

JULY 2009  
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

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the \$1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. "There isn't a lot of money involved," she said, "but I want to teach David a lesson. David can't possibly afford the legal fees to defend this case, so maybe we can put him out of business."

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the \$1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David's favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David's motion to dismiss on the grounds stated? Discuss.
2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? Discuss.

## Question 2

Alex, an attorney, represents Dusty, a well-known movie actor. Dusty had recently been arrested for battery after Vic reported that Dusty knocked him down when he went to Dusty's home trying to take photos of Dusty and his family. Dusty claims Vic simply tripped.

Paul, the prosecutor, filed a criminal complaint against Dusty. Suspecting that Paul was anxious to publicize the arrest of a high-profile defendant as part of his election bid for District Attorney, Alex held a press conference on the steps of the courthouse. He told the press: "Any intelligent jury will find that Dusty did not strike Vic. Dusty is the innocent victim of a witch-hunt by a prosecutor who wants to become District Attorney."

Meanwhile, Paul received a copy of the police report describing Dusty's alleged criminal behavior. Concerned that the description of Dusty's behavior sounded vague, Paul asked the reporting police officer to destroy the existing police report and to draft one that included more details of Dusty's alleged criminal behavior.

Paul interviewed Dusty's housekeeper, Henry, who witnessed the incident involving Dusty and Vic. Henry told Paul that Dusty did not knock Vic down. Paul told Henry to avoid contact with Alex.

Paul has not been able to obtain Vic's version of the events because Vic is on an extended trip abroad and will not be back in time for Dusty's preliminary hearing. Confident that Dusty is nevertheless guilty, Paul has decided to proceed with the preliminary hearing.

1. What ethical violation(s), if any, has Alex committed? Discuss.
2. What ethical violation(s), if any, has Paul committed? Discuss.

Answer according to both California and ABA authorities.

### Question 3

While driving their cars, Paula and Dan collided and each suffered personal injuries and property damage. Paula sued Dan for negligence in a California state court and Dan filed a cross-complaint for negligence against Paula. At the ensuing jury trial, Paula testified that she was driving to meet her husband, Hank, and that Dan drove his car into hers. Paula also testified that, as she and Dan were waiting for an ambulance immediately following the accident, Dan said, "I have plenty of insurance to cover your injuries." Paula further testified that, three hours after the accident, when a physician at the hospital to which she was taken asked her how she was feeling, she said, "My right leg hurts the most, all because that idiot Dan failed to yield the right-of-way."

Officer, who was the investigating police officer who responded to the accident, was unavailable at the trial. The court granted a motion by Paula to admit Officer's accident report into evidence. Officer's accident report states: "When I arrived at the scene three minutes after the accident occurred, an unnamed bystander immediately came up to me and stated that Dan pulled right out into the path of Paula's car. Based on this information, my interviews with Paula and Dan, and the skidmarks, I conclude that Dan caused the accident." Officer prepared his accident report shortly after the accident.

In his case-in-chief, Dan called a paramedic who had treated Paula at the scene of the accident. Dan showed the paramedic a greeting card, and the paramedic testified that he had found the card in Paula's pocket as he was treating her. The court granted a motion by Dan to admit the card into evidence. The card states: "Dearest Paula, Hurry home from work as fast as you can today. We need to get an early start on our weekend trip to the mountains! Love, Hank."

Dan testified that, as he and Paula were waiting for the ambulance immediately following the accident, Wilma handed him a note. Wilma had been identified as a witness during discovery, but had died before she could be deposed. The court granted a motion by Dan to admit the note into evidence. The note says: "I saw the whole thing. Paula was speeding. She was definitely negligent."

Assuming all appropriate objections were timely made, should the court have admitted:

1. Dan's statement to Paula about insurance? Discuss.
2. Paula's statement to the physician? Discuss.
3. Officer's accident report relating to:
  - a. The unnamed bystander's statement? Discuss.
  - b. Officer's conclusion and its basis? Discuss.
4. Hank's greeting card? Discuss.
5. Wilma's note? Discuss.

Answer according to California law.

**JULY 2009**



**California  
Bar  
Examination**

**Performance Test A**

**INSTRUCTIONS AND FILE**

**FARLEY v. DUNN**

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## **FARLEY v. DUNN**

### **INSTRUCTIONS**

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

**Sundquist & Davis**  
Attorneys at Law  
12 Manning Blvd.  
Columbia City, Columbia

**MEMORANDUM**

**To:** Applicant  
**From:** Wendy Davis  
**Date:** July 28, 2009  
**Re:** **Farley v. Dunn**

Our firm represents Dunn Insurance Company (“Dunn”), which is headquartered in Columbia. Dunn insures a wide variety of activities, including commercial trucking. Dunn has been sued by Farley Trucking, Inc. (“Farley”). Farley is a large, interstate trucking company also located here in Columbia. Farley, an apparently sophisticated company, aided by its insurance broker, seeks to elevate the status of a one-page letter into a three-year contract for millions of dollars of commercial general liability insurance coverage, and, in the process, unilaterally rewrite important terms of the insurance contract that was subsequently signed by the parties.

We are now prepared to file a motion for summary judgment, seeking dismissal of the entire lawsuit. Following the guidelines set forth in the attached memorandum regarding persuasive briefs in support of motions for summary judgment, please draft a Statement of Uncontested Facts and a persuasive brief in support of our motion in which we argue that the one-page letter is not enforceable as a contract, varies the one-year term of the policy, and is not a sufficient basis for Farley’s fraud allegation.

## **Sundquist & Davis**

Attorneys at Law  
12 Manning Blvd.  
Columbia City, Columbia

### **MEMORANDUM**

**To:** Attorneys  
**From:** Executive Committee  
**Re:** **Persuasive Briefs in Support of Motions for Summary Judgment**

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs in support of motions for summary judgment to be filed in state court shall conform to the following guidelines.

All of these documents shall start with a Statement of Uncontested Facts that itemizes the facts that are material to support our motion and explains why each of the material facts is undisputed. The attorney must sift through the facts in the file and draft a statement that persuasively shows that there is indeed no genuine issue of material fact. This requires a careful comparison of the opposing side's characterization of the facts in the file. The format and style shall be as follows:

Fact #1: The May 1, 2005 memorandum was signed by the President of the company.

Undisputed Because: The President of the company admitted this fact in paragraph 2 of her affidavit.

Fact #2: The meeting between James and Spellman occurred on March 1, 2006.

Undisputed Because: This fact is alleged in paragraph 10 of the plaintiff's complaint and is admitted in paragraph 14 of the defendant's answer.

Following the Statement of Uncontested Facts, the attorney must then argue, applying the law to the facts, and move on to show that, in light of the uncontested facts, our client is entitled to judgment as a matter of law.

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

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

1 Victoria Cooper, Esq.  
2 State Bar No. 7579  
3 Michaels & Farnsworth, LLP  
4 515 Francesca Way  
5 Marion, Columbia  
6 (555)337-2021  
7 Attorneys for Plaintiff

8  
9

10 **SUPERIOR COURT OF COLUMBIA**  
11 **IN AND FOR THE COUNTY OF CHESTER**

12 Farley Trucking, Inc., Civil Action  
13 Plaintiff, No. 89765

14 v.

15

16 **COMPLAINT**

17 Dunn Insurance Company,  
18 Defendant

19 \_\_\_\_\_ /

20 **THE PARTIES**

21 1. Plaintiff, Farley Trucking, Inc. (“Farley”), is a corporation organized and existing  
22 under the laws of Columbia, with its principal place of business in Columbia City,  
23 Columbia.

24 2. Upon information and belief, Defendant, Dunn Insurance Company (“Dunn”), is  
25 an insurance corporation incorporated under the laws of Columbia, with its principal  
26 place of business located in Columbia City, Columbia.

27 3. Upon information and belief, Dunn insures certain types of liabilities, including  
28 liabilities associated with the commercial trucking industry.

29

1 **JURISDICTION AND VENUE**

2 4. This Court has jurisdiction over this action.

3 5. Venue is proper in this Court.

4 **BACKGROUND**

5 6. Farley is a truckload motor carrier of general commodities in both interstate and  
6 intrastate commerce. Farley is among the five largest truckload carriers in the United  
7 States. It operates throughout the 48 contiguous states and also portions of Canada and  
8 provides through-trailer service in and out of Mexico. At 2006 year-end, Farley's fleet  
9 consisted of 7,475 tractors, over 19,770 trailers, and over 10,000 employees and  
10 independent contractors. The principal types of freight Farley transports include  
11 consumer products, retail store merchandise, food and paper products, beverages,  
12 industrial products, and building materials.

13 7. In the summer of 2006, Farley, through insurance brokers Bradford Insurance  
14 Brokers, Inc. ("Bradford"), negotiated with Dunn to purchase commercial general liability  
15 coverage.

16 8. In a letter dated July 11, 2006 (the "Agreement"), Dunn entered into a contract  
17 with Farley to provide coverage for a fixed premium rate of .0940 per 100 payroll miles  
18 for a period of three consecutive years beginning August 1, 2006 and ending August 1,  
19 2009. (A true and correct copy of the Agreement is attached to this Complaint as  
20 "Exhibit A.")

21 9. In accordance with the Agreement, effective August 1, 2006, Farley purchased  
22 from Dunn a commercial general liability policy (the "Policy") that provided for  
23 \$5,000,000 in policy limits per occurrence. (A true and correct copy of the relevant  
24 excerpts of the Policy is attached to this Complaint as "Exhibit B.")

25 10. All premiums due and owing under the Policy have been paid.

26 11. In breach of the Agreement, on May 23, 2007, Dunn sent Farley a notice of  
27 non-renewal (the "Notice") of the Policy effective August 1, 2007. (A true and correct  
28 copy of the Notice is attached to this Complaint as "Exhibit C.")

29 12. As of May 23, 2007, there was no material change in Farley's operations.

30 13. As of May 23, 2007, no claim in excess of \$500,000 has been filed.

1 14. As of May 23, 2007, Dunn has neither requested an increase in coverage nor  
2 a decrease in the policy deductible.

3 15. After Farley received the Notice, representatives from Bradford met with  
4 representatives from Dunn. The Bradford representatives learned from this meeting that  
5 Dunn claimed that their notice of non-renewal was because the terms of Dunn's  
6 reinsurance agreements would not allow them to lay off the risk they assumed in the  
7 Policy.

8 16. Dunn knowingly misrepresented its intention to renew and willfully placed its  
9 own pecuniary interest before that of its policyholder in failing to renew the Policy at the  
10 fixed premium rate through August 1, 2009, as it contracted to do in the Agreement.

11 17. Due to Dunn's breach of the Agreement, Farley was forced to purchase  
12 insurance similar to that previously provided under the Policy for the period August 1,  
13 2007 through August 1, 2009, at a cost to Farley significantly in excess of the fixed  
14 premium rate provided for in the Agreement.

15 **BREACH OF CONTRACT**

16 18. Farley repeats and realleges the allegations contained in paragraphs 1  
17 through 17 as if fully set forth herein.

18 19. Dunn was obligated under the Agreement to renew the Policy at the fixed  
19 premium rate of .0940 per 100 payroll miles for a period of three consecutive years  
20 beginning August 1, 2006 and ending August 1, 2009.

21 20. Dunn sent Farley a notice of non-renewal of the Policy effective August 1,  
22 2007 — two years before their obligation expired.

23 21. Thus, Dunn has breached the terms of the Agreement.

24 22. As a result of such breach, Farley has suffered, and will continue to suffer  
25 damages.

26 23. Farley, therefore, is entitled to an award of compensatory and consequential  
27 damages in an amount to be proven at trial.

28 **FRAUDULENT INDUCEMENT**

29 24. Farley repeats and realleges the allegations contained in paragraphs 1  
30 through 23 as if fully set forth herein.

31 25. Farley has justifiably relied upon the Agreement entered into on July 11, 2006.



Bradford Insurance Brokers, Inc.  
456 Peal Street  
Columbia City, Columbia

July 11, 2006

Scott Gordon, President  
Dunn Insurance Company  
717 Security Drive  
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance

Dear Mr. Gordon:

I enjoyed meeting with you yesterday and wanted to follow up our conversation concerning the proposed Farley Trucking, Inc. insurance policy with a brief summary of our discussion. We are in agreement that you will provide a rate of .0940 per 100 miles for the period of August 1, 2006 through August 1, 2009 with a minimum deposit of \$987,800 for the referenced account for the 12 month period August 1, 2006 through August 1, 2007.

This rate will not change unless:

- 1) There is a material change in operation;
- 2) There has been a claim in excess of \$500,000;
- 3) Farley requests an increase in coverage or a decrease in deductible.

If there are any questions, please contact me. I look forward to working with you.

Sincerely,

Bradford Insurance Brokers, Inc.

**Jennifer Barba**

Jennifer Barba  
Vice President

**EXHIBIT A**

Dunn Insurance Company  
717 Security Drive  
Columbia City, Columbia

**POLICY OF INSURANCE**

Policy No. GYC 3427

**NAMED INSURED:** Farley Trucking, Inc.

**TERM:** The policy term shall be one year, from August 1, 2006 to August 1, 2007.

**PREMIUM:** \$987,800 per year, adjustable at a rate of .0940 per 100 payroll miles.

\* \* \*

**COVERAGE:** Dunn will provide \$5 million commercial general liability coverage per occurrence.

\* \* \*

23. This policy constitutes the entire agreement between the insured and the insurer concerning this insurance.

24. Dunn may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least Ninety (90) days before the effective date of cancellation if we cancel for any reason other than bankruptcy or non-payment of premiums.

25. We may non-renew this policy by mailing to the first Named Insured written notice of the non-renewal at least 60 days before the expiration date of the policy.

Mark Jones

For Farley Trucking, Inc.  
Date: July 20, 2006

Scott Gordon

For Dunn Insurance Company  
Date: July 20, 2006

**EXHIBIT B**

Dunn Insurance Company

717 Security Drive  
Columbia City, Columbia

May 23, 2007

Mark Jones  
Farley Trucking, Inc.  
987 Broadway  
Columbia City, Columbia

Reference: Farley Trucking, Inc. Policy of Insurance No. GYC 3427

Dear Mr. Jones:

This letter is to advise you that Dunn Insurance Company is not renewing the 2006-2007 Policy No. GYC 3427.

We are willing to consider renewal options for this account. However, any renewal option we may offer may contain changes in limits, premiums, terms and conditions. If you wish to proceed on this basis, please forward completed signed, dated renewal submission including all pertinent information.

I look forward to hearing from you or your insurance broker.

Sincerely,  
Dunn Insurance Company

**Scott Gordon**

Scott Gordon  
President

cc: Jennifer Barba, Bradford Insurance Brokers, Inc.

**EXHIBIT C**

1 Wendy Davis, Esq.  
2 State Bar No. 5862  
3 Sundquist & Davis  
4 12 Manning Blvd.  
5 Columbia City, Columbia  
6 (555)337-1091  
7 Attorneys for Defendant

8  
9  
10 **SUPERIOR COURT OF COLUMBIA**  
11 **COUNTY OF CHESTER**  
12  
13

14 Farley Trucking, Inc.,  
15 Plaintiff,

Civil Action  
No. 89765

17 v.  
18 Dunn Insurance Company,  
19 Defendant

**DEFENDANT’S ANSWER**  
**AND**  
**AFFIRMATIVE DEFENSES**

20 \_\_\_\_\_/

21 **THE PARTIES**

- 22 1. Defendant admits the allegations of paragraph 1.  
23 2. Defendant admits the allegations of paragraph 2.  
24 3. Defendant admits the allegations of paragraph 3.

25 **JURISDICTION AND VENUE**

- 26 4. Defendant denies that this Court has jurisdiction over this action as Plaintiff  
27 has failed to state a claim upon which any relief may be granted.  
28 5. Defendant denies that this Court has venue over this action as Plaintiff has  
29 failed to state a claim upon which any relief may be granted.

1 **BACKGROUND**

2 6. Defendant admits the allegations of paragraph 6.

3 7. Defendant admits the allegations of paragraph 7.

4 8. Defendant admits that Exhibit A is a true and correct copy of the July 11, 2006  
5 letter but denies the remaining allegations of paragraph 8.

6 9. Defendant admits that Exhibit B is a true and correct copy of portions of the  
7 policy purchased by Plaintiff from Defendant but denies the remaining allegations of  
8 paragraph 9.

9 10. Defendant admits the allegations of paragraph 10.

10 11. Defendant admits that Exhibit C is a true and correct copy of the non-renewal  
11 notice but denies the remaining allegations of paragraph 11.

12 12. Defendant admits the allegations of paragraph 12.

13 13. Defendant admits the allegations of paragraph 13.

14 14. Defendant admits the allegations of paragraph 14.

15 15. Defendant denies the allegations set forth in paragraph 15.

16 16. Defendant denies the allegations set forth in paragraph 16.

17 17. Defendant denies the allegations set forth in paragraph 17.

18 **BREACH OF CONTRACT**

19 18. Defendant repleads its response to the allegations contained in paragraphs  
20 1-17 as though they were set forth herein verbatim.

21 19. Defendant denies the allegations of paragraphs 19 through 23.

22 **FRAUDULENT INDUCEMENT**

23 20. Defendant repleads its response to the allegations contained in paragraphs  
24 1-17 as though they were set forth herein verbatim.

25 21. Defendant denies the allegations in paragraphs 25-27.

26 **PRAYER FOR RELIEF**

27 Defendant denies that Plaintiff is entitled to any of the relief it has sought, including but  
28 not limited to, the alleged compensatory and consequential damages, or any award of  
29 attorneys' fees.

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1 **DEFENDANT’S DEFENSES**

2 The Complaint fails to state a claim upon which relief may be granted.  
3 Plaintiff’s rights and claims, if any, are barred by the statute of frauds.  
4 WHEREFORE, Defendant requests that Plaintiff’s request for relief be denied in its  
5 entirety.

6 Sundquist & Davis

7  
8 February 8, 2009

**WENDY DAVIS**

9 by: Wendy Davis, Esq.  
10 Counsel for Defendant  
11 Dunn Insurance Company

1 Victoria Cooper, Esq.  
2 State Bar No. 7579  
3 Michaels & Farnsworth, LLP  
4 515 Francesca Way  
5 Marion, Columbia  
6 (555)337-2021  
7 Attorneys for Plaintiff

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9  
10  
11 **SUPERIOR COURT OF COLUMBIA**  
12 **IN AND FOR THE COUNTY OF CHESTER**

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15 Farley Trucking, Inc.,  
16 Plaintiff,

Civil Action  
No. 89765

17  
18 v.

19  
20 Dunn Insurance Company,  
21 Defendant

**AFFIDAVIT OF MARK JONES**

22 \_\_\_\_\_/  
23  
24 Mark Jones, being first duly sworn, states the following upon personal knowledge:

25  
26 1. I am the Risk Manager of Plaintiff Farley Trucking, Inc. ("Farley"), a  
27 commercial trucking company.

28 2. Farley is a publicly-traded Columbia-based company involved in various lines  
29 of business, including the commercial trucking of goods throughout the United States.

30 3. I have been employed by Farley in this capacity during all relevant times and  
31 during those times purchased complex insurance programs from a multitude of  
32 insurance companies to cover different lines of business and risks with different layers  
33 of coverage.



1 Wendy Davis, Esq.  
2 State Bar No. 5862  
3 Sundquist & Davis  
4 12 Manning Blvd.  
5 Columbia City, Columbia  
6 (555)337-1091  
7 Attorneys for Defendant

8  
9 **SUPERIOR COURT OF COLUMBIA**  
10 **COUNTY OF CHESTER**  
11

12  
13 Farley Trucking, Inc.,  
14 Plaintiff,

Civil Action  
No. 89765

15  
16 v.

17  
18 Dunn Insurance Company,  
19 Defendant

**AFFIDAVIT OF SCOTT GORDON**

20 \_\_\_\_\_/  
21  
22 Scott Gordon, being first duly sworn, states the following upon personal knowledge:  
23

- 24 1. I am President of Defendant Dunn Insurance Company (“Dunn”).  
25 2. Plaintiff Farley Trucking, Inc. (“Farley”) purchased from Dunn a commercial  
26 general liability policy (the “Policy”) that provided for \$5,000,000 in policy limits per  
27 occurrence.  
28 3. The term of the policy was from August 1, 2006 through August 1, 2007.  
29 4. In the spring of 2007, Farley sought renewal of the Policy, or the issuance of a  
30 new one-year policy, at the 2006-2007 rate.  
31 5. On May 23, 2007, Dunn sent Farley a notice of non-renewal of the Policy,  
32 effective August 1, 2007.

1           6. Dunn did not agree in word or substance to provide insurance coverage to  
2 Farley for 3 years pursuant to the July 11, 2006 letter, or otherwise.

3           7. Farley failed to object entirely to the non-renewal of the Policy until one and  
4 one-half years later when it first asserted its claim under the July 11, 2006 letter through  
5 this legal action.

6

7

Scott Gordon

8

Scott Gordon

9 Subscribed and sworn to

10 before me this 8<sup>th</sup> day of February, 2009

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12 Don Ramos

13 Notary Public

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**JULY 2009**



**California  
Bar  
Examination**

**Performance Test A**

**LIBRARY**

**FARLEY v. DUNN**

**LIBRARY**

Columbia Civil Code § 1350..... 27

**First Data POS, Inc. v. Willis Group** (Columbia Supreme Court, 2001)..... 28

**Hieke v. George D. Warthen Bank** (Columbia Court of Appeals, 1999)... .. 32

**Callaway v. DeMaio Swine Breeders, Inc.** (Columbia Court of Appeals, 1998)..... 34

**Dana v. Piedmont Motors** (Columbia Supreme Court, 1974)..... 38

**COLUMBIA CIVIL CODE § 1350**

**§ 1350. Obligations which must be in writing.**

To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:

\* \* \* \*

- (4) Any contract for sale of lands, or any interest in, or concerning lands;
- (5) Any agreement that is not to be performed within one year from the making thereof;
- (6) Any promise to revive a debt barred by a statute of limitation; and
- (7) Any commitment to lend money.

## **First Data POS, Inc. v. Willis Group**

Columbia Supreme Court (2001)

In 1992, appellant First Data POS, Inc. ("First Data") purchased COIN Banking Systems ("COIN"), a software development company, from appellees the Willis Group ("Willis"). The parties executed a Stock Purchase Agreement (the "Agreement") in which First Data agreed to pay Willis \$2.5 million in exchange for all of COIN's stock. The Agreement provided that Willis might receive additional payments, so long as COIN's post-acquisition business generated certain levels of revenue over the three-year period following the Agreement's execution (the earnout provision). The Agreement expressly stated that First Data was under no obligation to carry on the current business of COIN, or even to maintain COIN as a business entity, but rather that First Data was authorized "at any time without limitation and without notice to Willis to reorganize or merge COIN out of existence or cease the sale of any of the products or services of COIN." Finally, the Agreement contained a standard merger clause, which stated that:

[The] Agreement ... constitutes the entire agreement between the parties with respect to the subject matter contained herein and supercedes all prior agreements and understandings, both oral and written by and between the parties hereto with respect to the subject matter hereof.

Approximately three years after the Agreement's execution, Willis filed suit alleging that during the precontractual negotiations, First Data had misrepresented its intention to increase COIN's business after it acquired the company, and that those misrepresentations had induced Willis to enter into the Agreement and to sell COIN's stock for less than its then-current market value. Willis' complaint against First Data alleged fraudulent misrepresentation and breach of contract. The Court of Appeals reversed the trial court's granting of summary judgment as to Willis' civil fraud and breach of contract counts.

Summary judgment is proper when the materials of record show that no genuine issue exists as to material facts and that the moving party is entitled to judgment as a matter of law. Col. R. Civ. P. 56(c). The threshold inquiry is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. If there is no evidence sufficient to create a genuine issue as to any essential element of plaintiff's claim, that claim tumbles like a house of cards. All of the other disputes of fact are rendered immaterial.

The proper construction of a contract may be a matter appropriate for resolution on summary judgment even though the parties contend the contract should be construed differently. A Court is first to look to the four corners of the instrument to determine the proper construction of the contract. Only if contract language remains ambiguous does a court then apply the appropriate rules of construction to interpret any unclear terms. If the language remains ambiguous after applying the rules of construction, only then may extrinsic evidence be considered to resolve the ambiguity.

The Agreement's terms state with absolute clarity that First Data was under no obligation to continue carrying on COIN's business and could, at any time and without notice to Willis, "reorganize or merge COIN out of existence or cease the sale of any of COIN's products or services." Despite this express contractual provision, Willis' claim is based entirely upon parol evidence of contradictory representations that are purported to have been made before the Agreement's execution. It has long been the law of this state that the parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous agreement to alter, vary or change the unambiguous terms of a written contract. Therefore, the Court of Appeals erred by basing its ruling upon such contradictory parol evidence.

The Court of Appeals also erred by concluding that the Agreement's merger clause did not preclude Willis' claim that First Data's precontractual representations amounted to fraud or fraudulent misrepresentation. As explained above, the Agreement's unambiguous merger clause states that it was the parties' intention that the Agreement

supercede all precontractual agreements and representations, both oral and written, concerning First Data's acquisition of COIN's stock.

It is axiomatic that contracts must be construed to give effect to the parties' intentions, which must whenever possible be determined from a construction of the contract as a whole. Whenever the language of a contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning. In written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties, nor would the violation of any such alleged oral agreement amount to actionable fraud.

The rational basis for merger clauses is that where parties enter into a final contract all prior negotiations, understandings, and agreements on the same subject are merged into the final contract, and are accordingly extinguished.

It follows from these well established precepts of contract law and the precedent based thereon that any impressions held by Willis that were based upon First Data's purported precontractual representations that it would increase COIN's business after the acquisition were superceded by the merger clause contained in the parties' Agreement, which expressly put Willis on notice that the Agreement's terms superceded any and all prior representations not contained therein.

Thus, Willis' claim that they were deceived by First Data's precontractual misrepresentations has no basis. Under the express terms of the Agreement, Willis could not have reasonably placed their reliance upon any precontractual representation that was not also included in the Agreement's language, and thus Willis could not have been deceived by such precontractual representations. Without deception, of course, there can be no fraud claim.

Accordingly, the Court of Appeals erred in ruling that the contractual merger clause did not preclude Willis' claim that First Data had committed fraud in making precontractual representations regarding the future business operations of COIN Banking Systems. As a matter of law, a valid merger clause executed by two or more parties in an arm's-length transaction precludes any subsequent claim of fraud based upon precontractual representations.

Judgment reversed.

## Hieke v. George D. Warthen Bank

Columbia Court of Appeals (1999)

Alleging that appellee-defendants George D. Warthen Bank (the “Bank”) had breached an agreement to loan them \$80,000, appellant-plaintiffs Jane and Ray Hieke (“Hieke”) brought suit to recover in fraud and contract. The Bank answered and counterclaimed, seeking to recover on notes which were allegedly in default. After discovery, the Bank moved for summary judgment on their own counterclaim as well as on Hieke’s main claim. The trial court granted summary judgment in favor of the Bank and Hieke appeals.

Construing the evidence most favorably for Hieke, they borrowed \$40,000 from the Bank pursuant to an *oral* extension of a \$120,000 line of credit, but were subsequently denied the additional \$80,000 when they sought to borrow it. However, such a commitment to lend Hieke money would have to be evidenced by a *writing* signed by the Bank. Columbia Civil Code §1350. The fact that the Bank did loan Hieke \$40,000, as evidenced by a note, would not serve to take the alleged oral agreement outside the Statute of Frauds.

A contract falling within the Statute of Frauds must be complete within itself as to all terms of the undertaking, and oral evidence cannot be used to supply contractual elements that are missing. Further, for such a contract, oral evidence is not permitted to prove provisions that are inconsistent with the writing.

In order to remove the alleged oral contract from the Statute of Frauds the proper performance shown must be consistent with the presence of a contract and inconsistent with the lack of a contract. The act of lending Hieke \$40,000 may be entirely consistent with an agreement to lend them an additional \$80,000, but neither is it inconsistent with the lack of an agreement to lend them any additional sum whatsoever. The lending of \$40,000 in no way tends to prove that the Bank agreed to the oral contract that Hieke seeks to enforce. To hold that the mere act of lending *any* sum to a borrower will serve

to render enforceable an alleged oral agreement to lend some *additional* sum would negate §1350 and have the anomalous effect of subjecting the lenders of this state to potentially fraudulent claims despite the protection ostensibly afforded them under the Statute of Frauds. It follows that the trial court correctly granted summary judgment in favor of the Bank as to Hieke's contract claim.

The trial court likewise correctly granted summary judgment in favor of the Bank as to Hieke's fraud claim. Although fraud can be predicated on a misrepresentation as to a future event where the defendant knows that the future event will not take place, fraud cannot be predicated on a promise which is unenforceable at the time it is made. The instant alleged oral contract was unenforceable at the time it was purportedly made because it was not in writing as required by §1350. Obviously, one cannot sue in fraud based upon the alleged breach of an oral contract which would itself be unenforceable under the Statute of Frauds.

With regard to the Bank's counterclaim, there is no dispute either as to the execution of the notes or as to Hieke's default thereon. In the original and supplementary evidence offered in support of the motion for summary judgment, the Bank showed the amounts of unpaid principal and interest that were owing on the notes. In opposition, Hieke offered nothing to demonstrate the existence of any *genuine* issue of *material* fact. It follows that summary judgment was properly granted in favor of the Bank.

Judgments affirmed.

**Callaway v. DeMaio Swine Breeders, Inc.**

Columbia Court of Appeals (1998)

Callaway Farms ("Callaway") brought suit against DeMaio Swine Breeders, Inc. ("DeMaio") for fraud and bad faith in selling diseased swine. The trial court granted summary judgment, dismissing Callaway's claims. For the following reasons, we affirm.

In 1992 and 1993, Callaway operated a large swine breeding herd with approximately 5000 sows in Wilkes County, Columbia. Callaway regularly introduced new breeding stock into its herd supplied by DeMaio. DeMaio is in the business of raising and selling swine breeding stock.

From 1989 through 1994, Callaway and DeMaio executed numerous written contracts documenting Callaway's purchase of breeding stock from DeMaio. Each contract contains a limitation of liability in the case of disease, stating:

DEMAIO CANNOT AND DOES NOT GUARANTEE THE ABSENCE OF ANY PATHOGENS OR DISEASES IN THE BREEDING STOCK SOLD BY DEMATIO. PATHOGENS OR DISEASES MAY BE PRESENT AT TIME OF SALE OR MAY APPEAR LATER.

The contracts recommend that the buyer have the swine tested at the buyer's expense prior to delivery. In the case of diseased swine, the contracts provide that replacement of the swine is the buyer's sole remedy. On the front page, in bold red letters, the contracts provide:

DEMAIO GIVES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE SWINE OR THEIR PROGENY. DEMATIO GIVES NO WARRANTIES OF MERCHANTABILITY, HEALTH OR FITNESS FOR A PARTICULAR PURPOSE.

Each contract contains a merger clause, stating that “[t]his contract supersedes all prior written or oral agreements related to the swine sold hereunder, and this contract cannot be amended except in a writing which refers to this contract and which is signed by both parties.” Moreover, the contracts provide a blank for the purchaser to state any promises or representations made by the seller not otherwise specified in the contract. In each of the contracts, Eugene Callaway, Jr., an officer of Callaway, wrote “none” in the blank.

In early 1993, Callaway considered replacing DeMaio with Pig Improvement Company (PIC) as their supplier of breeding stock. Callaway decided against this move, however, when it learned from a PIC veterinarian that PIC's herds had tested positive for Porcine Reproductive and Respiratory Syndrome (PRRS), a swine disease caused by a virus. In sows, PRRS may cause abortions and birth of stillborn, underweight, or defective pigs. PRRS is highly contagious and widespread. Callaway explained to DeMaio's sales personnel that it wanted to avoid PRRS and that was the reason they had decided to stay with DeMaio over PIC. Clinton Day, a DeMaio salesman, replied: “Well, that is a pretty good reason to stay with us.”

Callaway's herds tested negative for PRRS on March 1, 1993. On March 11, 1993, Callaway received nineteen boars from DeMaio. The animals had no clinical signs of PRRS at the time of shipment or delivery. As was the conventional practice, a Callaway farm manager signed the invoices upon delivery.

On April 9, 1993, Callaway's herds developed the PRRS virus. No swine were introduced to the Callaway herds from any source other than DeMaio.

Callaway filed suit alleging fraud and seeking damages in excess of \$2,000,000. DeMaio filed a motion for summary judgment that the trial court granted.

This court exercises a complete and independent review of the trial court's grant of summary judgment, and applies the same legal standards used by the trial court. As

such, we must view all evidence and make all reasonable inferences in favor of the nonmovant. This court should affirm the trial court's grant of summary judgment only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Col. R. Civ. P. 56(c).

The Columbia common law tort of fraud has five elements: (1) a false representation by the defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to the plaintiff. In granting summary judgment, the trial court found that Callaway's reliance upon Mr. Day's statement was not justifiable in light of the contractual provisions disclaiming liability for diseases.

Callaway asserts that the trial court improperly granted summary judgment on the fraud claim, stressing that the question of justifiable reliance was one for the jury. In most cases, the question of justifiable reliance is a jury question, but where a representation is controverted by the express terms of a contract, a plaintiff will be unable, as a matter of law, to establish that his reliance is justifiable.

DeMaio's contract with Callaway devotes over fifty lines of text to disclaimers as to pathogens and diseases and buyer's responsibilities as to testing and quarantine. The contract expressly states that "[o]rganisms which cause swine diseases (called pathogens) are present in every swine herd, including DeMaio's swine herds." The contract could not be any clearer in disclaiming DeMaio's responsibility for diseases in its swine herds.

In red letters, in a paragraph labeled "BUYER'S UNDERSTANDING," the buyer must attest that he "ha[s] discussed the purchase of DeMaio breeding stock with DeMaio, and ha[s] read this Contract, and, in particular, ...the 'Pathogen and Disease — Statement and Limited Replacement Policy', and 'Testing and Quarantine — Buyer's Responsibility' on the back of this page." The contract also has a space for the buyer to fill in any additional representations made by DeMaio representatives.

The situation is complicated somewhat by the fact that the alleged misrepresentation by Mr. Day was made after the contracts were signed. On delivery, one of Callaway's farm managers signed a delivery invoice stating that:

The Warranties and Remedies, if any, applicable to the swine delivered with this invoice are determined in the contract between you, the Buyer, and DeMaio Swine Breeders, Inc. Please refer to that contract for the warranties, exclusive remedies, and statements regarding the swine, including their fertility, diseases and soundness. Acceptance of the swine here delivered is a reconfirmation of that contract and its terms.

We agree with the trial court that, by signing this invoice, Callaway reaffirmed the sales contract and all of its provisions, including the merger clause. As such, Callaway could not justifiably rely on the intervening representation of Mr. Day as a matter of law.

AFFIRMED.

## **Dana v. Piedmont Motors**

Columbia Supreme Court (1974)

A suit in tort by a buyer against a seller for an alleged fraudulent misrepresentation by the seller's agent resulted in a jury verdict and judgment for the buyer, and on appeal by the seller the Court of Appeals affirmed. We determine the judgment of the Court of Appeals should be affirmed.

In this case, the buyer, Ryan Dana ("Dana"), contended that he purchased a used automobile with the understanding that the vehicle had never been wrecked. The seller, Piedmont Motors, denied that this representation was made by its agent (salesman) to the buyer. The buyer, Dana, signed a sales agreement which contained the words, "No other agreement, promise or understanding of any kind pertaining to this purchase will be recognized." In addition, the purchase agreement stated that the car is sold "as is." Subsequent to the purchase, the buyer discovered that the automobile had been wrecked, tendered the car to the seller, gave notice of rescission of the contract and brought the present action in tort for fraud and deceit.

In our review of the case, we accept the jury's factual determination that the seller's agent knowingly misrepresented the car as never having been wrecked. The decisive issue we address is whether the language of the merger clause that "no other agreement, promise, or understanding of any kind pertaining to this purchase will be recognized," was legally effective to prevent the buyer from claiming that he relied on the seller's misrepresentation. It has been recognized that §2-202 of the Uniform Commercial Code was intended to allow sellers to prevent buyers from making false claims of oral warranties in contract actions. Thus, in contract actions, the effect of merger and disclaimer clauses must be determined under the provisions of the Uniform Commercial Code.

However, under Columbia law, traditionally two actions have been available to a buyer in which to sue a seller for alleged misrepresentation in the sale. The buyer could affirm

the contract and sue in contract for breach or he could seek to rescind the contract and sue in tort for alleged fraud and deceit. Our threshold question in this tort case is to determine whether the adoption of the Uniform Commercial Code left available in Columbia a buyer's historic remedy in tort. The passage of the Uniform Commercial Code by the legislature evinced an intent to have that body of law control all commercial transactions. While the Code, however, is an attempt to make uniform the law among the various jurisdictions regarding commercial transactions, the draftsmen realized that it could not possibly anticipate all situations. Thus, §2-721 of the Code states:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

In addition, it provides that:

Remedies for material misrepresentation or fraud include all remedies available under this Article for nonfraudulent breach. Neither rescission nor a claim for a rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

The commentary by the drafters of the Uniform Commercial Code on this section states: "Thus the remedies for fraud are extended by this section to coincide in scope with those for nonfraudulent breach. This section thus makes it clear that neither rescission of the contract for fraud nor rejection of the goods bars other remedies unless the circumstances of the case make the remedies incompatible." See Official Comment, Uniform Commercial Code, §2-721.

We conclude from this language that neither the draftsmen nor the legislature intended to erase the tort remedy for fraud and deceit with the adoption of the Uniform Commercial Code in Columbia.

Having decided that a remedy in tort still exists in Columbia for actual fraud, we turn next to the seller's contention that the disclaimer language used here prevented any reliance by the buyer on the alleged fraudulent misrepresentation, and consequently the buyer's action must necessarily fail. The seller contends that there is no fraud on which the buyer relied that prevented him from knowing the contents of the contract, and, therefore, the buyer is bound by the terms of the contract.

We believe the better view is that the question of reliance on the alleged fraudulent misrepresentation in tort cases cannot be determined by the provisions of the contract sought to be rescinded but must be determined as a question of fact by the jury. It is inconsistent to apply a disclaimer provision of a contract in a tort action brought to determine whether the entire contract is invalid because of alleged prior fraud which induced the execution of the contract. If the contract is invalid because of the antecedent fraud, then the disclaimer provision therein is ineffectual since, in legal contemplation, there is no contract between the parties. In this case, parol evidence of the alleged misrepresentation was admissible on the question of fraud and deceit. As the antecedent fraud was proven to the satisfaction of the jury, it vitiated the contract.

Judgment affirmed.

JULY 2009  
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

In a recent statute, Congress authorized the United States Secretary of Transportation “to do everything necessary and appropriate to ensure safe streets and highways.” Subsequently, the Secretary issued the following regulations:

Regulation A, which requires all instructors of persons seeking commercial driving licenses to be certified by federal examiners. The regulation details the criteria for certification, which require a minimum number of years of experience as a commercial driver and a minimum score on a test of basic communication skills.

Regulation B, which requires that every bus in commercial service be equipped with seatbelts for every seat.

Regulation C, which provides that states failing to implement adequate measures to ensure that bus seatbelts are actually used will forfeit 10 percent of previously-appropriated federal funds that assist states with highway construction.

The State Driving Academy, which is a state agency that offers driving instruction to persons seeking commercial driving licenses, is considering challenging the validity of Regulation A under the United States Constitution. The Capitol City Transit Company, which is a private corporation that operates buses within the city limits of Capitol City, is considering challenging the validity of Regulation B under the United States Constitution. The State Highway Department, another state agency, is considering challenging the validity of Regulation C under the United States Constitution.

1. What constitutional challenge may the State Driving Academy bring against Regulation A, and is it likely to succeed? Discuss.
2. What constitutional challenge may the Capitol City Transport Company bring against Regulation B, and is it likely to succeed? Discuss.
3. What constitutional challenge may the State Highway Department bring against Regulation C, and is it likely to succeed? Discuss.

## Question 5

Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops and to fill their wells, immediately demanded that Diane stop construction. Diane refused. Six months into the construction, when the dam was almost complete, the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance and for a taking under the United States Constitution. After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, separately retained Lawyer and filed an application for a permanent injunction against Diane in federal court asserting the same causes of action and requesting the same relief as in the state court case. Personal jurisdiction, subject matter jurisdiction, and venue were proper. The federal court granted Diane's motion to dismiss Paul's federal court application on the basis of preclusion.

Infuriated with the ruling, Paul told Lawyer, "If the court can't give me the relief I am looking for, I will take care of Diane in my own way and that dam, too." Unable to dissuade Paul and after telling him she would report his threatening comments to criminal authorities, Lawyer called 911 and, without identifying herself, told a dispatcher that "someone is on his way to hurt Diane."

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
2. Was the federal court's denial of Paul's application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
3. Did Lawyer commit any ethical violation when she called 911? Discuss. Answer according to both California and ABA authorities.

## Question 6

Polly, a uniformed police officer, observed a speeding car weaving in and out of traffic in violation of the Vehicle Code. Polly pursued the car in her marked patrol vehicle and activated its flashing lights. The car pulled over. Polly asked Dave, the driver, for his driver's license and the car's registration certificate, both of which he handed to her. Although the documents appeared to be in order, Polly instructed Dave and his passenger, Ted: "Stay here. I'll be back in a second." Polly then walked to her patrol vehicle to check for any outstanding arrest warrants against Dave.

As she was walking, Polly looked back and saw that Ted appeared to be slipping something under his seat. Polly returned to Dave's car, opened the passenger side door, looked under the seat, and saw a paper lunch bag. Polly pulled the bag out, opened it, and found five small bindles of what she recognized as cocaine.

Polly arrested Dave and Ted, took them to the police station, and gave them *Miranda* warnings. Dave refused to answer any questions. Ted, however, waived his *Miranda* rights, and stated: "I did not know what was inside the bag or how the bag got into the car. I did not see the bag before Dave and I got out of the car for lunch. We left the windows of the car open because of the heat. I did not see the bag until you stopped us. It was just lying there on the floor mat, so I put it under the seat to clear the mat for my feet."

Dave and Ted have been charged jointly with possession of cocaine. Dave and Ted have each retained an attorney. A week before trial, Dave has become dissatisfied with his attorney and wants to discharge him in favor of a new attorney he hopes to select soon.

What arguments might Dave raise under the United States Constitution in support of each of the following motions, and how are they likely to fare:

1. A motion to suppress the cocaine? Discuss.
2. A motion to suppress Ted's statement or, in the alternative, for a separate trial? Discuss.
3. A motion to discharge his present attorney and to substitute a new attorney in his place? Discuss.

**JULY 2009**



**California  
Bar  
Examination**

**Performance Test B**

**INSTRUCTIONS AND FILE**

**WILLIAMS v. GOLUB**

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## **WILLIAMS v. GOLUB**

### **INSTRUCTIONS**

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains actual 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.

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MEMORANDUM

**To:** Applicant  
**From:** Lauren Evans  
**Date:** July 30, 2009  
**Re:** **Williams v. Golub**

We represent Adam Golub, a successful personal injury lawyer, who has been sued for defamation by Adrienne Williams. Ms. Williams was an associate in Mr. Golub's firm until she resigned to set up a solo law practice, taking one of the firm's clients with her. Mr. Golub was recently served with the complaint that alleges that a letter he sent to the client was defamatory.

As you will see when you read my notes from my interview with Mr. Golub, at least one of the assertions he made in the letter was untrue and is defamatory unless privileged. I need your help therefore in analyzing whether there are privileges that might apply.

An answer to the complaint is due next week. Please prepare an objective memorandum for me that analyzes whether any defenses to Ms. Williams' claim for defamation based on privilege are available.

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**MEMORANDUM**

**To:** File  
**From:** Lauren Evans  
**Date:** July 29, 2009  
**Re:** **Interview with Client Adam Golub**

Adam Golub is the principal of a five attorney personal injury law firm. He has been sued for defamation by a former associate, Adrienne Williams, who left the firm “under unpleasant circumstances.” He said that her work was substandard and that he spoke to her about it “numerous times” and that ultimately she resigned on January 13, 2008 rather than be fired. Williams followed up with a resignation letter in which she announced that a client on whose case she had worked, Harvey Campbell, had decided to retain her as his lawyer and that she had taken portions of the client’s files. Golub called her and accused her of “poaching” his client and demanded that she return the files. She declined, and said that he would be getting a letter from Campbell (and maybe others) instructing him to transfer the case to her and to turn over the remainder of the file to her.

Golub says the case she took involved a client with paralysis resulting from the collapse of a roof. He said that liability among multiple defendants wasn’t clear and that the cause of the collapse was contested as well as the permanency of the injury. He said he “couldn’t imagine how a lawyer as inept as Williams could win the case, and at stake was a potential multimillion dollar verdict and the client’s capacity to pay for medical treatment over the long term.” Golub’s firm took the case on a contingency fee of 33% of the recovery plus costs, and he has already invested hundreds of hours on

the investigation and more than \$30,000 for expert witness fees. He composed and sent a letter to the client to “warn him about Williams” and to persuade him not to change lawyers.

After reading the letter I said to Golub, “You certainly used some strong language.” He responded, “Although it’s complicated, Campbell has a strong case. There was a lot of money involved for both Campbell and me. The more he gets, the more I get. Also, I just didn’t want a client of mine to make a decision to change counsel before considering what he was entitled to and to clearly understand the risk he was taking of losing his case.”

I asked if the letter worked. He said that no, it hadn’t. About a week after he sent the letter, he received a fax from Campbell, telling him that he had retained Williams as his lawyer and that Golub should transfer all files and evidence to Williams. I asked Golub if he’d assumed he was still Campbell’s attorney up until the time he got the fax. He said, “Yes. I sure wasn’t about to take Adrienne’s word for it.” Golub said over the course of the next month he had complied in transferring files, etc., and that he had formally withdrawn from the case. Even so, he continued to have disputes over the transfer of the firm’s claim for its share of legal fees and costs. He said that the atmosphere between them “was quite poisonous and that was, no doubt, the reason she filed the defamation lawsuit.”

I asked him to tell me about Adrienne Williams. He said that she went to law school after working for a decade as an emergency medical technician and that he had hired her after she had worked at the Robin, Thomas, David and Sweet law firm for two years. She started at the previous firm right after passing the bar exam. Even though “she barely kept her grades high enough to graduate” he was impressed with her experience in the medical field and thought her knowledge of and comfort with medical terminology and procedures would be useful in the practice. He said that, although clients liked her, “she seemed to resist learning what I tried to teach her, and her level of disorganization created some real problems for the firm.”

I asked him if everything he wrote in the letter was true. He said, "I thought so at the time I wrote it. I have since found out that even though I said that she had never handled a case like Campbell's and that she had never won a case, in fact, when she was with the Robin, Thomas, David and Sweet firm, she did work on another paralysis case in which she had gotten a million dollar verdict."

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**MEMORANDUM**

**To:** File  
**From:** Lauren Evans  
**Date:** July 29, 2009  
**Re:** Telephone Conversation with Emily Sweet

After talking to Mr. Golub I called Emily Sweet. Emily is a partner in the law firm of Robin, Thomas, David and Sweet. She was Adrienne Williams' boss for 3 years. She said that Williams worked as a law clerk for the firm during her last year of law school and then they hired her as an associate after Williams passed the bar.

I asked whether Williams' work was satisfactory and she said, "Adrienne was quite good for her level of experience. During her time at the firm she tried two personal injury cases to completion and won one and lost one." She said that her research and writing "were adequate, not excellent."

I asked about the case she had won. Emily said, "It was her second trial and she had clearly learned some hard lessons from losing the first. In this one, she got a large verdict, \$1.2 million, for a client who had nerve damage with resulting paralysis. I was very proud of her, and the client was very pleased with her work."

I next asked why she had left the Robin, Thomas firm. The reply was "She went to work with Adam Golub because he lured her away with more money. He paid her more than I could afford. I was sad to see her go, but I didn't match his offer."

1 Conrad J. Gaskill  
2 Panama, Whittier, Francisco & Alameda, LLP  
3 5211 Bay Street  
4 Santa Barbara, Columbia  
5 (555)714-1937  
6 Attorneys for Plaintiff

7  
8 **SUPERIOR COURT OF COLUMBIA**  
9 **COUNTY OF HERKIMER**

10  
11 Adrienne Williams,  
12 Plaintiff

Civ. # 27706

13  
14 v.

**COMPLAINT**

15  
16 Adam Golub,  
17 Defendant

18 \_\_\_\_\_/

19  
20 This is an action for defamation, in which plaintiff Adrienne Williams seeks general,  
21 special, and exemplary damages proximately resulting from false and malicious  
22 statements defendant Adam Golub made in a letter to a client of the plaintiff impugning  
23 her competence and integrity as a lawyer.

- 24
- 25 1. Plaintiff is a lawyer, admitted to practice in the State of Columbia, and engaged  
26 in the private practice of law.
  - 27 2. Defendant is a lawyer, admitted to practice in the State of Columbia, and is the  
28 principal in the law firm of Adam Golub and Associates (“law firm”).
  - 29 3. From July 7, 2004 to January 13, 2008 plaintiff was employed as an associate  
30 attorney in defendant’s law firm.

- 1 4. As part of her duties while employed at the law firm, plaintiff represented Harvey
- 2 Campbell (“the client”) in a suit based upon tort.
- 3 5. On January 13, 2008, plaintiff resigned from the law firm.
- 4 6. On January 18, 2008, defendant was terminated as counsel for Campbell and
- 5 was instructed to transfer Campbell’s case from the law firm to plaintiff for
- 6 continuing representation.
- 7 7. On January 20, 2008, defendant sent a letter to the client containing false and
- 8 unprivileged communications tending directly to injure plaintiff and damage her
- 9 business and professional relationships by mischaracterizing her competence as
- 10 a lawyer and specifically stating the falsehood that plaintiff had lost every case
- 11 she had taken to trial.
- 12 8. Plaintiff is informed and believes, and based thereon alleges, that the conduct of
- 13 defendant described above was done with malice.
- 14 9. Defendant’s conduct was defamatory under the law of the State of Columbia. As
- 15 a result of defendant’s defamation, plaintiff has suffered loss of earnings, injury to
- 16 her personal, business and professional reputation, harm to her business and
- 17 professional relationships and severe emotional distress, in an amount to be
- 18 established at trial.
- 19 10. Defendant’s conduct was such as to entitle plaintiff to punitive damages in an
- 20 amount to be established at trial.

21  
22 Wherefore, plaintiff seeks damages as a result of defendant’s defamatory actions in an  
23 amount to be established at trial.

24  
25 Panama, Whittier, Francisco & Alameda

26  
27 Dated: May 20, 2009 C J Gaskill

28 Conrad J. Gaskill, Esq.  
29 Attorneys for Plaintiff Adrienne Williams

30

**Adam Golub and Associates  
Attorneys at Law  
11 Brocklebank Building  
Bodie, Columbia  
(555)538-2320**

January 20, 2008

Mr. Harvey Campbell  
1873 West Shawna Lane  
Shipley, Columbia

Dear Mr. Campbell:

Adrienne Williams has resigned from our law firm effective January 13, 2008 and set up a solo law practice run from her home. She informed me that you are considering withdrawing your case from our firm and hiring her to represent you in your ongoing lawsuit against those responsible for the roof collapse that injured you so severely. Because I do not think it is in your best interest to be represented by a lawyer with so little experience and such a weak record of success, I ask that you think long and hard before you make this change. If you do decide to transfer representation to her, I will, of course, honor your decision and turn over your file to Ms. Williams.

Ms. Williams has been an attorney for barely five years. In the three and a half years she was with my firm, she won only two cases. In each of those cases there was no defendant actively litigating against her allegations. In one, the doctor was in a mental institution and, in the other, she was suing a hospital for its emergency room practices, which they knew were deficient and were in the process of changing. They were anxious to settle once they had decided how to handle the changes. Both of those cases had been prepared for years by my office before Ms. Williams became involved. She has never before handled a case with an injury such as yours.

While with me, Ms. Williams lost four cases she took to trial. At her prior law firm, the first case she tried was a major case in which she represented a teacher who was dying of cancer that his urologist had failed to diagnose. The defendant's attorney told me that he had been present at a conference when the judge laughed at Ms. Williams for misrepresenting that her client was too sick to appear at a deposition when the defendant had surveillance photos showing him teaching a class and traveling to his vacation home in Montreal. The defendant's attorney also told me that Ms. Williams had not prepared her major witness. Her expert witness was unfamiliar with the medical records when questioned on cross-examination. Ms. Williams lost that case and every other one she took to trial.

It takes a lot of money to run a law office. I have heard that Ms. Williams hasn't enough money to hire a secretary. All of our attempts to reach her by telephone in the past two weeks have been unsuccessful because the answering machine says it is full. She will owe me tens of thousands of dollars in disbursements on the cases she hopes to take from my office.

If the defendant's attorneys know that the plaintiff's attorney has a record of losing cases, has limited experience in trying cases, and is not able to finance the great expenses of a complicated trial such as yours, which involves expert witnesses and depositions, they are likely to resist any legitimate settlement and force the case to trial. Also, Ms. Williams, in her need for money to pay her overhead and finance other cases, may attempt to settle your case for far less than its full value. Your case is worth millions of dollars. It would be criminal to settle the case for anything less. If she does so, she will have put her interests ahead of yours.

I tell you these things because, as your lawyer, I have an ethical obligation to give you candid advice. In addition, as I will receive a portion of the fee in your case, it is in both our interests that you receive the best possible result. As I have told you, I represented another client who has essentially the same injury as yours. I tried her case and obtained a verdict of \$3,500,000. The case was sent back for a new trial by the appellate court. The second time I obtained a verdict of \$3,400,000. I tried the case in Ness County, a jurisdiction that is much more hostile to plaintiffs than Herkimer. You, therefore, have a very valuable case. I am more than willing to continue to represent you in it. However, if you decide to entrust it to her, please, for both your sake and mine, take the following precautions:

1. Direct Ms. Williams in writing not to enter into settlement negotiations on your case without speaking first to you, discussing her settlement strategy, and obtaining your approval of the amounts she will demand and will be willing to settle for.
2. Before you accept any offer of settlement, you discuss the case with some other experienced personal injury attorney for the sake of having a second opinion and hearing other options. Your case is the first paralysis case that Ms. Williams will be handling. She does not have experience in evaluating or trying cases such as this and has very little rapport with the defense bar and the builders' insurance companies.

Judge Regina Mack, the judge handling your case, is very intelligent and experienced. After Ms. Williams was assigned to her for trial on a recent case, Ms. Williams called the court and stated that her father had been taken to the hospital. Ms. Williams had told me and an associate in my firm that she was afraid of going before this judge. The trial was continued. She then spent the day in the office rather than going to the hospital to see her father in the hospital, if he actually was in the hospital.

Please call me if you have any questions or wish to discuss these matters before making your decision.

Very truly yours,  
Adam Golub and Associates  
**Adam Golub**  
Adam Golub

**The Law Office of Adrienne Williams**  
**560 Winston Street**  
**Reginald, Columbia**  
**555-331-0500**

**BY PERSONAL DELIVERY**

**Email: [awlawyer@alo.com](mailto:awlawyer@alo.com)**

January 18, 2008

Adam Golub, Esq.  
Adam Golub & Associates  
11 Brocklebank Building  
Bodie, Columbia

Dear Adam:

This letter confirms our conversation in which I resigned as an associate with your firm, effective January 13, 2008. You know all of the ways that I was dissatisfied with the way I was treated by you and others at the firm, and I will not rehash them in this letter. My resignation gives me the opportunity to start my own firm, something I have always wanted to do.

Fortunately, I am working to ensure that the clients for whom I had primary responsibility are not harmed by my departure from your firm. They all have been quite happy with my work. That is particularly the case with Mr. Harvey Campbell, who has decided to come with me rather than stay with the Golub firm.

Mr. Campbell has authorized me to enter an appearance in his pending case in the name of my new law firm. I will obtain a substitution of attorney from Mr. Campbell and send it to you for signature. In addition, please arrange to have Mr. Campbell's files available for pickup by me on or before January 25, 2008. My hope is that we will be able to amicably resolve any lingering financial issues regarding this case along with the money you still owe me for past services.

Sincerely,

**A. Williams**

Adrienne Williams

## COPIES OF ADAM GOLUB AND ASSOCIATES E-MAIL CORRESPONDENCE

From: [duarte@golublaw.com](mailto:duarte@golublaw.com)  
To: [golub@golublaw.com](mailto:golub@golublaw.com)  
Sent 12/19/2007 4:15 PM  
Subject: RE: RE: Why are you excluding me?

Dear Adam,

I can no longer work productively with Adrienne. I realize that you have been counting on me as the senior associate to train her and bring her along but she has screwed up so many things that I don't feel I am being successful. She is disorganized and doesn't seem to be prepared. I sent her to court for a status conference a few weeks ago and she ended up going to the wrong courtroom and didn't straighten it out in time to be there when the case was called. This kind of thing happens too often, in my view.

I would appreciate it if you would assign me one of the other associates. Sorry to bother you with this. Here is the e-mail I got from her yesterday and my response to it.

Tony

From: [duarte@golublaw.com](mailto:duarte@golublaw.com)  
To: [williams@golublaw.com](mailto:williams@golublaw.com)  
Sent 12/19/2007 3:45 PM  
Subject: RE: Why are you excluding me?

Dear Adrienne:

I am not sure that carrying on this conversation by e-mail is the best idea. You asked why I exclude you, but the truth is that you have excluded yourself. How many client meetings have had to start without you because you came late or not at all? I can answer the question but perhaps you should reflect on it. It makes a very poor impression when we tell a client to expect you but you aren't there. Regarding expert witnesses, given your medical expertise I think you could potentially be a big help in talking with them but in the ones I have been part of with you it has seemed as if you were either unprepared or extremely disorganized. For these reasons I have stopped

scheduling you to be part of many meetings. If I can get a commitment from you to change your behavior, I will rethink my position.

Regarding the written work, I very often find your writing unpersuasive, your research incomplete, your analysis fuzzy, and your grasp of the facts marginal at best. I have offered repeatedly to work with you to help you improve but instead of accepting my constructive criticism you always walk away in a huff so I have just given up.

You aspire to be a trial lawyer but in the time you have been in this firm you haven't shown any of us that you have the drive or the ambition to develop the skills you need in order to be successful.

Tony

From: [williams@golublaw.com](mailto:williams@golublaw.com)

To: [duarte@golublaw.com](mailto:duarte@golublaw.com)

Sent 12/18/2007 2:20 PM

Subject: Why are you excluding me?

Anthony:

I am getting increasingly angry by your repeated exclusion of me from meetings with clients and witnesses. I don't see how I can continue to be an effective member of our litigation team unless I have the kind of first-hand knowledge that comes from these meetings. You rewrite briefs and pleadings that I have drafted without consultation or discussion with me. I thought we were supposed to collaborate but instead you insult my work and act with condescension in ways that undermine me. In the Thornton case summary judgment brief, you ignored what I wrote about the medical diagnosis and substituted your language for mine. As you well know, my knowledge of medicine is far superior to yours and I think the way you botched the descriptions of the client's injuries will harm her case. I know there is much I can learn from you, but you have to treat me with respect.

Adrienne

## **From the Desk of Harvey Campbell**

By Fax Transmission to 555-538-2321

**TO:** Adam Golub, Esq.  
Adam Golub and Associates  
11 Brocklebank Building  
Bodie, Columbia

**FROM:** Harvey Campbell  
1873 Shawna Lane  
ShIPLEY, Columbia

**DATE:** January 27, 2008

**NUMBER OF PAGES, INCLUDING COVER SHEET:** One (1)

Dear Mr. Golub,

I have decided to switch attorneys, and I want to be represented by Adrienne Williams.

I appreciate the excellent work that has been done on my behalf by your law firm, and my decision to change law firms is based solely on my desire to stay with Ms. Williams. It does not reflect an adverse opinion toward you or your work.

Ms. Williams has informed me that she will shortly present you a Substitution of Attorney. Please transfer all my records and all of your files, documents, and work product to Ms. Williams.

Finally, now that Ms. Williams is my attorney, in the future please direct all communications to her.

Thank you for your past work and your cooperation in this matter.

Sincerely,

**Harvey Campbell**

Harvey Campbell

**JULY 2009**



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## SELECTED PROVISIONS OF THE COLUMBIA CIVIL CODE

**§ 44 Defamation.** Defamation is effected by (a) libel, or (b) slander.

**§ 45 Libel.** Libel is a false and unprivileged publication by writing that exposes a person to hatred, contempt, ridicule, or obloquy, or causes the person to be shunned or avoided, or has a tendency to cause injury to reputation or occupation.

**§ 46 Slander.** Slander is a false and unprivileged publication, orally uttered, that charges a person with crime or tends directly to cause injury to a person's profession, trade or business.

**§ 47 Privilege.** A privileged publication is made:

- (a) In the proper discharge of an official duty;
- (b) In any
  - (1) legislative proceeding,
  - (2) judicial proceeding, or
  - (3) other official proceeding authorized by law;
- (c) In a communication, made without malice, to a person interested therein, by one
  - (1) who is also interested, or
  - (2) who is in a relationship to the interested person that affords a reasonable ground for supposing the motive for the communication to be innocent, or
  - (3) is requested by the interested person to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment.

**§ 48 Malice.** Malice is a state of mind arising from hatred or ill will toward the plaintiff; provided, however, that a communication made with a good faith belief in its truth at the time it is published shall not constitute malice.

**SELECTED PROVISIONS OF  
THE COLUMBIA MODEL RULES OF PROFESSIONAL CONDUCT**

**CLIENT-LAWYER RELATIONSHIP**

**RULE 1.4 COMMUNICATION**

(A) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(B) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**Comment**

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party.

\* \* \* \*

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the

client's best interests and the client's overall requirements as to the character of representation.

\* \* \* \*

## **COUNSELOR**

### **RULE 2.1 ADVISOR**

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client's situation.

#### **Comment**

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

**Auden v. Fox and Peters**  
Columbia Supreme Court (2002)

This appeal is a minor skirmish in a major litigation battle. The parent litigation is a case, *Pinkerton v. Duke Industries*, which after several years is still pending. While awaiting trial, Pinkerton's attorney Phillip Peters ("Peters") took the deposition of James Fox ("Fox"). At the deposition, Fox, in response to questions from Peters, said several unflattering things about Allan Auden ("Auden").<sup>1</sup> Two days after the deposition, Auden filed a defamation action against Peters and Fox. The Trial Court ruled in the defamation action that the statements were absolutely privileged and granted a motion to dismiss the complaint. Auden appeals.

The complaint alleges that Fox and Peters orally published defamatory matter about Auden at the deposition. The trial court held correctly that the plaintiff failed to state a cause of action for defamation because of the privilege recognized in connection with judicial proceedings.

Both sides recognize that the privilege of an attorney in judicial proceedings is absolute in that it cannot be defeated by a showing that the publication was made with malice. For the privilege to apply, however, the defamation published in a judicial proceeding must have "some relation" to the proceeding. (Restatement Torts, §585.)

Columbia Civil Code §47(b) provides that a privileged publication or broadcast is made in any (1) legislative proceeding, (2) judicial proceeding, or (3) other official proceeding authorized by law.

---

<sup>1</sup> We will discuss the statements made about Auden only to the extent that such discussion is absolutely necessary to our opinion. The entire record before us is replete with threats by everybody against everybody else to sue them on any theory which imaginative counsel can think of. There is no desire on the part of this court to act as an agent -- albeit immune -- who further publicizes a libel or slander and thereby adds grist to the parties' mills.

The purpose of §47(b) is to afford litigants freedom of access to the courts to secure and defend their rights without fear of being harassed by actions for defamation and to promote the unfettered administration of justice even though as an incidental result it may provide immunity to the evil-disposed and malignant slanderer. Thus, courts should not extend application of the absolute privilege unless the public policy upon which the privilege rests exists.

This statute protects attorneys as well as judges, jurors, witnesses and other court personnel from liability arising from publications made in the course of a judicial proceeding. The policy underlying the privilege is to afford our citizens utmost freedom of access to the courts. As a consequence, attorneys are given broad protection from the threat of litigation arising from the use of their best efforts on behalf of their clients. The privilege is absolute; it protects publications made with actual malice or with intent to do harm.

Although defamatory publications made in the course of a judicial proceeding are absolutely privileged, even if made with actual malice, the absolute privilege attaches only to a publication that has a reasonable relation to the action, is permitted by law, and if it is made to achieve the objects of the litigation. The absolute privilege in judicial proceedings is afforded only when the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law.

First, if the defamatory publication is made in furtherance of the litigation it is appropriate for the courts to define liberally the scope of the term "judicial proceeding" and the persons who should be regarded as litigants or other participants. If this requirement is met, the publication is absolutely privileged even though made outside the courtroom and no function of the court or its officers is invoked.

Second, although the defamatory matter need not be relevant, pertinent or material to any issue before the court, the publication must have some connection or logical relation to the judicial proceeding. Fox and Peters do not even have to claim that the allegedly defamatory deposition questions and answers were admissible, either directly or for the purpose of impeaching any witness or that they were calculated to lead to the discovery of admissible evidence. Doubts should be resolved in favor of relevancy and pertinency. For the privilege not to apply, the matter must be so unrelated to the subject matter of the controversy that there can be no reasonable doubt of its impropriety.

Third, since the deposition questions and answers concerned Auden's credibility, which would affect the outcome of the litigation, they were not pretextually calculated merely to defame and therefore they are made to achieve the objects of the litigation.

Fourth, the privilege stated in §47(b) is confined to statements made by an attorney while performing his function as such. This approach does not protect attorneys, witnesses and litigants who use the mere fact that they are talking in the course of judicial proceedings as a pretext to defame persons with respect to matters that have nothing to do with the question under consideration, yet it does shield counsel, clients and witnesses from having their motives questioned and being subjected to litigation if some connection between the utterance and the judicial inquiry can be established. Likewise, this approach does not shield attorneys, witnesses, or litigants who are no longer involved in the litigation, such as by way of dismissal as an attorney, witness, or litigant.

As long as Peters was actually retained as a lawyer in this litigation, he is protected by this privilege, and, so long as Fox was answering his questions, he, too, is protected.

AFFIRMED.

**Kashian v. Harriman**  
Columbia Supreme Court (1966)

Edward Kashian (“Kashian”), a prominent businessman and civic leader in Paradise Valley, Columbia, brought this action for defamation against Richard Harriman (“Harriman”). The dispute arises from remarks published by Harriman regarding Kashian, who was at the time serving as Chair of the Board of Trustees of Paradise Valley Hospital (PVH), a nonprofit, tax-exempt corporation.

In 1964, PVH announced plans to build and operate a for-profit heart hospital. Local non-profit medical providers, St. Anne Elizabeth Medical Center (“St. Anne”) and MediPrime, became concerned that PVH’s hospital would compete unfavorably with them. St. Anne wrote a letter to the Columbia Attorney General expressing its concern that PVH’s involvement in a for-profit hospital would conflict with its non-profit status and called for an investigation. Harriman, who was counsel for MediPrime, wrote a letter to the Attorney General joining in this request for an investigation.

In 1962, Harriman had been retained as special counsel in the bankruptcy of another provider whose assets PVH had purchased from the bankrupt estate. In his current letter to the Attorney General, Harriman wrote that, in the course of his duties as special counsel, “I conducted an investigation that led me to believe that PVH has engaged in unfair business practices since at least 1959 by pursuing a course on intentional conduct that interfered with the practices of private practitioners. Moreover, my investigation led me to believe that Mr. Kashian has unlawfully used his position as Chair of the PVH Board of Trustees to accrue substantial economic advantages for himself to the disadvantage of PVH.” Harriman’s letter indicated that he had sent copies to “Clients, and St. Anne.”

On June 1, 1964, *The Paradise Valley Bee* published a news article reporting on Harriman's letter, under the headline "Hospital Official Assailed." The article focused

primarily on the accusations about Kashian, and quoted parts of the letter, including the excerpt cited above. Kashian was quoted in the article as saying the accusations were “completely false.”

On June 19, 1964, Kashian filed a lawsuit against Harriman asserting that Harriman's letter was false and defamatory. He also alleged Harriman acted with malice.

Harriman filed a motion for summary judgment on all Kashian's claims. Harriman acknowledged sending his letter to the Attorney General with copies to his client and St. Anne, with which he was joining to request an investigation of PVH. He argued that his letter to the Attorney General was absolutely privileged under Columbia Civil Code §47(b), qualifiedly privileged under section 47(c), and not defamatory.

The trial court granted Harriman's motion. The court concluded Harriman's statements were privileged under section 47(b) of the Civil Code. The court declined to decide whether the privilege was a qualified one, in which case it could be defeated by a showing the statements were made with actual malice, because the evidence failed to show Harriman had acted with malice. It also ruled Harriman's delivery of the letter to third persons (his client and St. Anne) was privileged under Civil Code section 47(c). The trial court also declined to reach the question of whether the publication in *The Paradise Valley Bee* was defamatory because Kashian failed to make a sufficient prima facie showing that Harriman was the person responsible for sending the letter to the newspaper. Kashian appealed.

Columbia law recognizes two types of privileged communications: (1) communications that are absolutely privileged, for which there is no liability even if the defamatory communication is made with actual malice; and (2) communications that are qualifiedly privileged, for which a finding of malice will prevent the communication from being found privileged.

Section 47(b) defines what is commonly known as the litigation privilege. The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) that have some connection or logical relation to the action; (3) made to achieve the objects of the litigation; and (4) by litigants or other participants authorized by law. The privilege is absolute. If it applies, it does not matter whether the communication was made with malice or the intent to harm. Put another way, application of the privilege does not depend on motives, morals, ethics or intent. The litigation privilege is not limited to the courtroom, but encompasses actions by administrative bodies and quasi-judicial proceedings. The privilege extends beyond statements made in the proceedings and includes statements made to initiate official action. The absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing. The privilege is based on the importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity. *Wise v. Thrifty Payless, Inc., supra* (husband's report to the Department of Motor Vehicles regarding wife's drug use and its possible impact on her ability to drive).

Section 47(c) codifies the common law privilege of common interest which protects communications made in good faith on a subject in which the speaker and hearer share an interest or duty. This privilege applies to a narrow range of private interests and does not create a broad public interest privilege. The interest protected must be private or pecuniary. It must be a common interest in an outcome, which can exist in the absence of a formal relationship (for example, shareholders who bought corporate shares independently of one another). It can also be in a contractual, business, or similar relationship, such as between partners, corporate officers or members of incorporated associations, or between union members and union officers. The communication must have been in the course of the relationship.

This definition is not exclusive, however, and the cases have taken an eclectic approach toward interpreting the statute. The scope of the privilege is not capable of precise definition and its application depends upon an evaluation of the competing interests that defamation law and the privilege are designed to serve.

The common interest privilege as defined in §47(c) only arises in the absence of malice. Malice for purposes of the statute means a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person. Malice is not inferred from the communication itself, but from surrounding circumstances.

We now consider whether the privileges apply to Kashian's complaint. Kashian's claim for defamation is based on the letter Harriman wrote to the Attorney General and delivered to his client and involved in the complaint to the Attorney General. We assume the letter was defamatory and consider whether delivery of the letter was privileged.

Kashian argues Harriman's delivery of the letter to the Attorney General's office was subject only to the qualified common interest privilege because there was no official proceeding. We disagree. Section 47(b) provides for an absolute privilege with regard to statements made in "any . . . official proceeding authorized by law." A communication concerning possible wrongdoing made to an official government agency such as a local police department and designed to prompt action by that entity is as much a part of an official proceeding as a communication made after an official investigation has commenced. The policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility is to investigate and remedy wrongdoing. A qualified privilege is inadequate under the circumstances. Since the privilege is absolute, it cannot be defeated by a showing of malice.

In *Dove Audio, Inc. v. Stark, Vernon & Ruxton*, Dove Audio produced a recording featuring the voices of several celebrities whose royalties were to be paid to their designated charities. When few royalty payments were actually made, one of the celebrities contacted the law firm of Stark, Vernon & Ruxton (SV&R) to request that it look into the matter and contact the appropriate government agency to conduct an investigation. SV&R wrote to the celebrities explaining the situation and soliciting their

support for a complaint to the Attorney General's office. Dove Audio sued SV&R alleging the letter was defamatory and interfered with their economic relationships with other celebrities. The court granted SV&R's motion to dismiss the claims on the ground that the communication was absolutely privileged under Civil Code section 47(b). This court held that a petition to the Attorney General constitutes an official proceeding within the meaning of section 47(b) since the Attorney General has the statutory responsibility to protect the assets of charitable trusts and public benefits corporations. In addition, the court held that the privilege extends to communications with private parties who share with the defendant an interest in the investigation preliminary to the institution of the official proceeding.

We conclude, then, that Harriman's delivery of his letter to the Attorney General and the other entities requesting an investigation into PVH's business practices was absolutely privileged under section 47(b). Consequently, we need not reach the questions of the applicability of the qualified privilege as it applies to the delivery of the letter to the Attorney General.

On appeal, Kashian also argues that neither the litigation privilege nor the common interest privilege attaches to publication of the letter to *The Paradise Valley Bee* or to St. Anne. We address these contentions in turn.

As for the publication of the letter to *The Paradise Valley Bee*, we do not reach the question of privilege because we agree with the trial court that there is insufficient evidence to suggest that Harriman was responsible for sending the letter to the newspaper.

We turn finally to Harriman's publication of the letter to St. Anne. In this case, St. Anne was a party to the request to the Attorney General for an investigation into PVH's tax-

exempt status. It follows that their communications with one another in that connection were protected by the litigation privilege.

Kashian maintains, however, that the same privilege does not extend to their communications in regard to Harriman's request for an investigation into Kashian's alleged conflict of interest, a request in which St. Anne had not joined until after Harriman's letter. We need not decide whether the litigation privilege under section 47(b) reaches these communications because we conclude that St. Anne shared a common business or professional interest under §47(c) in investigation of both PVH's business practices and Kashian's potential conflict of interest.

Kashian argues that he presented evidence that, if believed, was sufficient to support a finding of actual malice, which would prevent the defense of a qualified privilege under section 47(c) from arising. On the premise that Harriman's statements about him in the letter are defamatory, Kashian contends a jury might reasonably infer Harriman acted with malice because he failed to conduct an adequate investigation before making the statements.

Malice, which is statutorily defined as state of mind arising from hatred or ill will, may be proved by showing the publisher of a defamatory statement lacked reasonable grounds to believe the statement was true, and therefore acted with a reckless disregard for the rights of the person defamed. However, negligence is not malice. It is not sufficient to show that the statements were inaccurate or even unreasonable; only willful falsity or recklessness suffice. Only reckless or wanton disregard for the truth will imply a willful disregard for or avoidance of accuracy sufficient to establish malice.

Kashian's bare assertion that many of the statements in Harriman's letter are false does not make it so, much less establish that Harriman made the statements maliciously. For example, Harriman urged the Attorney General to investigate certain of Kashian's business dealings using the following language: "Your investigators will need to obtain property profiles on certain properties, such as the proposed Heart Hospital and

Women's Center, in order to trace the ownership and development of the properties by entities in which Mr. Kashian has been involved, either directly or indirectly."

In his declaration Kashian asserts that "even a cursory review of the facts would have put anyone on notice that many of these factual allegations are false. For example, it is a matter of public record that the property purchased by the Heart Hospital--which Harriman accused me of profiting from--was sold by River Park Properties approximately 10 years prior to the Heart Hospital's purchase." This evidence tends to show at most that Harriman's letter was inaccurate insofar as it suggested Kashian may have had a direct financial interest at a certain moment in PVH's purchase of land for a heart hospital. The evidence is insufficient to support an inference Harriman acted with a reckless or wanton disregard for the truth when he wrote the letter. Consequently, the trial court was correct in rejecting Kashian's claim under section 47(c) because there was no prima facie showing of malice.

AFFIRMED.

## **Scott Rogers v. Associated Aviation Underwriters**

Supreme Court of Columbia (1953)

This defamation action was brought by Scott Rogers (“Rogers”) against Associated Aviation Underwriters (AAU) and various insurance companies that were members of that association. His action was based upon a report made by AAU that he claimed injured his reputation and deprived him of his profession as a pilot. At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendants on the ground that the communication from AAU to Rogers' employer, Olympic Oil Company (“Olympic”), was privileged.

AAU is the name of an organization of the aviation insurance departments of the defendant insurance companies. It inspects risks and makes periodic inspections of the aviation facilities insured by the insurance companies.

Olympic employed Rogers as an aircraft pilot from February 1948 until he was discharged about November 22, 1948. He alleged that his discharge resulted from a report of an investigation of all of the aviation facilities and pilot personnel of Olympic by AAU. Two sections of the report are at issue here. First, the report states that, “None of the crew members currently employed by Olympic Oil Company has qualified for Airline Transport Rating (ATR). We advise that all Olympic Oil pilots obtain an ATR rating from one of the recognized competent schools. This training should be given to weed out the weaker pilots.” Second, the report stated that, “In checking with a previous employer we were unable to substantiate that Rogers was anything other than an average pilot with questionable flying ability, and this employer lacked confidence in him as a pilot. In addition, we were informed he had a poor personality and there was much better pilot material available. In checking with another source, who has flown with Rogers and has known him personally for seven or eight years, we could not develop any information concerning Rogers' qualifications to operate aircraft in accordance with the high standards desired by the Olympic Oil Company.”

Rogers claims that the report does not fall within the qualified common interest privilege. Under the common interest privilege, communication made in good faith in which the person reporting has an interest and in reference to which he has a duty is conditionally or qualifiedly privileged if made to a person having a corresponding interest or duty. By definition the privilege arises only in the absence of malice. Malice is not inferred from the communication itself, but from surrounding circumstances.

Rogers does not contend that AAU did not believe the communications to be true or that they were actuated by hatred or ill will. He does contend that the communications were made with such gross indifference to his rights as to amount to a willful or wanton act. The evidence showed that Rogers actually had an ATR at the time of the report. The evidence further showed that the derogatory statements concerning Rogers were based upon only two telephone calls to persons who had known or been associated with him. A jury might very well have found that there was no sufficient investigation to support the statements against the appellant. We do not think, however, that the evidence was sufficient to submit to the jury the issue of such gross indifference to the rights of Rogers as would amount to willful or wanton conduct from which malice might be inferred.

In *Courtney v. Gault*, the alleged defamatory statement made was without any investigation in reliance upon a report made by a detective agency. The court held that negligence cannot take the place of actual malice to destroy the immunity from damages given to a privileged publication.

The judge correctly directed a verdict on the ground that the alleged defamatory statements were privileged and that there was insufficient evidence to authorize the jury to find that they were malicious.

AFFIRMED.