

**FEBRUARY 2013
ESSAY QUESTIONS 1, 2 AND 3**



California Bar Examination

Answer all three 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 facts 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

Max imports paintings. For years, he has knowingly bought and resold paintings stolen from small museums in Europe. He operates a gallery in State X in partnership with his three sons, Allen, Burt, and Carl, but he has never told them about his criminal activities. Each of his sons, however, has suspected that many of the paintings were stolen.

One day, Max and his sons picked up a painting sent from London. Max had arranged to buy a painting recently stolen by Ted, one of his criminal sources, from a small British museum.

Max believed the painting that they picked up was the stolen one, but he did not share his belief with the others.

Having read an article about the theft, Allen also believed the painting was the stolen one but also did not share his belief.

Burt knew about the theft of the painting. Without Max's knowledge, however, he had arranged for Ted to send Max a copy of the stolen painting and to retain the stolen painting itself for sale later.

Carl regularly sold information about Max's transactions to law enforcement agencies and continued to participate in the business for the sole purpose of continuing to deal with them.

Are Max, Allen, Burt, and/or Carl guilty of:

- (a) conspiracy to receive stolen property,
- (b) receipt of stolen property with respect to the copy of the stolen painting, and/or,
- (c) attempt to receive stolen property with respect to the copy of the stolen painting?

Discuss.

Question 2

Carol, a woman with young children, applied to rent an apartment owned and managed by Landlords, Inc. Landlords, Inc. rejected her application.

Believing that Landlords, Inc. had rejected her application because she had young children, Carol retained Abel to represent her to sue Landlords, Inc. for violation of state anti-discrimination laws, which prohibit refusal to rent to individuals with children.

Landlords, Inc. retained Barbara to represent it in the lawsuit. Barbara notified Abel that she represented Landlords, Inc.

Abel invited Ford, the former manager of rental properties for Landlords, Inc., to lunch. Ford had participated in the decision on Carol's application, but left his employment shortly afterwards. Abel questioned Ford about Landlords, Inc.'s rental practices and about certain conversations Ford had had with Barbara regarding the rental practices and Carol's application.

During a deposition by Barbara, Carol testified falsely about her sources of income. Abel, who attended the deposition, suspected that Carol was not being truthful, but did nothing.

After the deposition ended and Carol had left, Barbara told Abel that Landlords, Inc. would settle the dispute for \$5,000. Abel accepted the offer, signed the settlement papers that day, and told Carol about the settlement that night. Carol was unhappy with the amount of the settlement.

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

Answer according to California and ABA authorities.

Question 3

In 2004, Mary and Frank orally agreed to jointly purchase a small storefront space in City for \$80,000. Mary contributed \$40,000 of her own money. Frank contributed \$40,000 he had embezzled from his employer, Tanner. Mary and Frank agreed to put the property in Frank's name alone because Mary had creditors seeking to enforce debts against her. They further agreed that Frank would occupy the property, which he planned to use as an art studio and gallery. They also agreed that, if and when he vacated the property, he would sell it and give her one half of the net proceeds. He then occupied the property.

In 2005, Tanner discovered Frank's embezzlement and fired him.

In 2012, Frank sold the property, obtaining \$300,000 in net proceeds. Frank offered to repay Mary her \$40,000 contribution, but Mary demanded \$150,000.

Mary and Tanner each sued Frank for conversion.

At trial, the court found Frank liable to both Mary and Tanner for conversion.

1. What remedy or remedies can Mary reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.
2. What remedy or remedies can Tanner reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.



February 2013

California

Bar

Examination

Performance Test A

INSTRUCTIONS AND FILE

Doral Digestive Medical Clinic v. Dr. Kyle Harris

Instructions

FILE

Memorandum from Catherine Tedesci to Applicant

Memorandum from Executive Committee to All Attorneys

Transcript of Interview with Dr. Kyle Harris

Excerpt from Employment Agreement

Memorandum from Joan Malzone to Catherine Tedesci

DORAL DIGESTIVE MEDICAL CLINIC v. DR. KYLE HARRIS

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.

LAW OFFICES OF CATHERINE R. TEDESCI

1199 Brian Drive

Sweetwater, Columbia

MEMORANDUM

TO: Applicant
FROM: Catherine Tedesci
DATE: February 26, 2013
RE: Dr. Kyle Harris

One of our clients, Dr. Kyle Harris, a gastroenterologist, is involved in a contract dispute with Doral Digestive Medical Clinic (DDMC). Four years ago, Dr. Harris signed a contract that included a covenant not to compete. Dr. Harris left DDMC about a month and a half ago. He would like to open up a gastroenterology (GI) practice near DDMC, and wishes to know whether the covenant not to compete is enforceable in whole or in part. You can glean all of the facts from his interview transcript and a "market survey" of the market in which DDMC operates, generated by an associate here along with a medical economist, both of which are in the file.

At this point, however, Dr. Harris needs to know the likelihood that the non-compete covenant is enforceable. Please prepare, for my signature, an opinion letter to Dr. Harris in accordance with the firm's guidelines.

LAW OFFICES OF CATHERINE R. TEDESCI

1199 Brian Drive

Sweetwater, Columbia

MEMORANDUM

TO: All Attorneys
FROM: Executive Committee
DATE: September 28, 2010
SUBJECT: Opinion Letter Guidelines

Often the firm's attorneys must prepare an opinion letter to communicate their views to a client. An opinion letter should follow this format:

- State your understanding of the legal issue or issues you are asked to address.

- Analyze the client's legal position objectively, in light of the applicable law and the relevant facts, and resolve each of the issues implicated, arriving at a conclusion and identifying the degree of certainty as to each.

- Remember that many opinion letters are written to lay clients and that an opinion letter must provide genuine assistance to the client. Although you must discuss the law, you should do so as clearly and straightforwardly as possible.

Transcript of February 12, 2013 Interview with Dr. Kyle Harris

CATHERINE TEDESCI: Good afternoon, Dr. Harris. If it is okay with you, I'd like to record our conversation, so it can be transcribed if necessary to review your case.

DR. HARRIS: That's fine with me.

TEDESCI: Okay. I understand you have a contract matter to discuss with me?

HARRIS: Yes. I need some advice about whether I can open up my own practice.

TEDESCI: Why don't you start at the beginning and tell me the whole story?

HARRIS: Sure. I graduated from Medical School and did both my internship and residency at the University of Columbia Medical School in internal medicine. After that, I went out on the job market and ended up with a medical group whose patients are in Doral County, Columbia. The name of the organization is Doral Digestive Medical Clinic, or "DDMC." They did gastroenterology and general internal medicine. I was looking for a place to learn gastroenterology (GI), learn how to find patients and develop a practice, and get my career going. And I like Doral County a lot -- it is quite rural, a great place to live and raise a family, and develop a practice. I thought they had a lot to offer me, so I kept after it, and eventually the clinic decided to give me a try.

TEDESCI: How big was the group?

HARRIS: Actually, the term "group" is a little misleading. The guy who ran it as the president and owner was Dr. David Medved. Dr. Medved set up the practice in 1998 as Doral Digestive Medical Clinic.

TEDESCI: Did you sign an employment agreement with the clinic?

HARRIS: Yes. I originally signed an agreement that was a one-year trial period, terminable-at-will on their part. It was a pretty simple document. It said I would be employed as an associate for a trial period of 12 months, identified the pay schedule, which was about \$160,000 for the year, said that the clinic could terminate me at any time for any reason, and that was about it.

TEDESCI: How did that year go?

HARRIS: The year went great. It was sort of like a fellowship year in gastroenterology. There were only two gastroenterologists in the entire county, Medved and me. That is still the way it is today, by the way, although I've heard Medved is looking quite hard to find someone to replace me in the clinic. I learned the practice of gastroenterology and got to see just how Medved did it. I got training and took a lot of his overflow. I learned how to evaluate patients with gastrointestinal complaints, treat a broad range of conditions, and perform colonoscopies, which is the big part of the practice. But I also did the occasional biopsy and some interpretation of the results, and learned to make recommendations concerning the longer run health of the patients. As well, I did some endoscopies, mostly for ulcer diagnosis, and learned a little about irritable bowel syndrome. So I both got a lot out of the year and did a lot of good work for Medved and the patients in the county.

TEDESCI: What happened after the year?

HARRIS: We both agreed that I should join the clinic as a member, and had some vague discussion that if it continued to work out I might end up with equal ownership eventually. So I bought into the clinic as a shareholder member and signed a stock transfer and an employment agreement to work for DDMC. The agreement set up a 4-year employment term, with the pay increased to over \$200,000. That agreement has a non-compete clause in it. The language is in paragraph 14 of the agreement. I've brought a copy of it for you to look at.

TEDESCI: Were you aware of that term in the agreement when you signed it?

HARRIS: Yes, I knew about it. I read the whole thing and discussed it with some of my professors at the University and one of their lawyers. They all said it was fairly standard in the medical profession, that all practices had similar terms, and that they were in all the employment agreements because clinics and practices don't want to train someone, help them develop a specialty and a patient base, and then have the doctor leave with all of the patients. Otherwise they might not hire me at all. One of the professors told me that she heard that if the terms are totally unreasonable, and try to keep you from practicing medicine of any kind or anywhere, sometimes they can't hold you to it, but that 3 years and the 20-mile radius are probably okay. That seemed fair enough to me. I understood Medved's point of view, and I went ahead and signed it. I was the one who

really wanted DDMC to hire me, so I wasn't about to wreck the opportunity by objecting. It wasn't really something to negotiate about at that point.

TEDESCI: After you became a member, how did things go?

HARRIS: It continued to go quite well. The clinic had a lot of patients. We were getting plenty of referrals from the doctors in the county and we were making a lot of money. Colonoscopies, believe it or not, are in big demand because they are so effective for screening for colon cancer.

TEDESCI: So what happened?

HARRIS: It was all working out well until we sat down not that long ago to figure out what would happen when the 4-year agreement ended. I wanted to become an equal with Medved at that point, concerning the pay and ownership. I thought I had earned it, and I have brought in a lot of business for DDMC. Medved at first said we ought to be able to work that out. But I concluded that he never was genuinely interested in that, and he was just stringing me along on the equal ownership thing.

TEDESCI: Does the employment agreement say anything about renewal or negotiating in good faith towards a new arrangement at the end of the 4-year term?

HARRIS: Nothing. Medved had hinted that we might go in the direction of equal ownership at some point, but in all honesty he hadn't made any promises about that. So after going around and around with Medved about it, I got frustrated, told him it wasn't going to work, and when the 4-year term expired about a month ago, I resigned from DDMC and sold him back my shares.

TEDESCI: Was there anything in the agreement concerning what would happen to the shares if you left the practice?

HARRIS: Yes, there was a "buyout" provision. He gave me a fair amount for the shares. If anything, he was generous. I have no complaints about that.

TEDESCI: What have you been doing since?

HARRIS: I took a little time off, and then got into planning for my own practice. I'd like to open up my own office in Sweetwater to do gastroenterology. I've done some estimates, and if most of my patients stick with me and I get my share of referrals, I can do very well. There is some growth in the area, and I'm betting that the patients I

developed during the five years with DDMC will be quite willing to come with me to my new office.

TEDESCI: Sweetwater isn't that big a place. Has Medved figured out that you would like to open up your own practice in Sweetwater?

HARRIS: Oh, yeah, he knows. That's why I'm here, really. Yesterday he called up and asked if I was going to be doing gastroenterology. When I said of course, that's what my practice is, he got mad, started yelling, and said that I couldn't do that, that that was a violation of the agreement, and that if I tried that I would have to shut down and move away. I tried to talk to him about it and said, "You know I live here now and have a family here, and this is the only way for me to make a living." But he wouldn't listen. He said I was violating the covenant not to compete in the agreement, and that he was going to get his lawyer to get an injunction to keep me from practicing.

TEDESCI: Has he filed a lawsuit?

HARRIS: He hasn't done anything yet, but it is only a matter of time, I think. He isn't the type to say he is going to do that and not do it. So I guess I need some help with this.

TEDESCI: Looking at the language in paragraph 14, it says that the geographic scope of the non-compete agreement is a 20-mile radius of Sweetwater, and a 5-mile radius around hospitals or offices served by Doral Digestive Medical Clinic. Is there a way to just move your practice outside of that radius? If that is easy to do, that is one easy way to solve the problem.

HARRIS: I wish, but it wouldn't make any sense to do that. Almost all of my patients live near Sweetwater. Many patients needing GI care are elderly and frail. Neither they nor I would be enthusiastic about making a long trip, and the only place that makes sense to locate outside the radius is about 75 miles away. There is one hospital and medical building area that might be outside the 20 miles, but DDMC has a contract with them and does their gastroenterology, so according to the agreement I can't locate within 5 miles of that place. So none of it makes sense. Besides, I shouldn't have to move out, should I? These are my patients. I'm meeting a real need for these patients, and all Medved would have had to do was be reasonable and I wouldn't have left DDMC.

TEDESCI: Let me ask you something else. According to paragraph 14, the duration is three years. Is it feasible to do gastroenterology elsewhere for that time and then come back to Sweetwater?

HARRIS: No, for a couple of reasons. I'd lose my patients and I feel responsible for them. This is a medical practice we are talking about. I can't just cut and run. When I got back, who knows where they would be? I wouldn't blame them for being upset if I abandoned them for three years. In addition, and maybe the main thing, I'd lose out on referrals I can get from local doctors. It took a while before they started referring to me. I'll lose all of that. Furthermore, I bought a home here, I'm married now and have a young child, and we want to stay in this area.

TEDESCI: The payment term in the agreement is 25% of the monthly income. Sometimes such terms are interpreted to be a buyout provision that enables you to choose to practice if you are willing to pay it. I'm not saying that is the way it would be interpreted, but is that reasonable?

HARRIS: Sure. But things would be tight those first three years.

TEDESCI: Yes, but given that the 25% figure is reasonable, that portion is enforceable. So it comes down to whether the non-compete provision itself is enforceable. I think I have a pretty good picture of it. But why don't you tell me exactly what you would like to know from us?

HARRIS: I'd like some advice on what will happen if I go ahead and open up my practice. I need to know if Medved can really close me down. It is hard for me to believe the law really lets him do that. That doesn't seem right at this point. I also need to know if I will have to pay the money. I may have to move away to practice.

TEDESCI: Okay. We can evaluate all that. I can see that you need an answer to this quite soon. We need to do some research and then we'll give you an opinion letter advising you.

HARRIS: Great.

Excerpt from Employment Agreement:

Dr. Kyle Harris and Doral Digestive Medical Clinic

Paragraph 14

The parties recognize that the duties to be rendered under the terms of this Agreement by the Employee are special, unique and of an extraordinary character. The Employee, in consideration of the compensation to be paid to him pursuant to the terms of his employment with the Employer Corporation, expressly agrees to the following restrictive covenant:

(A) The Employee agrees that for a period of three (3) years after the date of termination of this Agreement, the Employee shall not, either separately, jointly, or in association with others, establish, engage in, or become interested in any entity that directly or indirectly competes with the business of the Employer Corporation. For purposes of this paragraph, "the business of the Employer Corporation" is defined as the general practice of gastroenterology, within a geographical area of a 5-mile radius of any office or hospital used by or serviced by the Employer Corporation, or within a 20-mile radius of Sweetwater, whichever is a larger area.

(B) The Employee agrees that a violation on his part of any covenant set forth in this Paragraph 14 will cause such damage to the Employer Corporation as will be irreparable. For that reason, the Employee further agrees that the Employer Corporation shall be entitled, as a matter of right, to an injunction from any court of competent jurisdiction, restraining any further violation of said covenants by the Employee, his corporation, partners or agents. Such right to injunctive remedies shall be in addition to, and cumulative with, any other rights and remedies the Employer Corporation may have pursuant to this Agreement or law. In addition to injunctive relief and other rights and remedies, the Employee agrees that he will pay to the Employer Corporation, to indemnify the Employer Corporation for the Employee's breach of any covenant, liquidated damages of twenty-five percent (25%) of the gross receipts received for medical services provided by the Employee, or any employee, associate, partner, or corporation of the Employee during the term of this Agreement and for a period of three (3) years after the date of termination, for any reason, of this Agreement.

MEMORANDUM

TO: Catherine Tedesci
FROM: Joan Malzone
DATE: February 22, 2013
RE: Market and Other Factual Data Concerning Doral Digestive v. Dr. Harris

Pursuant to your request, with the help of medical economist Steven J. Long, I have developed data concerning gastroenterological (GI) medical care as it pertains to Doral Digestive Medical Clinic (DDMC) and the Doral County/Sweetwater area. Two hospitals serve the area. We interviewed many physicians and hospital administrators knowledgeable about the area and gastroenterology, and generated additional data via questionnaires.

It is correct that the only two gastroenterologists in the greater Sweetwater area are Dr. Medved and Dr. Harris. Other than those two, the nearest GI specialist is in Porter, a major metropolitan area about 70 miles away.

Gastroenterology is a subspecialty of Internal Medicine that focuses on the intestinal tract and liver. Ailments such as heartburn, ulcers, pancreatitis, hepatitis and colitis are the most common gastrointestinal complaints. Much of the field focuses on early colon cancer detection and endoscopy. Endoscopy is performed to visualize and examine internal organs and to treat conditions such as colon polyps, intestinal bleeding, and stones in the bile duct. Most patients see a GI specialist at least once every five years for basic checkups and colon cancer screening. Most care can be done in the office and does not involve hospitalization.

The nature of the doctor-patient relationship in a GI practice often is not particularly close. The bulk of the DDMC practice is devoted to colon cancer screening and thus concerns colonoscopy, a procedure in which a gastroenterologist threads a scope into the colon inspecting for cancer or precancerous polyps, both of which can be biopsied or removed during the procedure. The patient is usually not awake for the procedure, and there is little contact between the doctor and the patient. Gastroenterologists don't ordinarily treat cancers. They do remove polyps for testing.

There are other aspects of the practice, including endoscopies of the stomach, mostly to inspect for ulcers. But this is waning, as the bacteria that causes ulcers have begun to disappear, so there are fewer patients with chronic ulcers treated by gastroenterologists. A large amount of the remainder of the practice constitutes standard tests, including prescribing and then interpreting blood tests, x-rays, and endoscopy results. Occasionally, recurring pancreatitis, GI bleeding, liver disease or irritable bowel syndrome lead to a more personal, patient-specific relationship, but it is the exception rather than the norm for the practice of gastroenterology in the greater Sweetwater area. There is a financial disincentive to treating patients with these conditions because they require extensive discussions with patients to help them cope, for which there is not much remuneration. The major issue for a patient switching from one gastroenterologist to another is not the personal nature of the doctor-patient relationship, but rather the inertia effect. Most of the procedures are diagnostic and not particularly comfortable, and if given a reason not to go, some patients may not seek colonoscopies at all.

Colonoscopies currently can be done only by gastroenterologists. On the horizon in this field, however, is colon cancer screening done by radiologists using CT scans to create a "virtual" picture of the colon without the need to use the scope. Also, primary care physicians will be able to take routine DNA samples from the colon and then send them to a lab to test for cancer. These technologies are expected to come on the market in about five years.

A couple of physicians stated that losing Dr. Harris's services would be "tragic" for the community. Most did not state it that strongly, but stated that "people need to go to GIs for routine services such as colonoscopy." They explained that for most patients over 50, colonoscopy every five years can drastically reduce the death rate from colon cancer. They all expressed concern that patients might be more likely to stop going if they had to switch to a different GI specialist or if there were less availability, and that that result would be troubling.

All physicians believed that having more than one gastroenterologist in the area would be "desirable." Quite a few physicians stated that, in their view, one gastroenterologist would not be able to meet the community's demand for such

services, and that losing Dr. Harris's services would create an excessive workload on Dr. Medved, and would "likely result in undesirable and possible critical delays in patient care and treatment." But many other physicians and hospital administrators commented that Dr. Medved did not appear pressed for time, and they anticipated he could probably fairly easily meet the community's demand for services, including those patients that until recently were handled by Dr. Harris. They pointed out that, in addition to treating his patients, Dr. Medved has had time to obtain and complete a large number of pharmaceutical contracts for major drug companies, has worked with local businesses in conducting preventive medicine programs and cost benefit studies, and, even prior to Dr. Harris's arrival in Sweetwater, has traveled outside the city to other communities in order to serve patients. Many of the physicians also stated that Dr. Medved has provided prompt and efficient care, and that they had no knowledge of patients going untreated. No one had heard of any circumstance in which a patient has gone without proper care at those times when Dr. Medved was the only gastroenterologist in Sweetwater, both before and after Dr. Harris was with DDMC.

Many physicians noted that many patients needing GI care are elderly and frail, and would be forced to travel about 70 miles from Sweetwater if Dr. Medved were unavailable or if the patients preferred to see a different gastroenterologist. They stated that several emergency situations, such as GI bleeding, liver coma and jaundice, and pancreatitis from biliary stones, occur in the GI field, and could make travel for care life-threatening. But no one said that patients needing emergency care had gone untreated and no one stated strongly that such a result was likely if Dr. Harris were unable to continue to practice in Sweetwater. A few indicated that Dr. Harris might perform certain highly specialized procedures that Dr. Medved does not perform, but everyone else thought the two were virtually identical concerning what they provided and their respective abilities. They also noted that there are presently four surgeons in Sweetwater who can perform surgery for GI bleeding and certain other semi-surgical procedures performed by gastroenterologists. In addition, they mentioned that GI emergencies, mostly GI bleeding, are rare and that in severe cases patients can be transferred by helicopter from the hospital in Sweetwater to Baptist Hospital in Porter, a trip of about 70 miles. Helicopter facilities are available at both of the local hospitals in the greater Sweetwater area.

One internal medicine specialist stated that he and Dr. Medved cover each other's cases. He also noted that there are a large number of internal medicine specialists in the county area served by DDMC, but that no one else is certified in the subspecialty of gastroenterology, which generally requires two additional years of training beyond that required to become an internist. He wasn't aware of any internists presently in the Sweetwater area who had started the training.

Prior to Dr. Medved's arrival in 1998, there had never been a gastroenterologist practicing in Sweetwater. Dr. Medved established a successful practice. At least sixteen gastroenterologists practice in Porter, 70 miles from Sweetwater. There is no shortage of specialists in internal medicine in Sweetwater.

The geographic area described in the non-compete covenant encompasses approximately 1200 square miles in and near Sweetwater and that portion of Doral County. All physicians agreed that DDMC's patients were from all over Doral County in the Sweetwater area. According to the doctors, Dr. Medved has "a well-established referral network" in the greater Sweetwater area. Most physicians have been referring their patients to Dr. Medved for GI work. The statement of one physician was typical: "Medved and Harris get my referrals. They are local and they do very good work. If Harris goes out on his own, I'd refer to both." When asked how long it would take for a new GI specialist to build up such a referral base, everyone agreed that it would take a minimum of two years to become known by the physicians in the area, and that realistically it might take up to three years. They said they didn't start seriously referring people to Dr. Harris, instead of Dr. Medved, until Dr. Harris had been with DDMC for two or three years.

There was a lot of speculation that Dr. Medved was trying to hire someone to replace Dr. Harris. There is a bit of a shortage of GI specialists throughout Columbia. One might think that this fact would make it easy to attract someone to Doral County, but in fact the opposite is true. The fact that it is somewhat rural in the county is not particularly attractive to most GI specialists, and in a comparative sense it would be easy and more lucrative to set up a GI practice around Porter. Since that is easy to do, and Porter is not yet overcrowded, it is harder to attract someone out to Doral County. Nevertheless, Dr. Medved has interviewed four or five doctors, and could hire at least

one, and that might alleviate some of the situation of having only one provider if Dr. Harris were unable to practice in the area.



February 2013

**California
Bar
Examination**

Performance Test A

LIBRARY

Doral Digestive Medical Clinic v. Dr. Kyle Harris

LIBRARY

Canyon Medical Specialists v. Eiger

Columbia Court of Appeal (2005)

Canyon Medical Specialists v. Eiger

Columbia Court of Appeal (2005)

We granted review to determine whether the restrictive covenant between Dr. Eric Eiger and Canyon Medical Specialists is enforceable. We hold that it is not.

Canyon Medical Specialists ("CMS"), a professional corporation, hired Eric S. Eiger, an internist and pulmonologist who, among other things, treated AIDS and HIV-positive patients and performed brachytherapy -- a procedure that radiates the inside of the lung in lung cancer patients. Brachytherapy can only be performed at certain hospitals that have the necessary equipment. The employment agreement, which initially committed both Dr. Eiger and CMS for three years, contained the following restrictive covenants:

The parties recognize that the duties to be rendered under the terms of this Agreement by the Employee are special, unique and of an extraordinary character. The Employee, in consideration of the compensation to be paid to him pursuant to the terms of this Agreement, expressly agrees that in the event either Employee or Employer terminates Employee's employment with the Employer, the Employee shall not

(a) Establish, engage in, become interested in, or work for anyone competing with, or who may compete with, the Employer in the practice of medicine within a five (5) mile radius of any office currently maintained or utilized by Employer for a period of two (2) years following the date of termination or dissolution or

(b) Either separately, jointly or in association with others, provide medical care or medical assistance to any person or persons who were patients of Employer during the period that Employee was in the hire of Employer.

Employer shall be entitled as a matter of right to an injunction restraining any violation of this covenant.

Dr. Eiger ultimately left CMS and began practicing within the area defined by the restrictive covenant. CMS sought preliminary and permanent injunctions enjoining Dr. Eiger from violating the restrictive covenant. The trial court denied CMS's request for a preliminary injunction, finding that the restrictive covenant violated public policy, as it interfered with the ability of AIDS patients to select the doctor of their own choosing or, alternatively, the restriction was unreasonable because it did not provide an exception for emergency medical aid and was not limited to pulmonology.

I. DISCUSSION

A. Level of Scrutiny

Despite the freedom to contract, the law does not favor restrictive covenants because they restrain trade, particularly in the employer-employee context. This disfavor is particularly strong concerning such covenants among physicians because the practice of medicine affects the public to a much greater extent. In fact, for the past 60 years, the American Medical Association (AMA) has consistently taken the position that non-competition agreements between physicians have a negative impact on patient care. Dr. Eiger signed the covenant not to compete in the context of an employee-employer relationship. Accordingly, the covenant will be strictly construed against CMS.

B. Columbia Law for Non-Competition Covenants

Under Columbia law, non-competition covenants are enforced only when reasonable. Reasonableness is a fact-intensive inquiry that depends on the totality of the circumstances. Each case hinges on its own particular facts. A restriction is unreasonable and thus will not be enforced: (1) if the restraint is greater than necessary to protect the employer's legitimate interest; or (2) if that interest is outweighed by the hardship to the employee and the likely injury to the public. Thus, in the present case, the reasonableness inquiry requires us to examine the interests of the employer, employee, patients, and public in general, to accommodate a right to work, a right to contract, and the public's right to competition. Balancing these competing interests is no easy task and no exact formula can be used. Accordingly, when strictly construed, a physician's covenant not to compete will be enforced only if it (1) is in writing; (2) was

entered into at the time of and as part of a contract of employment; (3) is based on valuable consideration; (4) can be shown by the covenantee to be reasonable in scope, including time, territory, and activity; and (5) does not fail due to public policy concerns.

The first two requirements, which are routinely present, exist here. It is uncontested that the agreement is in writing and was part of the contract of employment.

1. Consideration

The covenant must be based on valuable consideration. When the employment relationship is established before the covenant not to compete is executed, unless there is separate consideration to support the covenant such as a pay raise or other employment benefits or advantages for the employee, the covenant will not be enforced. Here the relationship was established at the time of the covenant, however, so there is consideration for the covenant: Dr. Eiger obtained, in exchange for the promise, the chance at a job.

2. CMS's Protectable Interest

CMS contends that it has a protectable interest in its patient base and network of referral sources. In the commercial context, it is clear that employers have a legitimate interest in retaining their customer base. The employer's point of view is that the company's clientele is an asset of value which has been acquired by virtue of effort and expenditures over a period of time, and which should be protected as a form of property. CMS has thousands of patients and a well-developed referral network. The employer's interest in its patient "customer base" is balanced with the employee's right to the patient "customers." Where the employee took an active role and brought already developed skills and customers with him or her to the job, courts are more reluctant to enforce restrictive covenants.

Dr. Eiger was a pulmonologist when he joined CMS, and brought some of his patients with him. He did not learn his skills from CMS. Restrictive covenants are designed to protect an employer's customer base by preventing a skilled employee from leaving an employer and, based on his skill acquired from that employment, luring away the employer's clients or business while the employer is vulnerable; that is, before the

employer has had a chance to replace the employee with someone qualified to do the job. These facts support the trial judge's conclusion that CMS's interest in protecting its patient base, ordinarily a strong interest, was less significant here. We agree with CMS, however, that in addition to its patient base, CMS has a protectable interest in its referral sources. Clearly, the continued success of a specialty practice, which is dependent upon patient referrals, is a legitimate interest worthy of protection.

3. Scope of the Restrictive Covenant

The restriction cannot be greater than necessary to protect CMS's legitimate interests. A restraint's scope is defined by its duration, geographic area, and definition of activities prevented. The idea is to give the employer a reasonable amount of time to overcome the loss of the former employee, usually by hiring a replacement and giving that replacement time to establish a working relationship, while giving the employee a reasonable opportunity to return to the geographic area after practicing outside of the area or in a different specialty for the duration.

a) Scope - Duration

An unduly lengthy time restraint in a covenant affords more protection to the employer than is justified, given the protectable interests, and will not be enforced. The duration of the restrictive covenant here is two years. Such durations have been found reasonable in many cases concerning physician covenants not to compete. While flat rules of reasonableness do not exist with regard to duration, two years appears to be near the outer edge of permissible restrictions, although some longer covenants (e.g., three years) have been found reasonable in duration even using the strict scrutiny applied to these covenants in employment contexts. Here, in order to protect CMS's interest in the referral base, the two years is reasonable, as it would take three to five years for Dr. Eiger's replacement to develop his pulmonary practice referral sources to the level they were when Dr. Eiger resigned.

b) Scope - Geographic Considerations

A covenant which includes more territory than necessary to protect the legitimate business interests of the employer is not reasonable, as it excludes the physician from

practicing in areas where the employer has no claim to need protection. The question thus is whether the size of the territory at issue here, which encompasses approximately 235 square miles, is necessary to protect CMS's legitimate interests. Evidence supports the trial court's finding that this was a reasonable restricted territory, as CMS attracted patients and referrals from throughout the designated area. Significantly, larger areas have been upheld as reasonable geographic restrictions on a physician's practice (e.g., an 1800 square mile area was upheld because the clinic attracted patients from throughout the restricted area; a ten county territory was upheld because the professional corporation had patients in all ten counties; and in the non-physician context, a half million square mile area was upheld because the employee and employer did business throughout substantial portions of the area). See generally, *Sasabe v. Island Dialysis Clinic*.

c) Scope - Activity Prevented

The activity prohibited by the restraint also defines the covenant's scope. In order to protect the employer's legitimate interests, the restraint must be limited to the particular areas of the present employment. *Peairs v. Old Town Orthopedic* (upholding injunction that enforced restrictive covenant preventing doctor from practicing only orthopedic medicine and orthopedic surgery). Otherwise, the restriction on the physician is too great.

On its face, the restriction at issue here precludes any type of medical practice, even in fields that do not compete with CMS. The covenant prohibited Dr. Eiger from providing any and all forms of "medical care," including not only pulmonology, but emergency medicine, brachytherapy treatment, and HIV-positive and AIDS patient care. Thus, we agree with the trial judge that this restriction is too broad.

4. Public Policy Considerations

The general rule is that a covenant not to compete is contrary to public policy unless the covenant protects a legitimate interest of the employer and is not so broad as to be oppressive to the employee or the public. In examining covenants not to compete between physicians, many courts in many jurisdictions have recognized the need to balance the public interest in health care with personal freedom of contract, and have

determined that under the particular facts before them, the public interest must prevail. If ordering an employee physician to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interest outweighs the contract interests of the employer, and the court will refuse to enforce the covenant. But public policy can sometimes best be served by enforcing a narrowly tailored physician covenant not to compete. There is benefit to the public as well as to the employer physician if the covenant encourages agreements between young doctors and older or more experienced practitioners. If ordering the employee physician to honor his agreement will merely inconvenience the employee physician without causing substantial harm, and enforcement can be seen to facilitate a desirable type of risk-taking physician relationship, the employer is entitled to have the covenant enforced.

There are several aspects to this consideration, including the availability of other physicians in the community affected by the covenant, the extent to which a patient's ability to select the doctors of his/her choice is significantly impaired by the covenant, and the hardship to the individual physician.

a) Are Covenants Restricting Medical Professionals Unreasonable Per Se as a Matter of Public Policy?

Dr. Eiger asks us to hold, as some states do, that restrictive covenants in the medical profession are void per se as against public policy. Such a rule assumes restrictive agreements are not in the public interest because free choice of doctors is the right of every patient, and free competition among physicians is a prerequisite of optimal care and ethical practice. Dr. Eiger's argument, however, would overturn a staggering number of Columbia cases that have implicitly rejected his argument by enforcing restrictive covenants in the medical context. We decline to overrule the longstanding principle that such agreements are not unreasonable per se.

b) Undue Hardship to the Physician

An original public policy concern with covenants not to compete was that, in addition to being anti-competitive and thus depriving the public of adequate choice, enforcement might deprive the restricted employee from earning a living. If the covenant would effectively remove a physician from the marketplace entirely, by either

explicitly or as a practical matter prohibiting him or her from practicing entirely, such an undue hardship can render a covenant unenforceable.

The trial court concluded that hardship to Dr. Eiger was not a sufficient justification for refusing to enforce the covenant. Again, we agree. Although Dr. Eiger and his expert testified that they did not believe Dr. Eiger could maintain an adequate practice outside the restricted areas, the facts demonstrated that Dr. Eiger is a highly qualified pulmonologist who could quite easily continue to practice outside of the restricted area. It might necessitate a move of offices, and perhaps a move to an alternative metropolitan area in the state, although there appear to be hospitals outside the restricted area near enough to where Dr. Eiger currently lives that he need not relocate or face an untenable commute. The question is whether doing so would be such a hardship that, as a practical matter, he would be unable to continue his practice and be forced to leave medicine entirely. Case law from many jurisdictions indicates that the physician must face such a significant relocation that so disrupts his or her personal life as to render a move impractical. Here, and generally, the "inconvenience" category is a large one. While enforcement of the covenant would no doubt have an adverse effect on Dr. Eiger's practice, it would not amount to an "undue hardship" that would prevent enforcement of the covenant.

c) Availability of Other Physicians

The public always has an interest in the availability of an adequate number of providers of any good or service. Thus, all non-compete agreements are scrutinized to make sure that the covenant does not shield the covenantee from minimal competition necessary to provide goods and services at the highest output and lowest cost to society. Such a concern is paramount concerning non-compete agreements applicable to physicians, as the public needs for available medical care are crucial. Courts in many jurisdictions have refused to enforce covenants that otherwise appeared reasonable in scope for this public policy concern. For example, an injunction was denied against a podiatry specialist where there was testimony of a shortage of such specialists in the county and patient delays in getting appointments. Similarly, a covenant was not enforced against an ear, nose, and throat (ENT) doctor where the court noted that it was common knowledge that specialists were in short supply in the

state, despite the fact that there was conflicting testimony as to the number of ENT specialists in the area. See generally, *ENT Inc. v. Atkinson*. In *New Castle Orthopedic Associates v. Burns*, enforcement against an orthopedic specialist who was one of only two such physicians in a small community was denied, because the result might leave the community in a vulnerable position.

Here, the trial court concluded that the restrictive covenant is not so broad as to violate public policy concerning a restricted number of physicians. We agree. The record contains nothing to suggest there will be a lack of pulmonologists in the restricted area if Dr. Eiger is precluded from practicing there. To the contrary, there appears to be an abundance of highly qualified pulmonologists in the five-mile radius from each of the three CMS offices, even though it covers a total of 235 square miles.

d) Patient Physician Choice

A court must evaluate the extent to which enforcing the covenant would foreclose patients from seeing the departing physician if they desire to do so. If a covenant not to compete fully removes patients' ability to continue to see a particular doctor of their choice, where successful treatment relies on the individualized nature of the doctor-patient relationship, the covenant may run afoul of public policy. For example, a court recently denied enforcement of a covenant against two pediatric specialists with many special needs patients in the restricted area, even though the community would still have had five pediatricians in the restricted area. Given the nature of the relationship between the pediatricians and their special needs patients, the covenant was unenforceable due to public policy. Similarly, a covenant asserted against a speech and hearing pathologist was struck down when she demonstrated that the patients she treated were not readily transferable to another therapist, even though there were other therapists in the area. Where there is less of a personalized nature of the doctor-patient relationship, however, this concern bears less weight. It is a reality of modern medical practice that patients find many doctors interchangeable within particular practices, and patients change doctors frequently due to changes in insurance. Practices that involve mostly standard diagnostic procedures and tests, such as x-rays, CAT scans, endoscopy and blood tests, create less of a concern and covenants have been enforced against physicians whose practices predominantly involved those areas, although the

covenant must be evaluated on a case-by-case basis rather than solely on the area of practice.

Here, the trial court found a crucial need for patients to select a particular pulmonologist with whom to work. We agree, particularly concerning pulmonologists who treat AIDS patients, given the potential for ongoing and specialized treatment. The geographic scope of this covenant encompasses approximately 235 square miles, making it very difficult for Dr. Eiger's existing patients, some of whom established their relationships with Dr. Eiger before he joined CMS, to continue treatment with him if they so desire. We thus hold that the covenant not to compete is unenforceable as a matter of public policy because it interferes with Dr. Eiger's patients' ability to select the doctor of their choice.

C. Judicial Rewriting of Covenants Not to Compete

On its face, the covenant broadly restricts Dr. Eiger from providing "medical care or medical assistance to any person or persons who were patients of Employer during the period that Employee was in the hire of Employer." CMS invites this court to use a "blue pencil" to rewrite the covenant to make it reasonable and thus enforceable. CMS's proposed approach has some superficial appeal on the theory that it results in enforcement of reasonable prohibitions. Columbia courts, however, have consistently refused to "blue pencil" or otherwise rewrite a non-compete covenant to make it reasonable. We decline to overturn this longstanding rule.

II. CONCLUSION

We hold that the restrictive covenant between Dr. Eiger and CMS cannot be enforced. Canyon Medical Specialists' interest in enforcing the restriction is outweighed by the likely injury to patients and the public in general.

**FEBRUARY 2013
ESSAY QUESTIONS 4, 5 AND 6**



California Bar Examination

Answer all three 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 facts 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

Darla is in the pest control business. She develops and produces fumigation gas for her own use. She also sells the gas to consumers. Some of her competitors do not sell gas to consumers because consumers sometimes do not follow safety instructions.

Darla sold a container of fumigation gas to Albert for use in ridding his apartment of insects. Although she had intended to produce gas of standard toxicity, she had unknowingly produced gas of unduly high toxicity. Albert used the gas and succeeded in killing all the insects in his apartment. Because he used the gas carelessly, some made its way into the apartment of his neighbor, Paul. The gas caused Paul to suffer serious lung damage and to fear that he would contract cancer as a result.

1. Is Darla liable to Paul? Discuss.
2. If so, may Paul obtain damages from Darla for fear of contracting cancer? Discuss.

Question 5

In March 2008, Pat, a citizen of State A, learned that Devon Corp. (“Devon”), a citizen of State B, may have been illegally releasing toxic chemicals into the air near her home.

In February 2011, Pat sued Devon in federal court, alleging a cause of action for negligence and seeking damages for a persistent cough. The court had subject matter jurisdiction over Pat’s lawsuit.

During discovery, Pat requested Devon to produce all documents relating to reports by local residents about foul odors coming from its plant. Devon objected to Pat’s discovery request, contending that the plant’s odors came from legally produced and harmless chemicals, and that therefore the request sought irrelevant information. In further response, Devon provided a privilege log that listed a document described as a summary of all communications with local residents concerning odors that emanated from the plant. As a basis for refusing to disclose the document, Devon claimed the summary was protected from disclosure under the work product doctrine because it had been created by its counsel, who therein described the underlying facts of the residents’ comments as well as counsel’s thoughts about them. Pat filed a motion to compel Devon’s production of the documents she requested. The court denied Pat’s motion.

In October 2012, while the lawsuit was still pending, Pat learned from a scientific report in a newspaper that the chemicals Devon released cause lung cancer.

In November 2012, Pat amended her complaint to add a cause of action for strict liability and sought to require Devon to pay for preventive medical monitoring of her lungs.

Devon moved to dismiss Pat’s strict liability cause of action on the basis that the applicable three-year statute of limitations had run.

1. Did the court correctly deny Pat’s motion to compel? Discuss.
2. How should the court rule on Devon’s motion to dismiss? Discuss.

Question 6

In 2011, Molly and Lenny started a computer software business. Molly prepared marketing materials and Lenny made sales calls. During the first year, Lenny sold 10 copies of certain software programs for \$50,000 each. The business had a net profit of \$480,000 and Molly and Lenny each received \$240,000.

In January 2012, Molly and Lenny hired an attorney to incorporate their business under the name "Software Inc." The attorney properly prepared all necessary documents to incorporate the business but carelessly failed to file them with the Secretary of State.

Lenny continued to make sales calls to sell the software. He also sold a five-year service contract developed by Molly. Due to brisk sales, Software Inc. projected income of about \$300,000 per year for the next five years from the service contracts alone. Software Inc. obtained a \$100,000 business loan from National Bank secured by the accounts receivable for the service contracts.

In May 2012, Lenny had an automobile accident, caused solely by his own negligence, on the way to visit a prospective buyer. The accident injured a pedestrian. As a result of the accident, Lenny stopped working and sales collapsed.

In July 2012, Software Inc. went out of business, leaving negligible assets and the unpaid loan to National Bank.

1. Is Software Inc., Molly, and/or Lenny liable to the pedestrian for the injury? Discuss.
2. Is Software Inc., Molly, and/or Lenny liable to National Bank for the loan? Discuss.



February 2013

California

Bar

Examination

Performance Test B

INSTRUCTIONS AND FILE

In re. Yamata Logging, Inc.

Instructions

FILE

Memorandum from Scott Rawlins to Applicant

Transcript of Interview with Hari Yamata

Note from Hari Yamata to Marvin Cox

Letter from Stanley Merrick to Hari Yamata

IN RE. YAMATA LOGGING, INC.

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.

Rawlins Baird, LLP
One Parkstead Plaza, Suite 1200
Fair City, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant
FROM: Scott Rawlins
SUBJECT: Yamata Logging, Inc.
DATE: February 28, 2013

Hari Yamata, the owner of Yamata Logging, Inc., has asked us to represent him in a contract dispute with Marvin Cox, owner of Albion Flat Properties. Yamata made a “handshake” deal with Cox to log a stand of timber at Albion Flat.

When Yamata was gearing up to begin logging, Cox told Yamata that he would not allow Yamata and his crews onto the property. Cox’s attorney wrote Yamata a letter asserting that Yamata has no enforceable contract to cut the timber.

Mr. Yamata does not want to commence litigation if it can be avoided. He has commitments to provide logs to buyers in Japan this spring, and his failure to deliver would have a disastrous long-term effect on his business. He would prefer first to try to persuade Cox to honor his contract. Stan Merrick, Cox’s attorney, is a reasonable, levelheaded counselor. If we can demonstrate persuasively that his client would be exposing himself to large damages by refusing to allow Yamata to do the logging, I’m confident he would counsel Cox to go forward with the contract.

What I would like you to do is to draft a persuasive letter for my signature to Cox’s attorney setting forth the facts and the law supporting Yamata’s position that he has an enforceable contract to log the tract at Albion Flat starting in March. Be sure to address each of the points asserted in Stan Merrick’s letter and, in addition, to explain to him the terms of the contract we believe Yamata will be able to prove.

Transcript of Interview with Hari Yamata

February 25, 2013

SCOTT RAWLINS: Good day, Mr. Yamata. I'm glad you could come in to flesh out the details of our short telephone conversation a few days ago. Since this is our first representation of you and your business, why don't we start with the basics?

HARI YAMATA: Sure, but let's get on a first name basis. I'll call you Scott if you'll call me Hari. Okay?

RAWLINS: Terrific! You faxed me this letter you got from Stan Merrick dated February 19th. I need to understand in detail what happened so I can make sense of the letter. So, tell me about your business.

YAMATA: I've been in the logging business for about 20 years. I've developed relationships with Japanese buyers for cut timber. I ship logs in 18-foot lengths to Japanese mills, where the logs are cut into lumber. Lately, there's been a big demand in Japan for red cedar. There's a small market for it here in the States, but in Japan they can't get enough of it.

RAWLINS: How does this fit in with what we talked about on the phone the other day?

YAMATA: Okay. Marvin Cox owns a thousand or so acres called Albion Flat on the north coast. He sells the trees and replants. It's a managed, renewable tract heavily forested with second-growth cedar. About four months ago, I logged 50 acres on the southwest corner of Albion Flat, and since then I've tried to get Cox to let me log a larger swath.

RAWLINS: Explain that to me. Were there discussions with him, or what?

YAMATA: Yeah. My Japanese buyers contacted me and asked me if I could get some more of the Albion Flat cedar.

RAWLINS: Is there something unique about Albion Flat cedar?

YAMATA: From what I hear from the buyers, the growing conditions in the area create an environment in which the timber grows rapidly and produces a lighter kiln-dried cedar that suits the Japanese needs better. From my point of view, logging at Albion is more productive because it's in a flat area and the growth is very dense and concentrated.

RAWLINS: Okay. Back to your discussions with Cox.

YAMATA: When I was logging the southwest corner, I saw a stand of trees of about 200 acres in the northwest corner that looked about ready for harvest. I told him I'd like to log that plot and that I'd pay him a premium for the logs.

RAWLINS: Did he agree?

YAMATA: Not right away. He said he'd think about it and get back to me. About a month later, I ran into him having breakfast at the Chatterbox Café, and I raised the subject again. We talked for a while, and he finally said, "Okay. I'll let you log those trees, but only those 18 inches or bigger."

RAWLINS: Do you mean 18 inches tall?

YAMATA: No, no. That's trade talk for the diameter of the tree trunks. I believe there are enough 18-inch trees in the stand to make the logging worthwhile.

RAWLINS: Did you talk about any further details?

YAMATA: Sure. We talked about all the usual stuff that's involved in logging -- price, start and finish time, marking the trees, cutting in the roads, storing the logs, cleaning up and burning slash, environmental permits, replanting seedlings, and so forth.

RAWLINS: Did you reduce any of this to writing?

YAMATA: Not really. It was basically a handshake deal. We're both in the business. He's been selling timber from Albion for years as the trees mature and I've been logging in the vicinity a long time, so we know how it works.

RAWLINS: Well, how would you know how much timber you could cut?

YAMATA: A few days later, we walked the northwest plot, marked the corners with stakes, did a rough count of the 18-inch trees, and estimated the board-footage. I figured about 750,000 board-feet, and he said that sounded about right.

RAWLINS: Tell me more about the details. Let's start with price.

YAMATA: There's a price the local mills will pay for logs, and there's an export market FOB price that fluctuates. But the export price is always a lot higher than the local price. We agreed I'd pay Cox 20% of the export FOB price. That was the same price deal we made the time before when I logged the 50 acres.

RAWLINS: What do you mean by "FOB" price?

YAMATA: That means "free on board," the price the buyer will pay for the logs once they're delivered to the shipping company at the Port Columbia dock.

RAWLINS: All right. Is there a way someone could find out exactly what those prices are at any given time?

YAMATA: For the local mill price, you just ask the mill operators -- but it's pretty much common knowledge in the trade. The export price is posted daily in the trade journals and financial newspapers.

RAWLINS: Well, is there any document you or he signed?

YAMATA: I know he's never signed anything, and I don't believe I have either.

RAWLINS: Has either of you ever put the terms of the deal in writing?

YAMATA: Not really. I believe he took some notes on a napkin while we were sitting at the table at the Chatterbox Café. The only thing I ever put in writing was that, on November 26th, about a week after we met, I typed a very short memo on a message pad I keep by my phone and made a copy of it. I dropped the original off at Cox's office.

RAWLINS: What did the memo say?

YAMATA: I brought the copy with me. Here it is. [Attached to this transcript.]

RAWLINS: Did you actually hand it to Cox?

YAMATA: No, I left it on the counter in his office. I know he saw it because I ran into his office assistant at the Chatterbox, and she told me she had given the note to him when he got back from lunch later that same day.

RAWLINS: Did he ever respond to your note in any way?

YAMATA: Not until February 5th. I ran into Cox at the Chatterbox at around breakfast time. That's when he shocked me.

RAWLINS: Shocked you? How?

YAMATA: I asked him how it was going cutting in the road and marking the trees and told him I was all geared up to start the logging on Albion Flat on March 5th. He just looked at me blankly and said, "You're not gonna do any logging on my property." I said, "Wait a minute. What about the deal we made back in November?"

RAWLINS: What did he say about that, Hari?

YAMATA: He said, "What deal? I never signed any contract. That piece of paper you gave my secretary doesn't mean squat."

RAWLINS: Did you talk any further about it?

YAMATA: All I said was, “Come on Marv. Don’t make me have to sue you over this.” Then, he just got up and walked out. In fact, I got stuck with his breakfast tab. I’ve tried several times to call him, but he won’t return my phone calls.

RAWLINS: Do you have any idea why his sudden reversal?

YAMATA: I mean it’s just scuttlebutt around town, but I hear he’s having big marital troubles and he expects his wife to file for divorce. My guess is that he’s trying to avoid generating any income that his wife can get her hands on. I know he inherited Albion Flat from his father and that he’s always run it as a separate business. I’m no lawyer, but I guess the income is subject to claims by his wife.

RAWLINS: How much money is involved in your deal with Cox?

YAMATA: Assuming the 750,000 board-feet we estimated, at the export market price, my sale price comes to about \$500,000, plus or minus, depending on the spot price on the day I deliver. Cox’s piece of that is about \$100,000. That’s the price he would receive for the logs based on our agreement. But you know, Scott, that’s the least of it. I really can’t make another logging contract for such high quality logs anywhere quickly or buy them on the open market and turn them over for a profit in time to meet my delivery commitments -- and that assumes I can even get them, which is highly doubtful. If I can’t deliver to my Japanese buyers, they’ll find other sources and that’ll be the end of that. I’d lose a very large amount of future business, which I estimate would net me about \$750,000 to \$1,000,000 over the next five years.

RAWLINS: How much would you net from this deal?

YAMATA: My net, after expenses, would be about \$200,000.

RAWLINS: Okay. Let’s talk about the details of the deal you believe you had with Cox. It’ll help me understand the things Cox’s attorney says in his letter.

YAMATA: Right. What the letter says is just plain not true. We *did* talk about those things, and we agreed on them.

RAWLINS: Okay, a minute ago you mentioned that when you last met Cox at the Chatterbox you asked him how cutting the road and marking the trees was coming along. Explain those things to me.

YAMATA: To get equipment and trucks into the logging site, you have to have a road. There wasn’t a road there, so when we talked about it, Cox said he would cut in the road.

RAWLINS: The time you logged the 50 acres four months ago, who cut the road?

YAMATA: It wasn't necessary because there was an existing road.

RAWLINS: Well, is cutting in a road a major item?

YAMATA: Definitely. It's expensive. And what it would cost him was all figured into the percentage I agreed to pay him. Plus, it's pretty much standard practice for the landowner to do it because it's his land and he can do it without additional permits. If I were to do it, I'd have to hassle with local bureaucrats about a permit.

RAWLINS: Okay. And what about marking trees?

YAMATA: Well, someone has to go through the stand and mark the trees that are 18 inches and over. You spray a stripe on the trunks with a can of blue spray-paint. Usually, the landowner and the logger will walk the tract together and mark the trees. That's how we did it the time I logged the 50 acres. But, at this time, since we had already walked through the area, we both had a good idea of how many trees would be marked, so I suggested that Cox do the marking. He nodded his head, so I took that to mean that he agreed.

RAWLINS: How big a deal is that?

YAMATA: Not a big deal at all. Two workers with two cans of spray-paint can do it in a matter of hours.

RAWLINS: You said something about cleaning up and burning slash. What does that mean?

YAMATA: Slash is the bark, stumps, roots, limbs, and other debris that's left when you fell and strip the logs. It has to be piled up and burned, which is something the logger usually does. But sometimes it can be hauled away and sold to woodchip mills. Cox said he wanted to see if he could make any money selling the slash, so we agreed that I'd rake it into piles and leave it.

RAWLINS: What's this about environmental permits?

YAMATA: Well, before you can cut any trees, the local forest protection agency has to issue environmental permits. Cox told me that he already has an approved environmental impact plan, which includes a logging schedule. He also told me that the 200 acres in the northwest plot have already been approved for logging, so all he has to do is request the permits. I can't get them because I'm not the landowner.

RAWLINS: Okay. Another item you mentioned was replanting. What's that all about?

YAMATA: As I said, Albion is a managed, renewable forest. Every tree that's cut is required by law to be replaced with a seedling -- a tree sprout, if you will. That's a condition of Cox's getting some renewable resource tax benefits that I don't fully understand.

RAWLINS: What was your discussion with Cox about that?

YAMATA: Well, since it's his forest, he's the one obligated to replant. He's got a greenhouse operation where Albion Flat sprouts the seedlings.

RAWLINS: Okay. And, finally, you said something about log storage. What's the significance of that?

YAMATA: Ordinarily, I'd haul the logs to local mills as I cut them. In this case, since I was to ship them overseas I would need to store them on site until I accumulate enough for a shipping container load. Without an onsite storage area, I'd have to rent a storage yard at Port Columbia. Double handling is expensive. So it's an important piece of the deal for me.

RAWLINS: How big a deal is it for Cox?

YAMATA: I don't see how it would cost him anything. There are lots of bare areas right alongside the 200 acres I'd be logging where I can stack the logs temporarily.

RAWLINS: Is on-site log storage standard practice in the industry?

YAMATA: No. Usually you just load the logs on trucks and haul them directly to the local mills. But Cox certainly knows it's different in this case because he knows the logs are going to be shipped in containers from Port Columbia and that double handling makes no sense. In fact, he let me store the logs on his land for a few days when I logged the 50 acres.

RAWLINS: I want to be certain that I've got it straight. It sounds like a few of the items you agreed to were critical. That is, if no agreement on them between you and Cox, then no deal. I mean the road, environmental permits, replanting, and on-site storage were a necessary part of the deal to you?

YAMATA: Yes. Any one of them would have been a deal breaker. But as I said, we did agree on each.

RAWLINS: Anything else that you and Cox agreed on?

YAMATA: No. I think that's about it. I know to a certainty that Marv and I settled on all the things I've told you. That's why I'm so upset by the letter from his attorney. My past

experiences with Marv have always been on the up and up, so I can only assume he must be under a lot of pressure, because it's not like him to back out of a deal.

RAWLINS: All right. Based on what you've told me, I believe we stand a good chance in a lawsuit for breach of contract. Is that what you want us to do?

YAMATA: I'd rather try to work it out amicably with Marv. I was supposed to start logging in a few days, but two or three weeks delay won't make much difference to me. So, if you can try to work it out quickly, that would be the best for me. But I guess, as a last resort, if he won't come around I'll have to sue.

RAWLINS: Are you willing to renegotiate any of the points you and Cox agreed on?

YAMATA: Sure, within limits, on things like marking trees and burning slash, but not on the expensive things.

RAWLINS: Okay. Let me see what I can do. I've found Stan Merrick to be a reasonable guy in my past dealings with him. I'll send him a letter and then sit down with him.

YAMATA: Great. Please keep me posted on the status.

RAWLINS: I will.

YAMATA LOGGING

Wooden you like to call me back?

Bailey Road & Sawmill Lane

Fair City, Columbia

(541) 434-7237

November 26, 2012

Marv: Just a note to let you know I plan, per our deal, to start logging Albion Flat (marked trees in staked area of NW corner) on March 5, 2013. Estimate 750K board-feet. Pricing per our discussion payable to you upon my delivery of logs FOB Port Columbia dock.

Stanley J. Merrick
Attorney at Law

Law Offices of Stanley J. Merrick

South Shore Center, Room 275

Fair City, Columbia

(541) 444-0790

February 19, 2013

Hari Yamata

Yamata Logging, Inc.

Bailey Road & Sawmill Lane

Fair City, Columbia

Delivered by Hand

Re: Albion Flat Properties

Dear Mr. Yamata:

Marvin Cox, owner of Albion Flat Properties, has asked me to communicate with you regarding your claim that Yamata Logging, Inc. has a contract to conduct logging operations on a designated tract at Albion Flat. Apparently, at your last meeting with Mr. Cox, you threatened to sue him for breach of contract. By this letter, I hope to persuade you that you do not have an enforceable contract and that any such suit would be fruitless.

Under Section 2-201 of the Columbia Commercial Code, any contract for the sale of goods for more than \$500 must be in writing and signed by the party against whom you are asserting the contract. Moreover, if there is a writing upon which you base your claim, that writing must be detailed and definite enough to clearly evidence the existence of a contract. I realize that you delivered to Mr. Cox's office an informal note stating your intention to start logging on March 5th, but that note in no way satisfies the requirements for a written, signed contract.

Mr. Cox informs me that he has never signed any document evidencing any such contract and that, in any event, your assertions regarding the terms of what you claim is a contract are widely at odds with anything he would ever have agreed to. Let me explain the reasons why we believe there is no enforceable contract.

- Mr. Cox never signed any such contract.
- The informal note that you delivered is so vague that it cannot be determined from it what the terms of the contract you claim might be.
- The quantity of timber you claim the right to take is a mere estimate and cannot be ascertained from the document.
- The location of the tract you claim to log is not certain.
- The price of the timber you claim the right to take is not stated.

In addition to the foregoing, Mr. Cox informs me that you have insisted on many additional terms to which he would never have agreed. Moreover, notwithstanding the fact that there was never even a general understanding that Yamata Logging, Inc. might be allowed to log an area on Albion Flat, it appears that you have belatedly insisted on the inclusion of the following additional terms:

- That Mr. Cox would be required to mark the trees,
- That Mr. Cox would be required to cut in a road,
- That Mr. Cox furnish you a temporary storage site,
- That you would not be required to burn the slash,
- That Mr. Cox would be required to obtain the necessary environmental permits,
and
- That Mr. Cox would have to do the replanting.

Within the meaning of Section 2-207 of the Commercial Code, these are additional terms that would materially alter anything Mr. Cox might conceivably have agreed to. For that reason as well, there was never any enforceable contract between you.

I hope the foregoing convinces you that suing Mr. Cox for breach of contract would not be worth your while.

Very truly yours,

/s/ Stanley J. Merrick

STANLEY J. MERRICK



February 2013

**California
Bar
Examination**

**Performance Test B
LIBRARY**

In re. Yamata Logging, Inc.

LIBRARY

Excerpts from Columbia Commercial Code

Marlene Industries v. Carnac Textiles
Columbia Supreme Court (2005)

A & G Construction Co. v. Reid Brothers Aggregate Co.
Columbia Court of Appeal (1999)

In re. Estate of Frost
Columbia Court of Appeal (2001)

EXCERPTS FROM COLUMBIA COMMERCIAL CODE

1-303. Course of Performance, Course of Dealing, and Usage of Trade.

(a) A “course of performance” is a sequence of conduct between parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A “course of dealing” is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A “usage of trade” is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

(d) A course of performance or course of dealing between the parties, or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware, is relevant in ascertaining the meaning of the parties’ agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.

2-201. Formal Requirements; Statute of Frauds.

(a) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars (\$500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in the writing.

(b) As between merchants, if within a reasonable time, a writing in confirmation of the contract and sufficient against the sender is received, and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (a) against the party, unless written notice of objection to its content is given within 10 days after it is received.

Official Comments to Section 2-201.

The required writing need not contain all of the material terms of the contract, and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated, but recovery is limited to the amount stated. The price, time, and place of payment or delivery, the general quality of the goods, or any particular warranties may be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term, even where the parties have contracted on the basis of a published price list. Frequently, the price is not mentioned because “market” prices and valuations that are current in the vicinity can normally be supplied without the danger of fraud.

Only three definite and invariable requirements as to the memorandum are made by this section. First, it must evidence a contract for the sale of goods; second, it must be “signed,” a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

Between merchants, failure to answer a written confirmation of a contract within 10 days of receipt is tantamount to a writing under subsection (b) and is sufficient against both parties under subsection (a). The only effect, however, is to take away from the party who fails to answer, the defense of the statute of frauds. The burden of persuading the trier of fact that a contract is in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under Section 2-207.

2-207. Additional Terms in Acceptance or Confirmation.

(a) A definite and seasonable expression of acceptance, or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) The additional terms are to be construed as proposals for addition to the contract. Between merchants, such terms become part of the contract unless:

(1) The offer expressly limits acceptance to the terms of the offer;

(2) They materially alter it; or

(3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Official Comments to Section 2-207.

If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. The written confirmation is also subject to Section 2-201. Under that section, a failure to respond permits enforcement of a prior oral agreement. Under this section, a failure to respond permits additional terms to become part of the agreement.

Marlene Industries v. Carnac Textiles

Columbia Supreme Court (2005)

This appeal involves yet another of the many conflicts which arise as a result of the all too common business practice of blithely drafting, receiving, and filing unread numerous purchase orders, acknowledgments, and other diverse forms containing a myriad of discrepant terms. Both parties agree that they have entered into a contract for the sale of goods; indeed, it would appear that there is no disagreement as to most of the essential terms of their contract. They do disagree, however, as to whether their agreement includes a provision for the arbitration of disputes arising from the contract.

The dispute between the parties, insofar as it is relevant on this appeal, is founded upon an alleged breach by Marlene Industries ("Marlene") of a contract to purchase certain fabrics from Carnac Textiles ("Carnac"). The transaction was instituted when Marlene orally placed an order for the fabrics with Carnac. Neither party contends that any method of dispute resolution was discussed at that time. Almost immediately thereafter, Marlene sent Carnac a "purchase order" and Carnac sent Marlene an "acknowledgment of order." Marlene's form did not provide for arbitration. Carnac's form, on the other hand, contained an arbitration clause placed in the midst of some thirteen lines of small type "boilerplate." Neither party signed the other's form. When a dispute subsequently arose, Carnac sought arbitration, and Marlene moved for a stay.

The courts below applied subsection (b) of Columbia Commercial Code section 2-201 and denied the application to stay arbitration, reasoning that as between merchants, where a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, written notice of objection should be given within 10 days after it is received. Since Marlene had retained without objection the form containing the arbitration clause, the court concluded that Marlene was bound by that clause. We disagree.

This case presents a classic example of the "battle of the forms," and its solution is to be derived by reference to Section 2-207 of the Columbia Commercial Code, which is specifically designed to resolve such disputes. The courts below erred in applying subsection (b) of Section 2-201, for that statute deals solely with the question whether a

contract exists which is enforceable in the face of a statute of frauds defense. It has no application to a situation such as this, in which it is conceded that a contract does exist and the dispute goes only to the terms of that contract. In light of the disparate purposes of the two sections, application of the wrong provision will often result in an erroneous conclusion.

The easiest way to avoid the miscarriages this confusion perpetrates is simply to fix in mind that the two sections have nothing to do with each other. Though each has a special rule for merchants sounding very much like the other, their respective functions are unrelated. Section 2-201(b) has its role in the context of a challenge to the use of the statute of frauds to prevent proof of an alleged agreement, whereas the merchant rule of Section 2-207(b) is for use in determining what are the terms of an admitted agreement. The proper and rather limited role of subsection (b) of Section 2-201 is a partial exception to the statute of frauds which merely ameliorates the writing requirement. A writing is still required, but it need not be signed by the party to be charged. The character of this exception is best understood in light of the form of fraud it was designed to combat.

Assume that two merchants, Orval Orfed and Len Lemhi orally agree over the telephone that Orfed will sell Lemhi 1000 bushels of wheat at \$40 a bushel. Orfed, the seller, thereafter sends a signed confirmatory memorandum to Lemhi reciting the terms of the deal, a common practice in such transactions. Such a memo would be good against Orfed under Section 2-201 should Orfed back out and Lemhi sue him for damages. But absent Section 2-201(b), the confirmatory memo would not be good against Lemhi, for it is not signed by him as required by Section 2-201(a). Thus Lemhi would be free to sit back and play the market. If at delivery date the cost of wheat had fallen to some level below \$40 a bushel, and he wanted to buy elsewhere, he could back out, whereas Orfed could not back out, at least so far as the statute of frauds goes, should the market rise. Section 2-201(b) is designed to prevent the Lemhis of the world from taking advantage of the Orfeds. It says that a memo good against Orfed will also be good against Lemhi provided that: (1) both are merchants, (2) the memo is sent by Orfed to Lemhi within a reasonable time after the phone call, (3) the memo by its terms confirms the oral contract, (4) the memo is good against Orfed under Section 2-201(a), (5) Lemhi receives it, (6) Lemhi has reason to know its contents, and (7)

Lemhi does not object to its contents within 10 days of receipt. This carefully circumscribed section thus seeks to combat one form of fraud which pre-Code versions of the statute of frauds actually facilitate. At the same time, Section 2-201(b) itself encourages the common and wise business practice of sending memoranda confirming oral deals, for the section obviates a disadvantage to which the sender would otherwise be subject.

Subsection (b) of Section 2-207, on the other hand, is applicable to cases such as this, in which there is an agreement that a contract exists, but disagreement as to what terms have been included in that contract. Subsection (a) of Section 2-207 was intended to abrogate the harsh “mirror-image” rule of common law, pursuant to which any deviation in the language of a purported acceptance from the exact terms of the offer transformed that “acceptance” into a counteroffer and thus precluded contract formation on the basis of those two documents alone. Under subsection (a) of Section 2-207, however, an acceptance containing additional terms will operate as an acceptance unless it is “expressly made conditional on assent to the additional or different terms.” Having thus departed from the common-law doctrine, it became necessary for the Code to make some provision as to the effect upon the contract of such additional terms in an acceptance. Subsection (b) of Section 2-207 was designed to deal with that problem.

Subsection (b) of Section 2-207 provides that any additional terms in an acceptance or a written confirmation are to be considered merely proposals for additions to the contract, and that such terms normally will not become a part of the contract unless expressly agreed to by the other party. As with many sections of the Code, however, there is a special provision for merchants: “(b) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (1) the offer expressly limits acceptance to the terms of the offer; (2) they materially alter it; or (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.”

The parties to this dispute are certainly merchants, and the arbitration clause is clearly a proposed additional term. As such, it became a part of the contract unless one of the three listed exceptions is applicable.

We hold that the inclusion of an arbitration agreement materially alters a contract for the sale of goods, and thus, pursuant to Section 2-207(b)(2), it will not become a part of such a contract unless both parties explicitly agree to it. The reason is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.

Applying those principles to this case, we conclude that the contract between Marlene and Carnac does not contain an arbitration clause; hence, the court below erred in refusing to permanently stay arbitration.

Reversed.

A & G Construction Co. v. Reid Brothers Aggregate Co.

Columbia Court of Appeal (1999)

This appeal concerns a dispute as to the amounts due for materials furnished for use on a highway construction project. Our resolution of the issues involves application of provisions of the Columbia Commercial Code (hereinafter CCC) to the contract in dispute.

On August 10, 1996, A & G Construction Company ("A & G") and Reid Brothers Aggregate Company ("Reid") entered into a materials supplier agreement wherein Reid agreed to supply A & G with sand and hot bituminous pavement aggregate (hot rock). The material was to be used in a State highway construction project in the Petersburg area for which A & G was the general contractor. Payment for the materials was to be on the basis of State-accepted scale ticketed tonnage at the price of \$23.65 per ton of hot rock.

During the course of performance, the agreement was modified. At Reid's request, the parties agreed to increase the price of additional hot rock by \$10.00 per ton to \$33.65.

A & G contests the award of \$58,000 for 5,800 tons of hot rock. The lower court found that, as to that additional quantity of hot rock, the original contract setting a price of \$23.65 per ton had been modified to \$33.65 per ton. The original agreement did not contain any reference to the amounts of material to be supplied. On August 30, 1997, A & G sent Reid a purchase order for 5,800 tons of hot rock. Earlier in the summer of 1997, Fred Hardesty, A & G's superintendent, orally informed Glenn Reid that an additional 10,000 tons of hot rock would be needed. Mr. Reid replied that the hot rock could be furnished, but that the price would have to be increased \$10.00 per ton to \$33.65 per ton. Mr. Hardesty asked Mr. Reid to send a letter on the subject. The letter, sent on July 13, 1997, stated:

On any additional hot rock to be delivered from this date, we will have to have \$33.65 a ton, as we are not breaking even. We have already delivered the original order but understand that you need about 10,000 tons more.

Yours truly,

(No personal signature)

Glenn W. Reid

The 5,800 additional tons were used by A & G for the project. A & G paid Reid only \$23.65 for the additional hot rock. A & G contends that Reid's claim for the additional sum is barred by the statute of frauds. CCC section 2-201 specifies, in pertinent part: "(a) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars (\$500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. . . .(b) As between merchants, if within a reasonable time, a writing in confirmation of the contract and sufficient against the sender is received, and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (a) against the party, unless written notice of objection to its contents is given within 10 days after it is received."

A & G cites subsection (a) of Section 2-201 and argues that since the letter from Reid to A & G was the only writing evidencing the modified agreement, and since A & G, the party to be charged, did not sign the writing, the statute of frauds was not satisfied. The necessity of the signature of the party to be charged required by subsection (a) is not absolute. It may be dispensed with if certain conditions set forth in subsection (b) are satisfied. Subsection (b) of Section 2-201 dispenses with the signature requirement if the following conditions are met: 1) the agreement is one between merchants; 2) the writing in confirmation is sent within a reasonable time after the agreement is reached; 3) the writing is sufficient as against the sender (i.e. would satisfy subsection (a)); 4) the party receiving it had reason to know of the contents; and 5) no written notice of objection is sent to the sender within 10 days of its receipt by the party to be charged.

Here, there is no question as to criteria (1), (2), and (4). CCC section 2-104(a) defines “merchant” as meaning a person who deals in goods of the kind, or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods, involved in the transaction. “Goods” is defined in CCC section 2-105(a) as “all things . . . which are movable at the time of identification to the contract for sale” and, in some cases, things that are not movable at the time of the contract. For example, a contract for the sale of timber to be cut is a contract for the sale of goods whether the subject matter is to be severed by the buyer or the seller even though it forms part of the realty at the time of contracting. Both Reid and A & G dealt with the materials here involved and held themselves out as having knowledge or skill with reference thereto and are therefore merchants.

Criterion (3) requires that the writing be sufficient as against the sender, in this case, Reid. The letter from Glenn Reid to Fred Hardesty confirming the oral agreement indicates that a contract for sale had been made between the parties – approximately 10,000 tons of additional hot rock at \$33.65 per ton. The writing thus complied with the portion of Section 2-201(a) requiring it to be sufficient to indicate that a contract for sale had been entered into between the parties.

The question remains as to whether it may be regarded as sufficient against Reid, “the sender,” so as to come under the exception set forth in Section 2-201(b). This, in turn, depends on whether a typewritten signature may be adequate. The letter did not contain Mr. Reid’s personal signature. “Glenn W. Reid,” however, was typed at the end of the letter. CCC section 1-201(39) defines “signed” as including “a symbol executed or adopted by a party with present intention to authenticate a writing.” The official comments to that section state: “The inclusion of authentication in the definition of ‘signed’ is to make clear that a complete signature is not necessary. Authentication may be printed, stamped, or written; it may be by initials or thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. A typed name is sufficient to meet the requirement.”

As to criterion (5), A & G did not send any written notice of objection. In its brief, A & G states that “[b]y telephone, George Atkinson of A & G informed Reid that the money would not be paid.” A & G does not cite any portion of the record in support of this allegation, and an independent review of the record and trial transcript has not

revealed any supporting material. Furthermore, even if Mr. Atkinson did object by telephone, this does not meet the statutory requirement of a "written notice of objection." In the absence of a written objection from A & G, the confirmatory letter sent by Reid to A & G meets the statutory requirements, and accordingly the claim for the modified price as to additional hot rock was not barred by the statute of frauds.

Affirmed.

In re. Estate of Frost
Columbia Court of Appeal (2001)

Appellant, Glenn L. Gest ("Gest"), appeals from the probate court's denial of his claim against the estate of Warren Bert Frost.

Warren Bert Frost ("Decedent") died on February 2, 1999. On February 19, 1999, appellee Jerry Lee Frost ("Frost") filed a petition to commence probate proceedings. Gest filed his claim against the estate on March 23, 1999, alleging that he and Decedent had entered into a written agreement on October 25, 1997, whereby Gest was to remove all specified timber from a parcel of land owned by Decedent. Decedent, it was alleged, had subsequently breached the agreement by allowing others to remove timber from that land. Attached to appellant's claim was a copy of the agreement, which read as follows:

Glenn L. Gest 10/25/97

Sold all trees for \$4.00 per rick. 16" dimensions 8 feet

high, 4 feet long. Does not cut anything that will log out

16 feet long and 12 inches on top end.

Take all wood sawable. Bunch brush burnable.

Owner Warren Frost [signature]

Buyer G.L.Gest [signature]

At the January 28, 2000 hearing on Gest's claim, Frost raised the statute of frauds as a defense, arguing that the writing was insufficient to support Gest's claim of a contract because it failed to include a quantity term. The probate court rejected Gest's argument that the word "all" was a quantity term and held that the agreement was unenforceable under the statute of frauds provision of the Columbia Commercial Code (CCC). The court held that a quantity term could not be supplied by parol evidence and, since Decedent had owned several parcels of land, the court would not guess at which one had been referred to in the contract. Gest's claim was dismissed.

QUANTITY TERM

Both parties have conceded that the agreement in question falls within the Columbia Commercial Code. Section 2-201 of the Code provides that such a contract is not enforceable unless "there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in the writing." The Official Comment to this provision states that the purpose of the writing requirement is to "afford a basis for believing that the offered oral evidence rests on a real transaction." The only term which must appear in the agreement is the quantity term.

In earlier discussions, this Court has held that parol evidence could not be offered to supply a missing quantity term. Instead, stated the Court, the quantity term must appear in the writing. In the instant case, however, appellant argues that the quantity term does appear in the written document as the word "all" which describes the number of trees which may be taken by appellant. Once a quantity term appears in the writing, it may be explained or supplemented by parol evidence.

The parties' failure to describe the parcel of land upon which the trees to be cut were located lends ambiguity to the agreement. The agreement is unenforceable, however, only where no quantity term appears at all. When quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact

quantity, but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term.

PAROL EVIDENCE

CCC section 2-204 provides that “[e]ven though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.” This reflects the Commercial Code policy of authorizing courts to fill in gaps in sales agreements. Parol evidence may be admissible under CCC section 2-202, which provides that terms intended by the parties to be a final expression of their agreement as they are set forth in a writing may not be contradicted “by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented” by course of dealing, usage of trade, or course of performance and by evidence of “consistent additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.”

It is apparent from a reading of these two sections that, once the basic requirements of Section 2-201 are met, additional evidence may be offered to explain or complete the writing. In this case, however, the probate court ruled that, because the writing failed to describe the land on which the trees were located, the agreement did not state an ascertainable quantity and that Gest could not introduce evidence to further clarify the writing, as that would be violative of the parol evidence rule.

In this case, it is clear from the face of the writing that it did not contain the complete agreement as assented to by the parties. Under the parol evidence rule, parties may introduce evidence not intended to contradict an integrated writing. Since the rule is supported by the public policy of preventing frauds and perjuries by limiting evidence of facts that contradict a valid contract, the rule does not apply to prevent proof of one or more of the terms of the contract. Where the quantity term is included in the writing, however, other omitted items may be shown by parol evidence. Such evidence should have been admissible in this case since it is clear from the face of the writing itself that it was not intended to be a “complete and exclusive statement of the terms of the agreement.”

Section 2-202 “makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached.” Appellant claims on appeal to have evidence showing that he had partially removed the trees referred to in the writing on a particular parcel of land, pursuant to the agreement, prior to Decedent’s breach of their contract. This would be evidence of course of performance. Such evidence is particularly relevant for “the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.”

Parol evidence consisting of the descriptions of the various parcels of land owned by Decedent at the time of the writing was made may also be helpful. It is possible that much of the land owned by Decedent was unsuited to the harvesting of timber, thus further clarifying the terms of the agreement. We do not limit here, however, the types of parol evidence which may be offered on remand. That evidence shall be whatever is relevant and helpful in proving the intent of the parties to the contract, subject to the probate court’s discretion as regards applicable rules of evidence.

CONCLUSION

The probate court erred in finding that no quantity term appeared in the writing evidencing the agreement between Gest and Decedent. The term “all” referred to a quantity and was sufficient to meet the requirements of the statute of frauds. Since additional evidence was required to explain the quantity term, however, parol evidence should have been admitted.

Reversed and remanded.