

FEBRUARY 2017
ESSAY QUESTIONS 1, 2 AND 3



California

Bar

Examination

Answer all 3 questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts 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 the 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

Mary was a widow with two adult children, Amy and Bob.

In 2010, Mary bought Gamma and Delta stock. She then sat at her computer and typed the following:

This is my will. I leave the house to Amy and my stock to Bob.
The rest, they can split.

Mary printed two copies of the document. She signed and dated both copies in the presence of her best friend, Carol, and her neighbor, Ned. Carol had been fully advised of the contents and signed both copies. Although Ned had no idea as to the bequests, he declared that he was honored to be a witness and signed his name under Mary's and Carol's signatures on both copies. Mary placed one copy in her safe deposit box.

In 2014, Mary married John. She soon decided to prepare a new will. She deleted the old document from her computer and tore up one copy. She forgot, however, about the other copy in her safe deposit box.

On her corporate stationery with her business logo emblazoned on it, Mary wrote:

I leave John my Gamma stock. My Delta stock, I leave to Bob.
Amy is to get the house.

Mary signed the document. She neither dated the document nor designated a recipient for her remaining property.

In 2015, Mary sold her Delta stock and used the proceeds to buy Tango stock.

In 2016, Mary died, survived by John, Amy, and Bob.

Mary's estate consists of Gamma stock, Tango stock, her house, and \$200,000 in cash in separate property funds.

What rights, if any, do Amy, Bob, and John have in the assets in Mary's estate? Discuss.

Answer according to California law.

QUESTION 2

Steve agreed to convey his condominium to Betty for \$200,000 in a written contract signed by both parties. During negotiations, Steve told Betty that, although there was no deeded parking along with the unit, he was allowed to park his car on an adjacent lot for \$50 a month. Steve stated that he had no reason to believe that Betty would not be able to continue that arrangement. Parking was important to Betty because the condominium was located in a congested urban area.

On June 1, the conveyance took place: Betty paid Steve \$200,000, Steve deeded the condominium to Betty, and Betty moved. She immediately had the entire unit painted, replaced some windows, and added a deck. The improvements cost \$20,000 in all. She also spent \$2,000 to remove the only bathtub in the condominium and to replace it with a shower, leaving the condominium with two showers and no bathtub.

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and was going to discontinue renting parking spaces. She also learned that Steve had known about these plans before the sale. She quickly investigated other options and discovered that she could rent parking a block away for \$100 a month. At the same time, she also found that, immediately before Steve had bought the condominium, the previous owner had been murdered on the premises. Steve had failed to tell Betty about the incident.

Betty has tried to sell the condominium but has been unable to obtain offers of more than \$160,000, partly due to the disclosure of the murder and the lack of a parking space. Betty has sued Steve for fraud.

What is the likely outcome of Betty's lawsuit and what remedies can she reasonably seek? Discuss.

QUESTION 3

Pete sued Donna's Pizza in federal court.

At trial, in his case-in-chief, Pete testified that, as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. He sustained serious injuries as a result and was taken to the hospital.

Pete then called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that, during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence and rested.

During Donna's Pizza's case-in-chief, Erin testified that she had the green light and that it was Pete who ran the red light. Donna, the owner of Donna's Pizza, then testified that Donna's Pizza was not responsible for the accident. On cross-examination, Donna was asked whether she had ever offered to pay for any of Pete's medical expenses, and she denied she had. Donna's Pizza rested.

In rebuttal, Pete testified that, at the accident scene, Erin told him, "I was in a hurry to make a pizza delivery and that is why I ran the red light." Pete also testified that Donna visited him in the hospital and told him that Donna's Pizza would take care of all of his medical expenses. Pete testified that Donna's Pizza, however, never paid for any of his medical expenses.

Assume all appropriate objections and motions to strike were timely made.

Did the court properly admit:

1. The hospital intake form? Discuss.
2. Pete's testimony about Erin's statements at the accident scene? Discuss.
3. Pete's testimony about Donna's statements at the hospital? Discuss.

Answer according to the Federal Rules of Evidence.



February 2017

**California
Bar
Examination**

**Performance Test A
INSTRUCTIONS AND FILE**

IN RE COLUMBIA NURSES ASSOCIATION

Instructions

FILE

Memorandum to Applicant from James Wood

Department of Education Legal Advisory

Columbia Nurses Association Demand Letter

Helping the Student With Diabetes Succeed: A Guide for School Personnel

High-Alert Medications

The Nursing Shortage in Columbia: Policy Advisory

IN RE COLUMBIA NURSES ASSOCIATION

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 parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

STATE OF COLUMBIA
DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

MEMORANDUM

TO: Applicant
FROM: James Wood, General Counsel
DATE: February 21, 2017
RE: Columbia Nurses Association Demand Letter

On February 10, 2017, the Columbia Department of Education (Department) issued a Legal Advisory to all superintendents of school districts advising them: (1) the Columbia School Medication Act authorizes school personnel who are not school nurses—unlicensed school personnel—to administer insulin to students with diabetes, including by injection; and (2) the Columbia Nursing Practice Act does not prohibit them from doing so.

Unsurprisingly, on February 16, 2017, the Columbia Nurses Association (CNA) sent the Department a letter demanding that it withdraw the Legal Advisory. The CNA argues that the Nursing Practice Act prohibits unlicensed school personnel from administering insulin to students with diabetes and that the School Medication Act does not authorize them to do so.

Please draft, for my signature, a letter to the CNA responding to its demand letter, stating that the Department declines to withdraw the Legal Advisory and arguing that the Department's position is sound and that the CNA's is not.

STATE OF COLUMBIA
DEPARTMENT OF EDUCATION
LEGAL ADVISORY

TO: All Superintendents of School Districts
FROM: Lila Lanford, Secretary of the Department of Education
DATE: February 10, 2017
RE: Administration of Insulin to Students With Diabetes

Some school districts have recently raised the question whether school personnel other than school nurses—unlicensed school personnel—may administer insulin to students with diabetes, including by injection. Citing the Columbia Nursing Practice Act, they have proceeded to give a negative answer.

Broadly speaking, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400, et seq., was enacted by Congress as anti-discrimination statutes to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families, in order to enable them to take full advantage of educational opportunities equally with their peers. The health care services to which students with disabilities have a right include the administration of needed medication. Students with diabetes are students with a disability within the meaning of the IDEA, and need medication including insulin.

It is undisputed that, under the School Medication Act and the Nursing Practice Act, school nurses may administer insulin to students with diabetes. After review, we have concluded that, under the School Medication Act, unlicensed school personnel may do so as well, without offense to the Nursing Practice Act.

Properly construed, the School Medication Act authorizes unlicensed school personnel to administer insulin to students with diabetes, and the Nursing Practice Act does not prohibit them from doing so. Any other construction of the School Medication Act and the Nursing Practice Act would yield unreasonable results and run the risk of making the statutes an obstacle to Congressional objectives as they appear in the IDEA.

If you have any questions about this Legal Advisory, please contact General Counsel James Wood at the Columbia Department of Education, 300 King Street, Springfield, Columbia or jwood@cde.columbia.gov.

COLUMBIA NURSES ASSOCIATION
2000 FRANKLIN STREET
MAPLETON, COLUMBIA

February 16, 2017

James Wood, Esq.
General Counsel
Columbia Department of Education
300 King Street
Springfield, Columbia

Re: Legal Advisory

Dear Mr. Wood:

On February 10, 2017, as you are aware, the Columbia Department of Education (Department) issued a Legal Advisory on the “Administration of Insulin to Students With Diabetes.” In the Legal Advisory, the Department concluded that school personnel other than school nurses—unlicensed school personnel—are authorized to administer insulin to students with diabetes, including by injection, by the School Medication Act, and are not prohibited from doing so by the Nursing Practice Act.

On behalf of the Columbia Nurses Association (CNA), whose 310,000 members include the state’s 2,800 school nurses, I am writing to demand that the Department withdraw the Legal Advisory immediately.

First, contrary to the conclusion advanced by the Department in the Legal Advisory, the School Medication Act does *not* authorize unlicensed school personnel to administer insulin to students with diabetes. The School Medication

Act authorizes unlicensed school personnel only to *assist* students with medication, that is, only to *help* students administer medication *to themselves*, not to *administer* medication to students. School Medication Act, Section 3(a). That means that the School Medication Act authorizes unlicensed school personnel only to help students with diabetes administer insulin to themselves, not to administer insulin to students. If there were any ambiguity on this point, the legislative history of the School Medication Act would dispel it. In 2002, the Legislature amended the School Medication Act to authorize unlicensed school personnel to administer insulin to students with diabetes, but the Governor vetoed the amendment.

Second, contrary to the conclusion advanced by the Department in the Legal Advisory, the Nursing Practice Act prohibits unlicensed school personnel from administering insulin to students with diabetes. The Nursing Practice Act provides that, unless he or she possesses a license, no person may engage in the practice of nursing, which includes the administration of medication, such as insulin. Nursing Practice Act, Sections 2 and 3(a)(2). Although the Nursing Practice Act contains exceptions, *id.* Section 4, none allows unlicensed school personnel to administer insulin to students with diabetes. The exception that arguably comes closest is not close enough. The Nursing Practice Act provides that it “does not prohibit” the “performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician,” as long as such a person does not engage in the practice of nursing. *Id.* Section 4(e). In administering insulin to a student with diabetes, unlicensed school personnel would necessarily be engaging in the practice of nursing, since the practice of nursing includes the administration of medication, even if unlicensed school personnel were acting “in accordance with orders issued by a physician.”

Third, the CNA recognizes that, under the Individuals with Disabilities Education Act (IDEA), students with diabetes have a disability and need medication

including insulin. That said, the IDEA does not displace state statutes. See, U.S. Dept. of Health and Human Services, *Helping the Student With Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016). Neither does the IDEA grant students with disabilities any right to medication except as needed. See, *Davis v. Francis Howell School District* (U.S. Dist. Ct., N.D. Columbia, 2015). Of course, no student with diabetes needs insulin administered by unlicensed school personnel. It goes without saying that the administration of insulin is hardly a trivial matter. Insulin has been identified as a “high-alert” medication by the United States Department of Health and Human Services. U.S. Dept. of Health and Human Services, *High-Alert Medications* (Jan. 1, 2017). As a high-alert medication, insulin is presumptively too dangerous for unlicensed school personnel to administer.

If the Department fails to withdraw the Legal Advisory immediately, the CNA will initiate an action to declare the Legal Advisory invalid as contrary to law. The CNA is confident that it would prevail in such an action.

The CNA urges the Department not to waste its limited resources in litigation, but to use such resources wisely for the benefit of all students, including students with diabetes, to help school districts hire more school nurses. The CNA accordingly urges the Department to do what is both proper and prudent—withdraw the Legal Advisory straightaway.

Very truly yours,

Marilyn Cones

Marilyn Cones

Associate General Counsel

Helping the Student With Diabetes Succeed: A Guide for School Personnel

United States Department of Health and Human Services

September 1, 2016

Diabetes is one of the most common chronic diseases in school-aged children, affecting about 200,000 young people in the United States. According to recent estimates, about 19,000 youths are diagnosed with diabetes each year.

Diabetes is a serious chronic disease in which blood glucose (sugar) levels are above normal due to defects in insulin production, insulin action, or both.

Diabetes is the sixth leading cause of death by disease in the United States. Long-term complications of diabetes include heart disease, stroke, blindness, kidney failure, nerve disease, gum disease, and amputation of the foot or leg. Although there is no cure, diabetes can be managed and complications can be delayed or prevented.

Diabetes must be managed 24 hours a day, 7 days a week. For many students with diabetes, that means careful monitoring of their blood glucose levels throughout the school day. It also means administering multiple doses of insulin by injection to control their blood glucose and minimize complications in order to enable them to survive. Insulin must be administered at unpredictable as well as predictable times in the course of the school day, at unpredictable as well as predictable places on and off campus, including in the classroom and on field trips and during extracurricular activities. Some students with diabetes can monitor their own blood glucose levels and administer insulin to themselves. Monitoring blood glucose levels and administering insulin are tasks well within the competence of practically all adults and many young people as well. But although some students with diabetes can monitor their own blood glucose levels and administer insulin to

themselves, many others cannot. As a result, coordination and collaboration among members of the school health team—including the school nurse, if any, other school personnel, and the student himself or herself—and the student’s personal diabetes health care team—including the student’s physician, the student’s parents or guardians, and again the student himself or herself—are essential for helping students manage their diabetes in the school setting.

The purpose of this guide is to educate school personnel about effective diabetes management and to share a set of practices that enable schools to ensure a safe learning environment for students with diabetes, particularly those who use insulin to control the disease. The school health team and the training approach for school-based diabetes management explained in this guide build on what schools already are doing to support children with chronic diseases. The practices shared in this guide are consistent with the requirements of the Individuals with Disabilities Education Act (IDEA), which is enforced by the U.S. Department of Education for each student with diabetes. This guide can be used, however, in determining how to address the needs of students with diabetes. The individual situation of any particular student with diabetes will affect what is legally required for that student. In addition, this guide does not address State and local laws, because the requirements of these laws may vary from state to state and school district to school district. This guide should be used in conjunction with Federal as well as State and local laws.

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High-Alert Medications

United States Department of Health and Human Services

January 1, 2017

High-alert medications are substances that carry a heightened risk of causing significant patient harm when they are used in error. Although errors may or may not be more common with these substances, the consequences of an error are clearly more devastating. We hope you will use this list to determine which of these substances require special safeguards to reduce the risk of errors. This may include strategies like improving access to information about these substances; limiting access; using auxiliary labels and automated alerts; standardizing ordering, storage, preparation, and administration; and employing redundancies such as automated or independent double-checks when necessary.

Colchicine injection

Epoprostenol

Insulin

Magnesium sulfate

Methotrexate

Opium tincture

Oxytocin

Nitroprusside sodium

Potassium chloride

Potassium phosphate

Promethazine

Sodium chloride

Sterile water for injection, inhalation, and irrigation

The Nursing Shortage in Columbia: Policy Advisory

**State of Columbia
Board of Nursing
January 15, 2017**

With only 310,000 nurses to serve a population of 35 million people, Columbia is experiencing a severe nursing shortage—a shortage that is likely to become even more severe in the foreseeable future.

Just last year, the Columbia Legislature found that the state “faces an ever-increasing nursing shortage that jeopardizes the health and well-being of the state’s citizens.” A forecast for 2030 predicts that Columbia will need 100,000 to 120,000 more nurses than the state will have available to meet health care needs. That statewide challenge will call for different responses depending on the region. Urban areas will need nurses to care for a growing, aging population. Rural areas are likely to lose nurses as their nurse population retires and are unlikely to replace them because of the absence of nursing education programs there. All areas will need nurses for safe, competent care in a host of settings.

By way of example, Columbia faces an ever-increasing school nursing shortage. There are more than 6 million students in Columbia public schools. Among them, 600,000 have some sort of disability, including 14,000 with diabetes, 12,000 with hearing impairment, 12,000 with orthopedic impairment, and 6,000 with visual impairment. There are only 2,800 school nurses to care for all of these 6+ million students, constituting only 1 school nurse for every 2,200 students; only 5 percent of schools have a school nurse full-time; 69 percent have a school nurse part-time; and 26 percent have no school nurse at all.

Factors contributing to Columbia's nursing shortage include changes in the healthcare environment that resulted in downsizing of the nursing work force as a result of managed care, the aging nursing work force, and public policy regarding nursing education. As a result, Columbia ranks 50th in the nation in number of nurses per 100,000 population. The current shortage is termed a "public health crisis" owing to a projected shortfall of 25,000 nurses within the next five years. Finding 25,000 additional nurses over the next five years only maintains the status quo.

Columbia cannot easily obtain additional nurses by increasing out-of-state recruitment. Half of the nurses working in Columbia already are educated in other states or countries. The shortage is occurring in other states and the educational pipeline, especially at the baccalaureate level, is decreasing nationally. Recruitment efforts aimed at increasing enrollments in Columbia programs are problematic. Until recently, all pre-licensure nursing education programs were fully subscribed, many with waiting lists of up to four years. Additionally, the number of pre-licensure nursing education enrollment opportunities have decreased slightly over the last 10 years rather than increasing to keep pace with increases in population.

While nursing shortages are not new, the current situation differs from past shortages. Not only is the shortage in number of nurses, the educational preparation of nurses is inadequate to meet the demands of today's health care system. Employers demand more nurses for hospitals and specialty nurses for intensive care units, operating rooms, emergency rooms, and other specialized areas of acute care.

In an effort to address the nursing shortage, the Board of Nursing has divided its work into three phases. The first phase will focus on development of a dynamic work force forecasting model to measure the need for nurses. The second phase will focus on a master plan for nursing education and practice. The third

phase will focus on evaluating the utility of the competencies for education and practice, synthesizing the next set of data, and creating an ongoing mechanism to continue collecting and analyzing data regarding the nursing work force. The Board of Nursing will publish an interim report on the completion of each phase, aiming for publication of the first-phase interim report in October 2017, the second-phase interim report in February 2018, and the third-phase interim report in May 2018. The Board of Nursing will publish a final report containing a comprehensive action plan in or around September 2018.



February 2017

**California
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**Performance Test A
LIBRARY**

IN RE COLUMBIA NURSES ASSOCIATION

LIBRARY

**Selected Entries from the
21st Century American Dictionary**

**Selected Provisions of the
Columbia School Medication Act**

**Selected Provisions of the
Columbia Nursing Practice Act**

**Davis v. Francis Howell School District
U.S. Dist. Ct. N.D. Columbia (2015).....**

**Selected Entries from the
21st Century American Dictionary
Third Edition, 2016**

Administer

ad·min·is·ter verb \əd-'mi-nə-stər\

transitive verb

1: to manage or supervise the execution, use, or conduct of <*administer* a trust fund>

2a : to mete out : dispense <*administer* punishment> b : to give ritually <*administer* the last rites> c : to give remedially by placing into or onto the body <*administer* a dose of medicine>

intransitive verb

1: to perform the office of administrator

2: to furnish a benefit : minister <*administer* to an ailing friend>

3: to manage affairs

* * * * *

Assist

as·sist verb \ə-'sist\

transitive verb

: to give support or aid to another by doing something for the other <*assisted* the boy with his dressing by putting on his rain boots> or by helping the other do something him- or herself <*assisted* the girl with her lessons by answering her questions>

intransitive verb

1: to give support or aid <*assisted* at the stove> <another surgeon *assisted* on the operation>

2: to be present as a spectator <the ideal figures *assisting* at Italian holy scenes — Mary McCarthy>

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Selected Provisions of the Columbia School Medication Act

Section 1.

- (a) This statute may be referred to as the School Medication Act.
- (b) This statute shall be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of students in the public schools of this state.
- (c) The Legislature finds that there is a severe shortage of school nurses in this state and declares that it enacts this statute to address that shortage.

Section 2.

No person shall administer medication to any student in any public school in this state.

Section 3.

- (a) Notwithstanding Section 2 of this statute, any student who is required to take medication prescribed for him or her by a physician may be assisted by a school nurse or by other school personnel, whether or not such personnel are licensed as health care professionals, if the school district receives the appropriate written statements identified in subsection (b).
- (b) In order for a student to be assisted pursuant to subsection (a), the school district shall obtain (i) written orders issued by the student's physician for the administration of the medication, detailing the name of the medication, method, amount, and conditions for its administration and (ii) written consent by the student's parent or guardian indicating a desire that the school district provide assistance to the student in the matters set forth in the written orders of the physician.

Section 4.

- (a) Notwithstanding Section 2 of this statute, any student with diabetes who is required to take insulin prescribed for him or her by a physician may administer insulin to himself or herself if the school district receives the appropriate written statements identified in subsection (b).

- (b) In order for a student with diabetes to administer to himself or herself pursuant to subsection (a), the school district shall obtain (i) written orders issued by the student’s physician for the self-administration of insulin, detailing the name of the insulin, method, amount, and conditions for its self-administration and (ii) written consent by the student’s parent or guardian indicating a desire that the school district allow the student to administer insulin to himself or herself in the matters set forth in the written orders of the physician.

* * * * *

Historical and Statutory Notes.

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Section 3. In 2002, the Legislature passed Assembly Bill No. 481 (2002 Reg. Sess.), which would have amended Section 3 to provide that, in the absence of a school nurse, other school personnel without any license as a health care professional “shall administer assistance to students with diabetes,” including “administering insulin” to them. Assem. Bill No. 481 (2002 Reg. Sess.), as enrolled Sept. 17, 2002, Section 2. The Governor vetoed Assembly Bill No. 481. In the veto message, the Governor stated that “Section 3 ‘already provides that any student who is required to take ... medication ... may be assisted by unlicensed school personnel,’ and hence already authorizes such personnel to administer insulin to students with diabetes.” Governor’s Veto Message to Assem. on Assem. Bill No. 481 (2002 Reg. Sess.) (Sept. 26, 2002).

Selected Provisions of the Columbia Nursing Practice Act

Section 1.

This statute may be referred to as the Nursing Practice Act.

Section 2.

No person may engage in the practice of nursing in this state without a valid and current license issued by the Board of Nursing.

Section 3.

(a) The practice of nursing within the meaning of this statute consists of those functions, including basic health care, that help people cope with difficulties in daily living that are associated with their actual or potential health or illness problems or the treatment thereof, and that require a substantial amount of scientific knowledge or technical skill. Such functions may include any and all of the following:

- (1) Direct and indirect patient care services that ensure the safety, comfort, personal hygiene, and protection of patients; and the performance of disease prevention and restorative measures.
- (2) Direct and indirect patient care services, including, but not limited to, the administration of medication, necessary to implement a treatment, disease prevention, or rehabilitative regimen ordered by a physician, dentist, podiatrist, or clinical psychologist.
- (3) The performance of skin tests, immunization techniques, and the withdrawal of human blood from veins and arteries.

- (4) Observation of signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition, and (i) determination of whether the signs, symptoms, reactions, behavior, or general appearance exhibit abnormal characteristics, and (ii) implementation, based on observed abnormalities, of appropriate reporting or referral or the initiation of emergency procedures.

Section 4.

This statute does not prohibit:

- (a) Gratuitous nursing of the sick by friends or members of the family.
- (b) Incidental care of the sick by domestic servants or by persons primarily employed as housekeepers.
- (c) Domestic administration of family remedies by any person.
- (d) Nursing services in case of an emergency. "Emergency," as used in this subsection, means an epidemic or public disaster.
- (e) The performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician, as long as such a person does not hold him- or herself out as a nurse.

* * * * *

Section 35.

This statute shall be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of the people of this state.

Davis v. Francis Howell School District

United States District Court for the Northern District of Columbia (2015)

Mary and Bobby Davis sued the Francis Howell School District, claiming that its refusal to administer to their son Shane his prescribed dose of Ritalin to treat attention deficit hyperactivity disorder (ADHD) violates the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400, et seq.

The school district has moved for summary judgment.

The law is settled. Congress enacted the IDEA as an anti-discrimination statute to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families, in order to enable them to take full advantage of educational opportunities equally with their peers. Congress stated the IDEA's purpose as to include "ensur[ing]" that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related" health care and other "services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Section 1400(d)(1)(A). The health care services to which students with disabilities have a right include the administration of needed medication. 34 C.F.R. Section 300.34(c)(13). Any prohibition in state law that stands as an obstacle to the accomplishment of Congressional objectives is preempted under the Supremacy Clause of the United States Constitution. *Hines v. Davidowitz* (U.S. Supreme Ct. 1941).

The evidence is undisputed. Suffering as he does from ADHD, Shane is a student with a disability. His physician has prescribed a daily dosage of 360 milligrams of Ritalin to control his symptoms of ADHD, up to 120 milligrams of which must be administered during the school day in one or two doses. The school nurse at Shane's school had been administering his school-time dose of

Ritalin for over a year when she expressed concern to Mrs. Davis that the dose might be dangerous because it far exceeded the recommended maximum dosage of 60 milligrams stated in the Physician's Desk Reference, which is the leading authoritative source of drug information approved by the Food and Drug Administration. Under the Columbia Medication Review Act, a "school nurse has the right and obligation to refuse to give any medication in excess of the recommended maximum dosage as stated in the Physician's Desk Reference." Medication Review Act Section 3. In accordance with the statute, the school nurse at Shane's school refused to continue to administer his school-time dose of Ritalin. The school district offered to allow the Davises to come to school to administer the medication themselves, but they refused the offer.

In moving for summary judgment, the school district argues that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law because Shane was not denied any right under the IDEA.

For the school district's summary judgment motion, the threshold issue—which turns out to be dispositive—involves the proper construction of the IDEA and the Medication Review Act.

In construing a statute, a court undertakes a single fundamental task, which is to effectuate the intent of the legislative body. *Smith v. District Court* (15th Cir. 2006). It begins with the language of the statute. *Cummins, Inc. v. District Court* (15th Cir. 2005). In doing so, it takes the statute's words as it finds them, giving them their usual and ordinary meaning. *Id.* Not only does it begin with the words of the statute, it also ends with them if they are unambiguous. *Id.* But if the words of the statute are ambiguous, it proceeds to extrinsic materials including legislative history and background facts. *Smith, supra.* In resolving any ambiguity that might remain in the words of the statute, it adopts a reading of the statute that yields reasonable results and rejects a reading that yields unreasonable ones. *Id.* Among other things, it avoids reading the statute in such

a way as to set up an obstacle to the accomplishment of Congressional objectives and would thereby avoid preemption. *Santa Clara County Local Transportation Authority v. Guardino* (15th Cir. 1995).

Although Congress intended to grant students with disabilities a right to receive the administration of needed medication by means of the IDEA, there is absolutely *no* language in the IDEA that could conceivably be read to grant *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. As noted, the IDEA's purpose includes "ensur[ing]" that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related" health care and other "services," such as administration of needed medication, "designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Section 1400(d)(1)(A). Not a word of the IDEA's language supports the existence of any right to receive medication in a potentially dangerous dosage. Quite the contrary. The IDEA's language precludes the existence of any such right because the IDEA aims to further the welfare of children with disabilities, not to undermine it.

And even if the language of the IDEA were ambiguous on this score—and it is not—there is *no* extrinsic material supporting a reading that the IDEA granted *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. That is hardly surprising, since, as indicated, the IDEA aims to further, not undermine, the welfare of children with disabilities.

In attempting to avoid summary judgment, the Davises ignore the IDEA itself. Instead, they argue that the language of the Medication Review Act is ambiguous in stating that a "school nurse has the right and obligation to refuse to give any medication in excess of the recommended maximum dosage as stated in the Physician's Desk Reference" (Medication Review Act Section 3) and that, if it were read in accordance with the apparent meaning of its words, it would set up

an obstacle to the accomplishment of Congressional objectives in the IDEA and would thereby suffer preemption. We disagree. There is nothing ambiguous about the language of the Medication Review Act. Nor does the Medication Review Act's language constitute an obstacle to any Congressional objectives in the IDEA. As stated, the IDEA does not grant *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. Practically by definition, a dosage of any medication that is in excess of the recommended maximum dosage as stated in the Physician's Desk Reference is a potentially dangerous dosage.

Because, under the law and the evidence, Shane was not denied any right under the IDEA, there is no genuine dispute as to any material fact and the school district is entitled to judgment as a matter of law. We accordingly grant the school district's motion for summary judgment and enter judgment in its favor.

FEBRUARY 2017 ESSAY QUESTIONS 4, 5 AND 6



California Bar Examination

Answer all 3 questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts 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 the 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

Years ago, Art incorporated Retail, Inc. He paid \$100 for its stock and lent it \$50,000. He elected himself and two family members to the Board of Directors, which in turn elected him as President and approved a ten-year lease for a store. He managed the store and was paid 10% of Retail's gross revenues as compensation.

Subsequently, Barbara bought 20% of Retail's stock from Art.

Retail's board approved a contract to buy 30% of the inventory of XYZ Co., a company owned by Art.

Subsequently, Art began taking home some of Retail's inventory without paying for it.

Retail had net profits in some years and net losses in others. It paid dividends in some years, but not in others. In some years, Retail's board met three times a year; in others, it never met.

Recently, Retail ceased business. Its assets were limited to \$5,000 in cash. Among the claims against Retail was one by Supplier, who was owed \$10,000 for computer equipment. Another claim was Art's, for the \$50,000 that he had lent and had just become due. Supplier and Barbara, individually, filed lawsuits against Retail and Art.

1. On what legal theory, if any, can Supplier reasonably seek to recover against Art on its claim against Retail? Discuss.
2. Does Barbara have a cause of action against Art, either derivatively or personally? Discuss.
3. If Retail is forced into bankruptcy court, will Art be able to collect from Retail any portion of his \$50,000 loan? Discuss.

QUESTION 5

Claire met with Len, a personal injury lawyer, in his office and told him that she had burned her legs when she slipped on some caustic cleaning solution spilled on a sidewalk outside Hotel. Len agreed to take her case and they properly executed a retainer agreement. Claire showed Len scars on her legs that she said were caused by the cleaning solution. She also showed him clothes that she said were stained by the cleaning solution. Len took the clothes from her and put them in his office closet for safe keeping.

Len filed a lawsuit in state court against Hotel. Hotel's lawyer, Hannah, called Len. She told him that this lawsuit was the fourteenth lawsuit that Claire had filed against Hotel, and that she intended to move the court to declare Claire a vexatious litigant. Len and Hannah had been engaged two years ago before they amicably decided to go their separate ways.

Len called Claire and left a message asking her to call him "about an important update in the case." He also sent her an email with a "read receipt" tag, with the same request. He received a notice that she had read the email, but did not receive any response. Over the next week, he sent her a copy of the same email once each day with the same "read receipt" tag; each day, he received a notice that she had read the email, but did not receive any response. He then sent her a registered letter asking her to contact him, but again, did not receive any response. A week later, he sent her another registered letter stating that he no longer represented her and that he would return her clothing to her.

Claire soon called Len, begging him not to "fire" her, saying she had not responded to him because "I didn't think calling you back was such a big deal." He then asked her about "the thirteen prior lawsuits against Hotel." She replied: "What 'thirteen prior lawsuits'? Besides, Hotel's got more money than I do." He told her that he was sorry, but that he was no longer her lawyer.

The next day, Len went to his office closet to retrieve Claire's clothes to send them back to her. To his dismay, he realized that he had sent her clothes along with his to be dry-cleaned. He rushed to the dry-cleaner and learned that all of the clothes he had sent had been dry-cleaned and that all of their stains had been removed.

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

Answer according to California and ABA authorities.

QUESTION 6

Ivan, an informant who had often proven unreliable, told Alan, a detective, that Debbie had offered Ivan \$2,000 to find a hit man to kill her husband, Carl.

On the basis of that information, Alan obtained a warrant for Debbie's arrest. In the affidavit in support of the warrant, Alan described Ivan as "a reliable informant" even though Alan knew that Ivan was unreliable.

Alan gave the arrest warrant to Bob, an undercover police officer, and told Bob to contact Debbie and pretend to be a hit man.

Bob called Debbie, told her he was a friend of Ivan and could do the killing, and arranged to meet her at a neighborhood bar. When the two met, the following conversation ensued:

Bob: I understand you are looking for someone to kill your husband.

Debbie: I was, but I now think it's too risky. I've changed my mind.

Bob: That's silly. It's not risky at all. I'll do it for \$5,000 and you can set up an airtight alibi.

Debbie: That's not a bad price. Let me think about it.

Bob: It's now or never.

Debbie: I'll tell you what. I'll give you a \$200 down payment, but I want to think some more about it. I'm still not sure about it.

When Debbie handed Bob the \$200 and got up to leave, Bob identified himself as a police officer and arrested her. He handcuffed and searched her, finding a clear vial containing a white, powdery substance in her front pocket. Bob stated: "Well, well. What have we got here?" Debbie replied, "It's cocaine. I guess I'm in real trouble now."

Debbie has been charged with solicitation of murder and possession of cocaine.

1. How should the trial court rule on the following motions:
 - a) To suppress the cocaine under the Fourth Amendment? Discuss.
 - b) To suppress Debbie's post-arrest statement under *Miranda*? Discuss.
2. Is Debbie likely to prevail on a defense of entrapment at trial? Discuss.



February 2017

**California
Bar
Examination**

**Performance Test B
INSTRUCTIONS AND FILE**

**CLAIM BY BLANCHARD ENGINEERING, INC.
AGAINST CITY OF CORSON**

Instructions

FILE

Memorandum to Applicant from John Trammell

Memorandum to John Trammell from Mike Bryant

Memorandum to File from Mike Bryant

Transcript of Corson City Council Meeting (August 8, 2016).....

Invoice from Blanchard Engineering, Inc.....

**CLAIM BY BLANCHARD ENGINEERING, INC.
AGAINST CITY OF CORSON**

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 parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Trammell, Simmons and Volz, PC
433 Corson Courthouse Square
Corson, Columbia

MEMORANDUM

TO: Applicant
FROM: John Trammell
DATE: February 23, 2017
RE: Claim by Blanchard Engineering, Inc. against City of Corson

We have received a request from Mike Bryant, the city attorney for the City of Corson, to evaluate a potential lawsuit against the City. Blanchard Engineering, Inc. performed services for the City as part of a potential upgrade to the City's wastewater treatment plant.

However, Blanchard claims that the City owes it over \$200,000 for services rendered pursuant to discussions that never resulted in a contract formally approved by the City Council. Blanchard sent an invoice to the City requesting payment, which the City has denied. Blanchard acknowledges that the contract never received a formal vote from the City Council. However, Blanchard's attorney has told the city attorney that, unless this case settles, Blanchard intends to file suit on a *quantum meruit* claim.

Please prepare an objective memorandum answering these questions:

- 1) Whether the City is immune from Blanchard's claim for *quantum meruit*.
- 2) Whether Blanchard can prove its claim for *quantum meruit*.

- 3) How a court might go about evaluating damages if Blanchard were to recover under *quantum meruit*.

Do not prepare a separate statement of facts, but make sure to use the facts in your analysis of the questions.

CITY OF CORSON
OFFICE OF THE CITY ATTORNEY
800 Main Street
Corson, Columbia

MEMORANDUM

TO: John Trammell
FROM: Mike Bryant, City Attorney, City of Corson
DATE: February 22, 2017
RE: Claim by Blanchard Engineering, Inc. against City of Corson

John: This memo asks your firm to assess a potential claim by Blanchard Engineering, Inc. against the City of Corson. Blanchard has demanded payment on an invoice it sent to the City, for services it began and completed before the last election. The new mayor and City Council refused payment in January 2017. Blanchard's lawyer called me several times to indicate that his client takes its demand seriously, and will file suit unless we can work something out. If the City decides not to settle, I anticipate asking your firm to handle the litigation.

Briefly, this dispute involves services that Blanchard rendered in connection with the City's efforts to upgrade its wastewater treatment facility, which the City owns and operates. The City hired Blanchard to help it put together an application for a state infrastructure grant to upgrade the plant. The City entered into a distinct contract, approved in compliance with the City Charter, to get Blanchard's initial advice on how to prepare an application for this funding. Blanchard provided that advice and the City paid Blanchard. That contract is not in dispute.

On June 10, 2016, Mayor Justine Reyes presented me with a new proposal from Blanchard, encompassing additional work in pursuit of the grant. On the same

day, I drafted a proposed contract embodying those terms and returned it to Mayor Reyes for further handling.

The progress of discussions concerning the June proposal appears in my interview notes with Mayor Reyes. She spoke with Bill Blanchard on June 13, 2016, and committed to bring the June proposal to the City Council for review and approval. For various reasons, that did not occur until August 8, 2016. The meeting that day was a public meeting; present were myself, Mayor Reyes, a majority of the Council and Bill Blanchard. I attach a transcript of all portions of the meeting concerning Blanchard's work. As you will see, I had signed a copy of the June proposal, as had Bill Blanchard, but the proposal never received a formal vote, and no entry concerning the June proposal ever appeared in the council journal.

By October 2016, Blanchard had completed substantially all of the work detailed in the June proposal. However, on October 18, 2016, we learned that the City of Corson's application for infrastructure funding was denied. Renovation of the facility never began.

On election day in early November 2016, Mayor Reyes lost her re-election bid. Moreover, because of attrition and contested seats, a majority of the council seats changed hands. In general, the new mayor and new council members articulated a more fiscally conservative position than the outgoing holders of those seats. The new mayor and Council came into office in early January of this year.

Blanchard submitted its invoice in mid-November 2016, but the City took no action before the new administration came into office in January 2017. After that, the new mayor contacted me about Blanchard's invoice. He indicated that, in his view, Blanchard had no claim. He said that, since the City didn't get the grant, he

didn't think that the City got any value from Blanchard's work. The City wrote Blanchard in January 2017, refusing to pay the invoice.

In the conversations I have had with Blanchard's attorney, he acknowledged that the June 2016 proposal had never received a final vote. At the same time, he indicated his belief that the City got exactly what it bargained for, on time and under budget.

CITY OF CORSON
OFFICE OF THE CITY ATTORNEY
800 Main Street
Corson, Columbia

MEMORANDUM

TO: File
FROM: Mike Bryant, City Attorney, City of Corson
DATE: February 13, 2017
RE: Claim by Blanchard Engineering, Inc. against City of Corson

I spoke with former Mayor Justine Reyes about her contact with Blanchard Engineering and Bill Blanchard in the course of their work on the City of Corson wastewater treatment facility. This memorandum summarizes what she told me. I believe that, if required to do so, she will testify consistently with the facts stated in this memorandum, and that she will be credible.

Mayor Reyes became mayor in 2012. The City experienced slow but steady growth during her tenure. It became increasingly clear that the City's wastewater treatment facility could not keep up with the demand posed by the growing population. The facility badly needs upgrading. It also became clear that the City could not afford major expenditures on improvements to the facility. Mayor Reyes held periodic conversations with representatives of various state and federal regulatory agencies about the facility. Those representatives made clear that, while the facility was currently in compliance, it would fall out of compliance within the next several years. Mayor Reyes understood the representatives to say that failure to upgrade the facility could result in fines totaling several million dollars.

In the fourth year of her term, Mayor Reyes became aware of state grants that would support infrastructure projects, including improvements in wastewater treatment facilities. After some research, she entered into an arrangement with Blanchard Engineering, Inc., an engineering firm from Columbia City with whom neither she nor the City had had prior dealings. Blanchard had expertise in designing and managing wastewater treatment facilities, and in assisting state and local governments in obtaining funding for significant wastewater improvement projects.

Reyes arranged for Blanchard to give the City advice on the steps the City would have to take to obtain the state funding. Blanchard did so promptly, and received payment for that advice from the City. That advice made clear that, in order to qualify for the funding, the City would need to prepare actual design engineering specifications, since the project needed to be “shovel-ready” by November 2016. This work included assessment of the facility’s existing capacity, analysis of the relevant EPA and Columbia EPA regulatory requirements, preparation of specific engineering and building designs, negotiations with contractors and suppliers, and applications for relevant permits and permissions. Blanchard Engineering prepared a proposal to accomplish this work for \$210,000. It presented that proposal to Mayor Reyes on June 9, 2016.

Mayor Reyes obtained a draft contract based on those terms from the city attorney on June 10, and met again with Bill Blanchard on June 13. On that date, Bill Blanchard told Mayor Reyes that it would take almost the entire time between then and November to get the project “shovel-ready.” He wanted assurances that the City would follow through on the contract if Blanchard invested its time and expertise in the project. Mayor Reyes assured him that she had the support of the City Council, and that she would present the contract for review and approval by the Council at the earliest opportunity. She told Blanchard to go ahead with the project.

Mayor Reyes did not get the project on the council agenda until August 8, 2016. She indicated that a transcript of that meeting would provide full details about what was said. However, she confirmed that, while all seven members of the Council voiced support for the June proposal, due to the press of business, the Council did not vote on the June proposal. She also confirmed that no vote was ever taken, nor was any note of the Council's opinion ever entered into the council journal. Mayor Reyes explained that neither she nor the Council thought that the project posed a controversial issue. Moreover, she and many council members were locked in difficult re-election fights, which distracted them through much of the fall.

Mayor Reyes received regular reports from Blanchard Engineering and Bill Blanchard on progress under the plan. By October 14, 2016, preparations were substantially complete, and Blanchard had delivered all its designs for the plant, along with a full schedule for construction, to Mayor Reyes. On October 18, 2016, the City received notice that its application had been denied. Slightly over two weeks later, Mayor Reyes lost her re-election bid.

She remained in her position as mayor through the beginning of January 2017. When the invoice from Blanchard Engineering arrived in November, Mayor Reyes consulted with the incoming mayor, who told her not to take action on it, but to leave it for him and the incoming City Council to handle.

TRANSCRIPT
CORSON CITY COUNCIL MEETING
August 8, 2016

Mayor Reyes called the roll. All council members present, including the Mayor, Council Members Frank, O'Bryan, Finzler, Manton, Sidney, and Baldwin. Also present: City Attorney Bryant, Mr. William Blanchard.

Abbreviations:

CM = Councilman

CW = Councilwoman

Mayor: I see that all are present

* * * *

Mayor: I want to turn to the wastewater treatment facility issue now. Mike Bryant, as city attorney, has some information for us. We also have Bill Blanchard from Blanchard Engineering on hand to give us an update. Mike, would you start us off?

Attorney Bryant: Yes, Madam Mayor. As the Council can see from the notice of today's meeting, the City got advice from Blanchard Engineering, Inc. in May on how to apply for funding to upgrade the wastewater treatment plant. That told us that the improvement project had to be ready to go as of mid-November. Madam Mayor, do you want to say more about this?

Mayor:

Of course. In working with Bill Blanchard, we realized that we have to get the whole project ready to start on November 15th of this year. To do that, we have to have a design; we have to have permits; we have to have contractors and subcontractors and suppliers and what have you; we have to have the EPA and the Columbia EPA signing off . . . and if we don't have all of this in time, we won't get the funding. It was my judgment that there was no way that we could do this on our own. I also knew that the City had to do this; we can't rely on a private utility to take this off our hands.

So I talked with Bill Blanchard, who had been doing really great work for us. He said that his firm could do it on a short deadline, so he put together a proposal. I ran it by Mike Bryant, who drafted a contract for me to talk over with Blanchard. On my authority, Blanchard got started in mid-June.

Attorney Bryant:

The contract that you have in your hands today was the one that I prepared for Mayor Reyes in June. The City Charter requires that I review and sign it before you vote on it, which I have done. You'll see that Bill Blanchard has signed it on behalf of Blanchard Engineering. The only thing left to do is for the Council to vote, and then to enter it into the council journal.

Mayor:

Maybe in a minute we can hear from Bill Blanchard about his progress on the project. But first I want to see if you have questions about this. Before you do, I want to say that I would not have authorized this without having talked with each of you privately beforehand. I think I remember having

your okay then. And let me say that this is a great chance to improve a key component of our infrastructure at minimal cost to the City.

CM Frank: I remember, Justine. I agree that this is a good project, and see no reason not to move forward. I'll want to hear from Bill Blanchard about progress though, and the chances that we'll get the money.

Mayor: Okay.

CW O'Bryan: I remember this project from May. I remember thinking then that the application would be harder than we thought. So it makes sense that we get some expert help with this.

Mayor: Any other questions or comments?

CM Finzler: None here. I'm comfortable with this direction.

CM Manton: I have only one question. If I read the contract right, you're going to need \$200,000 . . . no, \$210,000 to get this project ready. Is that right, Mr. Blanchard?

Mr. Blanchard: That's correct.

CM Manton: That's a lot of money. The Mayor's told us why she thinks it takes that much. Can you explain it in your words?

Mr. Blanchard: Of course. The funding application requires that the funds be committed within the fiscal year of award. Since the City's fiscal year runs until June 30, an award this year would

require you to begin construction on improvements no later than mid-November of this year. That means all conditions necessary to start construction have to be satisfied by that time. These conditions include creating a design for the improvements, something for which we already have substantial expertise, and which we can do within very tight time limits. Some other conditions take a little more time, but can also be accomplished fairly quickly. For example, finding and negotiating with contractors and suppliers.

But some of these conditions take months to complete. For example, the City has to obtain several different permits from several different agencies, and has to file regular periodic reports at defined intervals with specific bodies. We cannot reduce these time periods, and needed to get started in mid-June to make sure the City was ready in time.

All of these activities require us to devote staffing and resources in a coordinated and efficient way. With a longer term project, we could invest fewer teams, and perhaps save some staff time. With the shorter time period, we had to have multiple teams working simultaneously. Overall, the contract amount of \$210,000 represents good value for a project of this size and time sensitivity.

CM Manton: Thank you. That was very clear. No objections here.

CW Sidney: Mayor, I'm worried that you didn't get formal council approval for this contract before they started work in June. Could we have avoided that?

Mayor: I'm afraid not. You all remember the budget mess we faced in late June and July. I think I'm right in saying that we had to deal with that mess first. This is the earliest we could take this up.

CW Sidney: I don't have any objection to the project. It's just that, what if we don't get the grant?

Mayor: Then we're committed to pay Blanchard. There's no guarantee that we'll get the grant. This just puts us in the best position to get the funds. That's what we're getting.

CW Sidney: Why do we have to upgrade the wastewater treatment plant at all?

Mayor: Well, first, the agencies are forcing our hand. And we're the ones who have to do it. The private market won't step in to do it for us.

CW Sidney: Okay. No objection.

CW Baldwin: I'm interested in how the work is going. Mr. Blanchard, could you give us an update on your progress?

Mr. Blanchard: Yes

* * *

CW Baldwin: So you're telling us you're optimistic about our chances.

Mr. Blanchard: Let me stress, Councilwoman, that these applications are very competitive. I know from reliable sources that many cities in the region are going after these funds. But we think that you make a compelling case for need, given your population growth and your facility's condition. And we have confidence in our ability to make a convincing proposal for upgrade.

CW Baldwin: I'm sold! You should do this for a living, Mr. Blanchard!

[Laughter]

Mayor: Okay. Okay. Thank you, Mr. Blanchard. I think we've heard what we need to from members of the Council. I note for the record that Attorney Bryant has had to go. I'm also worried about time. We have to make sure to deal with the complaints about police conduct in District 3. Shall we turn to that next?

* * * *

Blanchard Engineering, Inc.

Innovation – Imagination – Integrity

4345 Battlefield Industrial Park
Columbia City, Columbia
accounting@blanchengineers.com

INVOICE

For services rendered to:
City of Corson
Justine Reyes, Mayor
1 Town Hall Plaza
Corson, Columbia

Contract Date: June 13, 2016

Contract Name: City of Corson Wastewater Treatment Facility Upgrade

ITEMIZATION

TIME AND LABOR:

Review and analysis of existing facility	\$15,000.00
Assessment and analysis of EPA and Columbia EPA mandates	\$25,000.00
Design of upgraded wastewater treatment facility	\$75,000.00
Applications for permits, variations, etc.	\$40,000.00
Preparation of reports to EPA / CEPA	\$10,000.00
Negotiations with subcontractors and suppliers	\$25,000.00
<u>MATERIALS:</u>	<u>\$13,409.00</u>
TOTAL DUE:	\$203,409.00

Dated: November 15, 2016

B. Blanchard
Bill Blanchard, President



February 2017

**California
Bar
Examination**

**Performance Test B
LIBRARY**

**CLAIM BY BLANCHARD ENGINEERING, INC.
AGAINST CITY OF CORSON**

LIBRARY

Corson City Charter Section 17-4

Lyman v. Town of Barnet
Columbia Supreme Court (1958)

Galax Consultants, Inc. v. Town of Avalon Beach
Columbia Supreme Court (1994)

Hiram Grant Partnership v. City of Vanderbilt
Columbia Court of Appeals (2005)

Corson City Charter Section 17-4

No contract with the city shall be binding on the city unless the contract is in writing, is signed after review by the city attorney, and is approved by the city council subsequent to its signature by the city attorney, with such council approval entered on the council journal.

Lyman v. Town of Barnet
Columbia Supreme Court (1958)

Mrs. Estella Lyman filed an action against the town of Barnet for two purposes: first, to establish whether her property lies within the town's corporate limits; and second, if her property falls within the town, to get reimbursement for a water line that she constructed to obtain water from the town water supply. The trial court determined that her property lay entirely within the town, but denied her request for reimbursement. Mrs. Lyman appeals.

The facts are not in dispute. Mrs. Lyman's property has been wholly within the corporate limits of Barnet since the land was sold to her. However, through an error, both town and county officials treated the property as lying outside the town but within the county. As a result, the town refused to supply it with water. When Mrs. Lyman constructed her own line, the town charged her an increased rate for the same reason. Mrs. Lyman paid taxes to the county, and not the town.

Several years after she built the water line, Mrs. Lyman upgraded it to a higher capacity pipe. At the same time, she subdivided her property, and sold off several lots to purchasers who built residences on their lots. The town connected these residences to the pipe laid by Mrs. Lyman, and collected water rents from each of these new owners.

In 1954, the town resurveyed its boundaries, as part of a potential annexation of several unrelated portions of the county. During this resurvey, a town official informally notified Mrs. Lyman that the resurvey tentatively indicated that her property lay within the town. Despite this, the town continued to charge Mrs. Lyman a higher rate, while also supplying water to other users off of the common pipe that she had built. After several years of unsuccessful negotiation, Mrs. Lyman filed this suit.

We think that the present case must be decided upon the principles of *quantum meruit*. The line became a part of the town water system and was used by the town in its water

business. It produced valuable water rentals and now accommodates many families. Where a town takes over and controls a water line built by others and uses it for the benefit of the town and consumers generally, and through it delivers water for a profit, it is obligated to pay those who constructed the line on a *quantum meruit* claim.

The town contends that it entered into no contract with Mrs. Lyman, other than the contract to supply her with water. Moreover, the town contends that it cannot be bound to pay for facilities that it uses in its governmental capacity.

A function is governmental in nature if it is directly related to the general health, safety, and welfare of the citizens. In contrast, a function is proprietary in nature if the municipal corporation provides a service that other private commercial businesses also provide, and that benefits the municipal corporation financially. When a municipality operates a water plant, it acts in its proprietary capacity by exercising business functions that another private business might also have provided. In such a case, the municipality must comply with the same rules that apply to private corporations or individuals engaged in the same business.

A municipality may become obligated under *quantum meruit* to pay the reasonable value of benefits it has accepted or appropriated, provided it has the power to contract on that subject matter. In such a case, the municipality can be held liable where, with the knowledge and consent of the members of the council, it has received benefits procured by its agents, either without a contract or where an express contract is invalid because of mere irregularities.

To be sure, Mrs. Lyman must still establish the elements of a claim for *quantum meruit*. To recover under this doctrine, a plaintiff must establish that: 1) valuable services and/or materials were furnished, 2) to the party sought to be charged, 3) which were accepted by the party sought to be charged, and 4) under such circumstances as reasonably notified the recipient that the plaintiff, in performing, expected to be paid by the recipient.

In this case, the trial court denied Mrs. Lyman's request for reimbursement on the grounds that the law provided her with no remedy against the town. Mrs. Lyman had no opportunity to offer evidence on the elements of her *quantum meruit* claim. Accordingly, we reverse this portion of the trial court's order, and remand the case for trial on the *quantum meruit* claim.

Reversed and remanded.

Galax Consultants, Inc. v. Town of Avalon Beach
Columbia Supreme Court (1994)

Plaintiff Galax Consultants, Inc. (Galax) appeals from a judgment of the trial court in favor of the defendant, the town of Avalon Beach (Town). The trial court held that, although Galax had proven all of the requirements of *quantum meruit* against the Town, immunity precludes Galax's recovery in this case. In addition, the trial court addressed the issue of damages in the event that Galax should prevail on this appeal. Galax appeals this portion of the trial court's ruling as well.

In the spring of 1988, the Town owned a ballpark in Avalon Beach, which it had contracted to sell to Banyan Partners, Inc. (Banyan). Banyan orally agreed with Galax for Galax to perform repairs and renovations to the ballpark. Galax completed the work in a competent manner and within a tight timetable, and the park was ready for the 1988 baseball season.

The purchase and sale agreement between the Town and Banyan required the Town to reimburse Galax for the costs of any repairs that Galax might make, even if the sale did not go through. The purchase and sale agreement was executed in compliance with the city charter. Moreover, testimony at trial indicated that the town manager had promised Galax that the Town would require any other purchaser of the ballpark to pay Galax what it was owed. The sale to Banyan did not take place; the Town operated the ballpark that summer and then sold it to another buyer. However, the Town absolved that buyer of liability for expenses incurred prior to the sale, including Galax's bill.

Galax sued Banyan and the Town for \$61,479, and obtained a judgment against Banyan. (Banyan has paid only \$10,000 of that judgment.) However, the trial court granted the Town's motion for judgment notwithstanding the verdict, on the ground that Galax could not maintain a *quantum meruit* suit against a city.

At trial, Galax offered evidence in support of its claim for \$61,479. This consisted of physical improvements to the park of \$35,000, overhead costs of \$20,000 and anticipated profits of \$6,479. In that portion of its ruling dealing with damages, the trial court ruled that, should Galax prevail on appeal, it should receive only the actual value of improvements to the park, and not the other two items.

The trial court erred in denying Galax's *quantum meruit* claim. No question exists that the Town owned and operated the park in the exercise of its proprietary function. Galax has proven that it has conferred a benefit on the Town in circumstances where it would be unfair for the Town to retain that benefit were it not a municipality. In such a case, a plaintiff should not be barred from recovering the retained benefit *solely* because the defendant is a municipality. This reasoning comports with our longstanding precedent. *Lyman v. Town of Barnet* (Col. Supreme Ct. 1958).

The trial court limited Galax's damages to the value of the physical improvements to the ballpark. The measure of damages for *quantum meruit* is the value of the benefit actually received and retained by the defendant. A plaintiff may prove the value of this benefit by proving not only the value of physical improvements, but also the value of work, labor, services and materials furnished. Other points of proof may include: the increase in the sale price of the property resulting from the plaintiff's work; the value of the risks avoided as a result of the plaintiff's work (e.g., through design and installation of safety measures); and similar items.

The trial court appears to have categorically excluded Galax's overhead expenses and profit from its calculation of the benefit received by the Town. Such a blanket exclusion of a plaintiff's overhead, costs, and profits is improper.

We therefore reverse, and remand for reconsideration of Galax's damages.

Reversed and remanded.

Hiram Grant Partnership v. City of Vanderbilt

Columbia Court of Appeals (2005)

The City of Vanderbilt (City) negotiated the purchase of a right-of-way from appellant Hiram Grant Partnership (Partnership). A written nine paragraph contract memorialized the resulting agreement. In Paragraph 4 of the contract, the City agreed to reclaim wetlands on property owned by the Partnership and to employ a wetlands specialist to do so.

The mayor and two council members executed the contract on the City's behalf. However, those three officers did not constitute a quorum, as defined by the City's charter. The city attorney did not review or sign the contract, nor did the city council approve it, both of which are required by the City's charter.

The City performed most of its obligations under the contract, including payment of all money due to the Partnership. However, the City failed to perform its obligations under Paragraph 4. It did not reclaim the wetlands, nor employ a wetlands specialist. The Partnership requested voluntary compliance with Paragraph 4, but the City refused.

The Partnership sought a court order to compel the City to validate the contract by entering it into the council's official minutes. The Partnership argued that the City was estopped from denying its obligations under the contract, given both the explicit terms and its substantial performance of all other parts of the contract. The City argued that the entire contract was *ultra vires* because neither that city council nor the city attorney has approved it, nor had it been recorded in the council's official minutes.

The trial court denied Partnership's petition, holding that because the contract was *ultra vires*, it was not legally binding on the City. The Partnership filed this appeal.

A municipality has no inherent power. It may only exercise power to the extent the state has delegated it the authority to act. Accordingly, we must construe a municipality's

allocations of power from the state strictly. If a local government enters a contract in abrogation of its delegated power or in excess of its authority to enter contracts, then the contract is deemed *ultra vires* and void.

The exact status of a defective contract depends upon the type of limitation that the local government has ignored in making it. An imperfect or irregularly executed contract may not necessarily be completely ineffective, as long as it falls within the type of contract that the municipality has the power to make. But if the imperfection or irregularity places the contract completely beyond the power or competence of the local government, then the contract is *ultra vires*: it becomes an absolute nullity.

Where a city charter specifically provides how the city must make and execute a municipal contract, the city may only do so in the method prescribed. A municipality's method of contracting, once prescribed by law or charter, is absolute and exclusive. In this case, the General Assembly enacted the City's charter, which in turn sets forth the parameters of the City's authority to take official action, including its ability to enter into contracts.

The City's charter provides in relevant part that: the Mayor may sign contracts when authorized by the city council to do so; a quorum of the council requires at least three council persons and the Mayor; no contracts shall bind the City unless approved by the council; and the city attorney must either draft the contract or review it before authorization by the council. In this case, the undisputed facts indicate that the city attorney neither drafted nor reviewed the contract before the Mayor and two council members signed it. Only two council members approved the contract; no quorum was present.

Thus, the City entered the contract outside of its limited grant of authority; in other words, the City acted beyond the power or competence of the local government. We have no choice but to conclude that the contract is *ultra vires*, null and void.

This is not a case where the City simply exercised its legitimate powers in an unusual or irregular fashion. Rather, it involves a situation where the City acted with a total absence of power and in direct contradiction to the strictures of its charter. Where, as here, a municipality contracts with a total absence of power, it is not estopped from denying the resulting agreement's validity.

Accordingly, the Partnership cannot seek whole or partial performance of the contract through mandamus or other means. Moreover, the City's substantial performance under the contract will not be treated as a ratification. Furthermore, the City is not estopped from asserting the contract's invalidity, even though the Partnership has performed its part of the bargain and might even have relied upon the contract to its detriment.

We are not persuaded by appellant's reliance on *Wreck-It Co. v. City of Lossoth* (Col. Ct. App. 2001). In that case, a wrecker company sued the city on a *quantum meruit* theory to recover for the cost of storing vehicles seized by city police. The company had entered into the storage arrangement orally with members of the police department; the city charter required that all contracts "other than for the ordinary needs of the city" be in writing. The Court of Appeals held for the company, stating that "provided a contract is within the scope of its corporate powers, a municipality may be held liable on a contract implied in law, to prevent the municipality from enriching itself by accepting and retaining benefits without paying just compensation." The court in that case did not address the *ultra vires* arguments presented by appellee in this case. Moreover, the city charter provisions differ. There, the storage of vehicles seized by police arguably falls within the "ordinary needs of the city."

Our conclusion here may appear unfair, but compelling policy concerns support it. The limitations placed on the City's ability to contract include numerous checks that prevent improper action by the City, and protect against disastrous consequences for taxpayers.

To allow an *ultra vires* agreement to appear effective in any sense, even quasi-contractually, would amount to a license to local government to expand its own powers without state legislative delegation. Indeed, this would annul the limitation itself and permit the local government to do indirectly that which it could not do directly. It would be but a short step to governmental extravagance with unreasonable risks and liabilities heaped upon the shoulders of local taxpayers. A strict rule of absolute nullity will nip these dangerous tendencies at the outset.

Because the City acted without any power, we conclude the trial court did not abuse its discretion in denying relief that would have compelled the City to validate the contract.

Judgment affirmed.

Judge Bandy joins this opinion.

Judge Quantrill issues the following dissenting opinion:

I dissent. Our Supreme Court's cases make clear that claims for *quantum meruit* may be sustained, even where the City has not fully complied with formal requirements for contracting under the city charter. *Lyman v. Town of Barnet* (Col. Supreme Ct. 1958); *Galax Consultants, Inc. v. Town of Avalon Beach* (Col. Supreme Ct. 1994). Cities should not be unjustly enriched at the expense of an innocent plaintiff by the simple expedient of failing to comply with purely formal requirements in the city charter.