classic telephoned the administrator for the arbitrator. The arbitrator confirmed that he had received the letter and said he would make a decision in the next few days. These calls were also ex parte.

The arbitrator thereafter issued an amended award, which included a finding favorable to Classic on the cause of action against Mandeville. The amended portion of the award provided: "Classic's stop notice directed to Mandeville is found valid for purposes of this action." Upon receipt of the amended award, counsel for Vladomir and Mandeville attempted unsuccessfully to contact the arbitrator and then learned of the ex parte communications from counsel for Classic.

Classic subsequently petitioned the trial court to confirm the amended arbitration award. Vladomir and Mandeville opposed the petition, moved to vacate the amended award, and requested that the trial court order that the entire dispute be reheard by a new arbitrator. In a declaration submitted to the trial court, the arbitrator confirmed that the parties had submitted proposed judgments at the conclusion of the arbitration that resolved the causes of action based upon the contract and the stop payment notice. The arbitrator further confirmed that counsel for Classic notified him that the award omitted a finding on the latter cause of action, and that he advised counsel for Classic that he had all the information necessary from the documents received at the arbitration and his notes to render a decision on this cause of action. The arbitrator stated that his failure to address the stop notice claim was inadvertent.

The trial court declined to vacate the amended award, granted Classic's petition to confirm the amended award, and entered judgment in favor of Classic for $42,051 and against both Vladomir and Mandeville.

Discussion

Vladomir and Mandeville contend that the trial court erred in refusing to vacate the amended arbitration award because the arbitrator: (1) exceeded his power under CCP Section 1284 by amending the award; (2) violated procedural requirements for amending or correcting the award under Section 1284; (3) issued an amended award based upon information obtained outside the arbitration in violation of CCP Section 1282.2; and (4) engaged in misconduct with Classic's counsel in violation of CCP Sections 1286.2 and 1286.6. We disagree.

As a general rule, courts will indulge every reasonable intendment to give effect to arbitration proceedings. To ensure that an arbitrator's decision is the end of the

dispute, arbitration awards are subject to very narrow judicial review. See, *Monroe v. Henson & Bailey*, Columbia Supreme Court (1992).

Arbitrators must produce an award that includes "a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy." (CCP Section 1283.) The consequence of an omission to decide all the questions is not addressed by Section 1283 or by any other provisions of the Act. Nothing in the statutory scheme either authorizes or prohibits the amendment of an award.

Section 1286.2 sets forth the exclusive grounds for vacating an arbitration award. Except on these grounds, arbitration awards are immune from judicial review in proceedings to confirm or challenge the award. (*Monroe*, *supra.*)

The record here does not establish that the amended arbitration award was procured by corruption, undue means, or misconduct of the arbitrator. In a sworn declaration, the arbitrator explained that he inadvertently had not resolved one cause of action and that, when contacted by Classic's counsel, he informed counsel that he had all the information from the documents admitted during the arbitration and his notes to issue a decision on the omitted claim. Thus, the record does not reveal that the arbitrator considered information outside the arbitration proceeding in ruling upon the claim. Nor does the record reveal any improper intent or attempt to influence the arbitrator on the part of opposing counsel. Classic's counsel explained, in a declaration submitted under penalty of perjury, that he had no intent to reargue the matters presented at the arbitration or bias the arbitrator, but intended only to remind the arbitrator that both sides had desired a ruling on the claim and had included it in proposed judgments previously submitted to him.

In the absence of a showing that the arbitrator was improperly influenced or actually considered evidence outside the original arbitration proceedings such that appellants needed a further opportunity to be heard on the stop notice claim, appellants cannot demonstrate that the amended award was procured by corruption, fraud, undue means, or misconduct of the arbitrator within the meaning of Section 1286.2.

The remaining issue is whether issuance of the amended award in response to an ex parte communication is an action in excess of the arbitrator's powers or

constitutes "other conduct ... contrary to the provisions" of the Act. We conclude that it is not.

Section 1284 authorizes an arbitrator, upon written application of a party to the arbitration, to *correct* the award upon either of the grounds set forth in Section 1286.6, subdivisions (a) and (c), i.e., where there is a miscalculation of amounts, a mistake in the description of a person or property referred to in the award, or where there is a defect *in the form* of the award that does not affect the merits of the controversy. Any application to correct an arbitration award under this section requires notice to the opposing party.

The *amendment* of the arbitration award in this case does not fall within these subdivisions. The arbitrator was not "correcting" a miscalculation or description contained in the prior award or correcting a defect in its "form." Rather, he was resolving the remainder of the dispute submitted to him. Thus, the time limits specified in Section 1284 do not apply.

The absence of a statutory provision authorizing amendment of an award does not deprive the arbitrator of jurisdiction to do so. The parties concede that the arbitrator had authority to decide the entire dispute, including the cause of action against Mandeville. The stop notice claim was raised in the pleadings, briefed by the parties, and included in proposed judgments submitted by both sides to the arbitrator. The amendment was made promptly. It is not inconsistent with other provisions of the original award and it does not substantially prejudice the legitimate interests of any party. In our view, the arbitrator was simply finishing his assignment by making a complete and full award on the matters submitted to him for resolution.

It has been suggested that the ancient rule of *functus officio* requires the award to be vacated under the circumstances we face here. That rule survives, but just barely, to bar arbitrators from revisiting and changing *complete* awards, i.e., awards where they in fact decided all the issues presented to them. But cases holding that an *incomplete* award is a nullity and must be vacated were generally decided before Columbia's Arbitration Act and the Supreme Court's instruction that the courts indulge every reasonable intendment to give effect to arbitration proceedings. To deny arbitrators the

authority to complete their task under such circumstances elevates form over substance.

We conclude Columbia's contractual arbitration law permits arbitrators to issue an amended award to resolve an issue omitted from the original award through the mistake, inadvertence, or excusable neglect of the arbitrator if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any party.

This opinion should not be read to condone the actions of Classic's counsel in communicating ex parte with the arbitrator. Counsel's ex parte communications were inappropriate, and under different, more egregious circumstances, might require vacation of an arbitration award.

The judgment is affirmed.

PT-B: SELECTED ANSWER 1

STATEMENT OF FACTS

LRI, Inc. (LRI) willfully and deceptively breached a contract with Riley Instruments, Inc. (Riley), under which LRI agreed to manufacture and supply computer chips to Riley in accordance with Riley's specifications. The contract provided for "final and binding arbitration [of disputes] to be conducted under the rules of the Manufacturers Arbitration Association." The contract further provided that "[t]he arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute" (emphasis added).

At arbitration, the parties agreed to the following statement of issues: "Whether LRI breached its contract by failing to manufacture the cp426i series chip according to Riley's specifications and whether LRI concealed a manufacturing flaw in the production run of the chips delivered by Riley. If so, what shall be the appropriate remedy? If no, shall LRI recover the contract price on its counterclaim?"

Prior to the arbitrator's May 9, 2014 Final Decision and Award (FD&A), Riley presented evidence of LRI's intentional concealment of the flaw, Riley's engineering analysis to determine the flaw (costing $75,000), and the appropriateness of punitive damages based on LRI's intentional misconduct. In its FD&A, the arbitrator concluded that LRI breached its contract. It awarded $875,650 in contract damages, post-judgment interest, $12,133 in costs, and $7,500 in administrative and filing fees against LRI. However, the FD&A failed to decide the issues of intentional concealment and punitive damages. Furthermore, it failed to explicitly declare a prevailing party—which clearly was Riley—or award a reasonable attorney's fee.

On May 27, 2014, counsel for Riley wrote a letter to the arbitrator bringing these omissions to his attention. A copy of the letter was sent to counsel for LRI. On May 30, 2014, counsel for LRI wrote in opposition to amending the FD&A.

The arbitrator completed his original obligations by publishing an Amended FD&A on July 11, 2014. The Amended FD&A clarified that LRI was guilty of intentional concealment, that Riley was the prevailing party, that punitive damages were appropriate, and that LRI shall pay Riley's attorney's fee.

LRI petitioned to vacate the Amended FD&A on July 16, 2014. Riley now submits this Brief in Opposition.

ARGUMENT

I. The Arbitrator Had Power to Amend the Final Decision and Award Because He Failed to Make a Complete Award and Thus Failed to Fulfill His Original Obligations

"[T]he general rule is that an arbitral decision is not final unless it conclusively decides every point required by and included in the submission of the parties." (Transport, Inc. v. Nat'l Petroleum Corp.) "Columbia's contractual arbitration law permits arbitrators to issue an amended award to resolve an issue omitted from the original award through the mistake, inadvertence, or excusable neglect of the arbitrator if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any party." (Classic Construction, Inc. v. Vladomir Development Co.) This is precisely the situation of this case: the arbitrator failed to resolve an issue, the omission of which he called "entirely inadvertent." (Amended FD&A.) Therefore, the decision was not final, because it failed to "conclusively decide every point required by and included in the submission of the parties." (See Transport.)

Nonetheless, LRI claims that "the arbitrator was functus officio and had no power whatsoever to amend or otherwise change the award." (Petition to Vacate.) Not so. It improperly relies on Transport, which is inapposite to the facts at hand. Transport held

that there were two principles that limited an arbitrator's ability to amend an award. "First, if the parties agree that the panel of arbitrators is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so. Second, once the arbitrators have finally decided the submitted issues, they are in common law parlance functus officio." (Transport.) In that case, an arbitrator died after deciding only part of the issues. Crucially, however, the parties had agreed prior to arbitration to bifurcate the issues instead of having them decided all at once. Because the parties made such an agreement, and one bifurcated issue was finally decided, it could not be amended.

This case is easily distinguishable from Transport. Here, the parties did not agree to bifurcate the issues. Instead, they submitted all issues, which are greatly intertwined, to the arbitrator for simultaneous decision. There is no indication that either party desired the issues to be individually decided, and there is certainly no agreement to that effect. Therefore, the arbitrator had not "finally decided" the issues submitted, and he was free to amend his inadvertent omissions.

In any event, the rule of functus officio "survives, but just barely." (Classic Construction.) Early cases, prior to Columbia's Arbitration Act, held that incomplete awards could not be amended. (Id.) However, "[t]o deny arbitrators the authority to complete their task under such circumstances elevates form over substance." (Id.) Instead, Classic Construction unequivocally holds that the doctrine of functus officio does not bar the amendment of incomplete awards when the omission is due to "mistake, inadvertence, or excusable neglect." (Id.). Because the arbitrator's omission was through inadvertence in this case, he is not barred by any "barely surviving" rule.

Functus Officio does not apply to these facts; therefore, the arbitrator had power to amend the FD&A.

II. The Amendment and Request Therefor Were Timely, Because Neither Rule 46 Nor CCP § 1284 Applies to a Correction of an Inadvertent Omission

a. The Amendment Is Not Time-Barred By Rule 46

Rule 46 of Commercial Arbitration governs the modifications of awards. It prevents the arbitrator from "redetermin[ing] the merits of any claim already decided" but allows the arbitrator "to correct any clerical, typographical, or computational errors in the award." (Rule 46.) A party must request such a correction within 10 days of service of the award. LRI claims that Rule 46 bars amendment. If Rule 46 applied, that would be true, because Riley received the FD&A on May 12, 2014 and requested correction on May 27, 2014. However, as explained below, Rule 46 is inapplicable to these facts.

Riley did not request a correction of a clerical, typographical, or computational error in the FD&A. It requested instead that the arbitrator complete his original duties set forth in the contract between LRI and Riley, and those set forth in the arbitration proceedings. The thrust of the current dispute is not in the merits of the case, or in the typography of the original FD&A. Instead, the dispute is over the fact that the arbitrator made omissions of duties he was legally obligated to complete, not typographical mistakes. Because the relief Riley requested in its May 27, 2014 letter does not fall within the purview of Rule 46, it is not constrained by the time limits in Rule 46.

b. The Amendment Is Not Time-Barred By CCP § 1284

CCP § 1284 allows corrections to an arbitration award, if upon grounds set forth in § 1286.6(a) and (c), as long as application for correction is "made not later than 10 days after service of a signed copy of the award on the applicant." (CCP § 1284.) LRI incorrectly claims that Riley is constrained by § 1284's 10-day time limit.

Classic Construction controls this issue. The court there held, "The amendment of the arbitration award in this case does not fall within [§ 1284]. The arbitrator was not 'correcting' a miscalculation or description contained in the prior award or correcting a

defect in its 'form.' Rather, he was resolving the remainder of the dispute submitted to him. Thus, the time limits specified in Section 1283 do not apply." (Classic Construction.) In Classic Construction, the arbitrator did not resolve certain claims that were brought before it. (Id.) This failure was brought to the arbitrator's attention by counsel for one of the parties in ex parte proceedings. (Id.) The arbitrator issued an amended award, making a favorable finding on the originally omitted issue for the party that brought the omission to his attention. (Id.) The arbitrator stated his failure to address the omitted claim was inadvertent. (Id.) In the subsequent appeal from the amendment, the court held that because the arbitrator was obligated under CCP § 1283 to make a determination on all questions submitted to it, and because his failure was inadvertent, amendment was proper. (Id.) It further held that, while not condoning ex parte proceedings, there was no evidence of corruption, fraud, or undue means. (Id.) Therefore, the amendment was valid, notwithstanding § 1284's time limit.

This case is highly analogous. The parties briefed and presented evidence on several issues that the arbitrator did not address in his original FD&A. Later, Riley brought these omissions to the arbitrator's attention in a letter that was also sent to opposing counsel. As in Classic Construction, the arbitrator admitted that the omissions were "entirely inadvertent." He then issued an Amended FD&A that corrected these omissions without any substantive changes to the underlying merits of the case. Importantly, every single issue the arbitrator clarified in his Amended FD&A had previously been argued prior to the original FD&A.

In sum, Classic Construction clearly holds that § 1284's time limit is inapplicable to the facts of this case. Therefore, Riley's letter and the subsequent corrections in the Amended FD&A were timely.

III. The Arbitrator Made a Proper Correction Because Fulfilling His Original Obligations Was Not Beyond the Scope of His Power

a. The Columbia Arbitration Act Does Not Preclude Amendment

"Arbitrators must produce an award that includes 'a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy.'" (Classic Construction (quoting CCP § 1283) (emphasis in original).) "The consequence of an omission to decide all the questions is not addressed by Section 1283 or by any other provision of the Act. Nothing in the statutory scheme either authorizes or prohibits the amendment of an award." (Id.)

In this case, the arbitrator's original FD&A failed to "include a determination of all the questions submitted" to him. This is a clear violation of CCP § 1283—a violation that Classic Construction holds is not beyond the arbitrator's power of amendment. LRI claims that the arbitrator exceeded the scope of his power in three ways. However, in each instance, the arbitrator clearly had the power to correct his omissions.

b. The Arbitrator Had the Power to Clarify that LRI was Liable for Intentional Concealment

The arbitrator was clearly entitled to clarify that LRI was liable for intentional concealment because this is one of the explicit issues the parties presented in arbitration. (See FD&A Issue Statement ("[W]hether LRI intentionally concealed a manufacturing flaw in the production run of the chips delivered to Riley").) CCP § 1283 requires the arbitrator to determine all questions submitted to him. If he fails to do so, nothing in the statutory scheme prevents him from amending the award. (See Classic Construction.) Here, the arbitrator inadvertently omitted the decision on this issue and subsequently corrected his mistake. Doing so was entirely proper—indeed, it was mandated by § 1283. LRI cannot now claim the arbitrator does not have the power to decide an issue it agreed to present to the arbitrator. The issue should have been in the original FD&A, and § 1283 allows it to be in the Amended FD&A.

c. The Arbitrator Had the Power to Recharacterize the Amount of the Contract Damages Award

LRI claims that the arbitrator should not have recharacterized the amount of the contract damages award. LRI is wrong. The arbitrator was justified in correcting the amount of the award based on his clarification that LRI was guilty of intentional concealment. "The Arbitrator intended, but neglected to state specifically that LRI intentionally concealed . . . ." (Amended FD&A.) The monetary award of $875,650 recited in the original FD&A was based on this negligent omission to specify that "LRI's concealment was intentional and with a motive to deceive." (Id.)

Even if the ability to correct the contract damages amount was not implicit in clarifying his finding, the arbitrator was justified in his recharacterization under CCP § 1286.6(a). This allows for the correction of an award "if the court determines that there was an evident miscalculation of figures." Under Classic Construction, as discussed above, the 10-day time limit of § 1284 does not apply when the arbitrator is "resolving the remainder of the dispute submitted to him." That is precisely what the arbitrator did here. His actions were proper because the original contract damages amount was based on an incomplete finding. Furthermore, LRI will not suffer any prejudice based on this amount, because it totals the exact same number. The arbitrator merely clarified where $75,000 of those contract damages came from. At the end of the day, LRI will pay the exact same amount in contract damages.

d. The Arbitrator Had the Power to Decide that Riley was Entitled to Attorney's Fees and to Retain the Power to Determine the Amount

It is clear Riley was the prevailing party in this arbitration. (See Amended FD&A ("Obviously, Riley Instruments is the prevailing party.").) The contract between Riley and LRI stated that the "arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute" (emphasis added). The word "shall" leaves no discretion to the arbitrator; he must award attorney's fees after making a determination of a prevailing party. The contract in effect bound the arbitrator to make two decisions: (1)

who the prevailing party was; and (2) how much to award in fees. Again, the omission to do so in the original FD&A does not preclude a clarification in the Amended FD&A.

This case is analogous to Marco v. Chandler. The parties in that case also went to arbitration under a contract that stated that "the prevailing party shall be entitled to reasonable attorney's fees." (Marco.) The arbitrator in Marco declined to award the prevailing party—Chandler—attorney's fees. (Id.) The court held that by doing so, the arbitrator "exceeded his powers because the agreement provides that 'the prevailing party shall be entitled to reasonable attorney's fees.'" (Id.)

Based on Marco, LRI's argument flies in the face of prevailing law. It is not that the arbitrator in this case exceeded his powers by amending the FD&A to include an attorney's fee award; he would have exceeded his powers by not doing so. As Marco held, he "lacks the discretion to do otherwise." (Id.) Riley and LRI explicitly agreed that the prevailing party in arbitration would be entitled to reasonable attorney's fees. LRI cannot in good faith dispute the fact that Riley prevailed in this arbitration, and it has no legal basis to escape its contractual obligation to pay Riley's attorney's fees.

Furthermore, the arbitrator is entitled to determine the amount of attorney's fees. Under Marco, the decision of the amount of fees lies with the arbitrator. (See id. ("It is the arbitrator, not the trial court, who is best situated to determine the amount of reasonable attorney's fees to be awarded for the conduct of the arbitration proceeding.").) As in Marco, the arbitrator properly withheld the power to determine the amount of reasonable fees.

IV. Punitive Damages Were Appropriate Because LRI Willfully Deceived Riley; In Any Event, This Court Has No Power to Vacate or Correct the Award Because Neither CCP §§ 1286.2 Nor 1286.6 Applies

LRI, without one scintilla of legal support, claims that the "arbitrator committed a grave error of law by awarding punitive damages in a contract case." As explained below, the arbitrator was wholly justified in awarding punitive damages for willful intent to deceive. Even if there were an error of law, however, the award must still stand.

a. The Arbitrator Was Justified In Awarding Punitive Damages

The arbitrator awarded "$100,000 as punitive damages for the intentional concealment of the manufacturing flaw." (Amended FD&A.) It found that the concealment occurred "with a motive to deceive." (Id.) The parties agreed that the arbitrator shall determine the appropriate remedy. (See FD&A.) This includes, the arbitrator held, an award of punitive damages. Although under contract law, punitive damages are not generally awarded, it is clear that they can be properly awarded in instances of intentional deceit. The arbitrator found such intentional deception in this case; as such, he did not make an error of law. Certainly, any decision here cannot be described, as LRI baldly asserts, as a "grave error of law." Quite the contrary: LRI engaged in grave deception, and now it does not want to pay the price.

b. Even if the Arbitrator Was Not Justified, He Did Not Exceed His Powers

"Unless the contract, the submission, or the rules governing the arbitration provide otherwise, an arbitrator's choice of relief awarded to the prevailing party does not exceed his or her powers so long as it bears a rational relationship to the underlying contract and to the breach thereof as interpreted, expressly or impliedly, by the arbitrator. This holds true as to any plausible theory of the arbitrator's interpretation of the contract. . . . [T]he existence of an error of law apparent on the face of the award, even one that causes substantial injustice, does not provide grounds for judicial review." (Monroe v. Henson & Bailey.) An award may be vacated only on grounds set forth in CCP §§ 1286.2 and 1286.6. (Id.)

Here, even if the arbitrator made an error in law—which he did not—such an error would not be grounds for judicial review. It is readily apparent that the arbitrator's award of punitive damages bore a "rational relationship to the underlying contract and to the breach thereof." The arbitrator found that the breach was willful, the LRI intended to deceive Riley, and that punitive damages were an "appropriate remedy." Because the parties gave the arbitrator the power to fashion an appropriate remedy, and because it bears a rational relationship to the contract and LRI's willful deception, the punitive damage award must stand. (See Monroe.)

c. Neither CCP §§ 1286.2 Nor 1286.6 Afford LRI Relief From The Proper Determination of Punitive Damages

CCP § 1286.2 lists the various statutory grounds for vacation of an award. These are the only grounds upon which a court may vacate an arbitrator's award. (Monroe.) These grounds include, inter alia, corruption, fraud, undue means, substantial prejudice by misconduct, an arbitrator's exceeding power, and an arbitrator's prejudicial refusal to postpone a hearing for sufficient cause. (See CCP § 1286.2.) LRI has not pleaded that any such circumstances exist in this case. Monroe is clear that an award will not be vacated for reasons outside the statute. Therefore, the decision must stand.

CCP § 1286.6 is equally unhelpful to LRI. It lists grounds for correction of an award by the court. These include, inter alia, the evident miscalculation of figures, the arbitrator's exceeding power, and the correction of the form of the award. (See CCP § 1286.6.) Again, LRI has not pleaded that any of these circumstances are present. Therefore, under Monroe, the court is precluded from correcting the award.

CONCLUSION

Because the arbitrator in this case properly fulfilled his obligations as set forth in the parties' contract and their statement of issues for arbitration, this court should deny LRI's Petition to Vacate.er.

PT-B: SELECTED ANSWER 2

MEMORANDUM IN OPPOSITION OF DEFENDANT'S PETITION TO VACATE ARBITRATOR'S AMENDED FINAL DECISION AND AWARD

The following constitutes the Plaintiff-Respondent, Riley Instruments, Inc.'s Memorandum in Opposition of the Defendant-Petitioner LRI, Inc.'s Petition to Vacate Arbitrator's Amended Final Decision and Award.

STATEMENT OF FACTS

Riley Instruments, Inc. (Riley) and LRI, Inc (LRI) entered into a contract under which LRI agreed to manufacture and supply computer chips to Riley in accordance with Riley's specification. The contract contained an arbitration provision which required that, "In the event a dispute arises under this contract... the parties agree that the dispute shall be submitted to final and binding arbitration to be conducted under the Manufacturers Arbitration Association (MAA)." The arbitration provision further provided that, "the arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute." LRI breached its contract with Riley when it consciously decided not to disclose a flaw in the computer chips manufactured for Riley because LRI knew that disclosing such information would cause Riley to reject the chips, as were its rights under the contract. LRI was required under contract to inform Riley on any problems and failed to do so based on this apprehension. The parties submitted the dispute to binding arbitration.

On May 9, 2014 arbitrator Warren issued an initial arbitration award, determining that LRI breached its contract and suffered damages from this breach. The arbitrator found for Riley and awarded contract damages, interest, costs, and administrative fees. The arbitrator found that LRI should take nothing on its counterclaim for recovery of the contract price. However, in this initial award, the arbitrator inadvertently failed to decide several issues submitted by the parties for resolution in the arbitration proceeding. First, the arbitrator failed to determine whether LRI intentionally concealed a manufacturing

defect, and if so, what damages Riley should recover as a consequence. Second, the arbitrator failed to decide whether Riley was entitled to punitive damages based on this unconscionable concealment. Finally, the arbitrator failed to award attorney's fees to Riley, the clearly prevailing party in the arbitration. On May 27, 2014 Riley submitted a letter to the arbitrator requesting an amendment of the award to include resolution of these issues and forwarded a copy to opposing counsel. LRI strenuously objected on the unfounded assertion that the arbitrator lacked authority, power, or jurisdiction to amend his award. On May 29, 2014 the arbitrator rendered an amended decision fully resolving all the remaining issues that was favorable to Riley. LRI petitions the court to vacate that final award in the present action.

ARGUMENTS

1. Defendant's Petition to Vacate the Arbitration Award Should Be Denied Because the Arbitrator Had Not Issued a Full and Complete Final Decision Award Based On the Arbitrator's Inadvertent Failure to Render A Decision on All Claims of Merit.

The general rule is that an arbitral decision is not final unless it conclusively decides every point required by and included in the submission of the parties. (Transport). The consequence of an omission to decide all the questions is not addressed in Section 1283 or any other provision of the Columbia arbitration act. (Classic). However, this general rule but be evaluated in light of the common law doctrine of functus officio. (Transport). The doctrine of functus officio means that once the arbitrator has finally decided the submitted issues, their authority over those questions is ended (Transport). However, this common law doctrine has not survived to apply to cases in which an amendment is required to be made of an award that does not address all submitted issues (Classic). The rule of functus officio only survives to bar arbitrators from revisiting and changing complete awards, such as those where the arbitrator in fact decided all the issues presented to them (Classic). However, in the case of incomplete awards, the Columbia Court of Appeals has held that to deny arbitrators the authority to complete their task of deciding all issues does not comport to the public policy behind the

Columbia Arbitration Act and the Supreme Court's instruction that the courts indulge every reasonable intendment to give effect to arbitration proceedings. (Classic). Columbia's contractual arbitration law permits arbitrators to issue an amended award to resolve an issue omitted from the original award through the mistake, inadvertence, or excusable neglect of the arbitrator if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any party. (Classic).

In the present arbitration at issue, the arbitrator failed to render a decision on all of the issues presented. First, the arbitrator failed to determine whether or not LRI intentionally concealed a manufacturing flaw. The arbitrator also failed to render a decision based on Riley's argument in their arbitration brief for an award of punitive damages. As such, the arbitrator failed to deal with the issue of concealment, the damages attributable thereto, and the punitive damages remedy. The arbitrator also failed to award attorney's fees as provided for in the arbitration contract. Therefore, as the arbitrator failed to render a final decision that was complete and dispositive of all claims, the arbitrator was permitted to amend his arbitration award to resolve the remaining claims at issue.

2. Defendant's Petition to Vacate the Arbitration Award Should Be Denied Because the Request For Amendment and the Amended Final Decision Award Were Timely Issued Because the Timelines Set Forth in Rule 46 and CCP Section 1284 Do Not Apply to the Arbitration at Issue.

Section 1284 of the Columbia Arbitration Act authorizes an arbitrator, upon written application of a party to the arbitration, to correct the award upon ether of the grounds set forth in Section 1286.6, subdivisions (a) and (c), which provide for correction where there is a miscalculation of amounts, a mistake in the description of a person or property referred to in the award, or where there is a defect in the form of the award that does not affect the merits of the controversy. (Classic). Any application to correct an arbitration award under that section requires notice to the opposing party (Classic). The

amendment of an arbitration award resolving the remainder of a dispute does not fall within these subdivisions; therefore the timelines set forth in Section 1284 do not apply. (Classic). Furthermore, the amendment of an arbitration award resolving the remainder of a dispute does not fall within the meaning of "correct[ing] any clerical, typographical, or computational errors in the award," as stated in Rule 46, based on the reasoning set forth in Classic.

In the arbitration at issue, the arbitrator failed to decide all of the issues that were submitted for arbitration. Therefore, he was empowered to amend the arbitration award to resolve the remainder of the dispute between LRI and Riley. As such was an amendment to dispose of all remaining issues and not a correction, the timelines set forth in Section 1284 and Rule 46 do not apply. Based on this reasoning, Riley's request for amendment of the arbitration awards was timely made. Furthermore, Riley provided notice to LRI through forwarding a copy of its request to LRI. Therefore, the court should deny LRI's petition to vacate because the timelines cited by LRI do not apply, rendering the issuance of the amended decision and Riley's initial request for amendment timely.

3. Defendant's Petition to Vacate the Arbitration Award Should Be Denied Because the Arbitrator Was Within the Scope of His Power When He Amended the Decision Award Based on Claims that were Inadvertently Undecided in the Original Award.

Section 1286.2 of the Columbia Arbitration Act sets forth the exclusive grounds for vacating an arbitration award and vacation of an arbitration award may be has if the amended arbitration award was procured by corruption, undue means, or misconduct of the arbitrator. (Classic). It is within the powers of the arbitrator to resolve the entire merits of the controversy submitted by the parties and merits include all the contested issues of law and fact submitted to the arbitrator for decision. (Monroe). Columbia's contractual arbitration law permits arbitrators to issue an amended award to resolve an issue omitted from the original award through the mistake, inadvertence, or excusable neglect of the arbitrator if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy,

and does not cause demonstrable prejudice to the legitimate interests of any party. (Classic).

The arbitrator in the present action admits in the amended decision that he intended, but neglected to, state specifically that LRI intentionally concealed from Riley the manufacturing defect and thereby violated the terms of the contract. The arbitrator also admits that the monetary award included the $75,000 in alleged damages to Riley, but that he failed to itemize the award. The arbitrator also admitted that his failure to address the proposed punitive damages was inadvertent and that he neglected to make a finding on that issue in the initial decision. Finally, the arbitrator admitted that he was required to award attorneys' fees to the prevailing party and that Riley was "obviously" the prevailing party. Therefore, the arbitrator was entitled to make all amendments undertaken based on his inadvertent failure to decide on those submitted issues.

a. The Arbitrator Was Acting Within the Scope of His Powers By Amending the Decision to Decide the Issue of LRI's Intentional Concealment

As stated above, an arbitrator is required to decide all issues submitted to arbitration and is empowered to amend a decision where such an issue has been inadvertently excluded from the decision.

As previously stated, the charge against LRI of intentional concealment was an essential issue to the dispute that was not decided upon in the original decision. While LRI asserts that the arbitrator exceeded the scope of his power by "adding a finding," it was in fact within the scope of the arbitrator's powers to issue a finding on the issue in question. The parties stipulated that this intentional concealment was a relevant issue during the arbitration proceeding. Therefore, the arbitrator was required under the scope of his powers to decide that issue. Based on the arbitrator's inadvertent failure to so decide, the arbitrator acted within the scope of his power to amend the award to include a determination on this claim.

b. The Arbitrator Was Acting Within the Scope of His Powers By Clarifying the Contract Damages Award to Demonstrate How the Final Contract Damages Were Apportioned

There is nothing contained within the MAA Rule nor the Columbia Arbitration Act that prevents an arbitrator from clarifying the apportionment of damages when issuing an amended decision award. The absence of a statutory provision authorizing amendment of an award does not deprive the arbitrator of jurisdiction to do so (Classic).

In the case of the arbitration award at issue, the arbitrator included the award of $75,000 in his total calculation initially. LRI argues in its petition that the arbitrator recharacterized the amount of the contract damages award. However, it was unclear to Riley whether or not the arbitrator failed to award contract damages that would compensate Riley for its damages suffered based on LRI's intentional concealment because the arbitrator did not itemize the contract damages awarded. The arbitrator was within his power to amend the award to provide clarity through itemizing damages that had already been awarded. Therefore, the arbitrator did not exceed his powers.

c. The Arbitrator Was Acting Within the Scope of His Powers By Awarding Attorney's Fees to the Prevailing Party Because He Was Required to do so Pursuant to the Arbitration Clause.

An arbitrator is required to award attorneys' fees to the prevailing party to an arbitration if the arbitration agreement between the parties explicitly states that the arbitrator shall make such an award. An award of attorneys' fees must be determined by the arbitrator, not the court, because it is the arbitrator who is best situated to determine the amount of reasonable attorney' s fees to be awarded for the conduct of the arbitration proceeding. (Marco).

In Marco v. Chandler, the Columbia Court of Appeals held that the arbitrator was required to award attorneys' fees where such a provision controlled the arbitration. The

language in the arbitrator agreement in Marco provided that "the prevailing party shall be entitled to reasonable attorneys' fees." This language is less clear than the language present in the LRI-Riley arbitration agreement, which explicitly provides that, "the arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute." Therefore, the arbitrator was required by the contract provisions to provide a reasonable award of attorneys' fees.

LRI will attempt to argue that because the arbitrator failed to make an explicit finding that Riley the prevailing party, the arbitrator was not required to amend the award to determine the prevailing party and award attorneys' fees. However, it is clear from the face of both the original and amended arbitrator awards that Riley was in fact the prevailing party. In the original award, the arbitrator provided all relief to Riley, absent the relief that was inadvertently omitted from the original award. Furthermore, the arbitrator did not award LRI success on its counterclaim Therefore, it is clear from the terms of both the original award and the amended award that Riley was in fact the prevailing party and as such was entitled to attorneys' fees pursuant to the arbitration agreement.

4. Defendant's Petition to Vacate the Arbitration Award Should be Denied Because the Arbitrator Did Not Commit a Grave Error of Law by Awarding Punitive Damages in a Contract Case Because Errors of Law are Subject to Judicial Review and Arbitrators Are Empowered to Fashion Awards According to What is Just and Good.

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties. (MAA Rule 43). The merits of the controversy between the parties are not subject to judicial review (Monroe). The form and sufficiency of the evidence and the credibility and good faith of the parties, in the absence of corruption, fraud or undue means in obtaining an award, are not matters for judicial review. (Monroe). Arbitrators are not bound by principles of dry law, but may decide on principles of equity and good conscience, and make their award according to what is just and good. (Monroe). In the absence of some limiting

clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the Columbia Arbitration Act (Monroe). Unless the contract, the submission, or the rule governing the arbitration provide otherwise, an arbitrator's choice of relief awarded to the prevailing party does not exceed the scope of his or her powers so long as it bears a rational relationship to the underlying contract and to the breach thereof as interpreted, expressly or impliedly, by the arbitrator. (Monroe). This requires a logical connection. (Monroe). The existence of an error of law apparent on the face of the award, even one that causes substantial injustice, does not provide grounds for judicial review (Monroe).

LRI alleges that the arbitrator erred in awarding punitive damages in a contracts case. While typically punitive damages are available only in specified areas of law, such as tort, an arbitrator is not bound by such technicalities. Here, the arbitrator found that LRI's concealment was intentional and with a motive to deceive. Furthermore, the arbitrator found LRI's conduct unconscionable and found that the intentional breach of contract based on this unconscionability warranted the imposition of punitive damages to punish LRI for its conduct. This imposition of punitive damages is logically connected to the actions undertaken by LRI and is rationally related to the conduct of LRI in breaching the contract. Therefore, the relief of punitive damages awarded by the arbitrator was not made in grave error of law as such a decision is not reviewable by the court and the arbitrator was empowered by both statutory and common law to fashion awards that are just and good. Here, punitive damages as a result of LRI's unconscionable actions would not cause LRI a substantial injustice. Therefore, the award of punitive damages must stand.

CONCLUSION

In conclusion, the court must deny LRI's Petition to Vacate the Arbitration Award for several reasons. First, LRI's Petition to Vacate the Arbitration Award should be denied because the arbitrator had not issued a full and complete Final Decision Award based on the arbitrator's inadvertent failure to render a decision on all claims of merit. As

previously stated, the arbitrator failed to render a decision on several key issues submitted by the parties for arbitration. Second, LRI's Petition should be denied because the request for amendment and the Amended Final Decision Award were timely issued because the timelines set forth in Rule 46 and CCP Section 1284 do not apply where there is an arbitration amendment, as they only apply to corrections made to arbitration decision, as defined by common law. Third, LRI's petition should be denied because the arbitrator was acting within the scope of his power when he amended the Decision Award based on claims that were inadvertently undecided in the original award. While LRI contends in its petition that the doctrine of functus officio ended the arbitrator's power to amend the award, this doctrine does not apply to arbitration decision that are not complete, as is the case here. Therefore, the arbitrator acted within the scope of his power to amend the original award to add the finding that LRI intentionally concealed the manufacturing defect, clarifying the damages awarded to demonstrate such a finding, and awarding attorney's fees as he was required to do under the arbitration agreement. Finally, the court should deny LRI's Petition because the arbitrator did not commit a grave error of law by awarding punitive damages in a contract case because errors of law in an arbitration decision are not subject to judicial review and arbitrators are empowered to fashion awards according to what is just and good. On the basis of these forgoing conclusions, the court must deny LRI's Petition to Vacate the Amended Final Decision and Award.

California Bar Examination

Performance Tests and Selected Answers

February 2015

The State Bar Of California
Committee of Bar Examiners/Office of Admissions

180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2015 California Bar Examination and two selected answers for each test.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

CONTENTS

February 2015

California Bar Examination

Performance Test A
INSTRUCTIONS AND FILE

IN RE VIRTA AND BURNSEN

IN RE VIRTA AND BURNSEN

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

CLARK, MACHADO & SAMUELIAN

Attorneys at Law

MEMORANDUM

TO: Applicant

FROM: Dario Machado, Managing Partner

SUBJECT: Richard Burnsen and B-G Investors

DATE: February 24, 2015

I met with Chris Conner on short notice. Conner is a junior partner in our firm, specializing in transactional law. He is in the middle of closing a stock purchase deal for our clients, Richard Burnsen and Burnsen-Goldman Investors ("B-G"), and must decide immediately whether to close the deal and transfer the stock certificates. The seller is trying to revoke, and his counsel insists that Conner has become the escrow holder of the transaction. His counsel also says that if Conner does not return the stock certificates, they would sue Conner and our firm.

We have two interrelated problems: Are there any ethical or fiduciary issues raised by Conner's actions, and what does Conner do now? Please draft an objective memorandum analyzing these two problems, organized in two parts, specifically addressing the issues listed below.

Part I - Ethical / Fiduciary Issues.

A. Did Conner become an escrow holder for all the parties?

B. If Conner acted as an escrow holder, was it proper for him to be an attorney for one party and an escrow holder for all parties?

C. If Conner acted in this dual capacity, does it restrict his ability both to advise his clients and to follow their instructions?

D. If Conner is an escrow holder, what are his duties to the opposing party?

Part II - <u>Options</u>.

Listed below are the options that I want to consider at this moment. Analyze the consequences and legal exposure of Conner and the firm resulting from each option. Finally, recommend which option best serves our firm's interests.

1. Complete the purchase and forward stock certificates for transfer.
2. File an interpleader action against our clients and the seller.
3. Do nothing immediately and retain possession of the stock certificates, until seller sues or parties work out a settlement.

At this point consider only the potential liability of Conner and our firm. Someone else in the firm will focus on our clients' risks.

TRANSCRIPT

Dario Machado Meeting with Christopher Conner

February 24, 2015

MACHADO: Okay, Chris, let me turn on the tape recorder. From what you've already told me it's obvious that one of our associates is going to have to look into this matter immediately and will need to know what's happened.

CONNER: Let me give you the deal in a nutshell. As I told you, our firm represents Richard Burnsen, founder, CEO, and majority shareowner of BTI. That's Burnsen Technologies, Inc. BTI develops and markets bio-compact discs for clinical diagnostics. It began as a small company operated out of Burnsen's house, but grew much larger, now has 60 employees, and occupies a large suite in New Bennett, Columbia.

Jordan Virta helped start BTI and had been the chief scientist and a vice president. At the start of the year, Virta and Burnsen had a falling out, and Virta resigned. At the time Virta held 2,000,000 shares of BTI stock that he had received in exchange for the assignment of all of his patents and inventions. But, even though he quit, Virta was still subject to a consulting agreement that gave BTI the rights to his future inventions for 2 years after he left BTI. Virta needed cash and to get back to work. Virta began discussing a sale of his stock to Burnsen.

MACHADO: So what was the deal?

CONNER: At the beginning of this year, Burnsen proposed to buy 2,000,000 of Virta's shares for $1.50 per share. Virta would receive $500,000 on signing the stock purchase agreement, and Burnsen would execute a promissory note payable to Virta over the next 2 years, secured by the shares. Burnsen thought it was a good deal, since last year, some other investors had paid as much as $5.00 per share of BTI stock.

MACHADO: Why the low price?

CONNER: Because Burnsen offered, as part of the transaction, to cancel the consulting agreement that was hindering Virta's ability to work elsewhere. The deal was delayed because Burnsen couldn't come up with the down payment. But then Burnsen

brought in another investor, Gerald Goldman, to help buy the Virta stock. We formed a company called Burnsen-Goldman Investors -- B-G, for short. Then on behalf of B-G, I negotiated a stock purchase agreement and a promissory note with Virta's attorney, Steven Dunn.

MACHADO: Did the stock purchase agreement include canceling the old consulting agreement that had granted BTI control of Virta's future inventions?

CONNER: Oh, yeah. That was a critical part, along with the terms of transfer of the shares themselves. Virta insisted on payment first.

MACHADO: What were those terms?

CONNER: That the deal would only close after the purchase agreement and promissory note were signed and after Virta acknowledged receipt of the down payment of $500,000. After the deal closed, then Virta's signed share certificates would go to BTI's transfer agent to be reissued in B-G's name. The shares would then go into an escrow account at Columbia State Bank and Trust Company, as security for the note, and thereafter be distributed by the Trust Company to B-G only as it paid for the shares according to the payment schedule.

MACHADO: Is this in writing?

CONNER: The escrow at the trust company? Yeah, Columbia State Bank and Trust Company's instructions were that it would hold all the shares, and release them to B-G as they made the down payment and the 5 payments of $500,000 provided under the note.

MACHADO: Who has the share certificates now?

CONNER: I do.

MACHADO: How did that come about?

CONNER: A few days ago, on February 16th, Dunn and I finished drafting the documents, but it turned out that Dunn was leaving for a couple of weeks on vacation and wouldn't be available for an office closing. Instead, we agreed to do it by mail. Exchange the signed documents, make the down payment, and then transfer shares to escrow.

MACHADO: Was this an oral agreement between you and Dunn or in writing?

CONNER: Both. We said that I'd hold the documents until everyone signed and Virta had confirmed he had the down payment. I think that's what our letters say too.

MACHADO: Let me get this straight. You were to hold the share certificates until the deal closes?

CONNER: Right.

MACHADO: Did Dunn do his part, get Virta to sign the stock purchase agreement and stock certificates?

CONNER: Yeah. I got all that on February 17th, hand-delivered, along with Dunn's letter. That's when the trouble started. I gave the agreement and promissory note to Burnsen for him and Goldman to sign. At first, I didn't hear anything, but on the 18th and 19th of February I start getting calls from Virta asking why the deposit hadn't been made into his account, and demanding that the deal close on February 18th as agreed. I started leaving messages for Burnsen to call me. On February 20th Burnsen called me and said that he and Goldman wanted me to move the closing back to February 23rd, and that they wanted to move back the payment schedule on the promissory note. Since Dunn was unavailable, Burnsen and Goldman were dealing directly with Virta.

MACHADO: What happened?

CONNER: Both Burnsen and Goldman talked to Virta, quite a few times, in the next couple of days. Virta was adamant that he wanted the down payment and for the deal to close immediately. Even though they had missed the original closing date, Virta was still expecting the deal to close; at least that's what they told me.

MACHADO: Did Virta agree to revise the payment schedule?

CONNER: Burnsen and Goldman weren't clear on that. Sometimes they'd report that he agreed or, at least, he didn't disagree to change the payment schedule. They did say he objected that the new schedule would put 4 rather than 3 payments in a single year, and make the tax bite too much.

MACHADO: So, the payment terms were critical to Virta?

CONNER: That's what he said to them. I think he has always doubted Burnsen's and Goldman's ability to come up with the down payment and make the payments. Frankly, it was a fair concern. Burnsen and Goldman were betting that BTI's growth would spin off enough for them to pay off Virta.

MACHADO: What did you think?

CONNER: You know, I really don't know. We don't ask clients for financial statements. Burnsen totally believed in his company. And Goldman? For all I know, he refinanced his house to come up with the down payment for Virta.

MACHADO: Very well. With what they told you, what did you do?

CONNER: I told them that I'd write up an amended promissory note and that they should come in and sign it, as well as the stock purchase agreement that they still hadn't signed. But, before they did, Burnsen called me at home, on the night of February 22nd, and read me a notice of revocation of the offer that Virta had faxed him that evening. We scheduled a conference call including Goldman for 10:00 p.m. that night.

MACHADO: What happened on the conference call?

CONNER: Goldman and Burnsen wanted to go ahead with the purchase, at least on their terms. Goldman agreed to deposit the $500,000, if it could close the deal on their terms.

MACHADO: What did you advise?

CONNER: That we probably did not have a defensible basis to go ahead and close. I told them that I'd make the best arguments I could, but that they shouldn't expect a miracle.

MACHADO: Were there colorable arguments?

CONNER: Some. The closing date was never ironclad. Even Virta demanded we close after the date had passed. We had an argument that the payment schedule had been amended orally. Also, the agreement didn't have a time-is-of-the-essence clause, and we could argue that the new payment schedule wasn't a substantive change.

MACHADO: So, you didn't think it should be a deal breaker?

CONNER: Perhaps not. Burnsen and Goldman believed that if we put the $500,000 down payment in Virta's hands, he'd see that they were going ahead, and he could be persuaded to accept the amended payment schedule. And if we closed, then the onus would be on Virta to challenge the executed deal. A little pressure like that might do it. Besides, by that point, Burnsen and Goldman had decided that the original payment schedule was unrealistic, and they couldn't have met it.

MACHADO: Did you think pushing the revised deal was a risk?

CONNER: No, just the usual give-and-take that goes on to finish the last details of a deal. Nothing more than aggressive representation of a client, I'd call it. An unrealistic payment schedule wasn't in Virta's interest either.

MACHADO: Well, okay. Is that what was agreed on the conference call?

CONNER: Yeah. Next morning, Goldman deposited the $500,000 into Virta's account. Here's the deposit slip he brought us, February 23rd at 9:52 a.m., and we faxed it to Virta and Dunn immediately. Do you want the deposit slip?

MACHADO: No, just keep it in the file. What happened next?

CONNER: I drafted a new promissory note, with the payment schedule Burnsen and Goldman wanted. They came in and signed the stock purchase agreement that Virta had already signed and I'd been holding, and they also signed the new promissory note.

MACHADO: The new payment schedule was not set forth in the stock purchase agreement?

CONNER: No. The payment schedule was only in the promissory note, and the stock purchase agreement provided that payments were to be made as provided in the promissory note. So we could use and sign the agreement that Virta had already signed. Then, that same afternoon, yesterday, I delivered a letter to Virta and Dunn confirming that the deal was ready to close and I was going to transmit the documents.

MACHADO: Why to Virta?

CONNER: Everybody had agreed that all parties should be copied on documents where appropriate. But this morning I received a call from another lawyer in Dunn's firm, a Russell Taylor, threatening to sue me if I transfer the shares.

MACHADO: Have you sent the shares for transfer?

CONNER: No, I haven't. I still have the share certificates, right here in the file.

MACHADO: Did you tell that to Taylor?

CONNER: Yes, but I certainly led him to believe that I was going ahead to close, you know, as my clients wanted, to pressure and to shift the burden to Virta.

MACHADO: Would it now be a problem if you had to back off, should we decide it's necessary?

CONNER: Probably embarrassing, but overall, not that bad.

MACHADO: Okay. What did you say to him?

CONNER: First, to chill, relax. Transferring the stock certificates wasn't a big deal, nor an irrevocable step. I reminded him that Virta had a specific remedy under the Commercial Code. Section 8403 permits suits to stop the transfer agent from registering the change of ownership. I urged him, instead of that, though, to work positively and finish the deal. The original deal was still on the table. Virta had a half a million dollars in his hands. A little more taxes next year isn't anything compared to that and absolutely trivial compared to Virta's ability to get back to work. I even suggested that they should calculate the additional tax burden of the amended payment schedule and make a counteroffer, adding it to the selling price. It couldn't be more than a few pennies per share.

MACHADO: Did it persuade him?

CONNER: No. Taylor said that I'm responsible as the escrow agent, and that the deal had been revoked. The shares must be returned or they would hold us responsible for the full, present value of the shares.

MACHADO: Sounds like he's claiming that would make the firm liable for money that our clients may not have?

CONNER: Exactly. That's what made me stop and realize I needed to discuss our options with a senior member of the firm.

MACHADO: What about returning the certificates?

CONNER: That's the bind. My clients don't want me to return the shares. They were explicit on that. They want to complete the purchase and believe that transferring the shares to BTI for reissuance in their name helps them. My duty to my clients comes first, even if Taylor claims I'm an escrow agent.

MACHADO: Was that claim a surprise?

CONNER: Yeah. I don't see how they can claim that I became their escrow agent. I didn't volunteer to be their agent. I didn't do anything unusual for a transactional attorney. We do that all the time, hold the documents until everyone signs and the money is deposited, then distribute as everyone agreed. It's like an escrow, I guess, but it doesn't trump my duty of loyalty to my client. They seem to be saying that it's

improper to be both a lawyer for a party and act as the escrow, if that's what I was. If so, the option of having to withdraw as counsel would be hard to accept.

MACHADO: If you're deemed to be an escrow agent, another option would be that you could interplead both sides of the dispute and deposit the share certificates in court, right?

CONNER: Sue my own clients? It is not in my clients' best interests for me to sue them and force them to hire another lawyer to defend themselves against me. How can that be consistent with my duty of loyalty to my clients?

MACHADO: Granted, that seems antithetical to everything we believe and do as lawyers.

CONNER: Seems to me that I don't have a choice but to follow my clients' instructions, and send the certificates to the BTI transfer agent. True, the transfer agent will change ownership to B-G, but really B-G only gets the shares they've paid for with the $500,000 down payment, and the remainder goes to the Trust Company and is held and released only as B-G makes future payments. Virta's not harmed by the closing and the transfer. Besides, as I told Taylor, Section 8403 is the functional equivalent of an interpleader. The results of a suit under Section 8403 and an interpleader are the same. The stock remains in Virta's name and under the control of a judge pending resolution of the dispute. Either way, Virta doesn't get and can't sell the stock until it's decided. The only difference is that Virta files the lawsuit instead of us.

MACHADO: Perhaps. I think the question is, which is the right course of action? Leave me the key documents and we'll get together shortly.

CONNER: Thanks. See you soon.

CLARK, MACHADO & SAMUELIAN

Attorneys at Law

Parkside, Columbia

February 16, 2015

HAND-DELIVERED

Steven J. Dunn
Dunn and Jaime
12 Main Street, Suite 100
Riverton, Columbia

Dear Steve:

Enclosed are the stock purchase agreement and promissory note that we have finished drafting. Since you will be on vacation after tomorrow, I propose that we have the documents executed by our respective clients, and close by mail. The following steps should permit us to close on February 18, 2015.

First, all parties will execute the documents and return all signed copies to me so that I have them on Wednesday, February 18, 2015. I shall then distribute those copies to the appropriate parties on that day. Steve, if you send me the stock certificates representing all of the pledged shares, with stock powers duly executed by Dr. Virta, I undertake to hold them until I have the agreement, together with the promissory note, executed by B-G Investors, at which time I shall send the promissory note to you and the share certificates to BTI for transfer and reissuance in B-G's name and delivery to Columbia State Bank and Trust Company.

I envy your Florida vacation during our annual monsoon season.

Sincerely,

/s/ Chris Conner
Christopher C. Conner

cc: Richard Burnsen
Gerald Goldman
Dr. Jordan Virta

DUNN and JAIME

Attorneys at Law

Riverton, Columbia

February 17, 2015

Christopher C. Conner
Clark, Machado & Samuelian
605 First Street, Suite 810
Parkside, Columbia

Dear Chris:

This will confirm that we have completed the documents to close the sale to B-G Investors of 2 million of Dr. Jordan Virta's shares on February 18, 2015. I have enclosed the following documents, all duly executed and signed by Dr. Virta:

1. A stock purchase agreement.
2. A promissory note.
3. The original stock certificates with executed stock assignments for 2,000,000 shares in Burnsen Technologies, Inc. (BTI).

These documents are all delivered to you to be held by you until both of the following conditions are satisfied:

(a) You have signed copies of all of the above-referenced documents and are authorized to deliver to me the originals of all such documents; and

(b) Dr. Virta has confirmed that the $500,000 has been deposited into his bank account.

Upon satisfaction of these conditions, the sale shall close, and only on satisfaction of these conditions are you authorized to send the share certificates to BTI for reissuance in B-G's name. Either you or BTI then is authorized to transfer the shares to Columbia State Bank and Trust Company, pursuant to the formal escrow instructions on file with the Trust Company.

Sincerely,

/s/ Steven J. Dunn
Steven J. Dunn

cc: Dr. Jordan Virta
Richard Burnsen and Gerald Goldman

FAX

Dr. Jordan Virta

TO: Richard Burnsen and Gerald Goldman, B-G Investors

SUBJECT: Revocation of Offer to Sell Stock

DATE: February 22, 2015

Dear Richard and Gerald:

I am out of patience. You are out of time.

We had agreed that this transaction would close on February 18, 2015. On that date you and your counsel had all of the documents, and all of the documents had been signed by me and approved by your counsel.

I have been calling my bank several times a day to learn if the down payment has been deposited as promised. It is now 4 days later, and no deposit. I don't know if you ever signed the agreement or the promissory note. I have never received signed copies of the documents.

Instead, each of you has been asking for an extension of the date of closing to February 23, 2015, and for a new, unacceptable payment schedule.

Each of these is a material breach of the agreement, if you ever signed it.

Effective this moment, I do hereby withdraw my offer to sell my shares in BTI.

I hereby demand that you and all agents and counsel acting on your behalf immediately return to me my stock certificates and all documents delivered by me.

Very truly yours,

/s/ Jordan Virta

Jordan Virta, Ph.D.

cc: Steven J. Dunn

Christopher C. Conner

CLARK, MACHADO & SAMUELIAN

Attorneys at Law

Parkside, Columbia

February 23, 2015

HAND-DELIVERED

Steven J. Dunn
Dunn and Jaime
12 Main Street, Suite 100
Riverton, Columbia

Dear Steven:

It is my understanding that, in separate conversations with Messrs. Burnsen and Goldman, Dr. Virta has urged that the transaction close immediately and agreed to accept these deliveries today.

It is my further understanding that the two conditions to close and release the stock certificates set forth in your letter of February 17, 2015 have been fully satisfied, to wit: (a) I have copies of the Stock Purchase Agreement, signed by all the parties, and of the Promissory Note, dated February 23, 2015, signed by Messrs. Burnsen and Goldman, the parties to be bound; and (b) I have a deposit slip confirming that $500,000 has been deposited into Dr. Virta's bank account.

Thus, we have completed the sale of Dr. Virta's shares in Burnsen Technologies, Inc. (BTI), and the transaction is now ready to close. Accordingly, I will send Dr. Virta's stock certificates that we received from you to BTI's transfer agent for transfer of ownership of the shares on BTI's books to B-G Investors, issuance of the appropriate renamed share certificates and transfer to Columbia State Bank and Trust Company.

Please find enclosed your copy of the fully executed Stock Purchase Agreement and the amended Promissory Note, signed by Messrs. Burnsen and Goldman.

Sincerely,

/s/ Chris Conner
Christopher C. Conner

cc: Jordan Virta, with all copies, and also hand-delivered this date

DUNN and JAIME

Attorneys at Law

Riverton, Columbia

February 24, 2015

VIA FAX

Christopher C. Conner
Clark, Machado & Samuelian
605 First Street, Suite 810
Parkside, Columbia

Dear Mr. Conner:

On behalf of our client, Dr. Jordan Virta, I hereby demand that you stop all efforts purporting to close the transaction for the disposition of Dr. Virta's shares in BTI.

There never was a signed agreement. Your clients never accepted the agreement that Dr. Virta signed; it did not close on February 18, 2015, as had been agreed, and your clients never performed the conditions. It never took effect.

Any action on your part to divest Dr. Virta of his stock is a conversion and a breach of your fiduciary duty as the escrow agent of the parties. The only course of action that will avoid liability is to return Dr. Virta's share certificates immediately.

We are astonished that any attempt would be made to exercise dominion and control over Dr. Virta's stock certificates in light of his revocation of the stock purchase offer and cancellation of the transaction. Please take notice that, if you do not immediately return Mr. Virta's stock certificates and related documents, you and your law firm will face significant personal liability for the tort of conversion, having exercised dominion and control over the stock certificates.

Today Dr. Virta received notice from his bank that $500,000 was deposited in his account on February 23, 2015. As soon as he is notified that the funds are at his

disposal, Dr. Virta will return the entire $500,000 by immediate wire transfer to Messrs. Burnsen and Goldman.

Sincerely,

/s/ J. Russell Taylor
J. Russell Taylor

February 2015

California Bar Examination

Performance Test A

LIBRARY

IN RE VIRTA AND BURNSEN

LIBRARY

SELECTED PROVISIONS OF COLUMBIA CODE OF CIVIL PROCEDURE, COLUMBIA COMMERCIAL CODE, AND COLUMBIA PROFESSIONAL CODE

Columbia Code of Civil Procedure

Section 386. Interpleader

Any person, firm, corporation, association or other entity against whom double or multiple claims are made, or may be made, by two or more persons which are such that they may give rise to double or multiple liability, may bring an action against the claimants to compel them to interplead and litigate their several claims. When the person, firm, corporation, association or other entity against whom such claims are made, or may be made, is a defendant in an action brought upon one or more of such claims, it may file a cross-complaint in interpleader.

Columbia Commercial Code

Section 8403.

(a) A person who is a registered owner of corporate shares may serve a written demand that the issuer of corporate shares not register an improper or unauthorized transfer of the shares.

(b) The issuer of the corporate shares may withhold registration of the transfer for a period of time, not to exceed 30 days, in order to provide the person who initiated the demand an opportunity to obtain legal process.

(c) A person who is the registered owner of corporate shares may seek an appropriate order, injunction, or other process from a court of competent jurisdiction enjoining the issuer of the corporate shares from registering an improper or unauthorized transfer of the shares.

Columbia Professional Code

Section 17002.

(a) It shall be unlawful for any person to engage in business as an escrow agent within this state except by means of a corporation duly organized for that purpose and licensed by the Commissioner of Corporations as an escrow agent.

(b) It shall not be unlawful for any person to engage in the business of an escrow agent, without authorization or license by the Commissioner of Corporations, if the person is:

(1) Doing business under any law of this state or the United States relating to banks, trust companies, building and loan or savings and loan associations, or insurance companies.

(2) Licensed to practice law in Columbia who has a bona fide client relationship with a principal in a real estate or personal property transaction and who is not actively engaged in the business of an escrow agent.

(3) Licensed by the Real Estate Commissioner while performing acts in the course of or incidental to a real estate transaction in which the broker is an agent or a party to the transaction and in which the broker is performing an act for which a real estate license is required.

Section 17003.

"Escrow" means any transaction in which one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter.

WASMAN v. SEIDEN

Columbia Court of Appeal (1998)

Does an attorney have a duty to safeguard property entrusted to him during settlement negotiations by an adverse party? Yes.

Plaintiff Kenneth Wasman sued his ex-wife and others for torts allegedly arising out of a marital dissolution gone awry. One of the named defendants was an attorney who arranged the property settlement on behalf of the wife. As to the causes of action against this attorney, the trial court sustained a general demurrer without leave to amend. Wasman appeals from the ensuing judgment of dismissal. We reverse.

Wasman alleged, and we assume for purposes of review, the following facts. Kenneth and Barbara Wasman married in 1992, and separated in 1995. In 1996, Barbara hired attorney Charles Schwenck to dissolve the marriage. The parties agreed to bifurcate the proceedings, with an immediate dissolution of the marriage contingent on acceptance of a proposed division of marital property, to be "formalized" later. The terms of the property division included Kenneth's conveyance to Barbara of his community interest in a Newport Beach residence in exchange for $70,000 in cash or a promissory note in that amount secured by a grant deed on the property.

In October 1996, Barbara, now married to Schwenck, retained new counsel, Peter Seiden, to complete the marital property settlement. After counsel conferred many times by phone, Kenneth's attorney Jeffrey Hartman sent a letter to Seiden enclosing a final draft of the settlement agreement and a grant deed conveying the Newport Beach property to Barbara. Kenneth had executed both documents. The letter stated that Seiden was "authorized to record the deed only upon obtaining" for Kenneth the $70,000 in cash or the promissory note.

Hartman received no response to his letter. Over the next few months he telephoned Seiden several times to ask the status of the settlement agreement. Hartman subsequently learned that Barbara, without handing over the cash or promissory note, had obtained the grant deed from Seiden and recorded it.

Kenneth Wasman sued Peter Seiden for legal malpractice. Seiden's general demurrer to the complaint was sustained.

The central issue in this appeal is whether Seiden had a legal duty to safeguard the executed grant deed until Barbara satisfied the condition of its delivery. Wasman argues Seiden owed him a professional duty to guard the deed until the stated condition for recordation was met; he contends breach of that duty was legal malpractice. But the law of professional negligence does not supply the foundation necessary for the duty Wasman asserts here.

We have rejected the theory that attorneys owe a duty of care to adverse third parties in litigation. Only in the limited circumstances when third parties are the intended beneficiaries of an attorney's services are they entitled to bring actions for professional negligence. Wasman's attempt to bring himself within this exception by arguing he was an intended beneficiary of the marital settlement is patently absurd: The agreement resulted from arm's-length negotiations between counsel acting to protect their respective clients' interests.

Although Seiden owed Wasman no professional duty, his acceptance of Wasman's deed would give rise to a duty of care. The wellspring of this duty is the fiduciary role of an escrow holder. An escrow is created when, for the purpose of facilitating a transaction, property is delivered to an escrow holder to be held until the conditions specified in agreed-upon instructions are fulfilled, when the property is to be delivered to another according to the instructions. See Professional Code, Section 17003.

The threshold issue in this appeal, then, is whether the complaint sufficiently alleges the elements of an escrow.

Wasman variously alleges in the complaint that Seiden "undertook to exercise reasonable care to protect Plaintiff's Deed" and "voluntarily accepted the trust and confidence reposed in him with regard to Plaintiff's Grant Deed." Significantly, there is no allegation of an express undertaking by Seiden or of agreed-upon instructions; rather, Wasman infers acceptance of the entrustment from the attorney's failure to reject or otherwise respond to the deed's delivery.

We find this a permissible inference. According to allegations in the complaint, the parties had successfully concluded settlement discussions. The final agreement had been reduced to writing and executed by Wasman; the document lacked only

Barbara's signature. The remaining acts required by the agreement were Wasman's conveying his interest in the Newport Beach property to Barbara, and her transferring to him a note or cash in the amount of $70,000. Given this state of affairs, Wasman's delivery of the grant deed to Seiden along with the executed settlement agreement can only be seen as a good faith attempt to facilitate settlement. The act appears foolish only when viewed against a backdrop of unethical and unprofessional practices by some attorneys.

Wasman and his attorney Hartman reasonably relied on Seiden because of his professional status and role as attorney for Barbara. If Seiden did not want to be responsible for the deed, he should have promptly returned it to Wasman. We hold a trier of fact could find any failure to do so was an acceptance of Wasman's entrustment and of its conditions. Thus, the allegations of acceptance are legally sufficient.

Having accepted the deed from Wasman, Seiden was bound to comply strictly with the escrow instructions. Specifically, he was obligated to prevent recordation of the deed until Barbara deposited into escrow the sum due to Wasman. Violation of an escrow instruction gives rise to an action for breach of contract; similarly, negligent performance by an escrow holder creates liability in tort for breach of duty.

Wasman forgoes the contract claim and alleges negligence in Seiden's handling of the deed. These allegations of negligence, however, are not the stuff of which legal malpractice claims are made. An attorney's failure to prevent a client's unauthorized seizure and recordation of a document held in escrow is not lawyering. But Wasman's erroneous labeling of his cause of action as one for professional negligence is of no consequence. To withstand a general demurrer, a complaint need only state some cause of action from which liability results.

Seiden’s liability is not founded upon professional negligence, but under the duty as a bailee to keep the property and not dispose of it without the authority of the depositor. Although not expressly pleaded, we believe the facts alleged are sufficient to state a cause of action for conversion. Conversion is the wrongful exercise of dominion over the property of another. The general rule is that the foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the

plaintiff from which injury to the latter results. Therefore, good or bad faith, care or negligence, and knowledge or ignorance, are ordinarily immaterial.

The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. As a general rule, the normal measure of damages for conversion is the value of the property at the time of the conversion and a fair compensation for the time and money properly expended in pursuit of the property (Civil Code, Section 3336).

The misdelivery of entrusted property of another constitutes a conversion of it even though he acted innocently and by mistake.

Seiden argues that saddling lawyers with the obligations of escrow holders will expose them to third party tort liability simply for helping clients conclude transactions and litigation. We do not intend to discourage attorneys from facilitating transactions or settlements. Indeed, it is both useful and commonplace to entrust attorneys with closing documents, settlement agreements, releases, funds and other items. However, we caution that an attorney cannot convert the escrowed property to his or her client's own use.

The court erred in sustaining the general demurrer to this cause of action.

The judgment is reversed.

DIAZ V. UNITED COLUMBIA BANK

Columbia Court of Appeal (1977)

Plaintiff and appellant Edelso Diaz executed a written agreement for the sale of his assets in the La Lechonera Restaurant to Antonio Gil. Diaz was a recent immigrant and could not read or write English and was ignorant of legal formalities. The agreement was prepared by a notary public and provided that the total purchase price was $19,000, payable by a promissory note payable by installments of $300. In furtherance of the sale, an escrow was opened by Antonio Gil at the United Columbia Bank ("Bank"). The escrow was processed on printed forms of the Bank signed by Edelso Diaz and by Antonio Gil. The original escrow instructions provided for a "note for $7,000 executed by Antonio Gil, in favor of Edelso Diaz, principal payable $200 or more per month and continuing until paid." Later, the escrow was supplemented by an additional instruction, also on a Bank form, as follows: "You are hereby instructed to reduce the principal amount of the note for $7,000 being delivered through escrow by an amount of $2,000, representing costs of repairs paid by Antonio Gil, by endorsement on back of note, payable in installments of $200 on the first day of each month."

Prior to close of escrow, the Bank received a letter from an attorney, Jorge Fernandez Isla, representing the seller, Edelso Diaz. The letter stated that:

> NOTICE is hereby given that the amount indicated in above-referred escrow of seven thousand dollars ($7,000) is in error. The escrow instructions should have read "Note for $19,000" and not $7,000.

The letter enclosed the original sale agreement showing the actual selling price of $19,000.

Thereafter, disregarding the attorney's letter, the Bank deducted $2,000 from the $7,000, and prepared the note for $5,000. Gil signed the note, and the Bank closed the escrow.

Plaintiff Edelso Diaz seeks compensatory and punitive damages from defendants Gil and Bank. A demurrer was sustained without leave to amend as to the causes of action directed against the Bank.

The gravamen of the action against the defendant Bank lies in the claim that the escrow was improperly closed after the Bank received the attorney's letter notifying it of a claim of error with respect to the consideration for the sale as recited in the escrow instructions.

It is elemental that the fiduciary duty of an escrow holder is to comply strictly with the instructions of its principals and to exercise reasonable skill and ordinary diligence with respect to the employment. If the escrow holder fails to follow his instructions, he may be liable for any loss occasioned thereby.

It is, however, also elemental that, where the written escrow instructions amount to an agreement made by two principals with their joint agent and signed by both, neither can unilaterally change the instructions.

We therefore agree with defendant Bank that the escrow holder had no duty, contractual or otherwise, in the instant case to defer to plaintiff’s unilateral notice as to the sale price and modify the escrow instructions in accordance therewith.

The question, however, remains as to the effect, if any, to be accorded the attorney's letter. While ineffective as a unilateral attempt to modify the instructions, it clearly placed the escrow holder on notice of a possible error in the instructions with respect to a material matter involving the escrow itself. The agreement of sale provided for a price of $19,000. The letter from attorney Isla not only advises of the total sale price as reflected in the agreement of sale, but specifically points out that the note should be for that amount ($19,000) rather than for $7,000. The failure of defendant Bank to heed the notice of a possible error in the escrow instructions and to close in the face thereof might be found to be a failure to exercise reasonable skill and ordinary diligence in the conduct of the escrow, and thus support recovery on a tort theory.

When faced with competing demands, an escrow holder must either hold the property or interplead it. The Bank neither held the property that was the subject of the sale nor interpleaded it. Its remarkable choice was to close escrow.

Section 386 of the Code of Civil Procedure permits a party against whom multiple claims are made to bring an interpleader action compelling the claimants to litigate their opposing claims. In an interpleader action, the court initially determines the right of the plaintiff to interplead the funds; if that right is sustained, an interlocutory decree is entered which requires the defendants to interplead and litigate their claims to the funds. Upon deposit of monies with the court, the plaintiff then may be discharged from liability and dismissed from the interpleader action. The effect of such an order is to preserve the fund, to discharge the stakeholder from further liability, and to keep the fund in the court's custody until the rights of the potential claimants of the monies can be adjudicated. By implementing an interpleader action and obtaining a discharge from further liability, the stakeholder avoids tort liability.

The Bank contends that it was not required to hold the property or interplead it, since neither party requested or sought those elections.

This argument presupposes two things. First, it assumes that there could have been no negotiated resolution of the matter, i.e., no new joint escrow instructions forthcoming, had the Bank simply not closed for a while to see how things played out. Second, it assumes that the litigation that ensued, once escrow had closed and Diaz was in the position of trying to undo it, was essentially the same as the litigation that would have ensued had an interpleader action been filed instead. We are not prepared to accept either assumption.

When the parties are still in escrow they tend to be predisposed to resolution. Once an escrow has been closed in such a manner as to make one party feel victimized and to force that party to hire a litigator to assert his or her rights, the chances of a speedy resolution diminish. There may even be a difference in the tenor of the litigation in that instance and in the instance in which a conflicted escrow holder has been the one to file an interpleader action.

Not surprisingly, the Bank cites no authority to the effect that closing an escrow is an acceptable alternative to holding the property or interpleading it. By definition, closing escrow, i.e., delivering property to parties on the completion of a transaction or the satisfaction of identified conditions, is not the same thing as filing an interpleader action, i.e., depositing property into the court until the rights thereto are resolved by

judicial intervention. The former device harbors obvious dangers for an aggrieved party that the latter does not.

The Bank simply has not convinced us that putting the burden on a party to an escrow to commence immediate litigation following a premature closing is the same as the escrow holder's filing of an interpleader action before any closing takes place. In an interpleader action, the parties' rights remain protected while the court sorts things out. By filing an interpleader action, the conflicted escrow holder may shield himself or herself from liability, and protect the interests of the parties to the escrow as well. Interpleader is a safe harbor for the conflicted stakeholder. An escrow holder who fails to implead acts at his or her own peril.

While the Bank had an option to hold up or interplead, it did not have a right to ignore these options and blindly close the escrow without making a reasonable effort to determine the correctness of the instructions prepared by it on behalf of these illiterate parties. We conclude that a reasonable construction of the escrow instructions required the Bank, upon receipt of the Isla letter, to at least hold up closure until the situation was clarified. The nature and extent of the duty, its breach if any, and the effect thereof, must be resolved in the instant case as questions of fact and not as questions of law on demurrer.

Finally, the Bank contends that the prayer for punitive damages is improper. Civil Code section 3294 provides for the recovery of punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice. . . ." We have held that something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.

The complaint alleged that, knowing full well that there was a dispute as to the terms of the escrow, the Bank closed it anyway. The Bank did so in complete disregard of the written notice from Diaz's attorney. The Bank did so while owing a duty, as escrow holder, to Diaz. There is sufficient evidence for a reasonable trier of fact to conclude by clear and convincing proof that the Bank acted in such a conscious and

deliberate disregard for the rights of Diaz that its conduct could be characterized as willful or wanton, giving rise to a punitive damages award.

The order of dismissal is reversed.

PT-A: SELECTED ANSWER 1

MEMORANDUM

TO: Dario Machado
FROM: Applicant
SUBJECT: Richard Burnsen and B-G Investors
DATE: February 24, 2015

As per your request, the following is a memorandum addressing two over-arching questions regarding Richard Burnsen, B-G Investors, and Chris Conner: (1) What, if any, are the ethical or fiduciary issues raised by Conner's actions; and (2) what should Conner do now to best serve the firm's interest. The memo will address each question in turn.

Part I: Ethical and Fiduciary Duties

A. Did Conner become an escrow holder for all the parties?

The issue here is whether Conner did anything that made him into an escrow holder for both parties—B-G Investors *and* Virta. To answer that question, this section first discusses elements of "escrow," who may legally act as an escrow agent, and the necessary steps one takes to become an escrow agent.

Escrow is created when, "for the purpose of facilitating a transaction, property is delivered to an escrow holder to be held until the conditions specified in agreed-upon instructions are fulfilled, when the property is to be delivered to another according to the instructions." *Wasman v. Seiden* (1998) (citing Columbia Professional Code § 17003). One of the elements for creating escrow is the acceptance of the property by the escrow holder to fulfill his duties as escrow holder. But the acceptance of that role can be implied.

In *Wasman*, the plaintiff was the ex-husband in a divorce dispute. The parties had agreed to a settlement agreement that included the disposal of a piece of real property. The terms of the agreement called for transfer of the property to his ex-wife in exchange for $70,000 either in cash or a promissory note. The husband's lawyer mailed the wife's lawyer a final draft of the settlement agreement along with a grant deed conveying the property to the wife. The letter included instructions that the wife's lawyer was "authorized to record the deed only upon obtaining" for the husband the $70,000. When the wife took and recorded the deed—but failed to pay the $70,000—the husband brought suit against the wife's lawyer. The court found that the wife's lawyer was acting as an escrow holder for the husband, and as such owed him a duty of care.

The court held that the husband's lawyer "reasonably relied on [the wife's attorney] because of his professional status and role as attorney for [the wife]." *Wasman*. Furthermore, if the lawyer "did not want to be responsible for the deed, he should have promptly returned it to [the husband]." Because he did not, the lawyer "was bound to comply strictly with the escrow instructions," and any violation of this compliance gave rise to "an action for breach of contract," or tort for breach of duty.

Here, Conner states that he never volunteered to be Virta's agent, and that he didn't do anything unusual for a transaction attorney. And he does not believe that whatever it is he became vis-a-vis Virta, that shouldn't trump his responsibilities to his clients. But it appears that under *Wasman*, Conner did in fact become an escrow agent for all the parties. On Feb. 17, Dunn delivered to Conner a stock purchase agreement; a promissory note; and the original stock certificates, all executed and signed by Virta. When he delivered the documents and property—in the form of the stock certificates—he instructed Conner that they were to be "held" by him "until both of the following conditions are satisfied . . . ." He then listed the two conditions.

Like the plaintiff in Wasman, Dunn and Virta "reasonably relied" on Conner because of his professional status and role as attorney for B-G Investors. Moreover, if Conner did

not want to be escrow agent, he should have returned the documents and property to Dunn. Because he did not do so, he is "bound to comply strictly with the escrow instructions." *Wasman*.

Nor does it matter—as Conner argues—that the real escrow agent is the Trust Company, which will only release the shares to B-G as they make their payments. There is still an escrow created under *Wasman* and CPC § 17003 for Conner to deliver the property to the Trust Company. The fact that the Trust Company will then act as an escrow agent is immaterial.

Thus, it appears that Conner did in fact become an escrow holder for all the parties.

B. If Conner acted as an escrow holder, was it proper for him to be an attorney for one party and an escrow holder for all parties?

Columbia law is clear that an attorney can also act as an escrow agent. Section 17002 of the Columbia Professional Code states that it is not unlawful for any person to engage in the business of an escrow agent—even without license or authorization—if that person is "[l]licensed to practice law in Columbia [and] has a bona fide client relationship with a principal in a real estate or personal property transaction and who is not actively engaged in the business of an escrow agent."

The court in *Wasman* specifically recognized an attorney who has all attending duties to his client must also act as an escrow agent with the attending duty of care to the party that delivered the property. In fact, the Wasman court admitted the dual-nature of this arrangement may be troubling for lawyers. Wasman. ("[The defendant] argues that saddling lawyers with the obligations of escrow holders will expose them to third-party tort liability simply for helping clients conclude transactions and litigation."). And the court acknowledged that "it is both useful and commonplace to entrust attorneys with closing documents, settlement agreements, releases, funds and other items." Wasman.

Nevertheless, the court was clear that once the escrow-agent relationship takes hold, the lawyer owes a duty of care to the party that delivered him the property.

Thus, it was proper for Conner to act as both attorney for one party and escrow holder for all parties, so long as he does not violate his duty of care that attached upon his becoming escrow holder.

C. If Conner acted in this dual capacity, does it restrict his ability both to advise his clients and to follow their instructions?

As discussed in the subsection above, nothing in law prohibits Conner from acting as his clients' attorney—and providing them with the advice they seek—as well as acting as an escrow holder for both parties. The conflict arises when his clients ask him to do something on their behalf that conflicts with his duties as escrow holder—the duties he owes to both parties.

As described in *Wasman*, "[a]n attorney's failure to prevent a client's unauthorized seizure and recordation of a document [there, a deed] held in escrow is not lawyering." *Wasman*. That is, where a client's demand is to take the property held in escrow even though the conditions have not yet been met for the client to legally take possession of it, the lawyer cannot properly follow their demand. The *Wasman* court held that that action would count as conversion—"the wrongful exercise of dominion over the property of another." Id.

Here, B-G wants to close—"at least on their terms," as Conner states. Conner, however, did not believe that he probably had a defensible basis to close, considering the fact that they wanted to change the payment schedule, and due to the fact that they were already past the closing date. Even though Conner believed he could make a few colorable arguments for the legality of his closing—the closing date was not "ironclad;" the payment schedule had been "amended orally; there was no time-is-of-the-essence clause—he still stated that closing probably was not defensible.

Conner is most likely correct in his assessment, especially as his "colorable arguments" are not that persuasive. (See below.) Certainly, Virta and his lawyers have disputed that the deal is ready to close in writing, which *Diaz v. United Columbia Bank* has held should "clearly place[] the escrow holder on notice of a possible error" in the closing of escrow. *Diaz*. And the failure of an escrow agent in such circumstances may be found to be a "failure to exercise reasonable skill and ordinary diligence in the conduct of the escrow." Id.

Thus, Conner may continue to advise his clients, but may not follow their instructions where they conflict the duties he owes all parties as escrow agent. Specifically, he should not presently close the deal.

D. If Conner is an escrow holder, what are his duties to the opposing party?

As discussed above, an escrow holder owes a "fiduciary duty" to "comply strictly with the instructions of its principals and to exercise reasonable skill and ordinary diligence with respect to the employment." *Diaz*. The *Wasman* Court agreed: "The wellspring of this duty is the fiduciary role of an escrow holder . . . . [The escrow holder is] bound to comply strictly with the escrow instructions."

Here, because Conner was acting as escrow holder for both parties, he owed Virta a fiduciary duty of care to comply with the instructions given to him by Virta when Virta deposited the property with Conner. The instructions that accompanied the delivery of the stock certificates to Conner included (i) a stock purchase agreement and (ii) a promissory note. The letter instructed Conner to hold on to the two documents, as well as the stock certificates, until "both of the following conditions are satisfied: (a) You have signed copies of all of the above-referenced documents and are authorized to deliver to me the originals of all such documents; and (b) Dr. Virta has confirmed that the $500,000 has been deposited into his bank account." Only after these conditions

are met will the sale close. Then, Conner may send the stock certificates to BTI "for reissuance in B-G's name."

As *Wasman* instructs, Conner is bound "to comply strictly with the escrow instructions." This, he presently cannot do. The instructions clearly state that the deal will only close upon satisfaction of *both* conditions. Condition A requires that Conner sign copies of all the above-referenced documents, and deliver the originals to Dunn. But Conner's clients have redrafted the promissory note to include the amended payment schedule. Sending Virta the amended promissory note—even if it is signed by Conner's clients—does not "strictly" satisfy the instructions given to him as escrow holder.

Thus, Conner owes Virta the duty to strictly comply with his instructions, and cannot close the deal—and deliver the certificates to the Trust Company—with the amended promissory note.

Part II: Options.

The following section of the memo will analyze the consequences and legal exposure of Conner and the firm resulting from each listed option. Finally, the memorandum will recommend an option that best serves the firm's interests.

1. Complete the purchase and forward stock certificates for transfer.

Virta has made clear in his lawyer's Feb. 24 letter that if Conner closes and forwards the certificates for transfer, he will view that as a "conversion" and a "breach of his fiduciary duty," and Virta will likely sue under both contract and tort theories. Thus, there is a probable, immediate consequence that Conner will be sued if he forwards the certificates. The secondary issue is whether the suit will be successful.

Conversion

Conversion is "the wrongful exercise of dominion over the property of another." *Wasman*. There is a general rule that the plaintiff in a conversion suit does not need to prove the knowledge *or* intent of the defendant to make a prima facie case. The elements for this tort are: (i) the plaintiff's ownership or right to possession of the property; (ii) the defendant's conversion by a wrongful act or disposition of property rights; and (iii) damages. *Id.* As a general rule, the normal measure of damages for conversion is the "value of the property at the time of the conversion and a fair compensation for the time and money property expended in pursuit of the property." *Id*. (citing CC § 3336). Moreover, "[t]he misdelivery of entrusted property of another constitutes a conversion of it even though [the defendant] acted innocently and by mistake." *Wasman*. The *Wasman* Court finally warned that "an attorney cannot convert the escrowed property to his or her client's own use." *Id.*

Here, as discussed above, Conner was acting as an escrow holder for Virta's stock certificates. As such, he owes Virta a duty of care in his entrusted property. If he delivers that property to third party—here, the Trust Company—illicitly, Conner would be guilty of conversion under *Wasman* even if he acted innocently and by mistake. There is no scienter requirement for this tort, and no good-faith defense. Even if Conner believed that he could close the deal in good faith and deliver the certificates, if a court finds that he in fact "misdeliver[ed]" the certificates, he would be found guilty.

Moreover, damages for conversion is the value of the property at the time of conversion. This means that Conner—and by extension the firm—would be liable in damages to the amount that the stocks were actually worth when delivered to the Trust Company. The deal for the purchase of the stocks was at $1.50 a share, which is well below market price for the shares. Connor states that last year some investors had paid as much as $5 per share. Conner's and the firm's liability could easily reach $10,000,000 or more depending on the market value of the shares at the time Conner delivers them to the Trust Company.

Civil Code 3294 also allows for punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." Here, Conner attempted to redraft the promissory note in violation of the instruction. A court may find that to be a fraudulent act and open up the possibility of punitive damages.

Thus, Virta will likely be successful in his conversion claim against Conner and the firm, and the liability may be exorbitant.

Breach of Fiduciary Duty

The escrow holder owes a fiduciary duty of care to person whose property he is holding. See *Wasman*. An "elemental" aspect of this duty requires the escrow holder to "comply strictly with the instructions of its principals and to exercise reasonable skill and ordinary diligence with respect to the employment." *Diaz*. A breach of this fiduciary duty "gives rise to an action for breach of contract." *Wasman*. Thus, if Virta is successful in his suit, he would likely get expectation damages—the market value of the shares minus the contract price. This could mean a large liability considering that the stocks are most likely selling for much more than the contract price of $1.50.

As discussed in subsection D of Part I, Virta's instructions clearly indicated that the deal could not close until the enclosed (i) stock purchase agreement and (ii) promissory note were signed and delivered back to Virta. Conner admits that he drafted a new promissory note that his clients signed because he needed to amend the payment schedule.

But this does not strictly comply with Virta's instructions. His condition clearly states that the enclosed promissory note must be signed and returned by Conner's clients in order for the deal to close. Substituting that note with a newly drafted one mostly likely counts as a breach of Conner's fiduciary duty to Virta—it does not comply strictly with

his instructions. Moreover, Virta will most likely argue that his Feb. 22 letter and the Feb. 24 letter from his lawyers are even clearer statements of instructions for Conner not to close the deal and not to deliver the certificates. In fact, Virta attempts to rescind his offer to sell the shares to BTI entirely. As escrow holder, Conner is under a duty to comply with Virta's instructions.

Thus, Virta will likely be successful in his breach of fiduciary.

Section 8403

Conner seems to think it will be better for him and the firm if closes the deal and forces Virta to bring forth a Section 8493 action, which allows a registered owner of corporate shares to seek an injunction enjoining the issuer of the shares from registering an improper or unauthorized transfer of the shares. Conner states this is basically the same as an interpleader action, but it puts the onus on Virta, and it wouldn't require us to sue our own clients in an interpleader action.

But *Diaz* shows that courts look down on this strategy. In Diaz, the court said that "[w]hen the parties are still in escrow they tend to be predisposed to resolution. Once an escrow has been closed in such a manner to make one party feel victimized and to force that party to hire a litigator to assert his or her rights, the chances of a speedy resolution diminish." *Diaz*. The court concludes that the two paths—interpleading and forcing a Section 8403 action—are not the same. And reiterates, "An escrow holder who fails to implead acts at his or her own peril."

2. File an interpleader action against our clients and the seller.

In an interpleader action, "the parties' rights remain protected while the court sorts things out." *Diaz*. It allows the "conflicted escrow holder [to] shield himself or herself from liability, and protect the interests of the parties to the escrow as well. Interpleader is a safe harbor for the conflicted stakeholder. An escrow holder who fails to implead

acts at his or her own peril." *Id.* To qualify for an interpleader action, a party must be one against whom multiple persons may make claims that "give rise to double or multiple liability." Columbia Code of Civil Procedure § 386. In such a case, the party "may bring an action against the claimants to compel them to interplead and litigate their several claims." Id. In other words, an interpleader action allows the party with current possession of the property bring all claimants to the property into court to settle who has true ownership.

If the court finds that the party is qualified to bring an interpleader action, "an interlocutory decree is entered which requires the defendants to interplead and litigate their claims to the funds. Upon deposit of monies with the court, the plaintiff then may be discharged from liability and dismissed from the interpleader action." *Diaz*

In *Diaz*, the escrow holder was a bank that was set to close a deal for the purchase of a restaurant. The bank had a validly executed agreement that had escrow instructions listing the price of the sale as $7,000. Both of the parties had signed this document. Later, one of the parties notified the court that the $7,000 figure was actually in error; the agreement was actually supposed to be for $19,000. Nevertheless, the Bank decided to close the deal for $7,000, in part because neither of the parties had sought an interpleader action. But the court said there is no authority for an escrow holder to close a contested deal instead of holding the property or interpleading it.

Here, Conner should qualify under the interpleader statute. That statute—as stated above—basically requires that the party seeking an interpleader action be one against whom multiple parties may make a claim. Certainly, Virta has already made a claim for recovery of his certificates. But it is also likely that B-G Investors may seek to compel Conner to deliver the certificates to the Trust Company. Conner has stated that they adamantly want the deal to close. They may try to force him—as their agent—to close the deal and deliver the stocks to the Trust Company.

Thus, courts appear to prefer escrow holders in Conner's position to interplead the two parties. Though, as Conner said, he would rather not have to sue his own clients. Nevertheless, it would quickly absolve Conner and the firm of any liability.

3. Do nothing immediately and retain possession of the stock certificates, until seller sues or parties work out a settlement.

As stated by the *Diaz* court, keeping disputed property in escrow benefits both parties because they "tend to be predisposed to resolution." In fact, the Diaz court held that a "reasonable construction of the escrow instructions required the Bank, upon receipt of the [letter disputing the sale price], to at least hold up closure until the situation was clarified." *Id*.

Here, there is a similar situation—both parties dispute whether the conditions have been met to close the deal. At very least, as escrow holder, Conner has a duty to clarify the situation before closing the deal. He has attempted to do this, and remained hopeful that the deal would close. He urged the other side to work positively to come to a settlement. He even suggested that they should calculate the additional tax burden of the amended payment schedule and make a counteroffer, adding it to the selling price.

But it has become clear that Virta has no interest in settling. His lawyer Taylor responded that the deal had been revoked and demanded return of the shares. Thus, it doesn't appear likely that our holding on to the shares will lead to any sort of positive, mutual settlement. Virta wants to walk away. Nor does it seem particularly wise to force Virta to sue. As Virta's escrow holder, Conner has a duty to follow his instructions. It is clear he will not settle, and the courts do not seem to like it when an escrow holder forces one of his principals into the situation where he has to sue.

Thus, because there is no likelihood of settlement, and because putting a principal in the position of having to sue is disliked by the courts and may precipitate a bad judgment against Conner and the firm, it is unadvisable to hold on to the shares.

Conclusion

Because Conner has become an escrow holder with fiduciary duties to Virta, his potential liabilities—and the potential liabilities of the firm—could be astronomical. He certainly should not close the deal, which could trigger contract and tort actions—including the possibility of punitive damages. Nor is it advisable that he hold on to the certificates in an attempt to foster a settlement. Virta is not interested in settling.

The last option for the firm—and mostly likely also for Conner himself—is to bring an interpleader action. Even though this would mean suing our own clients, it would absolve the firm of all liability. Thus, it is the preferred option.

PT-A: SELECTED ANSWER 2

PART I

A. Did Conner become an escrow holder for all the parties?

Most likely a court would find that yes, Conner did become an escrow holder for all the parties. Columbia Professional Code Section 17003 states that "escrow" means "any transaction in which one person, for the purpose of effecting the sale [of] ... personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of value to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter."

Here, the facts of our situation fit into the Professional Code's definition of escrow quite neatly. In Conner's case, Virta ("one person") gave him (the "third party") the share certificates ("evidence of title to personal property" or "other thing of value") on February 17th, to be held until the deal closes (the "happening of a specified event"). More specifically, the deal would not close until after the purchase agreement and promissory note were signed and after Virta acknowledged receipt of a down payment of $500,000. After the deal closed, Conner was to give the share certificates to BTI's transfer agent. Under these facts, it seems that Conner is clearly an escrow agent.

To bolster this point, the case law supports the idea that an attorney in Conner's situation would be seen by courts to be acting as an escrow agent. In Wasman v. Seiden, attorney Hartman (on behalf of his client, Kenneth) gave attorney Seiden (acting on behalf of his client, Barbara) a grant deed conveying a piece of real property to Seiden's client, but was explicitly told that Seiden did not have authorization to record

the grant deed until Kenneth received $70,000 in cash or promissory note from Barbara. In this case, Seiden was found by the court to be acting as an escrow agent. Paraphrasing the Professional Code section 17003, the court reasoned: "An escrow is created when, for the purpose of facilitating a transaction, property is delivered to an escrow holder to be held until the conditions specified in agreed-upon instructions are fulfilled, when the property is to be delivered to another according to the instructions." The court further went on to state that explicit acceptance of the duty of care of an escrow agent is not necessary, and that the court is permitted to infer that mere acceptance of the grant deed is enough to compel the attorney to follow the instructions given. The court seems to imply that this inference is allowable particularly in cases when the facts show that property is being given to the escrow agent as a good faith attempt to facilitate settlement.

This case is directly analogous to the situation Conner finds himself in now. Like Seiden, he willingly accepted property/documents to facilitate a transaction, and was given clear instructions as to when that property should be released. Moreover, Virta gave the share certificates to Conner in what appears to be a good faith attempt to close the deal. It is therefore very likely that a court would not only hold Conner to be acting as an escrow agent, but that as an escrow agent Conner was bound by the specific instructions he was given regarding the conditions that would allow him to transfer the share certificates.

B. If Conner acted as an escrow holder, was it proper for him to be an attorney for one party and an escrow holder for all parties?

Most likely a court would find that Conner could properly act as both an attorney for one party and an escrow holder for all parties.

In fact, Conner is only allowed to act as the parties' escrow agent because he is representing one of the parties. Section 17002 of the Columbia Professional Code specifies that it is permissible for a person to act as an escrow agent when "Licensed to

practice law in Columbia who has a bona fide client relationship with a principal in a real estate or personal property transaction and who is not actively engaged in the business of an escrow agent."

Under this law, B-T and Conner have a bona fide client relationship, B-T is a principal in the personal property transaction, being the buyer, and Conner is not actively engaged in the business of an escrow agent. There is nothing wrong with Conner having taken on the role of the escrow agent in this situation. To further bolster this point, the court opinion in Wasman is once again instructional. In that case, the court concluded by reiterating that attorneys are in fact encouraged to act as escrow agents. "[I]t is both useful and commonplace to entrust attorneys with closing documents, settlement agreements, releases, funds, and other items."

C. If Conner acted in this dual capacity, does it restrict his ability both to advise his clients and to follow their instructions?

This is a complicated question, but based on the case law Conner is only restricted in one sense: he cannot follow their instructions if it interferes with his duty as a bailee to "keep property and not dispose of it without the authority of the depositor" (Wasman). Conner's duties to his own clients remain, and he has unrestricted ability to advise them, but he cannot follow their instructions if it would lead to him releasing the share certificates without Virta's authorization. To be more precise, Conner cannot follow his clients' instruction if it would lead him to close escrow against the instructions agreed upon by both parties.

D. If Conner is an escrow holder, what are his duties to the opposing party?

Normally, courts have found that attorneys have no duty to adverse parties (Wasman). However, when the attorney has taken on the role of an escrow agent, as Conner likely has here, a new duty is imposed. Conner now has a fiduciary duty to Virta, and is obligated to comply strictly to the escrow instructions. In this case, this means Connor

has the duty to protect Virta's share certificates until the deal has closed, which would not happen until the purchase agreement and promissory note were signed and Virta had acknowledged receipt of a $500,000 deposit to his account. At that point, Conner would be authorized to transfer the share certificates to B-T.

Part II

Options:

1. Complete the purchase and forward stock certificates for transfer

This is likely the most dangerous option for our firm to take. There are two causes of action that Virta may raise against our firm if we complete the purchase.

First, Virta may raise a tort claim of conversion. As laid out in Wasman, the elements of a conversion claim are: 1) the plaintiff's ownership or right to possession of the property; 2) the defendant's conversion by a wrongful act or disposition of property rights; and 3) damages. Here, Virta had ownership of the share certificates, and if Conner transfers them to B-T, he will have converted them, potentially leading to damages for Virta. The only question here is whether the conversion is by a "wrongful act or disposition." In Wasman, the court found that if the escrow agent transferred the property he was obliged to protect without the express authorization of the depositor, then the transfer would be considered wrongful.

Here, a court is likely to find that Conner's transfer is wrongful, because the facts show that the required conditions for the escrow have not been met. Namely, the deal has not closed yet. In order for the deal to close, the promissory note and purchase agreement must be signed, and Virta has to have acknowledged receipt of a deposit of $500,000. These things must happen *before* Conner is properly allowed to transfer the share certificates. However, there are two problems: First, the facts show that Virta has not yet acknowledged receipt of the deposit; and second, Virta revoked his offer to sell

his shares before B-T had a chance to sign the purchase agreement or promissory note. As to the first problem, although the facts show that B-T deposited the required cash into Virta's account, the explicit terms of the escrow agreement stated that it was Virta's acknowledgement that was necessary, not B-T's. As to the second issue, contract law states that an offer (here, the purchase agreement) is revocable at any point before mutual assent is established. This transaction falls under the statute of frauds due to involving over $500 worth of property, and therefore mutual assent can only be established by signing the agreement.

One may be tempted to raise a defense that Conner did not intentionally, wrongfully convert the shares. The fact that B-T assured Conner that Virta still wanted to close shows Conner had reason to believe Virta was merely negotiating, and the fact that B-T deposited $500,000 into Virta's account shows that there was a good faith effort not to commit the tort of conversion. However, Wasman has established that the escrow agent's state of mind is irrelevant. "Good or bad faith, care or negligence, and knowledge or ignorance, are ordinarily immaterial ... The misdelivery of entrusted property of another constitutes a conversion of it even though he acted innocently and by mistake." Conner would therefore still be liable for the tort of conversion even though he had no bad intention.

Second, Virta may raise a claim for breach of Conner's duty to strictly follow agreed-upon instructions (or a breach of contract claim), as raised in the case Diaz v United Columbia Bank. In that case, the bank was acting as an escrow agent between two parties. Two main issues were raised in that case: 1) whether, when two parties had agreed to the escrow instructions, one party could unilaterally change the instructions; and 2) whether an escrow agent may still close after being given notice of a possible error in the escrow instructions.

As to the first issue, the court found that no one party was allowed to unilaterally change the instructions. A court might argue that Conner's alteration of the promissory note could be construed as altering the instructions, because Virta implicitly agreed only to

the terms of the original promissory note. A court would have to face the question of if the replacement promissory note was valid. While technically Virta was only required to sign the purchase agreement (which remained unchanged on its face), the purchase agreement was implicitly changed because the promissory note referenced within it was replaced by a new one, with new terms. Depending on the case law, a court might find either way.

As to the second issue, a court is likely to find that Conner was given notice of competing demands regarding a material fact. While there did not appear to be an error on the face of the instructions given, Conner had been given plenty of evidence that a conflict in the desires of the parties had arisen. Through Conner's communications with B-T, and the revocation letter from Virta, a court is likely to see that Conner was well aware of this conflict. In fact, by amending the promissory note Conner has impliedly admitted that he knew of the conflict, but instead of taking proper action to other authorities, attempted to unilaterally address the conflict himself on behalf of his client. There are three major points of contention: 1) the schedule for payments, 2) the deadline for closing, and 3) whether Virta validly revoked the agreement before closing. Although, as Conner notes in his interview, the schedule for payments and the deadline are both arguably minor, and therefore may not be not material facts, he would be hard-pressed to argue that the revocation of the agreement is immaterial.

In Diaz the court explicitly states that in the face of competing desires regarding a material term of the instructions, an escrow agent must either hold the property or interplead it in order to satisfy the requirement to exercise reasonable skill and ordinary diligence.

Moreover, by going ahead and closing, Conner may end up facing punitive damages under Civil Code section 3294. Under that code, punitive damages may be awarded when there is clear and convincing evidence that the defendant acted with "conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton." The court then concluded that this requirement was met when an escrow

agent closes, "knowing full well that there is a dispute as to the terms of the escrow." Here, the facts show that Conner had many reasons to know that there was a dispute ongoing between Virta and B-T. Even if we discount the second-hand information Conner received from B-T, the moment he received a notice of revocation from Virta he was put on notice that there was a dispute, and closing should no longer have been an option until the dispute was settled.

As a final note, Conner has cited Commercial Code section 8403 as a potential remedy for Virta if we went ahead and closed. Conner is technically correct; however, this is an unwise move, as it forces Virta to go to court to seek relief (injunctive or otherwise). The code section does not provide direct relief; it only allows Virta to demand the issuer of the shares to withhold registration of the transfer for 30 days until he can seek legal process. As analyzed above, the last thing we want is to push Virta into litigation where Conner may be held liable as an escrow agent.

To conclude, completing the purchase is by far our worst option, and is likely to lead to us being liable for the tort of conversion, a breach of contract, and punitive damages. Although Conner might find it slightly embarrassing to have to backpedal that way, his temporary discomfort and the minor hit to our professional reputation is likely nothing compared to the damages we may have to pay if Conner is liable for the above claims.

2. File an interpleader action against our clients and the seller

This is likely our firm's best option, as it provides a safe harbor that would remove the firm from any escrow agent liability.

As laid out in Diaz, interpleader would save Conner from all of the liabilities which he might otherwise face, as discussed above. According to Diaz, "By implementing an interpleader action and obtaining a discharge from further liability the stakeholder avoids tort liability." In this way, Conner can effectively wash his hands of the duties of an escrow agent, and return to representing B-T alone, with no duties owed to Virta. Once

the court takes charge, they can then focus on the issues of whether the escrow agreement was breached by Virta when he attempted to revoke the agreement, and/or by B-T when they amended the promissory note and signed the purchase agreement after Virta's attempted revocation.

Regardless of the outcome of that case, our firm will not be liable for any breach due to Conner's role as an escrow agent.

3. Do nothing immediately and retain possession of the stock certificates, until seller sues or parties work out a settlement

While this option is certainly better than completing the purchase, it still pales in comparison to the option of interpleading. According to Diaz, when an escrow agent has notice of a dispute between the parties, he has a duty to exercise reasonable skill and ordinary diligence. The court explicitly goes on to state that a reasonable response would be either to hold the property until the dispute is resolved, or to interplead it. The court appears to favor interpleader, but either route is acceptable.

However, if we should choose to hold the property, Conner remains liable as an escrow agent. This leaves the firm vulnerable, as it would allow either party to seek out tort recovery if the negotiations turn south.

Essentially, this option is only the most favorable if we determine that the parties are very likely to be able to negotiate a deal. As reasoned in Diaz "Once escrow has been closed in such a manner as to make one party feel victimized and to force that party to hire a litigator to assert his or her rights, the changes of a speedy resolution diminish." Although the court was referring to closing the escrow account, the same idea holds true for interpleader. By forcing the parties to go to court to resolve their dispute, we would potentially be forcing them into a more adverse relationship than is necessary.

In this case, assuming Virta has not been too angered by this whole proceeding, it does seem likely that this might be the best option. Virta and B-T are only disputing a small change (the scheduling of payments), not something that should cause a large amount of harm to either party. Moreover, Virta's problem with the deadline appears to be largely because he was not convinced B-T would be paying him at all. Since B-T has already paid the deposit, it seems likely that Virta might let the deadline issue go.

All that said, Virta does seem angry and may no longer be willing to work with us at all. This being the case, we may want to consider interpleader instead, as it provides us better protection from liability arising from Conner's role as the escrow agent. My recommendation is to set up a final meeting with Virta and his attorney to assess the possibility of continuing negotiations. If Virta appears adamant that the sale is off, then we should seek out interpleader.

February 2015

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

STATE v. DANIEL

STATE v. DANIEL

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. 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.

LYNCH and MAURER

Attorneys at Law

Avery Park, Columbia

MEMORANDUM

TO: Applicant

FROM: Mary Lynch

RE: State v. Daniel

DATE: February 26, 2015

We represent Christopher Daniel, who has been charged with the murder of Peter Daniel and the attempted murder of Gloria Daniel. Christopher is their son. Unfortunately, Gloria Daniel has recently died and I expect the indictment to be amended to charge Christopher with her murder as well.

I have filed a notice of a motion seeking to suppress evidence. We have ten days after filing this notice to file the supporting memorandum of points and authorities. Please prepare a draft of a persuasive memorandum of points and authorities that argues that the motion should be granted in full or at least in part. You may assume that, at the evidentiary hearing, witnesses will testify consistent with the material contained in the file. The transcript contained in the file is a certified copy of the recording. As such, you may assume that, if any parts of the recording are admitted into evidence, the transcript of that portion will also be admitted.

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 be suppressed. Take care to anticipate arguments the prosecution is likely to make and explain why they are not persuasive. Your memorandum should, of course, contain appropriate

argument headings, but should dispense with a statement of facts. I will draft the statement of facts later.

STATE OF COLUMBIA
WARREN COUNTY SUPERIOR COURT

STATE OF COLUMBIA v. CHRISTOPHER DANIEL	Criminal Division CASE NO. 2014-2341

NOTICE OF MOTION TO SUPPRESS EVIDENCE

PLEASE TAKE NOTICE that, upon the attached affidavit of Dr. Nancy Donahue, 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, Avery Park, Columbia, on March 5, 2015 at 9:00 a.m., or as soon thereafter as counsel can be heard, for an order:

1. Suppressing evidence of all or part of all testimony of nonverbal statements allegedly made by Gloria Daniel to the police during an interview conducted on August 12-13, 2014, as inadmissible hearsay, or in the alternative, a violation of defendant's constitutional right to confront witnesses, and
2. Suppressing evidence of all or part of all transcripts or testimony recording concerning the 911 call allegedly made by Peter Daniel on August 12-13, 2014, as inadmissible hearsay and a violation of defendant's constitutional right to confront witnesses, and
3. For such other and further relief as the Court may deem just and proper.

DATED: February 25, 2015

___*/s/ Mary Lynch*_____

Mary Lynch
Attorney for Defendant

STATE OF COLUMBIA

WARREN COUNTY SUPERIOR COURT

STATE OF COLUMBIA v. CHRISTOPHER DANIEL	Criminal Division CASE NO. 2014-2341

AFFIDAVIT OF DR. NANCY DONAHUE
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

I, Dr. Nancy Donahue, being duly sworn, state:

1. I am a medical doctor and board certified neurologist licensed to practice in the state of Columbia.
2. I have expertise in neurology and rehabilitation of people with brain injuries.
3. I am one of Gloria Daniel's treating physicians.
4. I am Department Chair of Neurology at Avery Park Health Systems.
5. I started treating Mrs. Daniel in October 2014.
6. I have reviewed the statements of police and first responders who assisted Mrs. Daniel on August 13, 2014, as well as her entire medical record.
7. Many people with brain injuries have erratic movements of their arms and legs.
8. In order to know if someone who moved her head up and down or side to side was actually answering a question, I would have to know much more about her mental status than is contained in medical records or witness accounts to determine if the movement was actually in response to the question, and/or if it was accurate.
9. There are brain injury patients who may nod their heads up and down, but do not really intend the "yes" response.
10. In order to assess such a person's movements and responses, I would first have to ask a series of questions in order to establish if the person was oriented to person, place, or time. Next, to determine if the individual was competent to answer

questions, I would ask simple and unambiguous questions to which the answer was immediately apparent, e.g., "Are you a woman?"

11. Even if a brain-injured person was oriented and able to follow commands, those facts did not mean the person had any memory of the event that caused the brain injury.
12. When police come to my facility to question someone with a brain injury, I first assess the person to determine if he or she can provide any useful information.
13. If the person is not oriented, even if he or she can follow simple commands, no useful information can be provided.
14. Even if Mrs. Daniel was oriented and could generally answer questions, it was very unlikely that she would have any memory of the event that caused the injury.
15. With such a serious brain injury, it was extremely unlikely, if not impossible, that Mrs. Daniel could have remembered the event that caused the injury.

___*/s/ Nancy Donahue*_____

Nancy Donahue, M.D.

Subscribed and sworn to before me on February 25, 2015 [Signature and Title]

TRANSCRIPT
PRELIMINARY HEARING TESTIMONY OF TYLER JAMES

BY: MELISSA BREGER, Deputy District Attorney

* * * * *

BREGER: I have a few questions.

JAMES: Fine.

BREGER: Officer James, can you tell us where you were on the evening of August 12-13, 2014?

JAMES: I was on patrol in the Newtown section of the city.

BREGER: That is here in Avery Park?

JAMES: Yes.

BREGER: Did you respond to a call?

JAMES: Yes.

BREGER: What was the nature of the call?

JAMES: The 911 operator said that there was an assault taking place at 365 Delmar Street and I immediately went there.

BREGER: Approximately what time was this?

JAMES: About 12:30 a.m.; so I guess it was the 13th.

BREGER: When you got there, who did you see when you first went into the residence?

JAMES: When I first went into the room, there was one person in the front room. He was a man later identified as Peter Daniel. And then there was a woman lying in front of the refrigerator in the kitchen who was identified as Gloria Daniel.

BREGER: All right. When you first went in there, in what kind of condition was Mr. Daniel?

JAMES: He was dead. He had a wound to the head that we later learned was caused by a baseball bat. He was lying in blood. It looked like he fell over when he died. In fact, he had a telephone in his hand. He apparently pulled the phone cord out of the wall when he fell.

BREGER: And did you approach Mr. Daniel?

JAMES: Yes, I did, but it was clear he was dead.

BREGER: What did you do then?

JAMES: I went into the kitchen, and saw Mrs. Daniel.

BREGER: What condition was she in?

JAMES: She also appeared to have a head wound. She was also severely beaten around her face.

BREGER: What did you do?

JAMES: I got on my handheld radio and made sure the emergency medical team was on its way. After that, I went back to Mrs. Daniel.

BREGER: Did you speak to her?

JAMES: Yes, I reassured her that help was on the way and asked her if there was anyone else in the house.

BREGER: Did she say anything?

JAMES: No, it was pretty clear she had suffered some kind of head injury and she was unable to speak.

BREGER: What happened then?

JAMES: I went to search the house to make sure the assailant was not still present.

BREGER: Was there anyone else in the house?

JAMES: Just Mr. Daniel.

BREGER: Then what happened?

JAMES: I went back to Mrs. Daniel.

BREGER: From the time you went to clear the house and the time you returned to Mrs. Daniel, how long was that?

JAMES: It was probably 10 minutes. It was a big house. Sometime during the search I heard that the ambulance had arrived, so I knew she was being attended to.

BREGER: When you went back to Mrs. Daniel, what happened?

JAMES: She was already on the gurney to be taken to the hospital, but I stopped them and I asked if I could have a few moments with her. So, the paramedics stopped.

BREGER: Then what happened?

JAMES: I asked her if she knew who had done this to her and her husband. She tried to speak, but again, couldn't.

BREGER: Then what happened?

JAMES: Based on what the 911 operator told me, I asked her whether a member of her family did this and she nodded yes. Then I asked whether her son Jonathan did this. She shook her head no. Then I asked whether her son Christopher had done this. She nodded yes.

BREGER: Then what did you do?

JAMES: I repeated the question about Christopher two more times and she nodded, yes, both times. Then the paramedics put her in the ambulance.

* * * * *

STATEMENT OF KEVIN ROBERT

I am a paramedic employed by the Avery Park Fire Department. I was a first responder to the scene of the Daniel murder and assault, 365 Delmar Street, on August 12-13, 2014. When my partner, Leonard Ickes, and I arrived at the Daniel residence we found Peter Daniel dead in the living room and Gloria Daniel on the kitchen floor. She had profound injuries.

Mrs. Daniel was obviously in extreme distress. She was agitated and frustrated that she was unable to speak and her legs were moving erratically back and forth. I attempted to give Mrs. Daniel oxygen and assess her injuries. I realized she would need to be intubated, so I radioed for medical permission to give her a sedative necessary for the intubation. I inserted an IV line to administer the sedative. I administered the sedative. She responded to the sedative and calmed down.

As I was moving her to the ambulance, Officer Tyler James stopped Leonard and me and asked to speak to Mrs. Daniel. I explained that she was unable to speak, but Officer James asked her if her son Christopher had done this to her. She nodded yes. He asked her the same question a second time and she again nodded yes.

___*/s/ Kevin Robert*_____

Kevin Robert

LYNCH and MAURER

Attorneys at Law

Avery Park, Columbia

MEMORANDUM

TO: State v. Daniel File

FROM: Mary Lynch

RE: Summary of Interview of Gloria Daniel

DATE: February 11, 2015

---

1. She is the mother of the defendant in the above-entitled action.
2. I spoke with her at the Avery Park Hospital.
3. She remains in serious condition and the prognosis for her recovering is not good.
4. At approximately 12:10 a.m. on August 13, 2014, she was attacked by an unknown assailant in her house on Delmar Street, Avery Park, Columbia.
5. I informed her that Officer Tyler James allegedly attempted to question her in her home on August 13, 2014.
6. I explained that Officer James allegedly asked her if she recognized the assailant who attacked her and killed her husband, Peter Daniel.
7. She indicated that at the time of the questioning by Officer James she was in deep pain and suffering from a head injury, making it impossible to speak and, therefore, could not have responded to any questions.
8. She has no recollection of being questioned by Officer James on August 13, 2014.
9. She was unable to speak for over one month following the attack on her and murder of her husband.
10. She claims that at no time has she identified who the attacker was.
11. She does not know who attacked her and killed her husband the evening of August 12-13, 2014.

LYNCH and MAURER

Attorneys at Law

Avery Park, Columbia

MEMORANDUM

TO: State v. Daniel File

FROM: Mary Lynch

RE: Summary of Interview of Harry Robinson

DATE: February 11, 2015

I spoke with Chief Robinson of the state police today by telephone. He indicated the following:

1. He went to Christopher Daniel's dorm room in College Station and questioned him at approximately 8:30 a.m. on August 13, 2014.
2. Christopher indicated that he was a student at Columbia State University in College Park.
3. Christopher indicated that he had been in his dorm room all night.
4. Christopher said he did not remember seeing anyone who could confirm his presence in the dorm.
5. Robinson asked to see Christopher's car.
6. Christopher identified a yellow Taurus, license plate 274 SUR, as his car.
7. It takes approximately 2½ to 3 hours to drive from College Station to Avery Park.

Transcript

911 Call Made August 13, 2014

12:43 a.m.

911: 911, what is your emergency?

CALLER: (background noise – heavy breathing)

911: Hello, 911. What is your emergency?

CALLER: Hello.

911: Hello, this is Avery Park Police. Are you trying to call 911?

CALLER: Uh, I've been beaten. It was a bat. My wife too.

911: What's going on?

CALLER: He left. He just drove off.

911: What's that?

CALLER: He just, he just left me.

911: Who just left you?

CALLER: My son. He's probably heading back to college.

911: So, what's going on there?

CALLER: My son. He's killed his mother.

911: I am sending police officers and an ambulance now. Hold on. Stay on the line.

CALLER: He's driving a Ford Taurus.

911: Sir, please hold on. Help is on the way. Sir, what is your son's name?

CALLER: Jonathan and Christopher.

911: Who did this?

CALLER: (unintelligible) . . . .

911: Sir, what color is the Taurus?

CALLER: Yellow.

911: Sir, do you know the license plate number?

CALLER: The license plate is 274 . . . .

911: Sir, are you at 365 Delmar Street?

CALLER: . . . . SUR.

911: Sir, where are you?

CALLER: In the house; the living room.

911: Okay, sir. Tell me where your wife is.

CALLER: 274 SUR . . . .

911: 274?

CALLER: (unintelligible)

911: Sir, what is your son's name?

CALLER: (unintelligible)

911: Sir?

CALLER: He was supposed to be (unintelligible) . . . .

911: Sir? Sir? Are you there Mr. Daniel?

Call Disconnected.

February 2015

California Bar Examination

Performance Test B

LIBRARY

STATE v. DANIEL

LIBRARY

SELECTED PROVISIONS
COLUMBIA RULES OF EVIDENCE

Rule 104. Preliminary Questions

(a) Questions of admissibility generally.—Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.—When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

* * *

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

* * *

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement.—A ''statement'' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.—A ''declarant'' is a person who makes a statement.

(c) Hearsay.—''Hearsay'' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

* * *

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

* * *

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

* * *

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

* * *

(4) Certified copies of public records.—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification.

Crawford v. Washington

U.S. Supreme Court (2004)

Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia's tape-recorded statement to the police, made several hours after the stabbing, describing the stabbing. The Washington Supreme Court upheld petitioner's conviction after determining that Sylvia's statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."

The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to the victim's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest.

We granted certiorari to determine whether the State's use of Sylvia's statement violated the Confrontation Clause.

History supports two inferences about the meaning of the Sixth Amendment.

First, the principal evil at which the Confrontation Clause was directed was the civil law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. The Sixth Amendment must be interpreted with this focus in mind.

The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused -- in other words, those who "bear testimony." Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an

acquaintance does not. The constitutional text, like the history underlying the common law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

Various formulations of this core class of "testimonial" statements exist: *ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition -- for example, *ex parte* testimony at a preliminary hearing.

Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard. The statements are not sworn testimony, but the absence of oath was not dispositive.

That interrogators are police officers rather than magistrates does not change the picture either. Justices of the peace conducting examinations under civil law statutes were not magistrates as we understand that office today, but had an essentially investigative and prosecutorial function. The involvement of government officers in the production of testimonial evidence presents the same risk, whether the officers are police or justices of the peace.

In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.

The historical record also supports a second proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination. The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the

courts. Rather, the “right ... to be confronted with the witnesses against him” is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. The common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations.

We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability.

Our case law has been largely consistent with these two principles. Our cases have remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Finally, to reiterate, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. It is therefore irrelevant that the reliability of some out-of-court statements cannot be replicated, even if the declarant testifies to the same matters in court. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police

interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.

The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Davis v. Washington

U.S. Supreme Court (2006)

This case requires us to determine when statements made to law enforcement personnel during a 911 call or at a crime scene are “testimonial” and thus subject to the requirements of the Sixth Amendment's Confrontation Clause.

The relevant statements were made to a 911 emergency operator on February 1, 2001. When the operator answered the initial call, the connection terminated before anyone spoke. She reversed the call, and Michelle McCottry answered. In the ensuing conversation, the operator ascertained that McCottry was involved in a domestic disturbance with her former boyfriend Adrian Davis, the petitioner in this case:

911 Operator: Hello.
Complainant: Hello.
911 Operator: What's going on?
Complainant: He's here jumpin' on me again.
911 Operator: Okay. Listen to me carefully. Are you in a house or an apartment?
Complainant: I'm in a house.
911 Operator: Are there any weapons?
Complainant: No. He's usin' his fists.
911 Operator: Okay. Has he been drinking?
Complainant: No.
911 Operator: Okay, sweetie. I've got help started. Stay on the line with me, okay?
Complainant: I'm on the line.
911 Operator: Listen to me carefully. Do you know his last name?
Complainant: It's Davis.
911 Operator: Davis? Okay, what's his first name?
Complainant: Adrian.
911 Operator: What is it?
Complainant: Adrian.
911 Operator: Adrian?

Complainant: Yeah.

911 Operator: Okay. What's his middle initial?

Complainant: Martell. He's runnin' now.

As the conversation continued, the operator learned that Davis had "just run out the door" after hitting McCottry, and that he was leaving in a car with someone else. McCottry started talking, but the operator cut her off, saying, "Stop talking and answer my questions." She then gathered more information about Davis (including his birthday), and learned that Davis had told McCottry that his purpose in coming to the house was "to get his stuff," since McCottry was moving. McCottry described the context of the assault, after which the operator told her that the police were on their way. "They're gonna check the area for him first," the operator said, "and then they're gonna come talk to you."

The police arrived within four minutes of the 911 call and observed McCottry's shaken state, the "fresh injuries on her forearm and her face," and her "frantic efforts to gather her belongings and her children so that they could leave the residence."

The State charged Davis with felony violation of a domestic no-contact order. The State's only witnesses were the two police officers who responded to the 911 call. Both officers testified that McCottry exhibited injuries that appeared to be recent, but neither officer could testify as to the cause of the injuries. McCottry presumably could have testified as to whether Davis was her assailant, but she did not appear. Over Davis's objection, based on the Confrontation Clause of the Sixth Amendment, the trial court admitted the recording of her exchange with the 911 operator, and the jury convicted him.

In *Crawford v. Washington* (U.S. 2004), we held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." A critical portion of this holding, and the portion central to resolution of this case now before us, is the phrase "testimonial statements." Only statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause. It is the testimonial character of the statement that separates it from other

hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.

Without attempting to produce an exhaustive classification of all conceivable statements, or even all conceivable statements in response to police interrogation as either testimonial or nontestimonial, it suffices to decide the present case to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers. For purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police.

The question before us, then, is whether, objectively considered, the interrogation that took place in the course of the 911 call produced testimonial statements.

The difference between the interrogation here and the one in *Crawford* is apparent on the face of things. Here, McCottry was speaking about events as they were actually happening, rather than describing past events. Sylvia Crawford's interrogation, on the other hand, took place hours after the events she described had occurred. Moreover, any reasonable listener would recognize that McCottry (unlike Sylvia Crawford) was facing an ongoing emergency. Although one might call 911 to provide a narrative report of a crime absent any imminent danger, McCottry's call was plainly a call for help against bona fide physical threat. Third, the nature of what was asked and answered in this case, again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. And finally, the

difference in the level of formality between the two interviews is striking. Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers; McCottry's frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe.

We conclude from all this that the circumstances of McCottry's interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying. What she said was not a weaker substitute for live testimony at trial. No “witness” goes into court to proclaim an emergency and seek help.

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot evolve into testimonial statements, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the structured police questioning that occurred in *Crawford*.

We affirm the judgment of the Supreme Court of Washington.

Melendez-Diaz v. Massachusetts

U.S. Supreme Court (2009)

The Massachusetts courts in this case admitted into evidence affidavits reporting the results of forensic analysis that showed that material seized by the police and connected to the defendant was cocaine. The question presented is whether those affidavits are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

Melendez-Diaz was charged with distributing cocaine and with trafficking in cocaine in an amount between 14 and 28 grams. At trial, the prosecution placed into evidence the bags seized. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags "have been examined with the following results: The substance was found to contain: Cocaine." The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law.

Petitioner objected to the admission of the certificates, asserting that our Confrontation Clause required the analysts to testify in person. The objection was overruled, and the certificates were admitted pursuant to state law as prima facie evidence of the composition, quality, and the net weight of the narcotic analyzed.

The jury found Melendez-Diaz guilty.

There is little doubt that the documents at issue in this case fall within the core class of testimonial statements as described in *Crawford v. Washington* (U.S. 2004). Our description of that category mentions affidavits. The documents at issue here, while denominated by Massachusetts law "certificates," are quite plainly affidavits: declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths. The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine -- the precise testimony the analysts would be expected to provide if called at

trial. The “certificates” are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.

Here, moreover, not only were the affidavits made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, but under Massachusetts law the sole purpose of the affidavits was to provide “prima facie evidence of the composition, quality, and the net weight” of the analyzed substance. We can safely assume that the analysts were aware of the affidavits' evidentiary purpose, since that purpose -- as stated in the relevant state law provision -- was reprinted on the affidavits themselves.

In short, under our decision in *Crawford* the analysts' affidavits were testimonial statements, and the analysts were “witnesses” for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to be confronted with the analysts at trial.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Respondent argues that the analysts' affidavits are admissible without confrontation because they are “akin to the types of official and business records admissible at common law.” But the affidavits do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless.

Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. *See* Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.

Respondent also misunderstands the relationship between the business and official records hearsay exceptions and the Confrontation Clause. Most of the hearsay exceptions covered statements that by their nature were not testimonial--for example, business records or statements in furtherance of a conspiracy. Business and public records are generally admissible absent confrontation not because they qualify under

an exception to the hearsay rules, but because, having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.

This case involves little more than the application of our holding in *Crawford v. Washington*. The Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits, and the admission of such evidence against Melendez-Diaz was error. We therefore reverse the judgment of the Appeals Court of Massachusetts and remand the case for further proceedings not inconsistent with this opinion.

People v. Jackson

Supreme Court of Columbia (2009)

Defendant-Appellant Junior Salas Jackson appeals from a conviction on two charges of misdemeanor assault and one charge of misdemeanor family violence stemming from an auto-pedestrian collision involving his girlfriend, Julie Sandra Muna Gadia. Jackson asserts that the trial court erred in admitting out-of-court statements made by witness-victim Gadia as an excited utterance exception under Rule of Evidence 803(2) where such statements were made in response to police officers' questions nearly a week after being run over by a truck.

On the night of August 3, 2007, Emergency Medical Technicians (EMTs) and police officers found Gadia in critical condition after being run over by a 1997 Mazda pickup truck belonging to Gadia's boyfriend, Jackson. Gadia experienced such a degree of physical trauma that she could not verbally respond to the EMTs and all she could do was move her eyes in response to light and groan in pain. She was transferred to the Naval Hospital where she underwent surgery.

Gadia spent nearly a week recovering in the Intensive Care Unit of the Naval Hospital. On August 9, 2007, at around 11:55 a.m., Officer Donald Nakamura was informed that Gadia was awake and said that Jackson ran her over twice. Lt. Krejci of the Naval Hospital told Officer Nakamura that Gadia would be more awake and responsive for an interview in a few hours after the sedatives wore off.

At around 2:00 p.m. the same day, Officer Nakamura was informed that Gadia was more responsive. At 2:38 p.m., Officer Nakamura arrived at the Naval Hospital and met with Lt. Krejci, who said that Gadia spoke softly because the ventilator tube was recently removed from her mouth. Officer Nakamura then interviewed Gadia. After Gadia began coughing heavily and started to moan, Officer Nakamura ended the interview and informed Gadia that he would return at a later time to interview her again.

At the trial, Gadia testified that she did not remember speaking to Officer Nakamura on August 9, 2007.

The trial court admitted into evidence excerpts from Officer Nakamura's report which recorded what Gadia said during an interview on August 9, 2007. The trial court found that, since Jackson would have the opportunity to cross-examine the declarant and test the reliability of Officer Nakamura, Jackson's confrontation rights would be satisfied. On the stand, Officer Nakamura read aloud:

> I inquired from ... Gadia if it was an accident. [G]adia informed me in a low, slurred tone of voice, that he did it on purpose. I inquired from her to whom was she referring to. [G]adia stated, 'Junior, my boyfriend.'... Gadia, in a low tone of voice, stated that it was over her coworker. [G]adia started coughing heavily and started to moan. I then ceased the interview and told her that we will come back at a later time to interview her. [G]adia informed me that she was afraid of Junior and does not want to see him, that she wanted him to go to jail in regards to what he did to her.

For a statement to be admitted under an excited utterance exception to hearsay, most courts have interpreted Columbia Rule of Evidence 803(2) to require: 1) an event or condition startling enough to cause nervous excitement; 2) the statement relates to the startling event; and 3) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent. All three inquiries bear on the ultimate question: Whether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event.

It was not an abuse of discretion for the trial court to find the first two requirements, that the event or condition was startling enough to cause nervous excitement and that the statements relate to the startling event, were satisfied in this case. It was not an abuse of discretion for the trial court to find that Gadia being run over by a truck, experiencing life-threatening physical trauma, extensive surgery and intensive medical care was startling enough to cause nervous excitement.

The third requirement that the statement must be made while the declarant is under the stress of the excitement caused by the event consumes the bulk of the

contention and analysis in cases applying the excited utterance exception. Courts look at various external factors as indicia of the declarant's state of mind at the time of the statements and no one factor is dispositive. In deciding whether the statement was the product of stress and excitement rather than reflective thought, courts have considered various factors in totality which may include, but are not limited to: the lapse of time between the startling event and the statement, whether the statement was made in response to an inquiry, age/maturity of the declarant, the physical and/or mental condition of the declarant, characteristics of the event, and the subject matter of the statements.

The lapse of time is often a central inquiry to determine whether the declarant spoke under the stress of the excitement caused by the event, but this factor is not dispositive. The inquiry focuses on the psychological impact of the event itself and not upon the contemporaneous nature of the startling event. Based on the totality of the circumstances, statements made hours after the startling event may still fall within the excited utterance exception.

Although not determinative, a statement made in response to an inquiry could bear on whether the statement was spontaneous or deliberative. However, a victim's statement made in response to an inquiry does not, without more, negate its spontaneity as an excited utterance.

Often, a witness' description of the declarant's emotional state is sufficiently weighty in determining whether the declarant's state of mind falls with the excited utterance exception. Describing the declarant's voice, appearance, demeanor, whether the declarant was crying or appeared frightened, is often sufficient to demonstrate that the declarant was in an excited state.

In cases where a declarant has lost consciousness or the ability to speak after sustaining fatal or nearly fatal wounds, declarant's accusatory statement made upon regaining consciousness or recovering the ability to speak is often admissible under an excited utterance exception to hearsay, despite the lapse of time.

Based on the totality of the circumstances, it is reasonable for the trial court to find a six-day delay between getting run over by a truck and speaking to Officer

Nakamura to fall within the excited utterance hearsay exception. Throughout those six days, Gadia was either semiconscious or unconscious and was unable to speak due to her physical condition, medication (painkillers and sedatives), anesthetic drugs and ventilator tube.

Accordingly, we AFFIRM the judgment of the Superior Court.

PT-B: SELECTED ANSWER 1

SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Part I: Any nonverbal statements allegedly made by Gloria Daniel to the police during an interview should be suppressed because it is both inadmissible hearsay and a violation of defendant's constitutional rights.

A. Gloria Daniel's nonverbal statements to the police are not admissible under the excited utterance exception to the hearsay rule because it was not "statement" as defined under the Columbia Rules of Evidence, considerable time had elapsed between the exciting event and the alleged statement, it was in response to repeated inquiry, and Daniel's sedated mental state caused her to no longer be under the stress of the event and able to communicate.

i. Gloria's alleged nonverbal statements to the police are not a "statement" under the law.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Columbia Rule of Evidence 801(c). A statement is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. CRE 801(a). Here, the police assert that Gloria Daniel nodded her head in response to an inquiry from Officer James as to whether her son Christopher had attacked her. However, the witness herself has indicated that at the time of the questing by Officer James, she was "in deep pain and suffering . . . making it impossible to speak, and therefore, could not have responded to any questions." R. at 13. Furthermore, Gloria was unable to speak for over a month following the attack. R. at 13. Finally, per sworn affidavit of Dr. Nancy Donahue, people with brain injuries have erratic movements of their arms and legs. R. at 7. It is clear from the record that Gloria sustained severe injuries to her head and face. R. at 10. Dr. Donahue avers that it is common for brain injury patients who nod their heads up and

down, and that such movements are not intended to convey a "yes" response. R. at 7. Moreover, Dr. Donahue avers that even if a brain-injured person were oriented in time and time, and able to understand, this does not mean that they have any memory of the event that caused the brain injury. R. at 8.

In this case, Gloria suffered an extensive head wound that in all probability will result in her death. She maintains that she did not communicate with Officer James, and to this day has no memory who attacked her. R. at 13. This fact coupled with Dr. Donahue's professional opinion, based on her experience with patients with brain injuries, renders a high probability that Gloria did not make a "statement" as defined under the Columbia Rules of Evidence, and thus, it cannot be admitted under a hearsay exception in any event.

ii. Gloria's alleged nonverbal statements do not fall under the excited utterance exception to hearsay.

Rule 803 of the Columbia Rules of Evidence holds that an excited utterance is an exception to the hearsay rule. An excited utterance is defined as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement cause by the event of condition." CRE 803(2). The Supreme Court of Columbia has interpreted Rule 803 to require: (1) an event or condition startling enough to cause nervous excitement; (2) the statement relates to the startling event; (3) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent. See People v. Jackson, Supreme Court of Columbia (2009) at 18. "All three inquiries bear on the ultimate question: Whether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event." Id. The third requirement that the statement must be made while the declarant is under the stress of the excitement caused by event is often the determining factor. Id. at 19. Courts look to various external factors in this regard, including the lapse in time between the startling event and statement, whether the statement was made in response to an inquiry, age/maturity

of the declarant, the physical and/or mental condition of the declarant, characteristics of the event and the subject matter of the statements. Id.

First, in this case, it is probable that an attack on Gloria was a startling event and that any statement regarding her attack would relate to that event. However, in weighing the third factors, any nonverbal communication by Gloria to Officer Jackson falls clearly outside the bounds of whether she made the statement under the stress of the event. First, there was a considerable lapse in time in between the attack and when officer Jackson inquired into Gloria's attacker; Gloria was attacked at 12:10 a.m. on August 13. R. at 13. Officer Jackson did not arrive until 12:30 a.m. R. at 9. Furthermore, another ten minutes elapsed before he made the inquiry. R. at 11. This means that half an hour had passed since the attack on Gloria and the inquiry. There is also evidence that the 911 call notifying police of the event came in at 12:43 -- but in any event, there was at least the lapse of the time in between the call plus the ten minutes it took for Officer Jackson to search the house. Courts have held that "the lapse of time is often a central inquiry to determine whether the declarant spoke under the stress of an excitement." People at 19. In this thirty minutes, Gloria had time for "reflective thought" as opposed to a "spontaneous reaction to the exciting event." Id. at 18.

The prosecution will cite People v. Jackson itself as authority that comments made several hours or even days have passed after the startling events can fall within the excited utterance exception. However, this case is distinguishable from People in several respects. First, the witness in People had lost consciousness since the time of the attack or was in a state of semi-consciousness before she awoke six days later and identified her attacker. People at 20. Second, the witness in People actually spoke, and with words identified her attacker. Id. at 19. The Court in People reasoned that where a declarant has lost consciousness, accusatory statements made upon regaining consciousness or recovering the ability to speak is admissible despite the lapse in time. Id. at 19. However, in this case, Gloria was conscious, although seriously injured, upon the arrival of Officer Jackson. R. 10. Furthermore, she was conscious when he made the inquiry. R. at 11. Thus, this is not a case where the witness was attacked, became

unconscious, and awoke still under the stress of the event. Gloria had ample time to reflect on the attack. Furthermore, the further consideration of the other factors also indicate this fact.

Second, Gloria's alleged nonverbal statement was in response to Officer Jackson's repeated inquiries. Jackson admitted asked Gloria a total of five times who her attacker was: once whether it was a member of her family, another time whether it was her son Jonathon, another time if it was Christopher, two more times to affirm it was Christopher. "A statement made in response to an inquiry could bear on whether the statement was spontaneous," although this fact is not determinative. People at 19. However, Officer Jackson's repeated inquiries gave Gloria substantial time to reflect and answer. Furthermore, this is not the only factor indicating that Gloria's alleged nonverbal communication was not spontaneous and under the stress of the event.

Third, considering the physical/mental state of the declarant factor, the facts reflect that Gloria was given a sedative when the ambulance arrived. First Responder Kevin Robert states that when he arrived on the scene, Gloria was in extreme distress. However, he inserted an IV line to administer a sedative, and states that she responded to the sedative and calmed down. R. at 12. It was only after that that Officer Jackson asked Gloria the identity of her attacker. Thus, Gloria was under the influence of calming and sedative drugs, which directly negates any arguments of a spontaneous declaration. By Robert's own statement, Gloria was calm. Thus, any nonverbal communication could not have been "spontaneous" as required by law.

For these reasons, Gloria's nonverbal communication should not be admitted, as it does not fall under the excited utterance exception to hearsay.

B. Gloria's alleged nonverbal statements should be suppressed as a violation of the Confrontation Clause because the communication was not given during an ongoing emergency and it was obtained by a police officer attempting to procure evidence as opposed to responding to an emergency.

The United States Supreme Court has held clearly held that testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. Crawford v. Washington (2004) at [6]. "Statements taken by police officers in the course of interrogations are . . . testimonial." Id. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis v. Washington, (2006) at 9. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id.

Here, Gloria will likely be unavailable for trial. R. at 13. She remains in serious condition and the prognosis for her recovering is not good. R. at 13. This means that any former statement made by Gloria in setting in which she was not cross-examined inadmissible.

Gloria's alleged nonverbal statement was testimonial. The facts reflect that when Officer Jackson arrived at the house, he searched it and the attacker was not inside. R. at 10. Furthermore, as outlined above, nearly forty minutes had passed since the alleged attack and Officer Jackson's inquiry. The record also reflects that an ambulance had arrived and Gloria was receiving medical treatment. There was no indication that an immediate danger was present or that Officer Jackson's questions to Gloria were inquiries made to "enable police assistance to meet an ongoing emergency." Davis at 9. Gloria was being loaded onto the ambulance to receive care from others when Officer Jackson stopped them to ask her questions about the attack based after receiving information from the 911 operator. R. at 11. The only motive Officer Jackson could have had was to obtain relevant evidence to (1) identify the attacker in order to arrest him and (2) preserve the evidence for a later trial.

The prosecution will argue that this case is analogous to the facts of Davis, where a victim made statements to a 911 operator that identified her attacker. Davis at 11. In

Davis, the Court deemed the statements to be non-testmonial for several reasons; first, the victim in Davis was facing an ongoing emergency whereby her attacker was still present when she called 911; second, the statements elicited from the victim were necessary to resolve that emergency so that dispatched officers might know whether they would be encountering a violent felon. Id. at 11 -12. The record is clear that Gloria's attacker had left -- Peter stated that fact, R. at 15, and Officer Jackson had made sure the house was clear. Thus, Officer Jackson had no need to elicit the information regarding the identity of Gloria's attacker for his own safety, but rather, it was in order to apprehend him.

Standing alone, procuring the identity of an attacker in a non-emergency situation surely qualifies as testimonial under the tests set forth in Davis and Crawford. The defendant in this case has had no opportunity to cross-examine Gloria regarding this statement; thus, offering this statement after in the likely events that Gloria becomes unavailable would be in violation of the defendant's right to confront the witnesses against him.

Part II. Any transcript or testimony recording concerning the 911 call allegedly made by Peter Daniel should be suppressed, as it is inadmissible hearsay and violates the defendant's constitutional right to confront the witnesses against him.

A. The transcript of Peter's 911 call is inadmissible hearsay, and does not fall under the business record exception as 911 call transcripts are produced to use as evidence at trial.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Columbia Rule of Evidence 801(c). Columbia Rule of Evidence 803 provided that public records and reports constitute an exception to the hearsay rule if they set forth matters observed pursuant to duty imposed by law as to matters there was a duty to report, excluding however, in criminal cases, matters observed by police officers and other law

enforcement and other enforcement personnel. The United States Supreme Court has held that documents kept in the regular course of business activity are not encompassed by the business record exception if the regularly conducted business activity is the production of evidence for use at trial. Melendez-Diaz v. Massachusetts, U.S. Supreme Court (2009) at 14.

Here, the transcript and recording are regularly kept by the police, and consist of observations of ongoing emergencies as presented by conversations between operators and alleged victims. However, such transcripts and recording are expressly forbidden by Rule 803, as they were matters observed by police officers and other law enforcement personnel. "If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." Davis at 9. Accordingly, any matters or conversations had by the 911 operator and subsequently made into the transcript or recording do not fall under the business record exception. In the alternative, were the Court to consider the transcript an exception, the United States Supreme Court has expressly held that "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because . . . they are not testimonial." Melendez at 15. As outlined below, the statements elicited from Peter Daniel from the 911 caller are testimonial and thus subject to the Confrontation Clause, and accordingly, they are nonetheless admissible.

B. The transcript and recording of Peter's 911 call does not fall under the excited utterance exception due to the lapse in time from the attack to the call and the likelihood that Peter was no longer under the stress of the event.

Rule 803 of the Columbia Rules of Evidence holds that an excited utterance is an exception to the hearsay rule. An excited utterance is defined as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." CRE 803(2). The Supreme Court of Columbia has interpreted Rule 803 to require: (1) an event or condition startling enough

to cause nervous excitement; (2) the statement relates to the startling event; (3) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent. See People v. Jackson, Supreme Court of Columbia (2009) at 18. "All three inquiries bear on the ultimate question: Whether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event." Id. The third requirement that the statement must be made while the declarant is under the stress of the excitement caused by event is often the determining factor. Id. at 19. Courts look to various external factors in this regard, including the lapse in time between the startling event and statement, whether the statement was made in response to an inquiry, age/maturity of the declarant, the physical and/or mental condition of the declarant, characteristics of the event and the subject matter of the statements. Id.

Here, as an initial matter, Peter made clear that the attack not only over, but that his attacker had left and was driving to a location almost three hours away. R. at 14, 15. Thus, it is arguable that he was no longer under the stress of the event or fear of the attacker. Secondly, in the lapse in time between the time of the attack and picking up the phone, Peter had time to "reflect" on what had happened in order to repeat it to the 911 operator. People at 19. The prosecution will argue that Peter was "heav[ily] breathing" when he made the 911 call, indicating that he was stressed from the event. R. at 1. However, first, that was only a characterization of the operator, and second, the record shows that Peter sustained mortal injuries, the pain of which could have caused his heavy breathing as opposed to the stress of the attack. R. at 10. Furthermore, Peter's statements regarding the identity of his attacker were made in response to inquiry from the operator. R. at 15. "A statement made in response to an inquiry could bear on whether the statement was spontaneous," although this fact is not determinative. People at 19.

Overall, the factors weigh against the admission of this testimony as an excited utterance, and the transcripts should be suppressed as inadmissible hearsay.

C. The transcript and recording of Peter's 911 call violates the defendant's right to confront the witnesses against him because the call concerned past events and not an ongoing threat, and the 911 operator elicited statements not to deal with an ongoing emergency but rather to obtain evidence of a past event.

The United States Supreme Court has clearly held that testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. Crawford v. Washington (2004) at [6]. "Statements taken by police officers in the course of interrogations are . . . testimonial." Id. "If 911 operators are not themselves law enforcement officers, they may at least be agents of law enforcement when they conduct interrogations of 911 callers." Davis at 9. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis v. Washington, (2006) at 9. "They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id.

In this case, the transcript shows that Peter called after his alleged attacker had left. R. at 15. Thus, the call related to past as opposed to events that were actually happening. Second, the 911 operator went beyond scope of assisting Peter and instead attempted to identify his attacker for law enforcement purposes. R. at 15. The 911 operator did not ask about the extent of Peter's injuries or give advice on what to do in order to help himself or aid his wife. Rather, the operator instantly began a battery of specific questions meant only to procure evidence and apprehend the attacker. The 911 caller asked for the attacker's name and license plate number. This was not to "enable police assistance to meet an ongoing emergency," but rather to apprehend the attacker. Davis at 9. The facts are clear that the attacker had left Peter's vicinity, and thus he was in no further danger. The only remaining motive of the 911 operator was to procure information "potentially relevant to a later criminal prosecution." Id.

The prosecution will again argue that this case is analogous to Davis. As set forth above, in Davis, the victim calling in was still under attack and facing an ongoing emergency, and the question posed by the operator, namely simply asking her the attacker's name, was necessary to resolve that emergency so that dispatched officers might know whether they would be encountering a violent felon. Davis, at 9, 11-12. The prosecution will further compare the "frantic answers" provided by the victim in Davis to the unintelligible and apparently breathless answers Peter provided. R. at 15-16.

In regard to the first argument, in this case, Peter had made clear that his attacker had left. R. at 15. Thus, there was no need to obtain information regarding the attacker, as dispatched officers would not be "encountering a violent felon" upon their arrival. Davis at 12. The only use of such information is to apprehend the attacker, which is clearly testimonial evidence under Crawford. Furthermore, the operator in this case went beyond the simple question asked by the operator in Davis, which is further evidence that she exceeded the scope of responding to an ongoing emergency. The operator in Davis asked only for the attacker's name. Davis at 9-10. In this case, the operator went so far as to confirm the attacker's model of car and his license plate number. R. at 15-16. Such information is not relevant in responding to what was a medical emergency. As to the second argument regarding the nature of the victim's answers, although Peter's answers are not completely calm, they were made in a safe environment, as his attacker had left. Furthermore, the formality of the so-called interview is only one factor in ascertaining whether a statement is testimonial. As outlined above, there is ample support that Peter's statements were elicited to assist law enforcement in investigating the crime rather than responding to the emergency.

Accordingly, because the comments elicited from Peter by the 911 caller were testimonial, and because he is unavailable and has not been cross-examined, the transcript and recording of the call should be suppressed pursuant to the Confrontation Clause.

PT-B: SELECTED ANSWER 2

Mary Lynch
State Bar # XXXXX
Lynch and Maurer, Attorneys at Law
Avery Park, Columbia

STATE OF COLUMBIA **v.** **CHRISTOPHER DANIEL**	**Criminal Division** **CASE NO. 2014-2341** **MOTION TO SUPPRESS**

MEMORANDUM OF POINTS AND AUTHORITIES

I. The nonverbal statements allegedly made by Gloria Daniel to the police on August 12-13, 2014 should be suppressed because they are inadmissible hearsay, or in the alternative, a violation of Christopher's Sixth Amendment Rights

A. Ms. Daniel's head nods do not fall within any hearsay exception, and thus are inadmissible

Hearsay is a statement offered in evidence to prove the truth of the matter asserted. Col. Rule of Evid. 801(c). A statement is an oral or written assertion or a nonverbal conduct of a person, if it is intended by a person as an assertion. Col. Rule of Evid. 801(a). Hearsay statements are inadmissible unless they fall under an exception to the hearsay rule. Exceptions to the hearsay rule include an excited utterance pursuant to

Col. Rule of Evid. 803(2) and the public records and reports exception under Col. Rule of Evid. 803(8).

In the instant case, Gloria Daniel's (Ms. Daniel's) nods to Officer Tyler James (Ofc. James) did not constitute hearsay because this nonverbal conduct was not intended by her as an assertion. As such, these statements are inadmissible because they are not relevant. Even if these head nods are hearsay, they do not fall under any of the hearsay exceptions. Thus, these statements by Ms. Daniel should be excluded and suppressed.

Ms. Daniel's head nods were not intended by her to be an assertion

Pursuant to Col. Rule of Evid. 801(b) the nonverbal conduct of a person is a statement pursuant to Col. Rule of Evid. 801(c) if the conduct is intended by a person as an assertion. In determining a preliminary question concerning the admissibility of person to be a witness, a court is not bound by the rules of evidence, except those with respect to privileges. Further, when the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Ms. Daniel's head nods were not intended by her to be an assertion. As noted in Dr. Nancy Donahue's affidavit, it is very unlikely, if not impossible, that Ms. Daniel would have any memory of the event that caused the injury. Dr. Donahue states that Ms. Daniel had a serious brain injury. She notes that many people with serious brain injuries have erratic movement of their arms and legs. Indeed, it is noted by paramedic Kevin Robert that Ms. Daniel was moving erratically back and forth, suggesting symptoms consistent with Dr. Donahue's diagnosis.

Even though Officer James asked Ms. Daniel questions prior to asking her if Christopher did this, these preliminary questions do demonstrate that Ms. Daniel intended her nods to be a yes to Ofc. James's questions regarding Christopher. Ms.

Daniel allegedly nodded yes that that one member of her family had been responsible for her injury. She then shook her head no that it was not her son Jonathan. Ofc. James claims that Ms. Daniel then shook her head yes in response that Christopher was responsible for her injuries. Ofc. James further contends that she nodded yes both times after being asked this same question. This repetitive nodding to the same question does not suggest an assertion by Ms. Daniel that she was responding yes to these questions. It is very likely that Ms. Daniel was just repeatedly nodding. Dr. Donahue further notes that there are brain injury patients who may nod their heads up and down, but do not really intend the "yes" response.

Even if Ms. Daniel was oriented and able to follow commands and generally answer questions, this does not mean that she had any memory of what caused her injury. As attested to by Dr. Donahue, even if a brain injured person was oriented and could generally answer questions, it was very unlikely that she would have any memory of the event causing the injury. As such, Ms. Daniel could not have intended her head nods to be an assertion.

Furthermore, in an interview with Ms. Daniel on February 11, 2105, Ms. Daniel confirmed that she "was in deep pain and suffering from a head injury" and could not have responded to any of the questions. She had no recollection of even being asked questions by Ofc. James. She claimed that at no time has she identified who the attacker was. Even though these statements by Ms. Daniel are hearsay statements, the court is allowed to consider them in deciding the preliminary question of whether to admit Ms. Daniel's statements.

Finally, Ms. Daniel was given a sedative by Kevin Robert prior to nodding her head in response to Ofc. James' questions. Mr. Robert stated that Ms. Daniel immediately responded to the sedative and calmed down. A massive head injury combined with a sedative more than likely prevented Ms. Daniel from being able to answer Ofc. James' questions.

All the above mentioned evidence is sufficient to support a finding that Ms. Daniel did not intend her head nod to be an assertion. As such, Ms. Daniel's head nods were not hearsay and cannot fall within any exception. Furthermore, Ofc. James' testimony regarding Ms. Daniel's head nods is not relevant because it does not have any tendency to make any fact in this case more or less true. Thus, Ms. Daniel's head nods should be excluded.

Even if Ms. Daniel's head nods were intended to be an assertion, they are inadmissible hearsay

Even if Ms. Daniel's head nods were intended to be an assertion that Christopher was responsible for her injuries, these nonverbal movements are hearsay statements that do not fall under an exception.

Ms. Daniel's statements are not an excited utterance

Pursuant to Rule 803, a hearsay statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition is admissible. *People v. Jackson* (Columbia Supreme Court, 2009) expounded on this exception to the hearsay rule. The court noted that to determine whether a declarant was still under the stress of the event a totality of the circumstances test will be used. Factors include lapse of time, whether the statement was made in response to injury, age/maturity, physical/mental condition, characteristics of the event, and the subject matter of the statements.

The *Jackson* court noted that lapse of time is a central inquiry. Here, more than a number of minutes, perhaps even an hour passed between when Ms. Daniel was injured and when she made her head nods. Ms. Daniel claims that she was attacked at approximately 12:10 a.m. The 911 call from her husband was made at 12:43 a.m. Ofc. James must have arrived after because Peter Daniel was dead when he arrived. Although Ofc. James claims that he arrived around 12:30 a.m., he was approximating the time. Ofc. James claims that he went to clear the house, which took

him about 10 minutes. During the search he heard the ambulance arrive. When Ofc. James questioned Ms. Daniel she was placed on the gurney; thus it is likely that Ms. Daniel made the statement at least an hour after the injury. Although in *Jackson*, the court still found that the declarant was under the stress of the event after a week, this was because the declarant had lost consciousness during this week period. Here, if the prosecution claims that Ms. Daniel could respond to questions, the assumption is that she was not unconscious. Thus an hour after an event occurred is enough to no longer be under the stress of the event.

Further the *Jackson* court noted that a response to an injury could make the statement less likely to be under the stress of an event. Here, Ms. Daniel was merely responding with head nods to Ofc. James's yes/no questions. This is distinguishable from *Jackson*. In *Jackson*, the declarant actually provided verbal responses to questions asked of her. Making nonverbal statements to nonverbal questions is more likely to negate spontaneity than nonverbal statements given that nonverbal statements require less effort and thus can be more calculated in response to pointed questions.

Although Ms. Daniel was initially in extreme distress when the ambulance arrived, she was not under this distress when she spoke with Ofc. James. As mentioned above, Ms. Daniel had received a sedative prior to speaking with Ofc. James. Mr. Robert noted that she responded to it and it had calmed her down. Thus, Ms. Daniel was no longer under the stress of an event.

Thus, given that over an hour had lapsed since Ms. Daniel's injury, her head nods were less spontaneous and more calculated to respond to questions, and she was calm after receiving a sedative; it is unlikely that her statements were made under the stress of excitement caused by her injuries.

B. Even if Ms. Daniel's statements are admissible under a hearsay exception, the introduction of these statements would violate Christopher's 6th Amendment rights because these statements are testimonial and Christopher has not had an opportunity to cross-examine Ms. Daniel.

Under the 6th Amendment, a defendant has a right to be confronted with the witnesses against him. See *Crawford v. Washington* (U.S. Supreme Court, 2004). Only testimonial statements cause a declarant to be a witness within the meaning of the Confrontation Clause under the Sixth Amendment. A witness's testimony may only be admitted against a defendant if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness.

Ms. Daniel's head nods were testimonial statements

In the U.S. Supreme Court decision *Davis v. Washington* (2006), the Court distinguished testimonial statements from non-testimonial statements. A testimonial statement is that which is made "when circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." A non-testimonial statement is that which is made "when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."

To illustrate the difference between testimonial and non-testimonial statements, the Davis court compared the statement made in *Crawford v. Washington* (2004) with the statement made in *Davis*. In *Crawford*, the declarant's statement was testimonial, whereas the statement in *Davis* was not testimonial. Based on a comparison of these two statements, the court acknowledged four factors relevant to determining if a statement is testimonial. First, whether the declarant was speaking about an event that was actually happening or an event that had already happened. Second, whether the declarant was providing a narrative report or facing on ongoing emergency. Third, the

nature of what was asked--whether the questions were intended to resolve a present emergency or rather simply learn what had happened in the past. Fourth, the court looked to the formality between the two interviews. Finally, the court in *Melendez-Diaz* noted that another factor to determine the nature of a statement will be whether it was made in anticipation of litigation. If so, it will likely be considered testimonial.

Based on these factors articulated by the court, Ms. Daniel's statement was testimonial. Like in *Crawford*, a time had lapsed since the event (i.e. the causation of her injuries had occurred.) As noted above, approximately an hour had elapsed. Ofc. James did a sweep of the house and noted that the perpetrator was not present. Thus, when Ofc. James asked Ms. Daniel questions, the perpetrator was no longer at the scene, unlike in *Davis*.

Next, Ms. Daniel was not facing an ongoing emergency. The ambulance had arrived and Ms. Daniel's injuries were being attended to by Mr. Robert. Further, Mr. Robert had administered a sedative that allowed Ms. Daniel to calm down. This is unlike in *Davis*, when the victim was speaking to the 911 operator as she her boyfriend was attacking her.

Additionally, Ofc. James's questions were not intended to resolve a present emergency, but rather simply learn what had happened in the past. The perpetrator had already fled and unlike the 911 operator in *Davis*, here Ofc. James was seeking to confirm what the 911 operator had already told him. He was investigating the validity information conveyed on the 911 call.

Moreover, the environment, although not at a station house, still had formal elements. Ms. Daniel did not provide answers in a frantic manner in an environment that was not tranquil. Rather, she was lying on a gurney and calmly nodding to Ofc. James. Ofc. James was asking a series of questions and likely taking physical or mental notes of her responses. This interrogation had the formality of a police investigation.

Finally, Ofc. James's questions were likely asked in anticipation of litigation. Officers are trained to build up cases and as such he was probably collecting evidence that he knew would be relevant and helpful to the District Attorney. Given the manner in which Ofc James was asking the questions, Ms. Daniel could assume that the her statements would be used at trial.

Considering all these factors, Ms. Daniel's head nods were testimonial.

Although Ms. Daniel is unavailable, Christopher has not had an opportunity to cross-examine her

As noted by the court in *Crawford*, testimonial statement may only be admitted if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. The opportunity to cross-examine a witness at trial is a necessary condition for the admissibility of testimonial statements. (*Crawford*.). Here, Ms. Daniel has passed away, and thus she is unavailable. Christopher, however, has not had an opportunity to cross-examine her. Although Christopher's counsel has interviewed Ms. Daniel prior to her death, this was not a cross-examination at trial. Rather, the interview took place at the Avery Park Hospital. Ms. Daniel was not in a courtroom and her statement was not made under oath.

Thus, Ms. Daniel's head nods cannot be admitted because they are testimonial statements and Christopher has not had an opportunity to cross-examine Ms. Daniel. As such, these statements should be suppressed.

II. The transcripts or testimony recording concerning the 911 call allegedly made by Peter Daniel on August 12-13, 2014 should be suppressed as inadmissible hearsay and a violation of Christopher's Sixth Amendment Rights

A. Mr. Daniel's statements are inadmissible hearsay

As defined above, hearsay is an out-of-court statement that is offered in evidence to prove the truth of the matter asserted. A statement is an oral or written assertion or a nonverbal conduct of a person, if it is intended by the person to be an assertion. Here, the 911 statements made by Peter Daniel (Mr. Daniel) on August 12-13, 2014 are statements that were made out of court. It is anticipated that the prosecution will attempt to offer these statements to show that Christopher was responsible for his injuries and his wife's injuries. These statements however, do not fall under any hearsay exception and thus are inadmissible.

Mr. Daniel's statements are not an excited Utterance

Pursuant to Rule 803, a hearsay statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition is admissible. *People v. Jackson* (Columbia Supreme Court, 2009) expounded on this exception to the hearsay rule. The court noted that to determine whether a declarant was still under the stress of the event a totality of the circumstances test will be used. Factors include lapse of time, whether the statement was made in response to injury, age/maturity, physical/mental condition, characteristics of the event, and the subject matter of the statements.

Here, Mr. Daniel's statements were made at least 30 minutes or more after the event that caused his injuries. As noted above, Ms. Daniel stated that the attacked occurred around 12:10 a.m. The call to 911 was placed at 12:43. Thus, this call was not made immediately after the event.

Mr. Daniel's statements are not a Public Records and Reports Exception

Under Rule 803(8), records or reports of public offices or agencies regarding matters observed pursuant to duty imposed by law as to which matters there was duty to report are admissible. There is an exception however that excludes these reports in criminal cases for matters observed by police officers and other law enforcement personnel.

The 911 call is not subject to this hearsay exception. Although it was a report of a public agency, this is a criminal case and as such, the report should be excluded. The 911 operator is a law enforcement personnel. As noted in Davis, although 911 operators are not law enforcement, they may be law enforcement personnel when conducting interrogations over 911 calls. Although the court was analyzing 911 operators with respect to whether a statement was testimonial, the court's logic is relevant here. It shines light on the fact that 911 operators often do question callers in a fashion similar to law enforcement and relay this information to law enforcement to help with an investigation. Here, the 911 caller asked questions that were similar to a police interrogation. The operator asked for the name of perpetrator and asked for the license plate number of the car. Furthermore, the operator relayed the information to Ofc. James, which he used to question Ms. Daniel. Thus, this report cannot be admitted under the public records and reports exception given that it was made by law enforcement personnel.

B. Admitting Mr. Daniel's statements would violate Christopher's 6th Amendment rights

As mentioned above, even if hearsay declaration may be admissible under a hearsay exception, they still may be required to be excluded if they violate a defendant's 6th Amendment rights. As noted by the court in dicta in *Melendez-Diaz*, even if statements are admissible under the business records exception, they can still be inadmissible if they violate the Confrontation Clause. Similarly, even if Mr. Daniel's statements fall into a hearsay exception, they can still be excluded if they violate the Confrontation Clause. Testimonial statements made by an unavailable declarant will not be admitted unless the defendant has had an opportunity to cross-examine the declarant. (*Crawford*)

*All Mr. Daniel's statements on the 911 call are testimonial statement*s

The court in *Davis*, while holding that a 911 call was not testimonial, did not hold that 911 calls are per se non-testimonial. In fact the court noted the 911 call evolved into testimonial statements. After the operator gained the information needed to address the exigency of the moment, the emergency appeared to have ended. When the operator proceeded to pose a battery of questions, the victim's statements were then considered testimonial.

Here, unlike in *Davis*, the entire 911 call consisted of testimonial statements. As Mr. Daniel noted in his phone call, the perpetrator had driven off by the time he placed the phone call. Mr. Daniel was no longer reporting an ongoing emergency. Rather, the operator was reporting an event that had already occurred. The operator did not need information to address the exigency of the moment because there were no longer exigency circumstances since the perpetrator had left. The operator asked a series of questions such as the type and color of car the perpetrator was driving and the license plate number. This was not unlike the structured police questioning that occurred in Crawford. Thus, these statements are testimonial.

In the alternative, the court should find that part of the 911 call consisted of testimonial statements

The court should at least find that the statements Mr. Daniel made after the 911 operator dispatched police officers and an ambulance were testimonial. After police officers and an ambulance were sent to Mr. Daniel, the operator no longer needed to address the exigency of the moment. Rather, as in *Davis*, the operator's questioning took the form of a police interrogation. The names of Mr. Daniel's sons, and the color of the Taurus and the partial license plate number provided are all testimonial statements. These are responses to questions asked by the operator that a reasonable person could expect to be used in court. Given that the injury already occurred these answers do not provide information relevant to stopping an emergency, but seek to find the perpetrator.

Christopher has not had an opportunity to cross-examine Mr. Daniel

Even though Mr. Daniel is unavailable to testify because he has passed away, Christopher has not had an opportunity to cross-examine Mr. Daniel in court under oath. As such, Mr. Daniel's testimonial statements must be excluded.

CONCLUSION

Ms. Daniel's head nods were not intended to be an assertion and as such should be excluded. If the court finds that they were intended to be an assertion, then these statements are inadmissible hearsay as they do not fall under any hearsay exceptions. Even if they did, these statements are testimonial and violate Christopher's 6th Amendment rights, and thus should be suppressed. Mr. Daniel's statements should also be excluded. His statements are not hearsay exceptions and even if they are they violate Christopher's rights under the Confrontation Clause. If the court finds that some of Mr. Daniel's statements are not testimonial (those prior to the police being dispatched), the court should still exclude Mr. Daniel's testimonial statements made in the 911 call. We respectfully request that both Ms. and Mr. Daniel's statements be suppressed.