TUESDAY MORNING
JULY 24, 2007

California Bar Examination

Answer all three questions.
Time allotted: three hours

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

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

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

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

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

Question 1

Larry leased in writing to Tanya a four-room office suite at a rent of $500 payable monthly in advance. The lease commenced on July 1, 2006. The lease required Larry to provide essential services to Tanya's suite. The suite was located on the 12th floor of a new 20-story office building.

In November Larry failed to provide essential services to Tanya's suite on several occasions. Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week. On December 5, the heat, electrical and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.

On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of services made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space.

Tanya vacated the suite on February 28 even though between December 12 and February 28 there were no longer any problems with the leased premises.

Larry did not attempt to relet Tanya's vacant suite until April 15. He found a tenant to lease the suite commencing on May 1 at a rent of $500 payable monthly in advance. On May 1, Larry brought suit against Tanya to recover rent for the months of March and April.

On what theory could Larry reasonably assert a claim to recover rent from Tanya for March and April and what defenses could Tanya reasonably assert against Larry's claim for rent? Discuss.

Question 2

Manufacturer designed and manufactured a “Cold Drink Blender,” which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer’s brochure that came with the Cold Drink Blender states that it is “perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas,” and cautioned, “Do not fill beyond 2 inches of the top.”

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

(1) Consumer’s injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.

(2) Consumer’s injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.

(3) The design of the Cold Drink Blender was not defective since It complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

(4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Question 3

Dave brought his sports car into the local service station for an oil change. While servicing the car, Mechanic checked the brakes and noticed that they needed repair. The following events occurred:

(1) Mechanic commented to Helper, “Dave had better get these brakes fixed. They look bad to me.”

(2) Mechanic instructed Helper (who did not himself observe the brakes) to write on the work order: “Inspected brakes — repair?”, which Helper then wrote on the work order. However, Helper currently does not remember what words he wrote on the work order.

(3) Many hours later when Dave picked up his car, Helper overheard Mechanic say to Dave, “I think your brakes are bad. You’d better get them fixed.”

(4) Dave responded, “I am not surprised. They’ve felt a little funny lately.”

(5) Later that day, when Helper was walking down Main Street, he heard the sound of a collision behind him, followed by a bystander shouting: “The sports car ran the red light and ran into the truck.”

The sports car involved in the accident was the one that Dave had just picked up from Mechanic. Polly owned the truck. Polly sued Dave for negligence for damages sustained in the accident. Polly’s complaint alleged that the accident was caused by the sports car running the red light because the sports car’s brakes failed. Polly’s theory of liability is that Dave knew or should have known that his brakes were bad and that driving the car under those circumstances was negligent.

Polly called Helper as a witness to testify as to the facts recited in items **(1)** through **(5)** above, and she also offered into evidence the work order referred to in item number **(2)**.

Assume that in each instance, appropriate objections were made.

Should the court admit the evidence offered in items numbers **(1)** through **(5)**, including the work order referred to in item number **(2)**? Discuss.

THURSDAY MORNING
JULY 26, 2007

California Bar Examination

Answer all three questions.
Time allotted: three hours

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

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

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

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

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

Question 4

Dan stood on the steps of the state capitol and yelled to a half-dozen people entering the front doors: “Listen citizens. Prayer in the schools means government- endorsed religion. A state church! They can take your constitutional rights away just as fast as I can destroy this copy of the U.S. Constitution.”

With that, Dan took a cigarette lighter from his pocket and ignited a parchment document that he held in his left hand. The parchment burst into flame and, when the heat of the fire burned his hand, he involuntarily let it go. A wind blew the burning document into a construction site where it settled in an open drum of flammable material. The drum exploded, killing a nearby pedestrian.

A state statute makes it a misdemeanor to burn or mutilate a copy of the U.S. Constitution.

It turned out that the document that Dan had burned was actually a copy of the Declaration of Independence, not of the U.S. Constitution, as he believed.

Dan was arrested and charged with the crimes of murder and attempting to burn a copy of the U.S. Constitution. He has moved to dismiss the charge of attempting to burn a copy of the U.S. Constitution, claiming that (i) what he burned was actually a copy of the Declaration of Independence and (ii) the state statute on which the charge is based violates his rights under the First Amendment to the U.S. Constitution.

1. May Dan properly be found guilty of the crime of murder or any lesser-included offense? Discuss.

2. How should the court rule on each ground of Dan’s motion to dismiss the charge of attempting to burn a copy of the U.S. Constitution? Discuss.

Question 5

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum ("Museum") any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as $300,000 for it and to pay Paula $15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.
Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's "The Pond." After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for $200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer $200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized that the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the $200,000. In the notation line of the check, Sally had written, "Refund on 1st of Monay Pond series."

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bound by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, "That's too bad. Our contract wasn't in writing, so you can't force me to sell the painting. Besides, you deceived me about why you wanted to buy it."

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting? Discuss.

Question 6

Husband and Wife married in 1997 in California. Neither of them brought any significant assets to the marriage, and they were both employed. Husband and Wife agreed that Husband should go to law school after they had saved up some money. Husband put his earnings in a savings account in his name alone. Wife deposited her earnings into a joint checking account in both of their names, which was used for their living expenses. Husband had a child support obligation from a previous marriage. Every month, Husband paid his child support by check from the joint checking account.

Husband began law school in 1998. Wife continued to work to support the couple. Husband took out a student loan to pay his tuition. Husband graduated in 2001 and obtained his law degree. He passed the bar exam and got a position with a large law firm.

In 2004 Husband became a partner in the firm. Husband's partnership earnings were substantial. He paid off his student loan using these earnings. Although the actual value of Husband's share of the firm's goodwill was substantially greater, the partnership agreement provided that its value was $3,000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage.

In 2006, Husband and Wife filed for dissolution of marriage.

1. Is the community entitled to reimbursement for
(a) The child support? Discuss.
(b) The payments on the student loan? Discuss.

2. Does the community have an interest in
(c) Husband's law degree? Discuss.
(d) The goodwill in Husband's law firm and, if so, is the community bound by the firm's valuation? Discuss.

Answer according to California law.

1. Is the community entitled to reimbursement for
(a) The child support? Discuss.
(b) The payments on the student loan? Discuss.

2. Does the community have an interest in
(c) Husband's law degree? Discuss.
(d) The goodwill in Husband's law firm and, if so, is the community bound by the firm's valuation? Discuss.

Answer according to California law.

TUESDAY AFTERNOON
JULY 24, 2007

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

CARTER v. RESTON HEALTH

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CARTER v. RESTON HEALTH

INSTRUCTIONS

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

COLUMBIA SUPERIOR COURT
DARBY COUNTY

MEMORANDUM

TO: Applicant

FROM: Judge Melissa Grant

DATE: July 24, 2007

RE: **Carter v. Reston Health**

The litigation in Carter v. Reston Health involves claims by Roseanne Carter, an indigent health care patient, that Reston Health engaged in discriminatory and predatory billing practices adversely affecting her and others similarly situated.

I have just concluded a hearing on a motion by counsel for Reston Health to disqualify the attorneys for Roseanne Carter because of a conflict of interest.

I conducted the hearing by receiving written declarations in support and opposition and by examining Mallory Jergens in camera. Ms. Jergens is the attorney whose status is alleged to have created the conflict. I believe Ms. Jergens was truthful in her statements to me and that she has not made any disclosure to National Center for Health Care (NCHC) of confidential information relating to Reston Health.

I haven't yet decided how to rule on the motion. Please prepare an objective memorandum that analyzes the legal and factual issues raised by the motion to disqualify plaintiff's law firm, NCHC. After objectively analyzing each issue, your memorandum should conclude with a recommendation as to how I should rule.

Malcolm Richardson
Suzanne Feldman
National Center for Health Care
100 Placer Street, Suite 300
Rincon, COL 83013
Telephone: (111)557-7887

Attorneys for Plaintiff Roseanne Carter

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,
Contract Defendant.
of
_____/

Case No. C06-030355MG

COMPLAINT - CLASS ACTION

Causes of Action:

Count One: Third Party Breach of Contract
Count Two: Breach of
Count Three: Breach of Duty Good Faith and Fair Dealing
Count Four: Breach of Charitable Trust
Count Five: Violation of the Columbia Unfair Competition Act
Count Six: Violation of the Consumers Legal Remedies Act
Count Seven: Unjust Enrichment

* * *

10. Defendant Reston Health is a private, not-for-profit corporation incorporated in Columbia. Reston owns and operates more than 20 hospitals in Columbia, including Perkins Memorial Hospital.
uninsured patients with medical care at reasonable rates, and to not engage in aggressive and unreasonable collection practices. Reston has failed to comply with these obligations.

17. Reston also engages in discriminatory pricing practices which have a significant detrimental impact on the very population Reston has obligated itself to assist.

* * *

25. Reston gives private insurance companies and governmental third party payers like Medicare and Medicaid significant discounts. It charges its uninsured patients 100% of the "full sticker price."

* * *

NATIONAL CENTER FOR HEALTH CARE

By:
Malcolm Richardson

Malcolm Richardson
Attorneys for Plaintiff

Hugo Brenner
Austen, James & Eliot, LLP
1 Jeremiah Plaza
Fort Meade, COL 83020
Telephone: (111) 430-8500
Attorneys for Defendant Reston Health

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,

Defendant.

_____/

Case No. C06-030355MG

DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS

Defendant Reston Health ("Reston") hereby moves the court for disqualification of the National Center for Health Care ("NCHC") from this legal proceeding. This motion is based upon the following facts, more fully set forth in the Declaration of Hugo Brenner, which is attached and by this reference incorporated herein:

1. Mallory Jergens, an attorney now employed by NCHC, was formerly employed by Coburn, Bronson & McQueen, a law firm that formerly represented defendant Reston.

2. During the period of her employment at Coburn, Bronson & McQueen, Ms. Jergens engaged in legal work on behalf of Reston that is identical to the matters at issue in this litigation.

3. Ms. Jergens acquired confidential information relating to defendant Reston, creating a direct conflict of interest. The confidential information relating to

defendant Reston is, as a matter of law, imputed to all members of the NCHC law firm, which must therefore be disqualified.

Dated: May 14, 2007

Respectfully submitted,
AUSTEN, JAMES & ELIOT, LLP

By: Hugo Brenner

Hugo Brenner, Esq.
Attorneys for Defendants

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Austen, James & Eliot, LLP
1 Jeremiah Plaza
Fort Meade, COL 83020
Telephone: (111) 430-8500

Attorneys for Defendant Reston Health

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated, Plaintiff, vs. RESTON HEALTH, a Columbia corporation, Defendant. _____/	Case No. C06-030355MG **DECLARATION OF HUGO BRENNER IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS**

I, Hugo Brenner, declare as follows:

1. I am the managing partner of the law firm of Austen, James and Eliot, LLP.

2. Our firm has been retained by Reston Health (Reston) to represent it in this action.

3. We learned from Reston that it had previously received representation from the law firm of Coburn, Bronson & McQueen (Coburn). One of the associates attended law school with attorney Mallory Jergens, and knew that she had worked at Coburn and now works at Plaintiff counsel's firm, National Center for Health Care (NCHC).

4. The essence of the complaint filed by Plaintiff Roseanne Carter ("Carter") is that Reston failed to fulfill its legal and contractual obligations to provide indigent medical services to her and a class of persons similarly situated.

5. The essence of a research memorandum written and presented to Reston by Ms. Jergens during her tenure at Coburn is Reston's legal and contractual obligations as a charitable institution to provide medical services to indigents. The memorandum advises Reston on how to meet and limit its obligations. The allegations of the complaint filed in this action relate directly to many of the issues that Ms. Jergens opined on in her research memorandum.

6. NCHC asserts that there is no other counsel available to represent Carter in this litigation. This is not true. I have personally contacted the managing partners of five prominent firms in the County of Darby who have reputations for providing significant amounts of pro bono services. Each of these firms indicated that it would have seriously considered helping Carter with regard to her collection dispute with Reston. Since the firms we contacted are willing to represent Carter on a pro bono basis, there is no cost concern present.

7. A review of the complaint in this case shows that NCHC is not particularly expert in the causes of action presented. The claims are based in contract, constructive trust, and tax law. None of these are areas in which NCHC has particular expertise which couldn't be available from any private firm.

8. Reston will suffer prejudice if NCHC is permitted to continue representing Carter inasmuch as Reston can never be assured that client confidential material has not been and will not be passed on from Ms. Jergens to other staff at NCHC.

9. NCHC is a small firm consisting of no more than 10 lawyers, of whom Ms. Jergens is a supervising attorney. In such a small office, it is impossible to create an effective ethical screen.

10. We are bringing this motion as soon as reasonably possible after learning of the facts. Reston was served with the complaint in this matter on approximately February 23, 2007. We learned of Ms. Jergens' conflict approximately March 23, 2007. We conducted an investigation of the facts, and brought this motion promptly upon completing our investigation.

11. Neither Reston nor my firm are motivated by anything except the interests of Reston in ensuring the continued confidentiality of attorney-client privileged information.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on June 22, 2007, in Fort Meade, Columbia.

Hugo Brenner

Hugo Brenner

Malcolm Richardson
Suzanne Feldman
National Center for Health Care
100 Placer Street, Suite 300
Rincon, COL 83013
Telephone: (111) 557-7887

Attorneys for Plaintiff Roseanne Carter

SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated, Plaintiff, vs. RESTON HEALTH, a Columbia corporation, Defendant. _____/	Case No. C06-030355MG **DECLARATION OF MALCOLM RICHARDSON IN OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY ATTORNEYS**

I, Malcolm Richardson, declare as follows:

1. I have personal knowledge of the statements contained in this declaration. If called to testify, I would attest to the truth of these statements.

2. I am the current Executive Director of the National Center for Health Care (NCHC). I have served in this capacity for the past 15 years.

3. NCHC is a nationally recognized, not-for-profit public interest law firm specializing in policy and advocacy on behalf of low income clients in the health care area. NCHC derives 50% of its funding from foundation grants, 25% from private donations, and 25% from attorneys' fees awards. Our current $2 million annual budget supports the work of 15 advocacy staff, including 10 attorneys with over 100 years of health care-related legal experience among them. We have filed over 30 state and nationwide class actions in the past 15 years. Defendants have included the federal government, various state and local governmental agencies, and several private health care providers.

4. Mallory Jergens was hired by NCHC about three years ago. As required by our hiring policy, Ms. Jergens furnished a list of the clients for whom she provided legal services while an associate at Coburn, Bronson & McQueen. This client list was added to our office's conflict database which contains a searchable listing of all NCHC's past and current clients, opposing parties, law firms, and former client lists.

5. Roseanne Carter, the plaintiff in this action, contacted NCHC approximately six months ago. We ran a conflict check after determining who the potential opposing party or parties might be. This conflict check revealed that Reston Health, the defendant in this case, was a former client of Mallory Jergens. When this was brought to my attention, I issued the memorandum attached hereto as Exhibit 1, which by this reference is incorporated herein. I have confirmed that all of the steps in the memorandum have been carried out, and have been maintained to date.

6. This case is a class action involving a defendant with $4.4 billion in assets that earned more than half a billion dollars in the past two years alone. Reston is a Columbia-based health care provider that operates more than 20 hospitals throughout Columbia.

7. Taking on a class action such as this litigation is a major undertaking for any firm. This dispute is not just about a collection action for $2,400 against Ms. Carter.

8. Our firm has made numerous inquiries with prominent private law firms throughout the state. We have been unable to find co-counsel, much less any firm to represent Ms. Carter. In addition, while Hugo Brenner, Counsel for Reston, is correct that the causes of action sound in areas of the law in which NCHC has no extraordinary expertise, the overarching area of the law that is at the heart of this litigation is health care for the indigent. We are the unquestioned preeminent national law firm in this area of the law. Ms. Carter evidently sought us out to represent her because of our reputation.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on July 10, 2007, in Rincon, Columbia.

Malcolm Richardson

Malcolm Richardson

National Center for Health Care

MEMORANDUM

To: All Staff

From: Malcolm Richardson

Date: January 24, 2007

Re: Roseanne Carter Ethical Screen

It is essential that the following be instituted immediately and that all legal and clerical staff abide by these provisions for the foreseeable future. Our office has been retained by Roseanne Carter to explore potential courses of action against Reston Health related to health care Ms. Carter received as a patient of a Reston Health hospital. Ms. Carter will probably be the named plaintiff in a class action we are considering filing against Reston Health. Mallory Jergens used to work for a firm, Coburn, Bronson & McQueen, which formerly represented Reston Health. In order to avoid any potential claim of a conflict of interest, Ms. Jergens must be screened from any access to or participation in this case. Therefore:

1. When reception staff receives a call related to this case, the call should be transferred to the appropriate staff member. The staff member who receives the call should ensure that Ms. Jergens is not in his/her office when taking the call.
2. All files related to this case shall be stored in a separate, locked file cabinet, and only staff directly working on the case, including assigned support

EXHIBIT 1

staff, shall have keys to this cabinet. A sign-in and sign-out log shall be maintained, and all persons removing or replacing files in the locked cabinet

shall sign and date the log. No staff shall give access to this cabinet to Ms. Jergens, and Ms. Jergens shall not seek access to the cabinet.

3. Staff must ensure that any files and internal work product related to this case shall be kept in the dedicated locked file cabinet except when in use. When in use, care should be taken to not leave the files or other materials in public areas of the office such as the library. When materials are temporarily being kept in an office, they should be in closed files, with any written materials not in plain view. Ms. Jergens will not seek access to any files or materials related to this case.

4. A password-protected computer filing system will be maintained for the computer files related to this case. Only staff directly involved in the case will have access to the password. Ms. Jergens shall refrain from seeking access to the computer files related to this case.

5. Staff shall not engage in conversations or discussions regarding this case in public areas of the office, such as the library, unless the doors are closed and Ms. Jergens is not present. Ms. Jergens will not engage in conversations with other staff regarding Reston Health matters. Ms. Jergens will not supervise any staff regarding this case.

HEARING TRANSCRIPT OF *IN* CAMERA TESTIMONY OF MALLORY JERGENS

Judge Melissa Grant: In the matter of Roseanne Carter versus Reston Health, we are now on the record. This is an in camera proceeding with attorney Mallory Jergens present. Let the record reflect that other than court personnel and Ms. Jergens, no other parties are present. Ms. Jergens, you understand that you are under oath, don't you?

Mallory Jergens: Yes, I understand, your honor.

Q: Ms. Jergens, please describe your legal career.

A: After graduating from law school eight years ago, I went to work as an associate for Coburn, Bronson and McQueen. I worked there for five years. I did exclusively transactional work while I was there, and specialized in health care law. In 2004, I went to work for the National Center for Health Care. It is a private, not-for-profit law firm doing both litigation and policy work on behalf of low income people in health-care related issues, including Medicare and Medicaid.

Q: While you were at Coburn, did you do any work for Reston Health?

A: Yes, Reston had been a client of the firm for several years before I worked at Coburn, and I was assigned to work for the partner who oversaw the firm's work on behalf of Reston.

Q: Please describe the specific work you did on behalf of Reston.

A: For the first couple of years, I just reviewed various contracts between the various Reston hospitals and various vendors, as well as between the hospitals and various entities, such as counties, the feds, and HMOs on the provision of healt**h** care.

Q: Did you meet with the client at all during these first couple of years?

A: No, I analyzed the contracts, made various suggestions, and then passed on these comments to the partner who would meet or speak with the various hospital administrators.

Q: I gather that the nature of your work on behalf of Reston changed at some point?

A: Yes, your honor. I was gradually given more responsibility. One specific project that I recall involved an extensive memorandum advising Reston on its obligations

as a charitable not-for-profit in terms of its obligation to provide indigent medical services in order to preserve its not-for-profit status under federal and state tax laws. I remember that this project took me at least a month to complete.

Q: Do you know what happened to your memo?

A: Yes, I gave it to the CEO of Reston. I also made a presentation to Reston's Board of Trustees highlighting the conclusions of my research.

Q: Did you advise the Reston Board to take specific actions as a result of your research?

A: Yes, I did, your honor. Would you like for me to go into detail?

Q: I'm trying to avoid the disclosure of confidential attorney-client communications, so please don't. Can you recall any other specific assignments you had regarding Reston?

A: No, I don't, your honor. I continued to review contracts. I also re-drafted a number of contracts. I also conducted research as requested, but I honestly don't recall any other specific assignments.

Q: Throughout your five years at Coburn, what percentage of your time was devoted to work for Reston?

A: I would say that it averaged about 10%, your honor, but that's really a guess.

Q: Okay, please tell me about your work at the National Center for Health Care.

A: I started working for NCHC about three years ago. I was hired to head the Indigent Health Care Project.

Q: What does that project do?

A: We are concerned with litigation and legislative proposals to improve the medical care for the poor and working poor.

Q: Could that include hospitals' services to the uninsured, such as are at issue in this case?

A: Yes. This case is being handled by one of the Project's attorneys.

Q: How many attorneys are in the Project?

A: Two of us.

Q: Are you both in the same office?

A: Our offices are adjacent.

Q: Do you supervise any of the work on this case?

A: No. None. But on all other matters I supervise the other Project attorney.

Q: When you were hired, were you asked about your work at Coburn?

A: Of course. I think that my experiences made me particularly valuable. The Executive Director, Malcolm Richardson, also had me obtain a client list - a list of all the clients on whose behalf I'd performed work while I was at Coburn. Mr. Richardson made it clear that this list would be incorporated into NCHC's database for conflicts checks.

Q: What's your understanding of how the conflict system at NCHC works?

A: I don't know the specifics, but I know that before we undertake representation of a client, a conflict check is run. If a potential conflict comes up, it is brought to the attention of Mr. Richardson, who takes appropriate action.

Q: Do you know what happened when this case against Reston first arose?

A: Yes. Mr. Richardson sat down with me and said that we were considering filing a case against Reston. He then went over the provisions of the memo he was going to circulate that explained how I was to be screened from the case. He also told me that I must observe the terms of that memo scrupulously. I think the memo is attached to his declaration filed in this proceeding.

Q: So what do you know about this litigation?

A: I don't know, except from what I've read in the newspapers. It concerns the billing practices of Reston as it relates to uninsured patients. That's all I know.

Q: As far as you know, have all of the procedures in the memo been carried out?

A: I don't know for sure. All I know is that I have not had any conversations with anyone at NCHC about this case since that initial conversation with Malcolm Richardson. No one in the office has approached me about the case. I have not heard any conversations about the case, even inadvertently.

Q: Ms. Jergens, did you take any research files or other work product with you from Coburn to NCHC?

A: No, but I did take general research files with me. That is permitted under Coburn's policies. However, I retained no work product, meaning any work

specifically related to a particular client. This work could not be removed from Coburn.

Q: At NCHC have you had any conversations about the law involved in hospitals' obligations to uninsured patients?

A: Yes, I have. But I have only discussed the law generally. I was never asked about and never disclosed any specific information about Reston.

Q: Thank you, Ms. Jergens. That's all I have. The hearing is closed.

END OF TRANSCRIPT

TUESDAY AFTERNOON
JULY 24, 2007

California
Bar
Examination

Performance Test A

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HOGLUND v. FORSYTH

United States Court of Appeals (15th Circuit, 2001)

James Forsyth, the plaintiff in the underlying case, *Forsyth v. County of Putnam*, is represented by attorney Stephen Younger and the law firm of Younger, Younger & Reichmann. Joseph Reichmann is a retired United States Magistrate Judge who, five years ago, presided over settlement negotiations in *Thomas v. County of Putnam*.

Forsyth and *Thomas* are police brutality cases, arising out of different incidents separated in time by several years. They are related only in the sense that the County of Putnam and one of its deputy sheriffs, Scott Hoglund, are defendants in both cases.

Defendants moved to disqualify the Younger firm on the ground that, during the settlement negotiations in *Thomas*, Reichmann met with defense counsel ex parte and therefore had access to confidential information pertaining to the County of Putnam and Deputy Sheriff Hoglund. Younger did not contest the disqualification of Reichmann but proffered the following evidence: Reichmann joined the Younger firm as a partner on November 1, 1999, and has had no involvement in the *Forsyth* case. Moreover, a week before Reichmann joined the firm, Stephen Younger removed all of the files pertaining to the case to his home and instructed the firm's only other lawyer, partner Marion Younger, not to discuss the case with Reichmann. Reichmann himself submitted a declaration stating that he had no recollection of the settlement discussions in *Thomas*, and that he does not recall having received any confidential information from defendants' lawyer in that case. Reichmann, moreover, explained that "as a magistrate judge from 1980 to 1996, it was my long-standing, regular, and continuing practice in conducting settlement conferences (1) not to go into the merits of actions, (2) not to request or receive either confidential or strategic information from counsel, and (3) to discuss only monetary matters." Reichmann Declaration at page 2.

For their part, defendants submitted the declaration of Richard Kemalyan, defense counsel in *Thomas*, who stated as follows: "I do not have a specific recollection of the details of what communications were made between declarant and Magistrate Judge Reichmann outside the presence of plaintiff's counsel. I am sure that in the normal course of the Settlement Conference, I did have private and confidential communications with Magistrate Judge Reichmann. I cannot recall the details of those communications." Kemalyan Declaration at page 1.

The district court denied the motion to disqualify the Younger firm, finding no evidence that Reichmann received confidential information during the settlement negotiations in *Thomas*. The court also found that the wall of confidentiality erected to shield Reichmann from the Youngers was adequate to protect the interests of the defendants. Defendants brought this petition for a writ of mandamus seeking reversal of the district court's order and disqualification of the Younger firm.

Until recently, the practice of judicial officers returning to law firms was rare, and the relevant authorities are sparse. The case law draws a distinction between situations where a judicial officer acted merely as an adjudicator and those where he acted as a mediator or settlement judge.

A judge who has participated in mediation or settlement efforts becomes a confidant of the parties, on a par with the parties' own lawyers. Under those circumstances, the judge will be conclusively presumed to have received client confidences in the course of the mediation, and his later participation in the case will be governed by the same rule that governs lawyers: He may not participate in the case and neither may his law firm.

The district court erred by inquiring whether confidential information actually passed from the parties to the mediator. As this case demonstrates, memories as to what transpired during these off-the-record proceedings are likely to be dim, making the fact-finding process highly perilous. More importantly, allowing an inquiry into what

transpired during settlement negotiations will surely chill the candor of the parties in speaking to the mediator. Suffice it to say that the mediation process inherently leads to the disclosure of confidential information, as Reichmann's declaration confirms. While Reichmann claims not to have requested or accepted confidential information during settlement negotiations, he admits that he did discuss "monetary matters." Information as to a party's bottom-line settlement position, or the degree of flexibility in settling a particular case, is itself a significant piece of information that the opposing party would love to have. In litigation, as in life, monetary matters *are* confidential matters.

Reichmann presided as settlement judge over a case other than the present one. Presuming that Reichmann learned confidential information as settlement judge in *Thomas*, it doesn't follow that any of that information pertains to *Forsyth*. When the two cases involve different parties and/or different incidents, disqualification of the former judge and his law firm is appropriate only if the two cases are "substantially factually related." The “substantially factually related” standard entails significant overlap of facts between the two cases. This standard also applies when an attorney is disqualified from representing a client because the attorney previously represented a party adverse to the client in a related case.

The "substantially factually related" standard provides that if there is a *reasonable probability* that confidences were disclosed in an earlier representation which could be used against the client in a later, adverse representation, a substantial relation between the two cases is presumed. To determine whether *Thomas* and *Forsyth* are sufficiently related, we must decide whether "there is a reasonable probability" that the confidences we presume were disclosed during the settlement discussions in *Thomas* would be useful to the plaintiff in *Forsyth*. This inquiry calls for a careful comparison between the factual circumstances and legal theories of the two cases. We cannot, on the record before us, determine whether *Forsyth* and *Thomas* are substantially related.

Yet we need not leave this matter unresolved and open for future dispute, which would further delay resolution of the underlying litigation. We will *assume* the two cases are substantially related, so Reichmann is presumed to have learned confidential information in *Thomas* that is relevant to *Forsyth*. This, in turn, will give rise to the further presumption that he shared those confidences with the Younger firm. If this latter presumption is irrebuttable, "the firm as a whole is disqualified whether or not its other members were actually exposed to the information" Reichmann learned from the earlier case.

Because we apply state law in determining matters of disqualification, we must follow the reasoned view of the state supreme court when it has spoken on the issue. For a long time, the Columbia Supreme Court was silent as to whether the presumption of shared confidences is rebuttable, leaving the question to the state's intermediate appellate courts. The Columbia courts of appeal developed a general rule that the presumption is not rebuttable.

But the Columbia Supreme Court has recently cast doubt on this approach. In *Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.* (2001), an attorney represented one party while the firm where he was former counsel represented an adverse party to the *same* litigation. *SpeeDee Oil* presented a situation on all fours with appellate case law holding that the presumption of shared confidences is irrebuttable. The Supreme Court, nevertheless, held that it "need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures," because the firm had failed to set up an effective screen. Observing that federal decisions have taken "a more lenient approach to conflicts disqualification than prevails in Columbia," the Court left open the possibility that screening can rebut the presumption of shared confidences within the firm. We read *SpeeDee Oil* as sending a signal that the Columbia Supreme Court may well adopt a more flexible approach to vicarious disqualification.

SpeeDee Oil was the kind of case most likely to give rise to automatic disqualification because the same firm represented adverse parties in the same litigation. The Columbia Supreme Court recognized that "discrete, successive conflicting representations in substantially related matters" - as are presented in our case - may pose less of a threat to the attorney-client relationship. Magistrate Judge Reichmann joined the Younger firm years after presiding over the *Thomas* settlement negotiations, and the Younger firm does not seek to represent a party to the *Thomas* litigation. The current case, though we assume it to be related, involves largely different facts. These circumstances create an even more compelling case than *SpeeDee Oil*, where the court nonetheless refused to hold that the presumption is irrebuttable.

The vicarious disqualification of an entire firm can work harsh and unjust results, particularly in today's legal world where lawyers change associations more freely than in the past. A rule that automatically disqualifies a firm in all cases substantially related to the tainted lawyer's former representation could work a serious hardship for the lawyer, the firm and the firm's clients. An automatic disqualification rule understandably would make firms more reluctant to hire mid-career lawyers, who would find themselves cast adrift, and clients would find their choice of counsel substantially diminished, particularly in specialized areas of law. Such a rule also raises the specter of abuse: A motion to disqualify a law firm can be a powerful litigation tactic to deny an opposing party's counsel of choice. This is a case in point: Forsyth's counsel, Stephen Younger, has a formidable reputation as a plaintiffs' advocate in police misconduct cases; defendants in such cases may find it advantageous to remove him as an opponent.

Several of our sister circuits have held that a firm can rebut the presumption of shared confidences when it seeks to represent a party in a case substantially related to one in which a new member of the firm has participated. Although not adopted in Columbia, the ABA Model Rules of Professional Conduct also recognize that the increased mobility of lawyers between firms calls for a less rigorous application of the disqualification rules.

We would nevertheless accept the costs of automatic disqualification, if it were the only way to ensure that lawyers honor their duties of confidentiality and loyalty. But it is not. A client's confidences can also be kept inviolate by adopting measures to quarantine the tainted lawyer. An ethical wall, when implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm. The ABA Model Rules explicitly approve the use of screening procedures to avoid vicarious disqualification where a former judicial officer or government lawyer has joined the firm. Here, Stephen Younger removed all files concerning the *Forsyth* case from the law office before Reichmann joined the firm; all attorneys were instructed not to discuss the case with Reichmann. The district court found "ample evidence of appropriate screening measures: all members of the firm have declared that they have not discussed the pending case and that Reichmann does not have access to the case file." We agree that the measures taken by the Younger firm adequately protect any legitimate interests of the defendants.

The changing realities of law practice call for a more functional approach to disqualification than in the past. In resolving this case, we take our cue from the Columbia Supreme Court's recent indication that it may be inclined to follow the path taken by other federal courts. We hold that the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge, where the settlement negotiations are substantially related (but not identical) to the current representation. Screening mechanisms that are both timely and effective, as the Younger firm erected here, will rebut the presumption that the former judge disclosed confidences to other members of the firm. Because the district court here found that the ethical wall adopted by the Younger firm was being scrupulously enforced and there is no reasonable possibility that confidential information will leak to Younger from Reichmann, or vice versa, we find no basis on which to disqualify the Younger firm from serving as counsel for plaintiff *Forsyth*.

Petition for writ of mandamus DENIED.

CITY AND COUNTY OF AMES v. MAMBO SOLUTIONS, INC.

United States Court of Appeals (15th Circuit, 2004)

Dennis Hammond (Hammond), now the City Attorney of Ames, represented Mambo Solutions, Inc. (Mambo), while in private practice, in a matter that was substantially related to this case. Thus, there is a conclusive presumption that Hammond had access to confidential information in the course of the earlier representation that is relevant to the current litigation and his disqualification is mandatory. We must decide whether his disqualification automatically extends to the entire City of Ames City Attorney's Office (Office) or simply requires that the Office effectively screen Hammond from any participation in this case. We hold that the presumption that Hammond will share the confidences of his former client with others in the Office is rebuttable by establishing the existence of an effective ethical screen. We remand to the trial court for a determination on the effectiveness of the ethical screen.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2000, Hammond was still in private practice. Mambo retained Hammond and his firm to represent it in a range of business matters, including dealings with the City of Ames (City) and an ongoing dispute with the City's Department of Building Inspections.

In November 2001, Hammond was elected Ames City Attorney and shortly thereafter left private practice.

In September 2001, under Hammond's predecessor, the Ames City Attorney's Office (Office) began an investigation that turned up evidence that Marcus Armstrong, the head of the City's Department of Building Inspections, had authorized prepayments on a city contract with Government Computer Sales, Inc. (GCSI) in violation of City law, and that GCSI had failed to fulfill the contract.

In February 2003, the City sued GCSI, Armstrong, and others, alleging that GCSI paid Armstrong kickbacks through various fictitious business entities in order to have him select GCSI for the contract and authorize illegal prepayments.

In March 2003, further investigation uncovered evidence of payments by Mambo, another City contractor, to Armstrong's fictitious business entities, and in April 2003 the City added Mambo as a defendant in the GCSI lawsuit.

One month later, Mambo moved to disqualify Hammond and the entire City Attorney's Office due to Hammond’s previous representation of Mambo in matters substantially related to the current lawsuit. The City Attorney's Office responded that it had instituted an ethical screen immediately upon discovering Mambo's alleged involvement in the kickback scheme. All responsibilities for decisions concerning the matter were passed from Hammond to his chief deputy, Jesse Smith, and Hammond had no further involvement in the case. It also argued that Hammond's prior representation of Mambo was not substantially related to the current litigation, and that disqualification was therefore unnecessary.

The trial court granted the motion to disqualify Hammond and the City Attorney's Office. Critically important to our analysis are the trial court findings that Hammond had personally represented Mambo, that he had obtained confidential information from Mambo, and that the subject of the prior representation was substantially related to the current lawsuit. The trial court held that as a matter of law disqualification of both Hammond and the City Attorney's Office was required.

A conflict of interest may arise from an attorney's successive representation of clients with adverse interests. With successive representation of adversaries, the chief fiduciary value jeopardized is that of client *confidentiality*. The former client's expectation of confidentiality must be preserved to ensure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper

defense. The attorney must maintain those confidences inviolate and preserve them at every peril to himself or herself. Because of this duty, an attorney in actual possession of material containing confidential information from a former client may not represent an adverse party without the former client's consent.

A trial court may disqualify a party's counsel to enforce these ethical standards. A trial court's authority to disqualify an attorney derives from the power inherent in every court to control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

In deciding a motion to disqualify, however, the court must balance the interests of a client in preserving its confidences with the interests of disqualified counsel’s client. These interests included a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.

In successive representation cases, the "substantially factually related" standard mediates between these competing interests. Absent a substantial factual relationship between the subjects of the two representations, the current client's choice of counsel will be honored and the motion to disqualify must be denied. However, if a substantial factual relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory. This mandatory rule applies unless the court finds that other countervailing factors exist, such as tactical abuse underlying the disqualification motion.

VICARIOUS DISQUALIFICATION

In addition, the general rule is that disqualification extends from the affected attorney to her entire firm. The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. (*SpeeDee Oil*). Vicarious disqualification is required "to assure the preservation of [the client's] confidences and the integrity of the judicial process." (*Id*.).

The Rules of Professional Conduct of the State Bar of Columbia do not address the vicarious disqualification of an entire law firm when a member of that firm has a former client conflict. For this reason, the vicarious disqualification rules have essentially been shaped by judicial decisions.

The appellate courts' current rule that rigidly applies vicarious disqualification in certain contexts was developed decades ago. The realities of a modern law practice compel a more flexible approach. Lawyers are increasingly mobile, and mid-career shifts are common. Gone are the days when attorneys typically stay with one organization throughout their entire careers. Law firm mergers, dissolutions and acquisitions of other firms' practice groups occur with regularity. International mega-firms have been formed, with offices in numerous countries, containing lawyers who are unlikely to meet, let alone discuss confidential matters, even if they share a common language. In this context, the automatic disqualification of the law firm may result in harsh consequences for the lawyer and the firm, without any compelling reason. Further, the firm's clients are likely to find their counsel of choice limited, particularly in specialized areas of the law. The rule that the presumption of shared confidences is conclusive also creates a substantial potential for abuse. A motion to disqualify is an effective litigation tactic depriving an opposing party of its counsel of choice, and, possibly, driving up its legal fees significantly. This is particularly true in a situation where a client and the challenged law firm have a long-term relationship.

None of these problems detracts from the primacy of preserving "public trust in the scrupulous administration of justice and the integrity of the bar." (*SpeeDee Oil).* But, the disqualification of the conflicted lawyer's current firm is not the sole means to preserve these important values. (*Hoglund*). A client's confidences can be maintained by isolating the lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate *under the circumstances* to protect information that the isolated lawyer is obligated to protect. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Vesting the trial court with the discretion to approve a screen when the head of a public law office is disqualified will permit an evaluation of all relevant circumstances. It is, of course, significant that the conflicted attorney has office-wide supervisory responsibilities, or helps in the formulation of office policy or plays a major role in the hiring, firing and promotion of subordinates. But, in evaluating the effectiveness of

any screen imposed, other factors should come into play. For example, the size of the office should be considered, at least to the extent it affects the number of levels of supervision, and, therefore, the ease with which another supervisor can replace the conflicted office head in the current case. Further, the trial court should consider whether the attorneys actually handling the case, and the office files they utilize, are in the same physical location as the disqualified head of the office.

In a motion to disqualify the current law firm because of an attorney's former client conflict, the presumption that the law firm is disqualified should be rebuttable by evidence that the conflicted attorney has been effectively screened.

Remanded.

DISSENTING OPINION BY JUSTICE JONES

I respectfully dissent. The majority's decision reaches far beyond the narrow issues presented. In one fell swoop, this Court precipitously overturns a host of decisions made by careful deliberations by appellate courts over many years and presumes to predict how the Columbia Supreme Court will decide its own rules.

The Court ignores the holding of *SpeeDee Oil*: "The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. . . . Vicarious disqualification is required to assure the preservation of the client's confidences and the integrity of the judicial process." It is not for this court to depart from this holding. We are not called upon to decide whether an ethical screen or some other lesser prophylactic measure might suffice.

I would affirm.

THURSDAY AFTERNOON
JULY 26, 2007

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

TANYA AND MARK GROSS v. BAKER

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TANYA AND MARK GROSS v. BAKER

INSTRUCTIONS

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

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

MEMORANDUM

TO: Applicant

FROM: Robert Popper

DATE: July 26, 2007

RE: Tanya and Mark Gross v. Baker

Our clients are Tanya and Mark Gross, children of Claude Gross, a prominent local businessman who recently died. Shortly before his death, while hospitalized and mentally deteriorated, he married his companion, Maxine Baker, and amended his will to leave her most of his property. Tanya and Mark believe that both actions are invalid and do not want Ms. Baker to benefit from taking advantage of Claude's debilitated condition.

Maxine Baker was represented by Rudolph Philmore in an action that Tanya and Mark brought to enjoin their father's marriage to Ms. Baker. I will contact him shortly to see if we can settle these matters prior to filing a lawsuit. Please prepare a letter to Mr. Philmore that persuasively explains that our clients should get their father's entire estate because:

A. The bequest to Claude's first wife Irene is no longer effective; and

B. The bequest to Maxine is invalid; and

C. The marriage to Maxine should be annulled because of Claude's incapacity.

Do not discuss fraud or undue influence. Also, in connection with your discussion of the validity of the bequest to Maxine (Part B above) do not discuss Claude's mental capacity to execute the codicil. Another associate is looking into those issues.

This case will be won or lost on our ability to marshal facts to support our legal position. The ability to weave the facts of our clients' case into our argument and to anticipate the factual arguments that will be raised against our position, therefore, are critical.

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

TO: File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 19, 2007

RE: Interview with Tanya Gross

Tanya and her brother Mark lost their father 2 weeks ago. Father was Claude Gross, a well-known successful businessman. Relationship between father and children was strained since divorce from mother 10 years ago, but Tanya said it had been improving and would have been restored had their father not been involved with Maxine Baker, who was a continuing obstacle to full reconciliation.

Tanya discovered that right before her father went into the hospital he signed a codicil to his will that left most of his money to Maxine, $10 million of what is likely to be a $12 million estate. In addition, while her father was in the hospital and on his deathbed, Maxine arranged for a marriage license to be issued and staged a marriage ceremony. Tanya believes he was barely conscious. Tanya tried to stop the wedding by going to court, but the "wedding" happened and her father died before the court acted.

Tanya and Mark want to challenge both the marriage to Maxine and the amendment to the will. They believe that their father was "extremely generous with Maxine and she doesn't deserve to have any more than she already got."

Tanya expresses anger over her father's behavior toward her mother during 50 years of marriage. He had numerous affairs, but his affair with Maxine was notorious, made it into the newspaper and was very embarrassing. The breakup with the mother was tumultuous. Her mother was a quiet but essential partner in

her father's business successes and was involved in his best decisions. During the divorce, there was a lot of litigation over who owned what, who would be left with what, and who would get control of which businesses. After two years of litigation, Tanya and Mark persuaded them to settle. As part of the settlement, her mother got the house and its contents, including some expensive paintings, and cash, stock and other assets worth $3 million. Claude also agreed to continue to fund the Gross Family Foundation to increase its assets to at least $7 million and to let her mother decide which charities it would fund. The bitterness from the divorce never faded.

Her father believed that she and Mark should not have taken sides, that they didn't appreciate "the unhappiness their mother inflicted upon me." He told Tanya that she had "ruined me for marriage. I will never marry again. Even though I love Maxine, I will never marry her or any other woman." Maxine was a wedge between the father and his children and grandchildren. Maxine told lies about the family, did not relay phone messages, and sowed discord. Although her father seemed to love his four grandchildren (she and her brother each have two kids), he saw them only once or twice a year.

Before his illness, Tanya last saw her father four months ago. His manner was jaunty, but his health had clearly deteriorated. He did not get up to greet her and his breathing seemed labored. He said that he didn't go out much anymore but that he was lucky that Maxine was there to take care of him. He expressed regret that they didn't spend more time together and said, "Maxine can't stand it when I see you and I would rather not fight with her." He was going to work on it and promised to call more often.

Tanya didn't know about his hospitalization -- he had not notified his children, and Maxine hadn't bothered to call. She found out when a friend who saw him in the Intensive Care Unit (ICU) called. When she entered his hospital cubicle on June 15, 2007, she was stunned. Intravenous lines were in his arms, a tube was in his

nose, and he was hooked up to all kinds of machines. His skin was grayish-yellow. A sign nearby read "Fall Risk." A private nurse was with him.

His situation seemed dire. He had a blank look and seemed confused. Tanya spent about 90 minutes with her father, holding his hand. He talked distractedly about his service in World War II, something he never talked about, interspersed with questions about his businesses. He didn't seem to know where he was, what date it was or what was going on. He came around after a while and asked her about her family but he was "in and out, mostly out." The whole time Tanya was there Maxine wasn't, so she had no trouble. Tanya departed, alarmed at his condition. Afterward, she telephoned her brother, Mark, who was out of town, and urged him to come home and see their father.

The next day, when Mark went to visit, his way was blocked by Maxine and her son Edward, who claimed to be Claude's lawyer. They told him that his father didn't want to see him. Mark argued with them and they finally let him go into the room, but his father was asleep. After that, Tanya and her brother timed their visits to avoid Maxine and her son. Tanya often waited in the parking lot outside, where she could see her father's room, and went in only after she saw the others leave.

On June 17, 2007, Tanya brought along one of her daughters. He was happy to see his granddaughter and asked to see her sister. The next day Tanya took both granddaughters and Mark took both of his children as well. Maxine and her son were there, briefly barring them from seeing Claude. Maxine relented after Tanya begged her. The grandchildren were allowed a quick visit after Maxine cautioned them, "No hugs in the ICU." He did not seem to recognize any of them and seemed largely out of it. Tanya asked one of the nurses to call her when her father was in better shape. Later that day the nurse called and told her about the wedding scheduled for a few days later. The nurse said that she

hoped the wedding would take place on "one of his good days" since she didn't see how he could take part otherwise.

Tanya said the wedding confirmed her worst fears that Maxine would take advantage of her father's incapacity. She and her brother were determined to prevent it.

Tanya and Mark immediately called Larry Fox, a lawyer they knew, and he agreed to petition the court to name them as conservators for Claude and to block the wedding. He filed papers the next day and the judge appointed a psychologist to report on whether enjoining the marriage was warranted. It wasn't until two days later that the expert showed up at the hospital and by then the marriage had already occurred. When her father died on July 5, 2007, the court dismissed the petition. Tanya brought the report from the court- appointed expert, Dr. Quint, and it contains excerpts from medical records that he consulted when he went to the hospital.

Tanya and her brother are determined not to let Maxine benefit from what they see as a phony marriage or a sham amendment to the will, especially since their father was so generous to Maxine.

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

TO: File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 23, 2007

RE: Meeting with Mark Gross

Mark Gross came to the office to confirm that he wants us to represent him along with his sister to challenge both the codicil and the marriage. (We discussed possible conflicts issues with both siblings. Since we do not envision any scenario in which the two siblings would have conflicting interests and they have agreed to the representation, we have agreed to represent both of them.)

Mark's story about the relationships among mother, father, siblings and Maxine Baker is essentially the same as Tanya's. He said that he had reached out to his father numerous times in the past three years and that his father seemed to welcome the communication. They met for lunch three or four times in 2006 and that each time they met he sensed that his father "was getting older, walking slower, speaking slower." The resentment Mark felt toward Maxine and her jealousy in return was a constant barrier to having the kind of relationship he wanted with his father.

He learned about his father's kidney and liver problems about 4 months ago when his father was hospitalized for the first time. He visited him in the hospital when Maxine wasn't there. He said that once his father left the hospital "it was as if Maxine built a fence around him. She wouldn't let us in to see him, claiming that he needed his rest and that he didn't want company. I really regret giving deference to her but after all of these years I didn't want an argument. I thought I was doing what was right for him."

He reiterated Tanya's story about his father's final hospitalization. He feels guilty that he couldn't do more but Maxine and her lawyer son, Edward, actively tried to keep him away. He fully supported his sister's attempt to stop the marriage. "They were preying on an old dying man when he couldn't think clearly."

He said that he met his father's housekeeper at his father's funeral. She told him that for much of the past two months at home his father had been very sick and non-communicative. She said that Maxine kept friends and family away and did an excellent job taking care of Claude Gross.

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

TO: Memo to File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 24, 2007

RE: Phone Conversation with Marvin Stevens

I had a phone conversation with Marvin Stevens on July 24, 2007. He is the named executor under Claude's first will and is a lifelong friend of Claude. He had the original in his office and received the codicil hand-delivered by messenger from the law office of Edward Baker one week before Claude died. He told me that Edward is the son of Maxine.

Stevens called Edward right after receiving the codicil. Edward told Stevens that the night before Claude went into the hospital for the second time, Claude told Maxine that he wanted to rewrite his will to be sure that she got the bulk of his estate. According to Edward, Claude was quite sick by then and wasn't sure he had much more time to live. Edward got a call from his mother at 8:00 pm on the evening before the hospitalization asking him if he could write a new will. He agreed, if there was time. Edward got on the phone with Claude and asked him if he was sure he wanted to change his will. Claude said yes. Edward asked if Claude had a copy of his current will and Claude said Maxine would fax it to him immediately. Claude then said that he wanted to give Maxine $10 million, which would leave a few million for his children. He wanted to do right by Maxine and also to be sure that his first wife didn't get any of the money. Claude also said that he had made his children rich through trusts and gifts over the course of their young lives and didn't feel the necessity of rewarding their ingratitude. Edward drafted the codicil and took it over first thing the next morning, showed Claude where to sign and had Claude's housekeeper and gardener sign as witnesses.

Stevens said he told Edward that all of this surprised him. Stevens said that he had spoken to Claude regularly and that Claude frequently expressed his sorrow over the state of his relationships with his children. Claude was pleased at recent moves toward reconciliation and talked of doing more to regain their affection and companionship. He wanted to be closer with them and particularly with his grandchildren.

Stevens told me that the marriage to Maxine surprised him almost as much as the change of the will. He said that Claude said often and in public that he didn't want to marry again and that he said it in the presence of Maxine. Also, Claude said that he had provided for Maxine by giving her the house and "a nice nest egg on top of it."

The Columbia Times
July 7, 2007

Family Feud Reaches Beyond Grave;
As Gross Lay Dying, Questions About Companion, Competency Swirled

Early evening on June 21, 2007 they gathered at the bedside of legendary Columbia tycoon Claude Gross, who lay in a glass-enclosed cubicle in the intensive care unit of Rosslyn Memorial Hospital.

Wearied by age and illness, Gross, 83, was jaundiced from liver failure; his weakened heart maintained a feeble beat and his kidneys no longer functioned. Short and pugnacious, the white-haired millionaire and former feisty businessman now seemed shrunken and frail against the expanse of his hospital bed.

He had just two weeks to live, but those who had assembled amid monitors, tubes and other hospital machinery that muggy night hadn't come to say farewell. They were there to see Gross marry.

His fiancée, Maxine Baker, 69, wearing an elegant pink suit, looked nervous as a judge intoned, "Repeat after me." The wedding ceremony lasted about 5 minutes. There was no cake. The groom stayed behind as his bride headed out for dinner with friends.

With the fate of a fortune estimated at more than $12 million at stake, the issue is whether the wedding was the most wonderful thing to befall him in a decade or the deathbed manipulation of a befuddled man.

His bride and the new friends he had developed say the marriage was his heartfelt desire. The children of his first marriage worry that it was not.

A second act would take on legal consequences after Gross's death. His will was amended to leave the bulk of his estate to Baker with only the leftovers for his children.

It was signed in the shaky and barely legible handwriting of a sick, old man. Skeptical family members question whether he was making his own decisions. They suspect that he was half-delirious and being duped.

The wealth that paid for Gross's lifestyle was of his own making. He built his fortune marketing the unusual inventions of others. His first success, the "Flapjack Shoe," involved a mechanism that replaced shoe laces with a flap that closed the shoe. The Flapjack Shoe became a fad in the 1950's and, through his partnership with the inventor, he made millions cleverly marketing it.

His estrangement from his wife Irene Hines was particularly bitter and involved allegations of infidelity and public verbal insult. It ended, about 10 years ago, with a divorce, the children estranged from him, the family name tarnished and millions spent on attorneys. Hines ended up with their mansion and many of their mutual friends sided with her.

In the aftermath, Gross found new happiness with a fresh circle of acquaintances, a sort of surrogate family. They said he grew devoted to Baker.

Baker has one adult child, Edward Baker, a well-known corporate lawyer in Rosslyn. Her first husband died in 1997.

After Gross's divorce, he vowed to friends that he would never wed again. But, according to their friends, he and Baker got on well. They traveled abroad and entertained. They lived in a house styled after the Taj Mahal, that he bought in 1999 as a gift for her. The house, which is currently appraised at $2,500,000, according to Rosslyn tax records, was featured in one of his lawsuits when he sued the swimming pool contractor for improperly installing several marble slabs.

But Gross's days of wheeling and dealing were nearing their end. He was admitted to Rosslyn Hospital, on April 7, 2007, where he was sent to intensive care and remained for five days.

"He was pure yellow," said Marvin Stevens, a friend who had known him for years. "It was clear he was not well." His liver was failing, and his kidneys were spent. He began dialysis three times a week, cleansing his blood of impurities. He was stabilized and sent home but returned for his treatments.

He was exhausted much of the time and he was unable to carry on his formerly active social life. Baker told friends and family to stay away to "let him recover his strength." After several months of this regimen he was back in the hospital.
The wedding was set for the next day.

Tanya Gross filed a petition in the probate division of Columbia Superior Court to stop the wedding.
The court petition asked for an evaluation of his mental status and requested that the judge stop the marriage. The circumstances surrounding the marriage, she said, clearly suggested "that he was clearly incapable of making a reasoned decision."

The court appointed a psychologist to evaluate Gross, but took no immediate action.

The magistrate read a simple civil wedding service. The couple exchanged "I do's," slipped rings on each other's fingers, and Gross added: "I love Maxine very, very, very, very much."

"We all laughed," Maxine said. "It was so cute."
Then the two kissed.

According to one member of the wedding party, they went to Guernsey's Restaurant, where they showered Baker with flowers.

Baker and Gross were husband and wife for exactly two weeks. Baker said the couple planned a honeymoon for when he got out.

On July 5, 2007, Baker was summoned to the hospital. Gross needed a ventilator to breathe. He was semiconscious and failing. About 10:30 p.m., with Baker and three friends at his side, he died.

Stephen Quint, Ph.D.
Licensed Clinical Psychologist
277 Carly Way
Rosslyn, Columbia

June 25, 2007

The Honorable Jan Cole
Superior Court of Columbia
Rosslyn, Columbia

RE: Petition to Enjoin the Marriage of Claude Gross

Dear Judge Cole:

Upon appointment by the court to render my opinion regarding the mental capacity of Claude Gross, who is hospitalized at Rosslyn Memorial Hospital, I reviewed the medical records insofar as they shed light on the question and also conducted my own psychological examination of Mr. Gross.

My professional qualifications include that I am licensed to practice clinical psychology in this state, I specialize in geriatric care, I am a Clinical Professor of Psychology at Columbia State Medical School, and I have been qualified as an expert witness more than 300 times by the judges of the Columbia Superior Court.

On June 20, 2007, Tanya Gross, daughter of Claude Gross, filed a petition in the Probate Division of the Superior Court to enjoin the marriage of her father to Maxine Baker. Her petition claims that her father was "seriously medically ill and lacked the capacity to make the decision to marry." It described him as "weak and disoriented," "confused about his surroundings and his condition," and "near death and easily subject to manipulation," and quoted from conversations with one or more of the nurses who questioned "whether he was conscious enough to make a choice to marry."

I spent 3 hours at the hospital on June 22, 2007, the day after the marriage ceremony took place at the bedside of Mr. Gross. Before visiting him, I read through the medical records. The records indicated that the medical staff was concerned about Mr. Gross's mental ability to make his own medical decisions.

On June 16, 2007, **Dr. Eduaro Espinoza**, the attending physician, described his physical condition as "...profoundly jaundiced due to the failure of his kidneys and liver, resulting in fatigue and exhaustion. Patient can move only with assistance." Regarding his mental status, "He answers questions vaguely, has difficulty concentrating, and falls asleep easily. On some days, Gross clearly can't make a decision." Dr. Espinoza said "he is also lucid for short periods, particularly after dialysis restores the balance of his fluids." This doctor ordered a psychiatric evaluation.

On June 16, 2007, **Dr. Daniel Rosenblum**, chief of the Department of Psychiatry, conducted a mental status exam to determine whether Mr. Gross was competent to make medical decisions. He recited the medical history that included renal (kidney) failure and long-term underlying liver damage, as a result of which his blood tests showed electrolytic abnormalities that would impair his ability to concentrate. He described Mr. Gross as "a very sick man with fluctuating mental states over the past week." He suffers from "cognitive dysfunction that is presumably secondary to and resulting from renal encephalopathy. Renal encephalopathy is an organic brain disorder. It develops in patients with acute or chronic renal failure. Manifestations of this syndrome vary from mild symptoms (e.g., lassitude, fatigue) to severe symptoms (e.g., seizures, coma). Severity and progression depend on the rate of decline in renal function; thus, symptoms are usually worse in patients as renal function declines. The symptoms of this syndrome are readily reversible following initiation of dialysis. However, the beneficial effect and its duration vary. Thus, it is consistent with this diagnosis that Mr. Gross's cognitive difficulties are now

present about 35% of the time, according to the nurse's observations. During the times of dysfunction he would be incompetent to participate in medical decisions. The rest of the time, I do not feel that the dysfunction is at a serious enough level to render him incompetent. As there is the possibility of further deterioration of his kidney and liver functions, his mental status may diminish, too, and he may have more frequent and severe periods of cognitive dysfunction. For that reason, I recommend frequent mental status examinations over the course of this treatment."

I observed Mr. Gross on June 22, 2007, the day after the wedding. I saw him a few hours after his dialysis. His prior dialysis was the day before the wedding. He was in the Intensive Care Unit and was being fed through a nose tube and was receiving a constant flow of antibiotics and other fluids intravenously. I interviewed him for thirty minutes and, although he did not make eye contact, I found him to be oriented to person, place and time. He could remember things in a sequential order but was confused as to dates. For example, he did remember that he had married Maxine Baker but thought that the wedding took place three weeks prior rather than the day before I saw him. He thought that I was a court-appointed lawyer and that I had been there last week and my attempt to explain who I was did not dissuade him. He blamed the fact that the court was trying to intervene in his life on his ex-wife wanting to continue to control him "as she always had." He was clearly diminished cognitively as a result of his illness but when I saw him he was reasonably alert. He was trying hard to maintain an air of normalcy. He claimed that he was still active in his business and that he had just negotiated a large transaction to conclusion. I had no way to verify whether this claim was accurate.

It is my opinion that Mr. Gross's physical condition has had a marked effect on his ability to function mentally and that this varies from day-to-day, perhaps even hour-to-hour. At good times, his cognitive powers enable him to focus and interact at a moderate level but at bad times he is unable to do so. It is

my opinion that his competence will continue to vary and probably deteriorate if his medical condition worsens.

Respectfully submitted,

Stephen Quint

Stephen Quint, Ph.D.

LAST WILL AND TESTAMENT OF CLAUDE GROSS

I am Claude Gross, of 32 Harbor Court, Cameo, Columbia. This is my Last Will, and I revoke all previous wills and codicils.

1. At the present time my wife is Irene Hines and we have two children, Tanya Hines Gross and Mark Hines Gross.

2. I give all of my automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible articles of a personal nature at the time of my death to my wife, Irene Hines, if she survives me.

3. I give my wife, Irene Hines, Two Million Dollars ($2,000,000), if she survives me. This bequest is to be paid from my estate in cash or in stock of equivalent value as of the date of my death, or a combination of stock and cash, at the discretion of my executor.

4. The balance of my residuary estate after all debts are paid I give in two equal shares to my children, Tanya Hines Gross and Mark Hines Gross, or to their descendants, if either or both do not survive me.

5. I nominate my trusted friend Marvin Stevens to serve as executor of my estate and empower him to exercise all administrative and management powers conferred on an executor under the laws of the State of Columbia and direct that he not be required to post a bond.

IN WITNESS WHEREOF, I, Claude Gross, have signed this, my Last Will and Testament, on the 19th Day of October, 1995.

Claude Gross

Witnesses:

David S. Klein

David S. Klein
3216 Chesterfield Road
Cameo, Columbia
October 19, 1995

Joanna Kelly

Joanna Kelly
109 Maple Avenue
Cameo, Columbia
October 19, 1995

CODICIL TO THE OCTOBER 19, 1995 LAST WILL AND TESTAMENT OF CLAUDE GROSS

I, Claude Gross of 475 Dean Street, Rosslyn, Columbia, declare this to be a Codicil to my Last Will and Testament dated October 19, 1995.

For the past eight years I have enjoyed the companionship and care of Maxine Baker, a woman with whom I am in love and with whom I share a home.

Accordingly, I hereby amend my Last Will and Testament dated October 19, 1995 as follows:

First, I give all of my automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible articles of a personal nature at the time of my death to my companion, Maxine Baker, if she survives me. She may distribute my personal effects to my children at her discretion.

Second, I give Ten Million Dollars ($10,000,000) to Maxine Baker, to be paid from the assets of my estate.

IN WITNESS WHEREOF, I, Claude Gross, have signed this Codicil on June 14, 2007.

Claude Gross

Witnesses

Judith Stern

Judith Stern
1519 Wye Street
Rosslyn, Columbia

Dated: June 14, 2007

Stuart Levy

Stuart Levy
27 Blue Hills Avenue
Cameo, Columbia

Dated: June 14, 2007

THURSDAY AFTERNOON
JULY 26, 2007

California
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Examination

Performance Test B
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TANYA AND MARK GROSS v. BAKER

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(SELECTED COLUMBIA STATUTES)

COLUMBIA FAMILY CODE

Chapter 2. Voidable Marriage

§ 221. Grounds for nullity

(a) A marriage is voidable and may be adjudged a nullity if at the time of the marriage either party lacked mental capacity, unless the party who lacked mental capacity, after coming to reason, freely cohabited with the other as husband and wife.

§ 222. Effect of judgment of nullity

(a) A judgment of nullity of marriage restores the parties to the status of unmarried persons.

(b) A judgment of nullity of marriage is conclusive only as to the parties to the proceeding and those claiming under them.

* * * * *

COLUMBIA PROBATE CODE

Chapter 8. Legal Mental Capacity

§ 810. Presumption of mental capacity

There exists a rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

§ 811. Mental incapacity

(a) A determination that a person lacks the mental capacity to make a decision or do a certain act, including to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts shall be supported by evidence of a deficit in at least one of the following mental functions:

(1) Alertness and attention, including level of consciousness; orientation to time, place, person, and situation; and ability to attend and concentrate;

(2) Information processing, including short- and long-term memory; ability to understand or communicate with others, either verbally or otherwise; recognition of familiar objects and familiar persons; ability to understand and appreciate quantities; ability to reason using abstract concepts; ability to plan, organize, and carry out actions in one's own rational self-interest; and ability to reason logically;

(3) Thought processes, including severely disorganized thinking; hallucinations; delusions; and uncontrollable, repetitive, or intrusive thoughts;

(4) Ability to modulate mood and affect, including the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may constitute incapacity only if the deficit, by itself or in combination with other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient by itself to support a determination that a person lacks the capacity to do a certain act.

* * * * *

Chapter 10 . Wills and Trusts

§ 102 . Dissolution of marriage; Provisions revoked

(a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved, the dissolution revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former spouse.

(2) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.

(b) In case of revocation by dissolution, property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.

* * * * *

§ 720. Limitations on transfers to drafters, care custodians, and others

(a) No provision of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

* * * * *

§ 820. Right to elective share

The surviving spouse of a person who dies domiciled in Columbia has the right to a share of the estate of the decedent as provided in this part, to be designated the elective share. The elective share is an amount equal to 30 percent of the value of the estate.

In re Marriage of Sawyer
Columbia Supreme Court (2004)

This is an appeal from an order granting the petition of Charles Sawyer's conservator to annul the marriage of Charles and Lillie Sawyer. Charles was 86 years old at the time of the trial in July 2002. Charles died on October 12, 2003, one month after entry of the judgment of annulment.

Up until August 2000, Charles spent his days at the Alzheimer's Services Center. In August 2000, he was removed from the center because of his disruptive behavior caused by the advance of late-stage Alzheimer's dementia. From then until April 30, 2002, when he was placed in a locked unit in the facilities of the Adult Protective Service, he spent his time at his personal residence.

In February 2001, the probate court appointed Dovie White as conservator for Charles. In appointing the conservator, the court found that Charles was unable to provide for his personal needs, physical health, food, clothing, and shelter; that he was unable to manage his financial resources and to resist fraud and undue influence; and that he lacked the capacity to give informed consent for medical treatment. The appointment of Dovie White was approved by Charles's family and Dr. Norman Quan, his long-time personal physician.

On April 5, 2002, Charles married Lillie Marshall, his lifelong friend. On April 30, 2002, without notice to Lillie, Dovie White arranged to place him in the locked unit of the Senior Assisted-Living Facility. It was not until Charles called Lillie from there that Lillie knew where Charles had been taken. On May 14, 2002, Lillie managed to make arrangements for Charles to return to his home.

Later in May, 2002, Dr. Norman Quan issued a report to the probate court stating that, based on an April 2, 2002 examination, Charles had mild to moderate impairment regarding alertness, attention, and information processing capability and that his periods of impairment did not vary substantially in frequency, severity, and duration. He opined that, although Charles had dementia, he was capable of giving informed consent to medical treatment and that there was nothing to be gained by placing him in a special care facility.

Also in May 2002, Teddy Kebede, a public health nurse who tendered care to Charles, wrote the court, stating, "Charles lives with his wife Lillie, whom he has known since childhood and whom he married last month. Lillie is a vibrant 80-year-old woman who takes good care of Charles and fills all his needs. When I visited Charles in the Senior Assisted-Living Facility last month, he was distraught. He is much better now that he is

back at his home, and he deserves to live out his days at home with the person he loves."

In June 2002, Conservator Dovie White arranged for Charles to be examined by a University of Columbia neuropsychologist, Jeffrey Kixmiller. Dr. Kixmiller interviewed and tested Charles and spoke with Lillie. The conclusions stated in his report are that, although both Charles and Lillie believed Charles was safe and well taken care of at home, neither of them fully appreciated the safety or functional implications of Charles's condition or the increasing needs that would be imposed on both of them by Charles's predictable further deterioration. Dr. Kixmiller found that Charles had mild to moderate dementia, his capacity to make safe judgments and to solve problems was significantly impaired, and that, when confronted by minor stressors, Charles was subject to emotional disturbances. All this, concluded Dr. Kixmiller, made Charles especially subject to safety lapses, coercion, and abuse. Dr. Kixmiller's examination did not address the question whether, on April 5, 2002, Charles had the capacity to marry.

In July 2002, Dovie White filed the instant petition to annul the marriage under Family Code Section 221(a) based on Charles's lack of mental capacity.

In addition to the foregoing, the often contradictory evidence that the lower court considered in making its order can be summarized as follows:

(a) Dovie White testified that both before and after the marriage, Charles was frequently confused. He did not know when his first wife had died. When Lillie, who, since 2000, had been serving as Charles's paid home health aide two days a week, told Dovie that she and Charles wanted to get married, Dovie advised her to first obtain the probate court's approval because she doubted that Charles understood what getting married meant. At the time, Charles's assets consisted of about $125,000 in cash and a home that was paid for. When Dovie learned of the marriage, she advised Lillie that Charles needed to be placed in an assisted living facility. Lillie resisted, saying she was perfectly capable of taking care of Charles. Dovie never discussed the marriage with Charles.

(b) Rick George, a social worker from Adult Protective Services, testified that, in October 2000, he had been assigned to conduct an investigation into allegations that Charles's money was being misused. He testified that he concluded that no misuse had occurred but that he found that Charles was impaired and incapable of managing his financial affairs. On April 30, 2002, when Dovie White arranged for Charles to be placed in a locked unit of the assisted living facility, Mr. George found Charles to be upset and disoriented. In George's discussions with Charles, Charles never indicated that he had not wanted to marry Lillie.

(c) Lillie testified that she and Charles had been close and constant friends since childhood and that as far back as 2000, soon after Charles's first wife died, Charles had asked her to marry him, and move in with and to care for him because he was sick and

afraid to be home alone, especially at night. She said there was never any doubt that Charles knew what he was doing and what he wanted and that she and Charles were very happily married.

(d) John Dorion, Charles's friend of 40 years, testified that he regularly saw Charles about twice a week and had met Lillie in 2000. Charles had told him that he asked Lillie to marry him and that Lillie had at first resisted because she wanted to "think about it." Dorion thought Charles knew what he was doing and what was going on around him. Charles never told Dorion that he did not want to marry Lillie.

In granting the petition to annul the marriage, the trial court found that Charles had deficits in his mental capacity that substantially impaired his ability to understand the obligations and responsibilities attendant upon marriage. This is the correct standard. Family Code Section 221.

The court found that, notwithstanding that Charles and Lillie were happily married, Charles was incapable of taking care of himself on a daily basis. The testimony that he was alert and aware was outweighed by Dr. Kixmiller's neuropsychological assessment. The court found it significant that Lillie was a paid caregiver at the time of the marriage and that she was in a position to exploit her access to him and his dependence upon her to make and shape decisions. The court found convincing the evidence that suggested that Charles did not have the capacity to enter into a marriage.

Determinations of mental capacity are governed by Probate Code Sections 810 and 811, which require at least one statutorily enumerated deficit in mental function that, by itself or in conjunction with other deficits, substantially impairs the ability to understand and appreciate the consequences of marrying. The day of the marriage is the critical date for determination of lack of capacity, but proof of the party's condition before and after that date is admissible for purposes of determining capacity on the day of the marriage. The standard for determining capacity to marry is separate and distinct from the standard for the appointment of a conservator. The question whether one has capacity to marry is applicable even though a conservator has been appointed.

The court below followed the two steps required by Section 811: first, it marshaled the facts it found to establish a deficit in Charles's mental functions (specifically subsection (a)(2) of Section 811, because of his dementia, memory failures and confusion, and inability to manage his financial affairs); and, second, the court found that these deficits impaired his ability to comprehend the consequences of the marriage.
Lillie contends that the court should not have rejected the evidence supporting Charles's capacity to marry and should not have credited the testimony of biased witnesses as to Charles's incapacity on the day of the marriage. That may be true, and, if this court were the court of first impression, we might well have decided otherwise. However, the test is one of substantial evidence that Charles lacked capacity. For example, Dr. Kixmiller's authoritative report of June 2002, within two months after the wedding, that Charles had significant mental, emotional, and behavioral deficits that rendered him

especially vulnerable to safety and emotional lapses and that his ability to make decisions was significantly impaired.

The court was entitled to reject inconsistent evidence from Dr. Quan and others based on other evidence that Alzheimer's dementia is a progressive disease that predictably gets worse and does not improve over time. With that premise, the court could have found that Charles was substantially impaired in his ability to make decisions, problem-solve, and understand the consequences of his decisions as well as upon the evidence that Charles's vulnerability to coercion and abuse could further undermine his ability to make decisions.

WE AFFIRM.

In Re Marriage of Vitale
Columbia Supreme Court (1957)

On the ground of his mental incapacity at the time of the marriage, Ralph Vitale was granted a judgment annulling it. Louise Vitale appeals, claiming that the evidence was insufficient to support the finding that Ralph lacked capacity on the day of the marriage. Louise correctly states that the degree of mental capacity at the precise time when the marriage is celebrated controls as to its validity and that if a marriage is contracted during a lucid interval the marriage is valid.

Ralph is a 56-year-old plumber and Louise is a 38-year-old employee of a telephone company. They met in 1952 and started dating. On May 24, 1954, they married. In June, 1954, Ralph entered Agnew State Mental Hospital and, in July, 1954, based on Louise's petition, he was committed to that institution.

Ralph presented numerous witnesses to the unsoundness of his mind. Ralph's son Frank testified that when his father returned in November 1953 from a trip to Europe he had changed. Frank related many instances in which his father talked incoherently, had hallucinations, and believed that television programs and cards in a drug store revealed plots against him. In Frank's opinion, his father was of unsound mind, although he did not show these behaviors every day. He did not see his father on the day of the marriage.

Laura Tharp, who knew Ralph for over 10 years, testified that after returning from Europe Ralph acted very odd, was upset, and heard voices. In August, 1954, when she visited Ralph at the hospital and mentioned the marriage, Ralph said he knew nothing about it.

Dr. Wilbur saw Ralph at his office two days before the marriage. When Ralph admitted that he had cut himself directly over an artery, Dr. Wilbur sent Ralph to Dr. Johnston, a psychiatrist. Dr. Johnston saw Ralph two days after the marriage. Ralph told him about delusions he had on the boat returning from Europe. Dr. Johnston diagnosed him as suffering from paranoid schizophrenia and described his ability to do abstract thinking as greatly impaired. Dr. Johnston saw Ralph again on June 8, 1954, and testified that Ralph's paranoid schizophrenia had continued from November, 1953.

Louise also presented several witnesses. Ruth Carey testified that before Ralph went to Europe and after he returned, he stated that he would like to marry Louise. Richard

Cavitt, a tax consultant and accountant, knew Ralph since 1948 and prepared his income tax returns from data given by Ralph, including in 1953 and 1954. Cavitt testified that during both of those years, Ralph reported income received from plumbing labor, that he clearly and concisely discussed his business affairs and showed no lack of understanding, and that about two weeks before the marriage, Ralph told him he planned to get married. He said Ralph was always lucid in his understanding of business matters.

Louise testified to her acquaintance with Ralph, his courtship, and the circumstances of the marriage. She described no abnormality in his actions. The taxi driver, who drove them from the airport to the wedding ceremony, served as a witness to the marriage, and drove them back to the airport after the ceremony, noticed nothing unusual in Ralph's manner, conversation or answers to the justice of the peace. The justice of the peace who performed the ceremony and his wife, the other witness to it, saw nothing unusual in Ralph's actions.

While Louise's evidence would have supported a finding that Ralph at the time of the marriage had capacity to marry, it does not compel such a finding. The finding of the jury that he lacked capacity is supported by substantial evidence. That no witness for Ralph testified to seeing him on the day of the wedding and witnesses for Louise had, does not mean there is no evidence of mental incapacity on that day. While it is the mental condition on that day that is in issue, that condition may be determined from his condition prior and subsequent to that day. Louise further contends that the mental defect must be one having a direct bearing upon the particular act which is brought into question and that Ralph's delusions and hallucinations did not have a direct bearing upon the act of getting married. However, the delusions and hallucinations were only parts of the mental defect or derangement. His whole mental condition, those matters included, caused Ralph to have the inability to comprehend the act of marriage.

The judgment is affirmed.