JULY 2010
ESSAY QUESTIONS 1, 2, AND 3

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

Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that “all firearms must be stored in a secure container that is fully enclosed and locked.” Burglar broke into Homeowner’s house while Homeowner was out and stole the handgun.

Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron had just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused. Burglar drew the handgun, pointed it at Patron, and stated, “You made me mad, so now I’m going to shoot you.”

Patron fainted out of shock and suffered a concussion. Burglar took her purse and fled, but was later apprehended by the police. Cinema had been aware of several previous attacks on its customers in the parking lot at night during the past several years, but provided no lighting or security guard.

Under what theory or theories, if any, might Patron bring an action for damages against Homeowner, Burglar, or Cinema? Discuss.

Question 2

There was recently a major release of hazardous substances from a waste disposal site in County. Owen is the current owner of the site. Fred is a former owner of the site. Hap is the producer of the hazardous substances disposed of at the site.

As a result of the hazardous substance release, County has identified the site as a priority cleanup target, and has notified Owen, Fred, and Hap that they are the responsible parties who must either clean up or pay to clean up the site. County advised each responsible party of his degree of culpability. In the event each responsible party does not pay his share of the cleanup costs, County is entitled to impose joint and several liability on each of them.

In an effort to facilitate the resolution of County's demand, Owen, the wealthiest responsible party, arranged for Fred, Hap, and himself to meet with Anne, his tax lawyer. At the meeting, Owen offered to pay the attorney fees of all three of them in exchange for their agreement to be represented by Anne. Fred and Hap accepted Owen's offer and Anne distributed identical retainer agreements to each of them, which they signed.

What ethical violations, if any, has Anne committed? Discuss.

Question 3

David and Vic were farmers with adjoining property. They had been fighting for several years about water rights.

In May, Vic and his wife, Wanda, were sitting in the kitchen when Vic received a telephone call. During the call, Vic became quite angry. As soon as he hung up, he said the following to Wanda: "That rat, David, just called and told me that he was going to make me sorry! He used some sort of machine to disguise his voice, but I know it was him!"

In June, Wanda and Vic passed a truck driven by David, who made an obscene gesture as they drove by. Vic immediately stopped and yelled that if David wanted a fight, then that was what he was going to get. Both men jumped out of their trucks. After an exchange of blows, David began strangling Vic. Vic collapsed and died from a massive heart attack. David was charged with manslaughter in California Superior Court.

At David's trial, the prosecution called Wanda, who testified about Vic's description of the May telephone call.

During cross-examination of Wanda, the defense introduced into evidence a certified copy of a felony perjury conviction Vic had suffered in 2007.

The prosecution then introduced into evidence a certified copy of a misdemeanor simple assault conviction David had suffered in 2006.

During the defense's case, David claimed that he acted in self-defense. He testified that he knew about two other fights involving Vic. In the first, which took place four years before his death, Vic broke a man's arm with a tire iron. In the other, which occurred two years before his death, Vic threatened a woman with a gun. David testified that he had heard about the first incident before June, but that he had not heard about the second incident until after his trial had commenced.

Assuming that all appropriate objections were timely made, should the California Superior Court have admitted:

1. Wanda's testimony about Vic's statement regarding the May phone call? Discuss.
2. The certified copy of Vic's 2007 felony perjury conviction? Discuss.
3. The certified copy of David's 2006 misdemeanor simple assault conviction? Discuss.
4. David's testimony about the first fight involving Vic breaking another man's arm with a tire iron? Discuss.
5. David's testimony about the second fight involving Vic threatening a woman with a gun? Discuss.

Answer according to California law.

JULY 2010

California
Bar
Examination

Performance Test A

INSTRUCTIONS AND FILE

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

FILE

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

INSTRUCTIONS

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

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

MEMORANDUM

To: Applicant

From: Anatoly Krotov, Senior Partner

Date: July 27, 2010

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

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

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

MEMORANDUM

To: All Attorneys

From: Executive Committee

Re: **Persuasive Briefs and Memoranda**

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

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

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

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

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

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

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

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

Greg Vasquez and Mary Vasquez,
Plaintiffs,
v.

Civil Action No. 03281955 DEB

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

STATEMENT OF AGREED FACTS AND SUBMISSION OF THE CASE

INTRODUCTION

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

JOINT STIPULATION OF FACTS

Plaintiffs and Defendants agree that:

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

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

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

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

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

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

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

8. On July 29, 2009, the Church entered into agreement with SpeakEasy for construction of a 50-foot bell tower on Lot Seven that would house a wireless telephone facility. The terms of the agreement were that SpeakEasy would pay all costs for construction of the bell tower and a monthly rental of $1,000 for use of the property.

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

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

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

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

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

(b) a two-story house addition;

(c) two amateur radio towers;

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

(e) a flagpole;

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

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

(h) a flagpole at the Church;

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

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

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

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

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

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

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

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

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

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

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

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

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

SUBMISSION OF THE CASE

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

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

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

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

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

Respectfully submitted,

Dated: July 27, 2010

Law Offices of Anatoly Krotov	McDonald, Carpenter & Dean
by: *Anatoly Krotov*	by: Paul McDonald
Anatoly Krotov, Esq.	Paul McDonald, Esq.
Attorney for Plaintiff	Attorneys for Defendants

EXHIBIT “A”

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

* * *

General Provisions:

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

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

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

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

* * *

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

* * *

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

* * *

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

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

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

* * *

JULY 2010

California
Bar
Examination

Performance Test A

LIBRARY

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

LIBRARY

Horton v. Mitchell

Columbia Supreme Court (2004)

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

DISCUSSION

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

strictly construed, and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions.

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

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

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

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

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

We conclude that the roadway is a structure within the ordinary meaning of the word and within the meaning of the CC&R's. Our review of the CC&R's does not evidence an intent to limit the term "structure" to anything other than its ordinary meaning. For

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

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

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

Blaire v. Evans

Columbia Supreme Court (1999)

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

CC&R No. 2 of the Occidental Restrictive Covenants provides:

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

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

Waiver by Acquiescence

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

The defense of waiver by acquiescence is raised when the restrictions sought to be enforced are not universally enforced or when there are frequent violations of the restrictions. A review of the relevant case law reveals three factors particularly significant to the analysis: 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior

nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.

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

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

The Non-Waiver Provision — Paragraph Number 27

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

> The failure for any period of time to compel compliance with any covenant, condition or restrictions shall in no event be deemed as a waiver of the right to do so thereafter, and shall in no way be construed as a permission to deviate from the covenants, conditions and restrictions.

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

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

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

Abandonment

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

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

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

Affirmed.

Lutz v. Gundersen

Columbia Court of Appeals (2000)

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

The Honker Bay Estates CC&R's provide:

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

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

Fundamental Change to the Neighborhood

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

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

Laches

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

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

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

Balance of Hardships

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

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

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

A: I heard that they were.

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

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

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

A: That's right.

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

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

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

Piedmont Valley Homes Association v. Walter

Columbia Supreme Court (2002)

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

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

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

Balancing the hardships

A court has discretion to balance the hardships and deny a mandatory injunction to remove a building or structure that has encroached or otherwise violates an enforceable

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

1. Innocent Violation

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

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

> Dr. Walter's only excuse is mistake of fact. What is to stop all other property owners whose rear property line abuts City property from

> extending their homes past the boundary limits with an "I don't know" excuse? It was Dr. Walter's responsibility to confirm the property lines whether through his own efforts or that of his agents. Walter's remedy, if any, is against his architect or contractor.

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

2. Irreparable Injury

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

> This Court finds that PVHA would suffer great and irreparable injury if this Court did not enforce the CC&R's. Property owners purchase property here, in part, because of these very restrictions. To allow Dr. Walter a variance of his structures to the limit line of his property would violate all notions of light, air and space. This would be a harmful precedent, causing the harm which the PVHA seeks to prevent: a flood of setback variance requests or violations justified by other previously granted

variances. There would be no end to the variances sought and the whole purpose of the minimum setback requirement would be undermined.

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

3. Relative Hardship

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

At trial, testimony revealed that it would cost $104,570 to remove the encroachments to within five feet of the property line. Combined with the amount spent on the project, the out-of-pocket loss to Dr. Walter would be roughly $280,000. Although he enjoyed the benefit of the 16 years, the removal likely will significantly reduce the value of his property. The disproportionate hardship borne by Dr. Walter is of considerable

magnitude, because, as noted above, in this unusual case there is no apparent harm to the subdivision or the City of Piedmont Valley that owns the parkland. Finally the fact that the suit was brought years after the violation, rather than contemporaneous with the construction, is also a factor leaning strongly in the direction of giving relief to the homeowner.

Reversed.

JULY 2010
ESSAY QUESTIONS 4, 5, AND 6

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

Alfred, Beth, and Charles orally agreed to start ABC Computers ("ABC"), a business to manufacture and sell computers. Alfred contributed $100,000 to ABC, stating to Beth and Charles that he wanted to limit his liability to that amount. Beth, who had technical expertise, contributed $50,000 to ABC. Charles contributed no money to ABC but agreed to act as salesperson. Alfred, Beth, and Charles agreed that Beth would be responsible for designing the computers, and that Charles alone would handle all computer sales.

ABC opened and quickly became successful, primarily due to Charles' effective sales techniques.

Subsequently, without the knowledge or consent of Alfred or Charles, Beth entered into a written sales contract in ABC's name with Deco, Inc. ("Deco") to sell computers manufactured by ABC at a price that was extremely favorable to Deco. Beth's sister owned Deco. When Alfred and Charles became aware of the contract, they contacted Deco and informed it that Beth had no authority to enter into sales contracts, and that ABC could not profitably sell computers at the price agreed to by Beth. ABC refused to deliver the computers, and Deco sued ABC for breach of contract.

Thereafter, Alfred became concerned about how Beth and Charles were managing ABC. He contacted Zeta, Inc. ("Zeta"), ABC's components supplier. He told Zeta's president, "Don't allow Charles to order components; he's not our technical person. That's Beth's job."

Charles later placed an order for several expensive components with Zeta. ABC refused to pay for the components, and Zeta sued ABC for breach of contract.

Not long afterwards, ABC went out of business, owing its creditors over $500,000.

1. How should ABC's debt be allocated? Discuss.

2. Is Deco likely to succeed in its lawsuit against ABC? Discuss.

3. Is Zeta likely to succeed in its lawsuit against ABC? Discuss.

Question 5

Harriet was on her porch when Don walked up, pointed a gun at her, and said, “You’re coming with me.” Believing it was a toy gun, Harriet said, “Go on home,” and Don left.

While walking home, Don had to pass through a police checkpoint for contraband. Officer Otis patted down Don’s clothing, found the gun, confiscated it, and released Don. Later, Officer Otis checked the serial number and located the registered owner, who said the gun had been stolen from him.

A month later, Officer Otis arrested Don for possession of stolen property, i.e., the gun. During a booking search, another officer found cocaine in Don’s pocket.

Don was charged with possession of stolen property and possession of cocaine. He moved to suppress the gun and the cocaine, but the court denied the motion.

While in jail, Don drank some homemade wine. As a result, when he appeared in court with counsel, he was slurring his words. The court advised Don that if he waived his right to a trial, it would take his guilty plea and let him go on his way. Don agreed and pleaded guilty. Subsequently, he made a motion to withdraw his guilty plea, but the court denied the motion.

1. Did the court properly deny Don’s motion to suppress:
    a. the gun? Discuss.
    b. the cocaine? Discuss.

2. Did the court properly deny Don’s motion to withdraw his guilty plea? Discuss.

3. If Don were charged with attempted kidnapping against Harriet, could he properly be convicted? Discuss.

Question 6

In 2000, Harry and Wanda, California residents, married. Harry was from a wealthy family and was the beneficiary of a large trust. After their marriage, Harry received income from the trust on a monthly basis, and deposited it into a checking account in his name alone. Harry remained unemployed throughout the marriage. Wanda began working as a travel agent. She deposited her earnings into a savings account in her name alone.

In 2003, Harry and Wanda purchased a vacation condo in Hawaii. They took title in both their names, specifying that they were "joint tenants with the right of survivorship." Harry paid the entire purchase price from his checking account, which contained only funds from the trust. Harry and Wanda orally agreed that the condo belonged to Harry.

In 2004, Harry purchased a cabin in the California mountains to use when he went skiing. He paid the entire purchase price of the cabin from his checking account, and took title to the cabin in his name alone.

In 2005, Wanda commenced a secret romance with Oscar. During a rendezvous with Oscar, Wanda negligently operated Oscar's car, causing serious personal injuries to Paul, another driver.

In 2006, Wanda received an e-mail advertisement inviting her to invest in stock in a bioengineering company. She discussed the investment with Harry, who thought it was too risky. Wanda nevertheless bought 200 shares of stock, using $20,000 from her savings account to make the purchase. She put the stock in her name alone.

In 2007, Harry and Wanda separated. Shortly thereafter, as a result of the car accident, Paul obtained a money judgment against Wanda.

Harry and Wanda are now considering dissolving their marriage. The condo and cabin have increased in value. The stock has lost almost all of its value.

1. In the event of a dissolution, how should the court rule on Harry's and Wanda's respective rights and liabilities with regard to:
   a. The condo in Hawaii? Discuss.
   b. The cabin in the California mountains? Discuss.
   c. The stock in the bioengineering company? Discuss.

2. What property can Paul reach to satisfy his judgment against Wanda? Discuss.

Answer according to California law.

JULY 2010

California
Bar
Examination

Performance Test B

INSTRUCTIONS AND FILE

IN RE BLACK

FILE

IN RE BLACK

INSTRUCTIONS

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

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

MEMORANDUM

To: Applicant

From: Donna Granata

Date: July 29, 2010

Re: **In re Black**

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

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

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

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

MEMORANDUM

To: Associates

From: Executive Committee

Date: October 29, 2007

Re: **Opinion Letters**

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

- State the questions asked by the client.

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

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

TRANSCRIPT OF INTERVIEW WITH AMANDA BLACK

July 28, 2010

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

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

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

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

DG: Fine. Go ahead.

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

DG: When did Lester retain you?

AB: On December 1, 2009.

DG: Hourly?

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

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

AB: No, none.

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

AB: I started work on the matter immediately, and made some overtures to Tunnell, who hadn't hired a lawyer yet, but had no luck in resolving the matter. I then brought an action for partition.

DG: When did you do that?

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

DG: Why do you say that?

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

DG: What did he mean?

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

DG: When was that?

AB: On June 29, 2010.

DG: You didn't believe Lester?

AB: No, I didn't.

DG: Why?

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

DG: You pursued the matter, I suppose.

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

DG: When was that?

AB: On July 14, 2010. We talked at some length; he knew I had worked hard on this case, and had to forego other opportunities, and his conscience seemed to bother him; he said he'd be willing to pay me for my services at the hourly rate I had quoted him originally—$300—as soon as I brought the case to a close by filing a dismissal with

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

DG: Did you speak with him again after that?

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

DG: Have you done so?

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

DG: Have you done anything else?

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

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

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

DG: Have you heard anything about it from Lester?

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

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

AB: No.

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

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

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

AB: That's a bit uncertain. But it seems that under the "private" settlement, Tunnell had either bought Lester out already, at Lester's asking price of $600,000, or had agreed to pay him half the $1.4 million once the sale closed.

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

AB: Pretty sure, but who can really tell?

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

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

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

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

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

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

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

AB: No.

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

AB: That's it.

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

AB: Great. Thanks so much.

ATTORNEY-CLIENT CONTINGENT FEE AGREEMENT

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

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

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

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

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

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

ACCEPTED AND AGREED TO:
December 1, 2009

By: Brian Lester

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: Amanda Black

AMANDA BLACK

LIEN AGREEMENT

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

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

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

ACCEPTED AND AGREED TO:
December 1, 2009

By: Brian Lester

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: Amanda Black

AMANDA BLACK

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

Attorney for Plaintiff Brian Lester

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

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

TO ALL PARTIES AND THEIR ATTORNEYS AND TO OTHERS INTERESTED:

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

Date: December 21, 2009

Amanda Black

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

E-MAIL MESSAGE

From: Lester, Brian

Sent: July 17, 2010 at 11:27 AM

To: Black, Amanda

Subject: Lester v. Tunnell

Dear Amanda:

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

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

Sincerely,

Brian

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
500 Ruxton Street
Bodie, Columbia
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July 19, 2010

Brian Lester
67 Clarendon Avenue
Bodie, Columbia 99911

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

Dear Brian:

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

Very truly yours,

Amanda Black

Amanda Black

JULY 2010

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SELECTED COLUMBIA STATUTORY AND RULE PROVISIONS

Section 1280 of the Columbia Code of Civil Procedure

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

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

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

* * *

Section 6200 of the Columbia Business and Professions Code

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

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

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

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

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

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

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

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

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

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

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

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

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

alleged malpractice or professional misconduct.

* * *

Rule 3-300 of the Columbia Rules of Professional Conduct

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

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

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

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

Discussion

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

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

Fracasse v. Brent

Columbia Supreme Court (1972)

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

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

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

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

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

Affirmed.

Carroll v. Interstate Brands Corporation

Columbia Court of Appeal (2002)

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

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

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

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

Reversed.

Aguilar v. Lerner

Columbia Supreme Court (2004)

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

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

Aguilar signed the fee agreement and initialed the arbitration provision.

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

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

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

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

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

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

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

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

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

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

Affirmed.