



February 2012 California Bar Examination

ESSAY QUESTIONS 1, 2, AND 3

Answer all three questions

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 that 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

Sam, a widower, set up a valid, revocable *inter vivos* trust, naming himself as trustee, and providing that upon his death or incapacity his cousin, Tara, should be successor trustee. He did not name any additional trustee. He directed the trustee to distribute the income from the trust annually, in equal shares, to each of his three children, Ann, Beth, and Carol. He specified that, at the death of the last of the three named children, the trust was to terminate, and the remaining assets were to be distributed to his then living descendants, by representation.

When he established the trust, he also executed a valid will pouring over all his additional assets into the trust.

Two years later, Sam died. He was survived by Ann, Beth, and Carol. Within two months, Dave, age 25, began litigation to prove that he was also a child of Sam's, although Sam had never known of his existence.

For three years after Sam's death, Tara administered the trust as trustee. Because Ann had very serious medical problems and could not work, and because Beth and Carol had sufficient assets of their own, Tara distributed nearly all of the trust income to Ann and little to Beth and Carol.

After the court determined that Dave was in fact Sam's child, Dave claimed a share of the trust. Beth and Carol have filed suit against Tara, claiming breach of fiduciary duties. Tara has submitted her resignation, and Beth and Carol have sought termination of the trust so that all assets may now be distributed outright to the beneficiaries now living.

- 1) What interests, if any, does Dave have in the trust assets? Discuss. Answer according to California law.
- 2) Are Beth and Carol likely to be successful in terminating the trust? Discuss.
- 3) Are Beth and Carol likely to be successful in suing Tara? Discuss.

Question 2

City recently opened a new central bus station.

Within the central bus station, City has provided a large bulletin board that is available for free posting of documents. City requires that all free-posted documents be in both English and Spanish because City's population is about equally divided between English- and Spanish-speaking people.

City refused to allow the America for Americans Organization (AAO) to use the bulletin board because AAO sought to post a flyer describing itself in English only. The flyer stated that AAO's primary goal is the restriction of immigration. The flyer also advised of the time and place of meetings and solicited memberships at \$10 each.

Does City's refusal to allow AAO to use the bulletin board violate the rights of AAO's members under the First Amendment to the U.S. Constitution? Discuss.

Question 3

Paul sued David in federal court for damages for injuries arising from an automobile accident.

At trial, in his case-in-chief, Paul testified that he was driving westbound, under the speed limit, in the right-hand lane of a highway having two westbound lanes. He further testified that his passenger, Vera, calmly told him she saw a black SUV behind them weaving recklessly through the traffic. He also testified that, about 30 seconds later, he saw David driving a black SUV, which appeared in the left lane and swerved in front of him. He testified that David's black SUV hit the front of his car, seriously injuring him and killing Vera. He rested his case.

In his case-in-chief, David testified that Paul was speeding, lost control of his car, and ran into him. David called Molly, who testified that, on the day of the accident, she had been driving on the highway, saw the aftermath of the accident, stopped to help, and spoke with Paul about the accident. She testified further that, as soon as Paul was taken away in an ambulance, she carefully wrote down notes of what Paul had said to her. She testified that she had no recollection of the conversation. David showed her a photocopy of her notes and she identified them as the ones she wrote down immediately after the accident. The photocopy of the notes was admitted into evidence. The photocopy of the notes stated that Paul told Molly that he was at fault because he was driving too fast and that he offered to pay medical expenses for anyone injured. David rested his case.

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

1. Vera's statement? Discuss.
2. The photocopy of Molly's notes? Discuss.

Answer according to the Federal Rules of Evidence.



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PERFORMANCE TEST A

INSTRUCTIONS AND FILE

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IN RE SWAYNE

INSTRUCTIONS

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

Arbuckle Baines, LLP
Attorneys at Law
Walkerville, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant
FROM: Roger Arbuckle
DATE: February 28, 2012
SUBJECT: Law Offices of Richard Swayne – Business Plan

Our client, Richard Swayne, is a lawyer who practices law here in Walkerville as a solo practitioner. A college classmate of his, Ann Moulton, has proposed that she and Mr. Swayne enter into a business arrangement, which would be to publish and market a series of legal forms for use by individuals and small business entities wishing to represent themselves rather than retain counsel.

Ms. Moulton has presented Mr. Swayne with a business plan that spells out the scope and contours of the proposed business arrangement. He has some concerns about the legal ethics of entering into such an arrangement and has asked us to advise him on that aspect of the venture.

Please draft a two-part memorandum to prepare me for my upcoming meeting with Mr. Swayne.

In Part 1, explain what specific ethical problems the following parts of the Business Plan present under the Columbia Rules of Professional Conduct and the Professions Code:

1. Each of the duties of the “receptionist” listed in the “helpline” service section of the plan.
2. The revenue sharing arrangements described in the plan.
3. The partnership nature of the venture.

In Part 2, explain the following:

4. Whether Swayne’s drafting the forms and instructions constitute “law-related services” and, if so, what Swayne’s ethical obligations are to the users of the forms.
5. What obligation, if any, Swayne might have to supervise the “receptionist.”

There are several other ethical issues that I have assigned to another associate to explore. You should focus only on the ones I’ve listed above.

1 **Transcript of Interview with Richard (“Dick”) Swayne**
2 **February 27, 2012**

3 * * *

4 **Roger Arbuckle:** Hi, Dick. I’m glad you could come in to talk about that business plan
5 you told me about over the phone yesterday. Did you bring it with you?

6 **Richard Swayne:** Yeah, I did. Here it is.

7 **Arbuckle:** Great. I’ll take a close look at it later, but let’s talk so you can at least give
8 me the highlights.

9 **Swayne:** OK. It’s a business venture I’d really like to do, but I want to be sure I don’t
10 run into any ethical problems. Basically, Ann Moulton – she’s a college acquaintance of
11 mine – did some market research and found that there are lots of individuals and small
12 business owners who don’t want to spend the money on an attorney to handle relatively
13 minor legal problems. She came up with the idea of putting together sets of legal forms
14 that litigants can buy and use to do the work themselves. I’d draft the forms and the
15 instructions. Ann would handle the marketing and sales, mainly over the Internet.

16 **Arbuckle:** Describe your existing practice for me.

17 **Swayne:** It’s a small but busy practice, mostly plaintiff’s personal injury cases – car
18 accidents, product liability, slip-and-falls – that sort of thing. I also represent debtors
19 against creditors’ claims and small business owners in commercial disputes. Probably
20 about one-fifth of my work involves estate matters – wills, probate, uncomplicated estate
21 planning. I’m a solo practitioner, so on larger, complicated matters, I usually associate
22 co-counsel with special expertise.

23 **Arbuckle:** What sort of business association would you operate this new venture
24 under?

25 **Swayne:** We’d form a limited liability partnership. Ann would be the general partner
26 responsible for running the day-to-day operations, and I’d be the limited partner. We’d
27 share the profits and losses 50-50.

28 **Arbuckle:** I see. Well, do you think there’s enough money in such a venture to make it
29 worth your while?

30 **Swayne:** I *think* so. We’re estimating that it will begin generating profits in the fourth or
31 fifth year, but there are some immediate side advantages to me.

32 **Arbuckle:** Like what?

1 **Swayne:** Well, first of all, I own the building on Center Street, and my law offices now
2 occupy only half of it. The new LLP would lease the other half from me. Second, aside
3 from my share from the sales of the forms, I'd get a lot of referrals and client leads that I
4 could follow up on and use to develop my law business. Of course, as you can see in
5 the plan, I'd have to share with the LLP some of the referral fees. But, all told, it would
6 represent a nice piece of change.

7 **Arbuckle:** I'd want to take a very close look at those aspects of the deal before you
8 agree to any of that.

9 **Swayne:** Why? Those are the parts of the deal that make it worthwhile to me.

10 **Arbuckle:** Because I think some of that comes pretty close to crossing the ethical
11 line.

12 Would any of your office staff be involved in running the LLP?

13 **Swayne:** No, not really. The LLP would hire its own staff, including the receptionist,
14 who would be the main contact point for those who email or call in by phone. Although I
15 guess I'd be available to answer any questions if a user of the forms wanted to contact
16 me.

17 **Arbuckle:** Give me an example of what kinds of questions you're talking about.

18 **Swayne:** Well, I mean things that don't involve my professional judgment, like where to
19 file, how many copies, what are the filing fees, and so forth.

20 **Arbuckle:** What exactly would be the receptionist's duties?

21 **Swayne:** That person's duties are pretty well spelled out in the business plan, at least
22 insofar as they relate to the LLP. But that person would also direct clients of mine who
23 come in for appointments or consultations to me. And, I guess, if a user of the forms
24 called in or walked in and had a question for me, the receptionist would direct that
25 person to me as well. The business plan has a provision that would allow the users of
26 the forms to refer questions to me and to contact me for limited free consultations.

27 **Arbuckle:** What do you mean "limited?"

28 **Swayne:** I'm not quite sure. I'd answer simple questions for free, but if it got beyond
29 simple information, for example into issues of liability or strategy that require my
30 professional judgment, I'd handle the person as a regular client of my firm and bill him
31 or her as usual for my services.

1 **Arbuckle:** Is there going to be just a single phone number so that all calls for both you
2 and the LLP will be routed through the receptionist?

3 **Swayne:** No. I'll have my own phone number for my law office, and calls related to my
4 law practice will be routed directly to me.

5 **Arbuckle:** I'd want to take a close look at those things too. Would you have any
6 supervisory role or authority over the receptionist?

7 **Swayne:** Not if I could help it. I just don't want to divert my energies to running the LLP
8 and being held to the duties of a general partner. As far as I'm concerned, Ann alone
9 will be supervising the receptionist. As you know, under the LLP laws, the general
10 partner is completely responsible and liable, unless a limited partner gets involved in
11 managing the day-to-day affairs.

12 **Arbuckle:** That's right, but, as *you* know, that doesn't preclude the application of the
13 Rules of Professional Conduct to you. But tell me a little bit about what your role would
14 be in creating the forms and instructions for their use.

15 **Swayne:** Well, it would be the usual range of forms used in commencing litigation and
16 responding to litigation already commenced – summons, complaints, answers,
17 discovery documents, motions, and the like. Then, I'd draft the instructions on what
18 forms to use for specific purposes.

19 **Arbuckle:** Would these instructions contain any directions or suggestions about what
20 language the user should employ to fill in spaces on the forms where narrative
21 statements are required?

22 **Swayne:** No. The instructions would simply tell them what boxes to check and spaces
23 to fill out, without telling them what language to use. They would also explain the filing
24 requirements. I wouldn't want it to appear that I am giving legal advice to the users of
25 the forms by telling them what language to use. I'd leave that part of it up to the
26 receptionist when users contact him or her for assistance.

27 **Arbuckle:** Anything else that I should be aware of?

28 **Swayne:** No. Ann and I have discussed the various ways we can structure this. For
29 example, in the original draft of the business plan, in my capacity as a lawyer – not as a
30 member of the LLP – I would have been retained as the lawyer for the LLP to handle
31 any legal matters and claims against the partnership, and I'd charge the LLP my usual
32 rates. I rejected that idea. I want a cleaner relationship and one with greater financial

1 potential. I want to be a partner of an LLP, not an employee, consultant, independent
2 contractor, or anything else.

3 **Arbuckle:** OK. I hope that can be accomplished under the rules, but maybe not. By
4 the way, do you want advice or help from me on the technicalities of formation of the
5 LLP?

6 **Swayne:** No. I can take care of that myself.

7 **Arbuckle:** All right, then. Give me a few days to do the research, and I'll get back to
8 you.

9 **Swayne:** Thanks, Roger. I'll be anxious to hear from you.

Business Plan Self-Help Legal Enterprise Project, LLP

OVERVIEW: Research shows that there are many small business entities and individuals in the State of Columbia and elsewhere who choose to represent themselves in litigation and related legal matters rather than retain counsel. There is a need for legal forms that conform to the rules of the courts of the State of Columbia, such as will enable such persons to comply with filing and pleading requirements. The undertaking proposed in this Plan will fill that need and, at the same time, serve as a business development vehicle for both the sale of such forms and the law practice of participating lawyers.

Form of the undertaking: This Plan contemplates the creation of a limited liability partnership named Self-Help Legal Enterprise Project, LLP (SHLEP).

General Partner: Ann Moulton, BS, MBA, University of Columbia, will be the managing partner and will manage the day-to-day operations of the partnership. Ms. Moulton was formerly employed as Regional Vice President and Sales Manager of Manifold Business Forms, Inc., a nationwide producer and supplier of business forms. As such, Ms. Moulton has an existing business network that will facilitate production and marketing of SHLEP's legal forms.

Limited Partner: Richard Swayne, BA, JD, University of Columbia, will be the sole limited partner. Mr. Swayne has been a practicing lawyer in the City of Walkerville, Columbia for 15 years. He is a solo practitioner. He has familiarity with the court system and the requisites necessary to ensure that the forms will comply with court rules.

Office Facilities: The current law offices of Richard Swayne are located in a building at 42 Center Street owned by Mr. Swayne. Swayne and his staff are currently the sole occupants of the building. This Plan contemplates that the west wing of the building, which is currently vacant, would be leased from Swayne and occupied by SHLEP and its staff at a rental amount to be determined and paid to Swayne. The east wing would continue to be occupied by The Law Offices of Richard Swayne.

Contribution of Capital and Division of Profits and Losses: Ann Moulton and Richard Swayne shall each contribute \$100,000 in cash at the inception of SHLEP and,

thereafter, their skill and labor and such other amounts of capital as shall be necessary. Ms. Moulton and Mr. Swayne shall share profits and losses equally.

Method of Operation: To the extent permitted by law, SHLEP and The Law Offices of Richard Swayne shall work cooperatively to maximize the sale and use of the legal forms produced and marketed by SHLEP. There shall be the following division of labor between the two entities.

Production of Legal Forms: Mr. Swayne shall be primarily responsible for determining the types of forms that are necessary and the design thereof to ensure compliance with the rules of the courts of the State of Columbia. He shall also be responsible for drafting instructions for the use and purposes of the forms in any advertising and marketing media utilized by SHLEP.

Ms. Moulton shall be primarily responsible for contracting with printers for printing, packaging, and purchasing paper forms, taking orders for, and shipping forms to purchasers who wish to use hard copy rather than online features, and for designing and implementing website access for online completion of the forms and court filing.

Marketing and Sales: The principal means of marketing and utilizing the forms will be via a SHLEP website on the Internet and advertising in legal publications. Ms. Moulton, as general partner of SHLEP, shall be responsible for such advertising and the creation and maintenance of a SHLEP website. All costs of advertising, marketing, and sales shall be borne by SHLEP. The advertising and website shall promote use of the forms and shall contain the following features:

- Descriptions of the various forms and their uses, emphasizing that they are accompanied by a complete set of written instructions for completion and filing of the forms.
- Representations that the forms and instructions were created by Richard Swayne, an experienced attorney licensed in the State of Columbia, including assurances that the forms, if properly filled out and filed, will comply with court rules.
- A schedule showing the cost of the forms and quantity discounts.
- A mechanism for online ordering and paying for the forms, requiring the potential purchaser to provide name, address, and telephone number and offering the option of paying by credit card.

- Emphasis on the security and confidentiality of the website and “online” capabilities for completion and filing of the forms with the courts.
- A “helpline” telephone number that purchasers of the forms can call for free-of-charge assistance in completing the forms and directions for filing them.
- Email capability for users to attach completed forms to be checked by the receptionist for completeness and to ask and get responses to questions.
- A link to the court system for online, electronic filing and service of the forms with the courts.
- A representation that Mr. Swayne is available for free limited consultation to any user of SHLEP’s forms.
- An email link, which the caller can click and use to send a question or other inquiry to SHLEP and/or Mr. Swayne.

Free “Helpline” Service: SHLEP shall hire a receptionist. The duties of the receptionist shall include the following:

- The receptionist will answer telephones and greet customers of SHLEP.
- The receptionist will take all “helpline” calls and assist the callers in filling out the forms by answering their questions, telling them which boxes to check, and helping to formulate language to be inserted in various parts of the forms.
- The receptionist will respond to all email inquiries received from users of the forms.
- The receptionist shall also screen all callers and make an initial determination whether the caller needs legal assistance beyond mere help in filling out the forms. If so, the receptionist shall so inform the caller and tell the caller that Mr. Swayne is available for immediate consultation for \$250. If the caller agrees to pay for a consultation, the receptionist shall transfer the call to Mr. Swayne.
- The receptionist shall maintain records of the names, addresses, and telephone numbers of all “helpline” callers and, monthly, shall furnish said records to The Law Offices of Richard Swayne as “leads” Mr. Swayne may wish to pursue for client development purposes.

Books of Account and Sharing of Revenues: SHLEP and The Law Offices of Richard Swayne shall in all respects maintain separate financial records, books of

account, payroll, accounts receivable and payable, and bank accounts and, with the following exceptions, shall each bear its own expenses and costs of operation.

- SHLEP and The Law Offices of Richard Swayne shall pay equally all costs of utilities, telephone and high-speed Internet services.
- SHLEP shall pay Richard Swayne from the revenues of SHLEP the agreed-upon lease rental for the office facilities on Center Street.
- Mr. Swayne shall remit to SHLEP 50% of all consultation fees he receives from callers referred to him by the receptionist.
- The Law Offices of Richard Swayne shall remit to SHLEP 10% of all fees earned from “leads” obtained from the receptionist.
- Mr. Swayne shall reimburse one-half of the cost of health insurance and other fringe benefits provided to the receptionist.

[Financial Projections Omitted]



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PERFORMANCE TEST A

LIBRARY

IN RE SWAYNE

LIBRARY

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The State Bar of Columbia Standing Committee on
Professional Responsibility and Conduct:
Formal Opinion No. 1995-141..... 26

Selected Provisions of Columbia Rules of Professional Conduct

Rule 1-100. Rules of Professional Conduct, in General: The Columbia Rules, together with any standards adopted by the Board of Governors pursuant to these rules, shall be binding upon all lawyers admitted to practice by the State Bar of Columbia.

Lawyers are also bound by the applicable case law and the provisions of the Columbia Professions Code. Although not binding, opinions of ethics committees in Columbia and other jurisdictions and bar associations should be consulted by lawyers for guidance on proper professional conduct.

* * *

Rule 1-120. Assisting, Soliciting, or Inducing Violations: A lawyer shall not knowingly assist in, solicit, or induce any violation of these rules or the Columbia Professions Code.

* * *

Rule 1-300. Unauthorized Practice of Law: A lawyer shall not aid any person or entity in the unauthorized practice of law.

* * *

Rule 1-310. Forming a Partnership with a Non-Lawyer: A lawyer shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Discussion: Rule 1-310 is not intended to govern lawyers' activities that cannot be considered to constitute the practice of law. It is intended solely to preclude a lawyer from being involved in the practice of law with a person who is not a lawyer.

* * *

Rule 1-320. Financial Arrangements with Non-Lawyers: (A) Neither a lawyer nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer. (B) A lawyer shall not compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the lawyer or the lawyer's law firm by a client, or as a reward for having made a recommendation resulting in employment of the lawyer or the lawyer's law firm by a client.

* * *

Rule 1-400. Solicitation: For purposes of this rule, a "solicitation" means any communication concerning the availability for professional employment of a lawyer or a law firm in which a significant motive is pecuniary gain and that is delivered in person or by telephone. A solicitation shall not be made by or on behalf of a lawyer or law firm to a prospective client with whom the lawyer or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of Columbia.

* * *

Rule 1-500. Responsibilities Regarding Non-Lawyer Assistants: With respect to a non-lawyer employed or retained by or associated with a lawyer:

(A) A lawyer who possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(B) A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

* * *

Discussion: Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's

professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

* * *

Rule 1-600. Responsibilities Regarding Law-Related Services: (A) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

(B) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (A), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

Discussion: "Law-related services" and "legal services" are two distinct things. Rule 1-600 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and regardless of whether the law-related services are performed through a law firm or a separate entity. The conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services.

If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The lawyer must take reasonable measures to communicate a clear, understandable disclaimer to assure that the recipient of the law-related services knows that the services are not legal services and the protections of the client-lawyer relationship do not apply.

Selected Provisions of Columbia Professions Code

Section 25. Practice of Law: The practice of law is the provision of legal services. It includes, but is not limited to, giving any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies. No person shall practice law in Columbia unless the person is an active lawyer of the State Bar.

* * *

Section 51. Runner or Capper: As used in this article:

A runner or capper is any person, firm, association or corporation acting for consideration in any manner or in any capacity as an agent for an attorney-at-law or law firm, whether the attorney or any lawyer of the law firm is admitted in Columbia or any other jurisdiction, in the solicitation or procurement of business for the attorney-at-law or law firm as provided in this article. An agent is one who represents another in dealings with one or more third persons.

Section 52. Prohibited Solicitations by Runner or Capper: (a) It is unlawful for:

Any person, in an individual capacity or in a capacity as a public or private employee, or for any firm, corporation, partnership or association to act as a runner or capper for any attorneys or to solicit any business for any attorneys in and about the state prisons, county jails, city jails, city prisons, or other places of detention of persons, city receiving hospitals, city and county receiving hospitals, county hospitals, superior courts, or in any public institution or in any public place or upon any public street or highway.

* * *

Section 64. Self-Help Services Provided by Legal Document Assistants:

(a) "**Legal document assistant**" means any person, corporation, partnership, association, or other entity that provides, or assists in providing, or offers to provide, or offers to assist in providing, for compensation, any self-help service to a member of the public who is representing himself or herself in a legal matter, or who holds himself or herself out as someone who offers that service or has that authority. This paragraph

does not apply to any individual whose assistance consists merely of secretarial or receptionist services.

(b) "**Self-help service**" means all of the following:

(1) Completing legal documents in a ministerial manner, selected by a person who is representing himself or herself in a legal matter, by typing or otherwise completing the documents at the person's specific direction.

(2) Providing general published factual information that has been written or approved by an attorney, pertaining to legal procedures, rights, or obligations to a person who is representing himself or herself in a legal matter, to assist the person in representing himself or herself. Merely publishing such factual information shall not require registration as a legal document assistant.

(3) Making published legal documents available to a person who is representing himself or herself in a legal matter.

(4) Filing and serving legal forms and documents at the specific direction of a person who is representing himself or herself in a legal matter.

(c) **A legal document assistant**, including any legal document assistant employed by a partnership or corporation, may not provide any self-help service for compensation, unless the legal document assistant is registered in the county in which his or her principal place of business is located and in any other county in which he or she performs acts for which registration is required.

Section 65. Registration: A legal document assistant shall be registered pursuant to this chapter by the county clerk in the county in which his or her principal place of business is located and in any other county in which he or she performs acts for which registration is required.

Section 66. Solicitation Requirements: (a) It is unlawful for any legal document assistant in the first in-person or telephonic solicitation of or response to a prospective client of legal document services to enter into a contract or agreement for services or accept any compensation unless the legal document assistant states orally, clearly, affirmatively and expressly all of the following, before making any other statement, except a greeting, or asking the prospective client any questions:

- (1) The identity of the person making the solicitation or response to a caller.
- (2) The trade name of the person represented by the person making the solicitation or response to the caller.
- (3) The kind of services being offered for sale.
- (4) The statement: "I am not an attorney" and, if the person offering legal document assistant services is a partnership or a corporation, or uses a fictitious business name, "(name) is not a law firm. I/we cannot represent you in court, advise you about your legal rights or the law, or select legal forms for you."

Section 67. Prohibited Acts for Legal Document Assistant: It is unlawful for any person engaged in the business or acting in the capacity of a legal document assistant to do any of the following:

- (a) Provide any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies. A legal document assistant shall complete documents only in the manner prescribed in section 64(b).
- (b) Engage in the unauthorized practice of law, including, but not limited to, giving any kind of advice, explanation, opinion, or recommendation to a consumer about possible legal rights, remedies, defenses, options, selection of forms, or strategies.

**THE STATE BAR OF COLUMBIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT**

FORMAL OPINION NO. 1995-141

INTRODUCTION

This opinion addresses the ethical responsibilities of lawyers who render law-related services to a client either directly, through a non-lawyer, or through an entity in which the lawyer or the lawyer's firm has an ownership interest. "Law-related services" are services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

Examples of law-related services that might be performed by a non-lawyer are such things as family counseling by a social worker, rendering tax advice by an accountant or a tax-preparer, providing financial services by a stockbroker, giving advice regarding testamentary disposition by a charity, and the like. The characteristic that such undertakings have in common is that they all present the problem that providers of such services have the opportunity to identify and refer persons using their services to lawyers, who would, of course, receive such referrals for "pecuniary gain."

Concerns frequently arise in situations where the law-related services are rendered either by an entity owned by a lawyer or a law firm, individually or with others, or by a non-lawyer employed by the lawyer or the lawyer's firm.

These practices raise ethical concerns in the areas of improper solicitation of clients and financial relationships between a lawyer and non-lawyers. This opinion addresses these concerns.

DISCUSSION

Applicability of the Rules of Professional Conduct to a Lawyer's Performance of Law-Related Services: Lawyers have historically been allowed to practice law and to pursue other business activities at the same time. Although the current Columbia Rules of Professional Conduct do not contain specific restrictions on dual practices, ethics opinions have warned dual practitioners that the rules place constraints on their activities in other businesses and professions.

A lawyer's ethical obligations are not limited to activities undertaken in the course of rendering pure legal services. Any act involving moral turpitude, dishonesty or corruption by an attorney, whether the act is committed in the course of the practice of law or in the pursuit of other business activities, constitutes grounds for discipline.

Improper Solicitation of Clients: A lawyer or law firm's performance of legal and law-related services may not involve the referral of business between the two areas of service. For example, where a lawyer offers law-related services through a person or entity in which the lawyer has an interest, whether ownership, management, or control, the lawyer may not use or encourage persons in that entity to channel or otherwise direct users of those law-related services to the lawyer if the purpose of such a practice is to attract the users as potential clients of the lawyer's law practice.

Such practices raise issues under rule 1-400, which governs lawyer solicitation. Rule 1-400 bans solicitations and prohibits in-person or telephonic communications that suggest the availability of professional services if a significant purpose of the communications is for pecuniary gain. It does not, however, bar solicitations and communications regarding the availability of purely non-legal professional services.

The ban on solicitations applies when legal employment is solicited of someone with whom the lawyer or firm does not have an existing or prior lawyer-client relationship. Thus, the rule applies when such solicitations occur in the course of rendering law-related services.

Rule 1-400 applies to solicitations and communications made on behalf of a lawyer or law firm by a non-lawyer employee or a lawyer or law firm owned, managed, or controlled entity. Thus, the rule prohibits solicitations and communications regarding the availability of legal services, which are made by a lawyer or a non-lawyer employee on behalf of the lawyer in the course of rendering law-related services.

Financial Relationships Between Lawyers and Non-Lawyers: A lawyer providing law-related services through non-lawyer employees or business entities in which non-lawyers also have an interest must also comply with the Columbia Rules of Professional Conduct governing the financial relationships between lawyers and non-lawyers. First, a lawyer shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law.

Second, non-lawyers cannot share in the profits of a law practice. Rule 1-320 prevents a lawyer from directly or indirectly sharing legal fees with a non-lawyer.

Together, these rules require that both the structure of the business relationship and the division of income from law-related services be separate and distinct from the lawyer's law practice. The entity owned by the lawyer and non-lawyer cannot engage in the practice of law. The two cannot share the legal fees from the lawyer's practice.

Another area of concern is where a non-lawyer in a business relationship with a lawyer to provide law-related services seeks to influence the conduct of a lawyer's legal practice through the referral of business or imposing other profit-related concerns on the legal practice. A lawyer cannot compensate, give, or promise anything of value to any person or entity for the purpose of recommending or securing employment of the lawyer or the lawyer's firm by a client under the rule. The rule encompasses situations in which a lawyer gives any financial benefit or compensation in exchange for the referral of business.

CONCLUSION

As the preceding discussion demonstrates, the rendering of non-legal services by lawyers, law firms or entities in which either has an ownership interest raises a number of ethical concerns that must be carefully evaluated. Lawyers engaged in rendering such services must not only be aware of the ethical issues raised in this opinion, but must also watch for other ethical issues that may arise in the course of providing the service.



February 2012 California Bar Examination

ESSAY QUESTIONS 4, 5, AND 6

Answer all three questions.

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 that 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

Testco, Inc. conducts market surveys, and is solely owned by Amy, Ben, and Carl. Each paid \$50 for one-third of Testco's no-par shares. Amy and Ben, respectively, are Testco's president and secretary and its only two directors. Carl holds no office and is not involved in any aspect of Testco's business. Amy and Ben are scrupulous about holding directors' meetings to conduct corporate business and to make monthly distributions to the shareholders of almost all cash on hand. As a result of the latter practice, Testco has little cash on hand and frequently finds itself in the position of negotiating extensions for payment of its debt.

While Ben was on vacation, Examco called Amy, asking to enter into a one-year contract with Testco. Amy said that if Examco would agree to a ten-year contract, Testco would grant its standard fifty-percent discount. Examco agreed, and Amy signed the contract in the following manner: "Testco, by Amy, President." When Ben returned, he said that he had thought for some time that Testco's standard fifty-percent discount was unwise, and convinced Amy to revoke the contract with Examco.

Examco wants to sue Testco, Amy, Ben, and Carl for damages. If found liable, Testco will not be able to pay.

On what theory or theories may Examco bring an action for recovery of damages against:

1. Testco? Discuss.
2. Amy, Ben, and Carl as individuals? Discuss.

Question 5

Attorney mailed a professional announcement to several local physicians, listing his name and address and his area of law practice as personal injury. Doctor received Attorney's announcement and recommended that her patient, Peter, call Attorney. Peter had become very ill; he thought the cause was breathing fumes from a chemical company near his home.

Attorney agreed to represent Peter in a lawsuit against the chemical company. At Attorney's request, Doctor agreed to testify as an expert witness on Peter's behalf at the trial. Attorney advanced Doctor expert witness fees of \$200 an hour for her time attending depositions, preparing for trial, and testifying.

Attorney learned in discovery that numerous scientific studies had failed to find any medical risks from the chemical company's fumes. Doctor was nevertheless willing to testify, on the basis of her clinical experience, that the fumes had harmed Peter. Attorney did not know whether Doctor's testimony was true or false. He offered Doctor's testimony at trial, and Peter won a judgment.

After the trial, Attorney sent a \$500 gift certificate to Doctor, with a note thanking her for recommending that Peter call him.

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

Answer according to California and ABA authorities.

Question 6

Donna was looking for a place to live. Perry owned a two-story home, with the second story available to lease.

Donna and Perry signed a two-year lease that provided, in part: "Lessee may assign the leased premises only with the prior written consent of Lessor."

Upon moving in, Donna discovered that the water in her shower became very hot if Perry ran water downstairs. When Donna complained to Perry about the shower and asked him to make repairs, Perry refused, saying, "I'll just make sure not to run the water when you are in the shower."

Perry soon adopted a new diet featuring strong-smelling cheese. Donna told Perry that the smell of the cheese annoyed and nauseated her. Perry replied: "Too bad; that's my diet now."

After constantly smelling the cheese for three weeks, Donna decided to move out and to assign the lease to a friend who was a wealthy historian.

Donna sought Perry's consent to assign the lease to her friend. Perry refused to consent, saying, "I've had bad experiences with historians, especially wealthy ones." Thereafter, every time Donna took a shower, Perry deliberately ran the water downstairs.

After two weeks of worrying about taking a shower for fear of being scalded and with the odor of cheese still pervasive, Donna stopped paying rent, returned the key, and moved out. At that time, there were twenty-two months remaining on the lease.

Perry has sued Donna for breach of the lease, seeking damages for past due rent and for prospective rent through the end of the lease term.

What defenses may Donna reasonably raise and how are they likely to fare? Discuss.



February 2012 California Bar Examination

PERFORMANCE TEST B

INSTRUCTIONS AND FILE

STATE v. DOLAN

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STATE v. DOLAN

INSTRUCTIONS

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

**State's Attorney's Office
County of Greene
3472 Route 9
Ulster, Columbia**

Richard Parsons
State's Attorney

Date: March 1, 2012
To: Applicant
From: Richard Parsons
Re: State v. Dolan

As you may know, this office is prosecuting Bruce Dolan. Mr. Dolan is charged with 1) possession of methamphetamine and marijuana, 2) possession with intent to distribute methamphetamine and marijuana, and 3) conspiracy to distribute methamphetamine and marijuana.

The nonjury bench trial was completed yesterday and closing arguments were scheduled for this morning. Unfortunately, Barbara Jordan, the Assistant State's Attorney trying the case, has gone into the hospital for an emergency appendectomy. The court has given us an extension of time until tomorrow to present closing arguments. I will present the closing argument, but I want you to prepare a draft of that closing argument for my review.

Please write out the argument exactly as you would give it if you were presenting it. It might be helpful to read the Library first. You need to understand the elements of each charge in order to understand how each witness' testimony establishes the facts necessary to support our argument that each of the elements has been proven beyond a reasonable doubt.

Follow the guidelines contained in the office memo on Closing Arguments: Bench Trials.

**State's Attorney's Office
County of Greene
3472 Route 9
Ulster, Columbia**

**Richard Parsons
State's Attorney**

Date: September 1, 2011
To: Assistant State's Attorneys
From: Richard Parsons
Re: Closing Arguments: Bench Trials

Your closing argument should begin with an understanding of the elements of the crime that will be applied to the facts in the case. In jury trials, you will have jury instructions. In bench trials, however, you must rely on your analysis of legal authority (statutes and case law) during closing argument. The legal authorities in bench trials (just as the instructions in jury trials) will give you the framework for your closing argument. The argument must show how the evidence admitted during the trial meets the required elements established by the statutes and case law. While in a jury trial you do not ordinarily discuss or make reference to the legal authorities, in a bench trial you have more latitude in referring to the legal authority. Indeed, in the absence of jury instructions, you may find it necessary to explain to the court finer points of the law. But, you must not lose sight of the fact that a closing argument is not a legal memo or an essay. The argument is based on the evidence presented, not histrionics or personal opinion.

Your job is to help the judge understand how the law relates to the facts presented, and to persuade the judge that he or she has no choice but to find as you have advocated.

Do the following:

- Address each charge separately.
- For each charge state the elements that are required to get a conviction.
- Argue that the evidence establishes each element beyond a reasonable doubt.
- Draw reasonable inferences from the evidence to support your position.

-- Never hold back any argument assuming you will have a second opportunity to make it in rebuttal.

Organization and persuasiveness are very important. If you immerse the judge in a sea of unconnected details, he or she will not have a coherent point of view.

TRIAL TRANSCRIPT
STATE v. DOLAN
EXAMINATION OF RODNEY MACK

Rodney Mack, a witness called by the state, first being duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. JORDAN

Q: Would you tell us your name?

A: Rodney Mack.

Q: Where do you work?

A: I am unemployed.

Q: Where do you live?

A: I am a guest of the county, at the jail.

Q: What were you arrested for?

A: Possession of controlled substances.

Q: Drugs?

A: Yes.

Q: Are you familiar with the defendant Bruce Dolan?

A: We went to high school together and we did a little business on the side.

Q: What business?

A: Dolly would sell me drugs that I would then resell.

Q: By Dolly you mean the defendant.

A: Yeah; all his friends called him by the nickname "Dolly."

Q: What was the time frame during which you had this relationship?

A: Must have been basically June 2008 through September or October 2010.

Q: Were you the only person the defendant supplied?

A: No; he sold to a close-knit group of friends and neighbors.

Q: Who?

A: Me, Lynette Rogers, Will Gardner, Tom Cord.

Q: Did these people have anything in common other than buying drugs?

A: Actually we all went to high school together and some are related in one way or another.

Q: What exactly are the family relations?

A: My daughter married and had a child with Lynette Rogers' son.

1 **Q:** What type of drugs would you purchase?

2 **A:** Methamphetamine and marijuana.

3 **Q:** Did the defendant ever tell you where he obtained the drugs he sold to you?

4 **A:** He never actually said; he only told me that he got the drugs, buried and stored them

5 on his property, and had friends come to his property to obtain and use drugs.

6 **Q:** Was this a rural setting?

7 **A:** He lived in rural Montour, Columbia, along the Columbia River, in a one room shack,

8 on property that used to be a Boy Scout camp.

9 **Q:** Other than his friends, did he sell the drugs directly to users?

10 **A:** He told me he used his friends to actually distribute the drugs.

11 **Q:** Specifically, what drugs did you buy from the defendant?

12 **A:** Meth.

13 **Q:** How much did you buy?

14 **A:** One-quarter pound at a time.

15 **Q:** Where did you buy the drugs?

16 **A:** He had really strict rules. A couple of us could buy at his house, but others would

17 have to meet him in Tama and the casino.

18 **Q:** Where did *you* buy?

19 **A:** It really depended. Both places really.

20 **Q:** What types of arrangements were made about the price?

21 **A:** Again, he was very rigid; cash only, nothing larger than \$20 bills. No negotiation on

22 price. Strictly take it or leave it.

23 **Q:** What did you do with the drugs?

24 **A:** I sold the drugs to others in the Kellogg and Newton, Columbia areas.

25 **Q:** Who did you sell it to?

26 **A:** I broke it into ounces to sell to at least four people. Richard Crutchfield. I can't

27 remember who the others were.

28 . . .

29

1 CROSS-EXAMINATION BY MS. MAYER

2 Q: You have been charged with possession of meth with intent to distribute, haven't
3 you?

4 A: Yes.

5 Q: In fact, haven't you cut a deal with the prosecutor in this case that if you testify
6 against Mr. Dolan, he will let you plead to a reduced crime?

7 A: Yes.

8 Q: You remain close to Mr. Dolan, don't you?

9 A: Not any more.

10 Q: Let's try this, then. Weren't you a friend of Mr. Dolan for a long time?

11 A: Since high school.

12 Q: You hung out together?

13 A: Yes.

14 Q: Drank together?

15 A: Some.

16 Q: Actually, you were arrested once together, weren't you?

17 BY MS. JORDAN: Objection.

18 BY THE COURT: Overruled.

19 Q: You have been convicted of a felony yourself, haven't you?

20 A: Yes.

21 Q: That was three years ago?

22 A: I think that's right.

23 Q: The conviction was for sale of narcotics, is that right?

24 A: I believe that's what they called it.

25 Q: You spent 18 months in prison, correct?

26 A: Yes.

27 Q: I assume it was unpleasant in prison.

28 A: Not a great experience.

29 Q: You don't want to go back, do you?

30 A: Not particularly.

31

32

1 EXAMINATION OF RICHARD CRUTCHFIELD

2 Richard Crutchfield, a witness called by the state, first being duly sworn, testified as
3 follows:

4 DIRECT EXAMINATION BY MS. JORDAN

5 **Q:** Would you tell us your name?

6 **A:** Richard Crutchfield.

7 **Q:** Where do you work?

8 **A:** I am currently unemployed.

9 **Q:** Where do you live?

10 **A:** I am currently in jail.

11 **Q:** What were you arrested for?

12 **A:** Possession of meth.

13 **Q:** Have you ever purchased methamphetamine?

14 **A:** Yes.

15 **Q:** From whom?

16 **A:** From both Tom Cord and Rodney Mack. When one of them was not available, I
17 would purchase methamphetamine from the other.

18 **Q:** Did you ever have occasion to go to the Tama casino with Mr. Mack?

19 **A:** Yeah; he and I went to the casino in Tama and Mack would leave the casino to pick
20 up methamphetamine.

21 CROSS-EXAMINATION BY MS. MAYER

22 **Q:** You have been charged with possession of meth with intent to distribute, haven't
23 you?

24 **A:** Yes.

25 **Q:** In fact, haven't you cut a deal with the prosecutor in this case that if you testify
26 against Mr. Dolan, he will let you plead to a reduced crime?

27 **A:** Yes.

28 **Q:** You've known Mr. Dolan for almost 10 years, correct?

29 **A: Yes.**

30 EXAMINATION OF TOM CORD

31 Tom Cord, a witness called by the state, first being duly sworn, testified as follows:

32

1 DIRECT EXAMINATION BY MS. JORDAN

2 Q: Are you familiar with the defendant Bruce Dolan?

3 A: We went to high school together.

4 Q: Did you do any business together?

5 A: Yes.

6 Q: What business?

7 A: He would sell me drugs that I would then resell.

8 Q: What was the time frame during which you had this relationship?

9 A: From around June of 2009 through December of 2010.

10 Q: How much did you purchase during this period?

11 A: Maybe a couple of pounds of methamphetamine a month at most.

12 Q: Where did you buy the drugs?

13 A: Always at his house or I would have to meet him in Tama at the casino.

14 Q: What types of arrangements were made about the price?

15 A: Cash only, nothing larger than \$20 bills. He would get really angry if you tried to
16 negotiate the price. He always said "take it or leave it."

17 Q: Are you familiar with Rodney Mack?

18 A: Yes. We went to high school together.

19 Q: Have you remained close?

20 A: Yes.

21 CROSS-EXAMINATION BY MS. MAYER

22 Q: You have been charged with possession of meth with intent to distribute, haven't
23 you?

24 A: Yes.

25 Q: In fact, haven't you cut a deal with the prosecutor in this case that if you testify
26 against Mr. Dolan, he will let you plead to a reduced crime?

27 A: Yes.

28 REDIRECT EXAMINATION BY MS. JORDAN

29 Q: You remain close to Mr. Mack, don't you?

30 A: Yes.

31 Q: When you finished a violator program in Altaville, Columbia, Rodney Mack picked
32 you up?

1 **A:** Yes.

2 **Q:** Indeed, you met your girlfriend, Stacey Carroll Black, through Rodney and Renee
3 Mack?

4 **A:** Yes.

5 EXAMINATION OF LYNETTE ROGERS

6 Lynette Rogers, a witness called by the state, first being duly sworn, testified as follows:

7 DIRECT EXAMINATION BY MS. JORDAN

8 **Q:** Did you ever buy drugs from the defendant, Bruce Dolan?

9 **A:** He would sell drugs to my brother, Will Gardner. Will would then resell the drugs.

10 **Q:** When did this take place?

11 **A:** It was around October 2009. I began taking my brother to defendant's residence to
12 obtain marijuana and methamphetamine to sell to others.

13 **Q:** If it was your brother who was buying, why did you take him?

14 **A:** Will was quadriplegic. He needed to earn some quick money for medical bills, and for
15 one month, I helped him sell controlled substances.

16 **Q:** Did you just show up at the defendant's home and ask to buy it?

17 **A:** No; I arranged by phone for Will to buy methamphetamine from defendant.

18 **Q:** Did you know the defendant before you made the call?

19 **A:** I knew the defendant through my boyfriend, Billy Purvis. Billy had gotten one-half
20 ounce to one-ounce quantities of methamphetamine from Rodney Mack and told me
21 that Rodney got it from Dolly.

22 **Q:** How much did you buy from the defendant in total?

23 **A:** Had to be somewhere between twelve to fourteen ounces of methamphetamine.

24 **Q:** Did you buy it all at once?

25 **A:** No, no. Will usually bought two ounces of methamphetamine at a time from
26 defendant, and sold most of it to Todd Bram.

27 **Q:** Where did you buy the drugs?

28 **A:** At his house, sometimes in Tama, at the casino.

29 **Q:** What types of arrangements were made about the price?

30 **A:** He would only accept \$20 bills.

31 **Q:** Did you negotiate the price?

32 **A:** Absolutely not. He was very clear he would not do that.

1 Q: Your Honor, at this point, I ask the court to take judicial notice of the fact that
2 defendant's home phone number as published in the directory is 555-555-2345.

3 **BY THE COURT:** So noted.

4 Q: Showing you what has been marked as State's Exhibit 50, do you recognize it?

5 A: Yes.

6 Q: What is it?

7 A: It's my cell phone bill from October 19, 2009, to December 15, 2009.

8 Q: Does it show any calls to the defendant's phone number?

9 A: It shows three calls to the defendant's residence.

10 **CROSS-EXAMINATION BY MS. MAYER**

11 Q: Your brother is dead, isn't he?

12 **BY MS. JORDAN:** Objection, irrelevant.

13 **BY MS. MAYER:** Goes to bias, Your Honor.

14 **BY THE COURT:** Overruled.

15 Q: Again, your brother is dead, isn't he?

16 A: Yes.

17 Q: He died from an overdose of meth, is that correct?

18 A: Yes.

19 **EXAMINATION OF TODD BRAM**

20 Todd Bram, a witness called by the state, first being duly sworn, testified as follows:

21 **DIRECT EXAMINATION BY MS. JORDAN**

22 Q: Have you ever purchased meth?

23 A: Yes.

24 Q: When and from whom?

25 A: I purchased an ounce of methamphetamine from Will Gardner once or twice a week
26 for three to four months between October and December 2009.

27 Q: Where did the sales take place?

28 A: Usually at the casino in Tama.

29 Q: How did you come to identify Mr. Gardner as a source?

30 A: I had heard that Dolly was dealing and I approached him. Dolly told me he didn't do
31 retail, that I should check out someone like Will Gardner.

32

1 EXAMINATION OF STACEY BLACK

2 Stacey Black, a witness called by the state, first being duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. JORDAN

4 **Q:** Have you ever been to the defendant's home?

5 **A:** Yes, though I have never seen him there.

6 **Q:** Why were you there?

7 **A:** I went twice, with Tom Cord.

8 **Q:** Why?

9 **A:** The first time I did not realize Tom was buying drugs. I only found out when we
10 arrived. Tom made me wait in the car.

11 **Q:** How do you know he got drugs?

12 **A:** Easy. We were driving back and Tom was arrested by the police after a traffic stop.

13 **Q:** What happened?

14 **A:** Tom's car was impounded. Tom whispered to me that the car contained an ounce of
15 marijuana and one-quarter pound of methamphetamine that he had just picked up from
16 defendant.

17 **Q:** What did you do?

18 **A:** I got the drugs while the car was impounded and returned them to Tom.

19 **Q:** If the car was impounded, how did you get the drugs?

20 **A:** Just a second set of keys. The car was just sitting there in the police station parking
21 lot.

22 **Q:** When was the second trip to the defendant's?

23 **A:** Sometime after the first stop.

24 **Q:** Did Tom drive?

25 **A:** No. I drove because Tom was too tweaked out to drive. Tom had been awake too
26 long, needed sleep, and was nervous about driving back to defendant's residence after
27 the arrest after the traffic stop.

28 **Q:** Did Tom buy drugs?

29 **A:** Yes, I saw him bring about one-quarter pound of methamphetamine and an ounce of
30 marijuana out of the house.

31 CROSS-EXAMINATION BY MS. MAYER

32

1 EXAMINATION OF B. J. ATWOOD

2 B.J. Atwood, a witness called by the state, first being duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. JORDAN

4 **Q:** Would you tell us your name?

5 **A:** B.J. Atwood.

6 **Q:** Where do you work?

7 **A:** I am a Detective with the Columbia Drug Enforcement Administration.

8 **Q:** How long have you worked with the CDEA?

9 **A:** Fifteen years.

10 **Q:** Do you have a specific assignment with the CDEA?

11 **A:** I head up the meth task force for the southern part of the state.

12 **Q:** How long have you had that assignment?

13 **A:** Five years.

14 **Q:** Did you have occasion to search the home of Mr. Rodney Mack?

15 **A:** Yes. I and other law enforcement officers went to Rodney Mack's residence in
16 Kellogg, Columbia, to execute a search warrant.

17 **Q:** Did you find anything?

18 **A:** Yes. We found one-quarter pound of methamphetamine inside a vehicle and seized
19 methamphetamine, marijuana, drug records, cash, and drug paraphernalia from the
20 house.

21 **Q:** Did you have occasion to search the home of Mr. Tom Cord?

22 **A:** Law enforcement officers executed a search warrant at Cord's residence in Newton,
23 Columbia.

24 **Q:** Was anything seized?

25 **A:** Officers seized one-quarter pound of methamphetamine from the residence.

26 **Q:** Did you ask Mr. Cord about this?

27 **A:** Yes. He said he paid defendant \$4,200 for the one-quarter pound of
28 methamphetamine.

29 **Q:** Did you find anything else?

30 **A:** We found a piece of paper with the name "Dolly" and defendant's phone number on
31 it. Cord said he had received the paper from Rodney Mack. Mack gave Cord

1 defendant's phone number so that Cord would always have a way to get in touch with
2 Dolan.

3 **Q:** Did you have occasion to search the defendant's home?

4 **A:** Yes. A few days later law enforcement officers executed a search warrant at
5 defendant's residence.

6 **Q:** What did you find?

7 **A:** Twelve firearms — four handguns and eight long guns — were seized from
8 defendant's residence. All twelve firearms were manufactured outside of Columbia.
9 Subsequent investigation showed that the Remington 12-gauge shotgun seized at one
10 time belonged to Rodney Mack.

11 **Q:** Was anything else seized?

12 **A:** Yes. Officers also seized 40 grams of methamphetamine from defendant's property.

13 **Q:** Where did you find this meth?

14 **A:** The methamphetamine was wrapped up and lying beside an ammunition can outside
15 on defendant's property alongside a driveway or lane 150 yards from defendant's
16 house.

17 **Q:** Did you seize anything else?

18 **A:** Some of the meth was laid out in a line next to a snort tube and a baggie containing
19 meth residue with a rubber band around it.

20 **Q:** Anything else?

21 **A:** Officers also seized around 73 pounds of marijuana. The majority of the marijuana
22 was in six large black garbage bags inside a locked 55-gallon drum. The drum was
23 buried on defendant's property. Also in the drum was a PVC pipe containing finely
24 manicured or processed marijuana. The drum was locked with a padlock and the key to
25 it was seized from the kitchen area of defendant's residence.

26 **Q:** And tell me about the key.

27 **A:** The key was not in the lock. Obviously, we wouldn't have used bolt cutters if it had
28 been. The key was secured from inside Mr. Dolan's residence a little bit later.

29 **Q:** Showing you what is marked as State's Exhibit 1, do you recognize it?

30 **A:** Yes.

31 **Q:** How do you recognize it?

32 **Q:** Showing you what is marked as State's Exhibit 18, do you recognize it?

1 **A:** Yes.

2 **Q:** How do you recognize it?

3 **Q:** Your Honor, having laid the foundation with Officer Atwood, at this point the state
4 would like to introduce into evidence State's Exhibits 1 through 18, specifically Exhibits
5 1-12, weapons seized from defendant's residence; Exhibit 13, 40 grams of
6 methamphetamine seized from defendant's property; Exhibit 14, a snort tube and a
7 baggie containing meth residue; Exhibit 15, the rubber band with which the baggie was
8 covered; Exhibit 16, 73 pounds of marijuana seized from the defendant's property;
9 Exhibit 17, the PVC pipe containing processed marijuana seized from the defendant's
10 property; and Exhibit 18, the key to the marijuana drum that was seized from the kitchen
11 area of defendant's residence.

12 **BY THE COURT:** They are so admitted.

13

14 **BY MS. JORDAN:** Detective Atwood, referring to State's Exhibit 13, how is meth
15 usually sold on the street?

16 **A:** Methamphetamine is generally sold in rock or powder form.

17 **Q:** What would be a typical sale in terms of amount sold for personal use?

18 **A:** Usually it will be sold in quarter-gram units for \$35.00 a unit.

19 **Q:** Would 40 grams be for personal use?

20 **A:** Absolutely not.

21 **Q:** Typically, what would be the quality of the meth sold on the street, what level of
22 purity?

23 **A:** It is usually in the range of 10 to 15% pure.

24 **Q:** Would 73 pounds of marijuana be for personal use?

25 **A:** Absolutely not. Personal use is three or four ounces.

26 **CROSS-EXAMINATION BY MS. MAYER**

27 **Q:** You interviewed Mr. Cord, correct?

28 **A:** Yes.

29 **Q:** You took a statement from him, didn't you?

30 **A:** Yes.

31 **Q:** In that statement Mr. Cord insisted he did not have any agreement with Mr. Dolan,
32 did he not?

1 **A:** That's correct.

2 **Q:** Isn't it true that the methamphetamine was approximately 150 yards from
3 defendant's house?

4 **A:** Yes.

5 **Q:** The marijuana that was seized was water damaged, correct?

6 **A:** Some of it.

7 **Q:** The water damage meant that that particular marijuana was not marketable, correct?

8 **A:** Yes.

9 **REDIRECT EXAMINATION**

10 **Q:** The meth that was found 150 yards from the defendant's house, where precisely
11 was it?

12 **A:** Alongside defendant's driveway or lane.

13 **Q:** What about the marijuana, where was it found?

14 **A:** The marijuana was found less than 100 yards from the residence.

15 **Q:** Where did you find the key?

16 **A:** The key to the marijuana was found in defendant's residence.

17 **Q:** How much of the marijuana was water damaged?

18 **A:** About 20 percent.

19 **Q:** Was the other 80 percent marketable?

20 **A:** Yes.

21 **EXAMINATION OF ANNETTE KAHLER**

22 Annette Kahler, a witness called by the state, first being duly sworn, testified as follows:

23 **DIRECT EXAMINATION BY MS. JORDAN**

24 **Q:** Would you tell us your name?

25 **A:** Annette Kahler.

26 **Q:** Where do you work?

27 **A:** I am a forensic chemist with the Columbia Drug Enforcement Administration.

28 **Q:** How long have you worked with CDEA?

29 **A:** Twenty years.

30 **Q:** Showing you what has been marked as State's Exhibit 13, do you recognize it?

31 **A:** Yes, it is the meth seized in this case that I tested.

32 **Q:** What results did your testing reveal?

1 **A:** I analyzed the substance and found it weighed slightly more than 40 grams and
2 contained 40% pure methamphetamine.

3

4 **BY MS. JORDAN:** The defense has no questions for Ms. Kahler.

5 **BY MS. MAYER:** The state rests its case-in-chief, Your Honor.

6

7

EXAMINATION OF BRUCE DOLAN

8 Bruce Dolan, a witness called by the Defendant, first being duly sworn, testified as
9 follows:

10

DIRECT EXAMINATION BY MS. MAYER

11 **Q:** Would you tell us your name?

12 **A:** Bruce Dolan.

13 **Q:** Were you aware of the drugs that were found in this case?

14 **A:** I had no idea they were there.

15 **Q:** How is that possible?

16 **A:** Look, a bunch of that stuff was obviously hidden. This is a rural area. I can only
17 imagine someone was using it as a hiding place. I'm out all day working, get home after
18 dark. I guess someone just took advantage of my absence.

19 **Q:** What about the key?

20 **A:** You know, I have given that a lot of thought. I hate to say it, but it kind of makes me
21 think it was Will Gardner and his sister that were hiding the stuff. They certainly kept
22 coming out to the house and bugging me. I never locked the place up, so who knows,
23 they probably decided to leave the key there just for convenience.

24 **Q:** Anything else lead you to that conclusion?

25 **A:** Well, from what I've heard here, Will and his sister were obviously dealing.

26 **Q:** How about all the guns?

27 **A:** I like to hunt. Like I said, it's rural.

28

CROSS-EXAMINATION BY MS. JORDAN

29 **Q:** Mr. Dolan, this isn't the first time you have been arrested, is it?

30 **A:** No.

31 **Q:** In fact, isn't it true that you were charged with selling marijuana to a minor?

1 **BY MS. MAYER:** Objection, Your Honor. Use of an arrest is improper impeachment.
2 Likewise, the sale of marijuana charge led to a plea of guilty by Mr. Dolan to a
3 misdemeanor of endangerment of a minor and hence, even the conviction is improper
4 impeachment under Columbia Rule of Evidence 609.

5 **BY MS. JORDAN:** Your Honor, this is not going to impeachment. Rather it is relevant to
6 prove motive, opportunity, intent, plan, etc., under Columbia Rule of Evidence 404(b).

7 **BY THE COURT:** Objection overruled. Go ahead.

8 **BY MS. JORDAN:** Isn't it true that you were charged with selling marijuana to a minor?
9 **A:** Yes.

10 **Q:** You pleaded guilty to endangerment of a minor, correct?
11 **A:** Yes.

12 **Q:** An element of the crime you were charged with was intent to distribute?
13 **A:** Don't know about that.

14 **Q:** When you pleaded guilty to endangerment, you admitted you sold marijuana to a
15 minor, didn't you?
16 **A:** My lawyer just told me to plead guilty so I could go home.

17 **Q:** But the judge, before accepting your plea, asked you about the circumstances of the
18 crime, correct?
19 **BY MS. MAYER:** Objection, Your Honor. I renew my previous objection and now object
20 to the introduction of the conviction. This is improper impeachment under 609.

21 **BY MS. JORDAN:** Your Honor, this is not going to impeachment. The evidence is
22 relevant under 404(b).

23 **BY THE COURT:** I'll overrule the objection.

24 **BY MS. JORDAN:** Mr. Dolan, let me ask again, the judge, before accepting your plea,
25 asked you about the circumstances of the crime, correct?
26 **A:** I don't remember.

27 **Q:** But certainly after this incident, you knew marijuana was illegal, correct?
28 **A:** Of course.

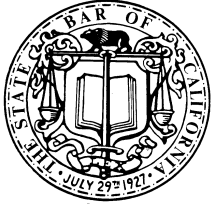
29 **Q:** Just like I'm sure you know possession of meth was illegal, correct?
30 **A:** You'd have to be pretty stupid not to know that, right?
31 **Q:** You don't consider yourself stupid, I assume?
32 **A:** No, I don't.

1 **BY MS. MAYER:** Your Honor, the defense rests.

2 **BY MS. JORDAN:** The State has no other witnesses.

3 **BY THE COURT:** Thank you. Given the late hour, I think we will recess until tomorrow
4 at 9:30 a.m. At that point I will hear closing arguments. Good afternoon.

5



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PERFORMANCE TEST B

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Selected Provisions of the Columbia Penal Code

§ 200 General requirements of culpability

a. *Minimum requirements of culpability.* Except as provided in subsection c.(3) of this section, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

b. *Kinds of culpability defined.*

(1) *Purposely.* A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. “With purpose,” “designed,” “with design” or equivalent terms have the same meaning.

(2) *Knowingly.* A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. “Knowing,” “with knowledge” or equivalent terms have the same meaning.

* * * * *

§ 840 Possession

Except as authorized by this subchapter, it shall be unlawful for any person knowingly to possess a controlled substance as defined in § 875.

§ 841(a) Possession with intent to distribute

Except as authorized by this subchapter, it shall be unlawful for any person knowingly — (1) to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance as defined in § 875.

* * * * *

§ 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

* * * * *

§ 875 Controlled substances

Controlled substances include:

(13) Marijuana.

(38) Methamphetamine.

State v. Jones
Columbia Supreme Court (1995)

Mark Jones, Jimmy Don Winemiller, Jr., Keith Gunter, and Barbara Whitehead appeal their convictions for various drug-related offenses. Winemiller and Gunter also appeal their sentences. We affirm all convictions and sentences, except for Winemiller's conviction for possession with the intent to distribute methamphetamine in violation of Columbia Penal Code § 841(a)(1). As to that conviction, we reverse and remand for entry of judgment and resentencing for possession of methamphetamine in violation of Columbia Penal Code § 840.

To support a conspiracy conviction, the government must show that: a conspiracy existed for an illegal purpose; the defendant knew of the conspiracy; and the defendant knowingly joined in it. Whitehead, Jones, Gunter and Winemiller argue there was insufficient evidence supporting their conspiracy convictions; Whitehead also claims insufficient evidence in regard to her possession conviction. They assert that the basis for the jury verdicts was Jones' testimony and that his testimony was incredible because he was a paid informant, had been granted immunity, had trouble remembering some dates, and psychological testing indicated that he had a poor memory. The jury, however, was aware of these things, and it was for the jury, not this court, to weigh Jones' credibility. Moreover, as the court noted in denying the motions for judgments of acquittal, although Jones' testimony had some inconsistencies, his testimony was not so incredible when weighed with other corroborating evidence produced by the government.

We find merit, however, to Winemiller's challenge to the sufficiency of the evidence supporting his conviction for possession with the intent to distribute methamphetamine. Winemiller does not contest the fact that Drug Enforcement Administration Agent Bryant testified that a four-gram quantity of methamphetamine was a distributable amount, but argues that the government failed to present testimony that the methamphetamine weighed four grams or other evidence demonstrating his intent to distribute. At oral argument, the government noted that at sentencing Winemiller stipulated that the methamphetamine weighed 4.1 grams, but conceded that it "dropped the ball" because

it failed to present testimony at trial concerning the weight of the methamphetamine. The government, however, argued there was sufficient evidence before the jury based on the testimony that the methamphetamine was 47% pure as compared to methamphetamine found on the street, which was generally in the range of 10-15% pure.

We disagree with the government. It is true that intent to distribute may be established by circumstantial evidence, including such things as quantity and purity and the presence of firearms, cash, packaging material, or other distribution paraphernalia. Moreover, we recognize that intent to distribute may be inferred solely from the possession of large quantities of narcotics. Proof, however, of possession of a small amount of a controlled substance, standing alone, is an insufficient basis from which an intent to distribute may be inferred.

Assuming, without deciding, that intent can also be inferred solely from the purity of a drug, we do not believe that 47% pure, standing alone, is sufficient to prove beyond a reasonable doubt that Winemiller intended to distribute the methamphetamine. Moreover, even if evidence of weight had been before the jury, the facts here do not bring into play the doctrine that possession of large quantities of drugs justifies the inference that the drugs are for distribution and not for personal use. Although Bryant testified that a four-gram quantity was not for personal use, he admitted that personal use varied among individuals and that his opinion was based on a comparison to a \$25.00 quarter-gram unit, which was the starting dose for methamphetamine sold on the street. This case is unlike *People v. Ojeda*, in which this court held that an inference of intent to distribute could be drawn from possession of 7.1 kilograms of 88 to 91% pure methamphetamine.

Rather, this case is similar to *People v. White* and *People v. Franklin*. In *White*, this court found that 7.54 grams of cocaine, which would make 75 to 80 dosage units, was insufficient, standing alone, to support a conviction for possession with intent to distribute, even though as little as five grams has been held to be a distributable

amount. In *Franklin*, this court found that 35 grams of 42% pure cocaine, standing alone, was insufficient evidence from which a jury could infer intent to distribute.

In both cases, because quantity or quantity and purity combined were insufficient to support a reasonable inference of intent to distribute, the courts looked to additional circumstances or evidence consistent with intent to distribute narcotics.

In *White*, this court found sufficient additional evidence because the cocaine was packaged in multiple packages and the defendant had wired a large amount of cash and had a revolver.

In contrast, in *Franklin* the court reversed convictions for possession with the intent to distribute because of the lack of additional evidence of intent. In *Franklin*, the cocaine was not packaged in a manner consistent with distribution and the government offered no evidence of distribution paraphernalia, amounts of cash, weapons, or other indicia of narcotics distribution.

In this case, we conclude that the government failed to produce sufficient additional evidence from which a jury could draw a reasonable inference that Winemiller intended to distribute the methamphetamine. As in *Franklin*, the drug was not packaged for resale, and the government did not introduce evidence of a large amount of unexplained cash or other distribution paraphernalia. We are aware that a rifle and a shotgun were found in the trunk of Winemiller's car. Further, because a firearm is generally considered a tool of the trade for drug dealers it is also evidence of intent to distribute. We do not believe, however, that a reasonable jury could infer that the unloaded rifle and shotgun found in the trunk of the car along with camping gear, which included duck calls and waders, were "tools" of the drug trade. Indeed, the searching officer testified that the rifle was sitting "on top of all kinds of camping gear as if [Winemiller] was out camping or hunting with the weapon."

Winemiller, however, does not go free. The common elements of all drug possession offenses are: (1) a specified controlled substance, in a sufficient quantity, and in a

usable form; (2) possession, which may be physical or constructive, exclusive or joint; and (3) knowledge of the fact of possession and of the illegal character of the substance. Each of these elements may be established circumstantially. Because the jury found Winemiller guilty of possession with the intent to distribute, the jury necessarily found all the elements of simple possession in violation of Columbia Penal Code § 840. We thus reverse and remand for the entry of judgment accordingly and for resentencing on this lesser included offense, but otherwise affirm.

State v. Hach Columbia Supreme Court (1998)

Francis “Butch” Hach (“Butch”) was involved in cocaine use and dealing in Cooksville, Columbia, from the late 1980's until his arrest in 1997. He was indicted for conspiracy to distribute cocaine along with Anthony and Nicholas LaCorcia and his own son Carl Hach (“Carl”).

Butch was tried and convicted by a jury in January 1998, and was sentenced to 240 months imprisonment. He raises a bevy of issues on appeal, asking that his conviction be reversed, or in the alternative, that his sentence be vacated or remanded. Carl pleaded guilty to the conspiracy and was sentenced to 188 months imprisonment.

The Haches lived in Cooksville, Columbia at the Cooksville Blacksmith Shop, which Butch owned. Beginning sometime in the late 1980's Butch and Carl began to purchase cocaine, first from Mark LaCorcia (now deceased), then from Nick LaCorcia, and after Nick was incarcerated, from the third LaCorcia brother, Tony. The LaCorcias also had a partner, Tom Sajenko, who frequently couriered drugs and money to and from the Haches.

The defendants received their cocaine at the Blacksmith Shop. The cocaine was weighed on Carl's scale, and delivered to the defendants in their respective bedrooms. The Haches sometimes resold the cocaine they obtained from the LaCorcias and Sajenko. Tony LaCorcia continued delivering cocaine to the Haches until May 1997, when law enforcement authorities executed a search warrant on the Blacksmith Shop. At that time, Carl agreed to cooperate with law enforcement. Due to Carl's cooperation, Tony LaCorcia was arrested by the authorities.

At the defendants' separate sentencing hearings, the trial court made factual findings concerning the amount of drugs attributable to the conspiracy and to Butch and Carl individually. The trial court attributed between 5.4 and 8.3 kilograms of cocaine to the conspiracy. It also held that based on the joint participation of the defendants, each was accountable for the entire amount.

Butch contends that the trial court erred in denying his motion for a judgment of acquittal. When a defendant avers a lack of sufficient evidence, the question both the trial court and this Court ask is whether evidence exists from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

To sustain a conspiracy conviction, the record must contain evidence showing that a conspiracy to distribute cocaine existed, and that Butch Hach knowingly participated in it. Butch maintains that while he bought, consumed and sold cocaine, he had no agreement with the LaCorcias and Sajenko to distribute what they sold him. If he is correct, his conviction must be reversed, because, as we have held, to demonstrate a conspiracy, the government must show proof of an agreement to commit a crime other than the crime that consists of the sale of cocaine itself. A simple agreement between a buyer and seller to exchange something of value for cocaine cannot alone constitute a conspiracy because such an agreement is itself the substantive crime.

Butch argues that his relationship with his suppliers — the LaCorcias and Tom Sajenko, and his son Carl — was just this type of arm's-length buyer-seller arrangement. Butch argues that his dealers never directed him to sell the cocaine they had sold him. He seeks to bolster his case by contending, for example, that Tom Sajenko never said to him “Butch, here's some cocaine. If you can't sell it, you don't have to pay for it.” According to Butch, the absence of such facts indicates the absence of a conspiracy.

We may, however, look beyond the lack of explicit agreements and direct evidence to circumstantial evidence which tends to establish the conspiracy to distribute cocaine. In reviewing the record, we look for evidence of a prolonged and actively pursued course of sales coupled with the seller's actual knowledge and a shared stake in the buyer's illegal venture. We have identified four factors as particularly salient in determining whether a conspiracy existed, and whether a defendant knowingly participated in it: (1) the length of affiliation, (2) the established method of payment, (3) the extent to which transactions were standardized, and (4) the demonstrated level of mutual trust. Although none of these factors is dispositive, if enough are present and point to a

concrete, interlocking interest beyond individual buy-sell transactions, we will not disturb the fact-finder's inference that, at some point, the buyer-seller relationship developed into a cooperative venture.

The record shows that each of these factors existed in the relationship between Butch and his coconspirators, and that in the aggregate, the facts denote the concrete and interlocked interest. As to the length of affiliation, Butch bought cocaine from the LaCorcias and Tom Sajenko for seven years. In that time, the LaCorcias and Sajenko provided Butch with cocaine on a steady basis, sometimes providing amounts fit for more than personal consumption. When one of the sellers was incarcerated or indisposed, another in the group picked up the slack.

The transactions were also standardized; nearly every sale had certain hallmarks. Deliveries were made almost exclusively to the upstairs bedrooms at the Blacksmith Shop; they were routinely made on Wednesdays or Thursdays. Each time, the cocaine was measured out and weighed in Carl's bedroom on Carl's scale, whether he was present or not. The payments were sometimes made at the time of delivery, and sometimes made a few days later. Sajenko testified that on occasion, if Butch did not have enough cash, Sajenko would still give him the cocaine and would return for full remuneration later. Frequent and repeated transactions with an attendant established method of payment that includes a rudimentary form of credit can support a conspiracy conviction.

These routinized deliveries indicate the fourth factor, demonstrated level of mutual trust. Butch and Carl permitted Tom Sajenko free, unencumbered access into their living area at the Blacksmith Shop, where he was allowed to use Carl's scale to weigh the cocaine. After apportioning the drugs, Sajenko waited for Carl and Butch to join him so he could deliver them their drugs. The arrangement advanced all parties' interests — the sellers had a safe place to distribute their cocaine, and the buyers (Butch and Carl) literally had bedroom service. Immediately upon receiving the cocaine in the confines of their home, Butch and Carl either used it themselves, or cut it and repackaged it for sale.

The length of affiliation, established method of payment and routinized transactions present here also underscore this demonstrated level of mutual trust. When Nick LaCorcia was about to go to prison, he arranged for his brother Tony to continue an uninterrupted flow of cocaine to Butch. This saved Butch from having to find an alternative source and worry about problems attendant to creating a new buyer-supplier relationship. He maintained a continuous source of drugs for himself and his clients. Sajenko and the LaCorcias benefitted from having such reliable customers even in the face of the turnover in their operation.

Viewing the evidence in total, it is clear that the factors we have found salient for determining whether a conspiracy existed are present here. For the foregoing reasons, the judgment of the trial court is affirmed.