TUESDAY MORNING
FEBRUARY 21, 2006

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Autos, Inc. manufactures a two-seater convertible, the Roadster. The Roadster has an airbag for each seat. Autos, Inc. was aware that airbags can be dangerous to children, so it considered installing either of two existing technologies: (1) a safety switch operated by a key that would allow the passenger airbag to be turned off manually, or (2) a sensor under the passenger seat that would turn off the airbag upon detection of a child's presence. Both technologies had drawbacks. The sensor technology was relatively new and untested, and the safety switch technology had the risk that people might forget to turn the airbag back on when an adult was in the seat. The safety switch would have increased the price per car by $5, and the sensor would have increased the price per car by $900. Research showed that most riders were adults and that the airbags rarely hurt children who were properly belted into the seat. No federal or state regulation required either a safety switch or a sensor. Autos, Inc. chose to install neither.

Oscar bought a Roadster. On his first day of ownership, he decided to take his 10-year-old daughter, Chloe, to a local ice cream shop. On the way home, Oscar accidentally ran the Roadster into a bridge abutment. The airbags inflated as designed and struck Chloe in the head, causing serious injury. Chloe was properly belted into the seat. She would not have been hurt if the airbag had not struck her.

What tort theories can reasonably be asserted on Chloe's behalf against Autos, Inc., what defenses can Autos, Inc. reasonably raise, and what is the likely outcome? Discuss.

Question 2

Tim and Anna were married for ten years. In 2000, their marriage was legally dissolved. For several months following the dissolution, Tim and Anna attempted to reconcile but ultimately failed to do so.

In 2001, after reconciliation attempts failed, Tim executed a valid will leaving "all my property to my best friend, Anna." Later that year, Fred was born to Anna out of wedlock. Tim was Fred's father, but Anna did not inform Tim of Fred's existence.

In 2002, Tim and Beth married. Two days before the wedding, Beth executed a prenuptial agreement waiving all rights to Tim's estate. Beth was not represented by counsel when she executed the prenuptial agreement.

In 2003, Sarah was born to Tim and Beth.

In 2004, Tim died. His estate consists of his share of a $400,000 house owned with Beth as community property, plus $90,000 worth of separate property.

Tim's 2001 will has been admitted to probate. Beth, Sarah, Fred and Anna have each claimed shares of Tim's estate.

How should the estate be distributed? Discuss.

Answer according to California law.

Question 3

Mike had a 30-year master lease on a downtown office building and had sublet to others the individual office suites for five-year terms. At the conclusion of the 30-year term, Olive, the building's owner, did not renew Mike's master lease.

When Olive resumed control of the building, she learned that Mike had failed to comply with the terms in the 30-year lease that required him to renew an easement for weekday parking on a lot between the building and a theatre. The theatre, which, in the past, had always renewed the easement, used the lot for its own customers on evenings and weekends.

Olive also learned that a week before the end of the 30-year lease Mike had renewed for another five years the sublease of one tenant, Toby, at a rate much below market. Toby ran an art gallery, which Mike thought was "classy." Upon signing the renewal, Toby purchased and installed expensive custom lighting and wall treatments to enhance the showing of the art in his gallery.

Because of Mike's failure to renew the parking easement, the theatre granted it to another landowner. As a result, Olive had to request a variance from the town ordinance requiring off-street parking. The Board of Zoning Appeals (BZA) denied the request because a nearby parking-lot operator objected. The off-street parking requirement, combined with the loss of the parking easement, meant that several offices in Olive's building would have to be left vacant. The BZA had recently granted a parking variance for a nearby building under very similar circumstances.

Olive commences the following actions:

1. A suit against Mike to recover damages for waste resulting from Mike's failing to renew the parking easement.

2. An action for ejectment against Toby and to require him to leave the lighting and wall treatments when he vacates the premises.

3. An appeal of BZA's denial of Olive's variance request.

What is the likelihood that Olive will prevail in each action? Discuss.

THURSDAY MORNING
FEBRUARY 23, 2006

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

Pat, a resident of State A, received a letter from Busco, a tour bus company that had been in business for about two months. Busco was incorporated and had its principal place of business in State B. The letter invited Pat to go on a tour of State C at a special introductory price. After Pat sent in her money, Busco sent Pat a tour brochure and ticket.

Ed, also a resident of State A, saw an ad that Busco had placed once a week for the last several weeks in Ed's hometown newspaper for the same State C tour. The ad listed a State A telephone number to call for tickets. Ed called the telephone number and ordered and bought a ticket for the same tour as Pat and for the same price.

Pat and Ed boarded the tour bus in State B. Upon entering State C, the bus veered off the road and hit a tree. Ed was not hurt, but Pat suffered serious injuries. The tour was canceled. Busco refused to reimburse passengers the price of their tickets.

Ed sued Busco for breach of contract in state court in State A to recover the price of his ticket. Busco moved to dismiss the suit based on lack of personal jurisdiction. The court denied the motion. After trial, judgment was entered in favor of Ed.

Thereafter, Pat sued Busco in state court in State A for breach of contract to recover the price of her ticket and for tort damages for her personal injuries. After Busco filed its answer, Pat filed a motion for summary judgment on both claims on grounds of res judicata and collateral estoppel. The court denied Pat's motion.

State A has a long-arm statute that authorizes the exercise of personal jurisdiction over nonresident defendants on any basis not inconsistent with the Constitution of the United States.

1. Did the court rule correctly on Busco's motion to dismiss Ed's suit for lack of personal jurisdiction? Discuss.

2. Did the court rule correctly on Pat's motion for summary judgment on each of her claims on grounds of res judicata and collateral estoppel? Discuss.

Question 5

Marla is a manufacturer of widgets. Larry is a lawyer who regularly represents Marla in legal matters relating to her manufacturing business. Larry is also the sole owner and operator of a business called Supply Source ("SS"), in which he acts as an independent broker of surplus goods. SS is operated independently from Larry's law practice and from a separate office.

At a time when the market for widgets was suffering from over-supply, Marla called Larry at his SS office. During their telephone conversation, Marla told Larry that, if he could find a buyer for her excess inventory of 100,000 widgets, Larry could keep anything he obtained over $1.00 per widget. Although Marla thought it unlikely that Larry would be able to sell them for more than $1.25 per widget, she said, ". . . and, if you get more than $1.25 each, we'll talk about how to split the excess." Larry replied, "Okay," and undertook to market the widgets.

During a brief period when market demand for widgets increased, Larry found a buyer, Ben. In a written agreement with Larry, Ben agreed to purchase all 100,000 widgets for $2.50 each. Ben paid Larry $250,000. Larry then sent Marla a check for $100,000 with a cover letter stating, "I have sold all of the 100,000 widgets to Ben. Here is your $100,000 as we agreed."

When Marla learned that Ben had paid $2.50 per widget, she called Larry and said, "You lied to me about what you got for the widgets. I don't think the deal we made over the telephone is enforceable. I want you to send me the other $150,000 you received from Ben, and then we'll talk about a reasonable commission for you. But right now, we don't have a deal." Larry refused to remit any part of the $150,000 to Marla.

1. To what extent, if any, is the agreement between Larry and Marla enforceable? Discuss.

2. In his conduct toward Marla, what ethical violations, if any, has Larry committed? Discuss.

Question 6

Deft saw Oscar, a uniformed police officer, attempting to arrest Friend, who was resisting arrest. Believing that Oscar was arresting Friend unlawfully, Deft struck Oscar in an effort to aid Friend. Both Friend and Deft fled.

The next day, as a result of Oscar's precise description of Deft, Paula, another police officer, found Deft on the street, arrested him for assault and battery and searched him, finding cocaine in his pocket. After Paula gave proper Miranda warnings, Deft said he wanted to talk to a lawyer before answering any questions. Paula did not interrogate him. However, before an attorney could be appointed to represent Deft, Paula placed him in a lineup. Oscar identified Deft as his assailant. Deft was then charged with assault and battery of a police officer and possession of cocaine. Thereafter, he was arraigned.

The next day Paula gave Deft, who was without counsel, proper Miranda warnings, obtained a waiver, and interrogated him. He admitted striking Oscar.

How should the judge rule on the following motions made by Deft at trial:

1. To suppress the cocaine? Discuss.

2. To suppress Oscar's identification during the lineup? Discuss.

3. To suppress Deft's admission that he struck Oscar? Discuss.

4. For an instruction to the jury that Deft's assault was justified on the basis of defense of another? Discuss.

TUESDAY AFTERNOON
FEBRUARY 21, 2006

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

HENSEN v. BUILD A BURGER

FILE

HENSEN v. BUILD A BURGER

INSTRUCTIONS

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

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

To: Applicant

From: Beverly Cohen

Date: February 21, 2006

Re: Hensen v. Build a Burger

Our firm represents Gail Hensen in an action against Build a Burger (Burger), the regional fast food restaurant chain. During a deposition yesterday, an issue arose whether there had been improper contact by this firm with two witnesses. After a conversation with the judge, both parties were ordered to submit simultaneous briefs addressing Burger's allegation that our firm engaged in improper *ex parte* communication with two Burger employees.

We need to prepare our brief anticipating defendant's argument that the actions of the firm violated the Columbia Rules of Professional Conduct. Please draft a persuasive memorandum of points and authorities that argues that the firm has done nothing improper. Disputes like this are won or lost on how well we use the facts, so it is very important that you pick the key facts that support our position, set them forth cogently in your statement of facts, and weave the facts into your legal arguments. Follow the guidelines in the attached office memo regarding persuasive briefs.

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

To: Attorneys
From: Gregory Mandel
Date: March 27, 2003
Re: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to all attorneys, all persuasive briefs or memoranda such as memoranda of points and authorities to be filed in state court shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position.

Following the Statement of Facts, the Argument should begin. This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, Improper: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. Proper: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM

ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA, HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

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

Cohen & Mandel
Attorneys at Law
12 Manning Blvd.
Balston Springs, Columbia

To: File

From: Beverly Cohen

Date: June 1, 2004

Re: Hensen v. Build a Burger – Interview Notes

Gail Hensen is a former general manager of a restaurant owned by Build a Burger. She worked for the company for fifteen years, starting as a server and working her way up to general manager. She was general manager of a Henniker, Columbia Build a Burger for approximately three years.

Ms. Hensen quit over a salary dispute. For her first twelve years at Build a Burger, she worked approximately 50 hours per week. As a result she received regular overtime pay. After being promoted to general manager, she worked for approximately 60 hours per week. From the beginning of her job as general manager, she submitted requests for overtime but was routinely denied. She claims that her Area Training Director, James Gathii, told her that now that she was management, she was an exempt employee and no longer eligible for overtime.

Ms. Hensen states that just before her promotion to general manager she was making $9.00 per hour. She was making on average about $23,000 per year including overtime. When she left Build a Burger her income as general manager was approximately $25,000. She figures that on an hourly basis she was making less money than before the promotion.

I told her I would look into the matter and we set up another appointment.

ADDENDUM/JULY 16, 2004:

I met with Ms. Hensen today to discuss the potential lawsuit against Build a Burger.

I explained that research indicates we can bring a claim against Build a Burger for unpaid wages, fraud, deceit, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. The basis of the complaint is that Build a Burger misclassified her as exempt from the overtime pay provisions of Columbia law.

I explained, therefore, that the principal focus of a lawsuit would be on what duties Ms. Hensen actually performed and what percentage of those duties were properly classified as exempt work. In Columbia, employees are exempt from overtime requirements if they are employed in an "administrative, executive or professional" capacity. A person is considered to be employed in an administrative, executive or professional capacity if, among other things, the employee is "engaged in work that is primarily intellectual, managerial, or creative, and that requires the exercise of discretion and independent judgment."

Ms. Hensen wishes to pursue the matter.

ADDENDUM/NOVEMBER 6, 2004:

Suit filed today.

Excerpts of Deposition of Harold Dubroff

February 20, 2006

FOR PLAINTIFF: Beverly Cohen (Cohen)

FOR DEFENDANT: Neil Levine (Levine)

* * *

BY BEVERLY COHEN

Q: Please state your name.

BY HAROLD DUBROFF

A: My name is Harold Dubroff.

Q: Where do you work?

A: I'm currently an Area Training Director with Build a Burger.

Q: Since when?

A: I began in November, 1997.

Q: Since you've been an Area Training Director for so long, you are obviously familiar with the position's responsibilities.

A: Sure.

Q: Are these responsibilities the same at Build a Burger for all Area Training Directors?

A: Oh yes. We all do the same thing.

Q: What are your responsibilities?

A: Area Training Directors are each responsible for the management of multiple restaurants owned by Build a Burger.

Q: What does that entail?

A: Area Training Directors directly supervise the general managers. The Area Training Directors report directly to Build a Burger's Regional Vice President.

Q: Who does the Regional Vice President report to?

A: She reports directly to the President of Build a Burger.

Q: How much contact is there between the general managers and the Area Training Directors?

A: They talk at least once a day.

Q: How familiar are the Area Training Directors with the operation of individual outlets?

A: As the direct supervisors of the general managers, the Area Training Directors are familiar with what the general managers do on a day-to-day basis.

Q: I think we may be able to move this along a bit more quickly if we refer to your signed declaration, Plaintiff's Exhibit A. In that declaration you said . . . .

Levine: Okay, let's stop right here. Ms. Cohen, am I to understand that you have previously spoken to Mr. Dubroff?

Cohen: Certainly.

Levine: When was this?

Cohen: You can see on the declaration Mr. Dubroff signed. It was several months before the complaint was filed.

Levine: I don't believe this. You previously deposed Mr. Gathii during the course of this lawsuit, and I appeared at the deposition representing Build a Burger and Mr. Gathii. Don't tell me you also talked to Gathii before his deposition.

Cohen: Of course I did, as part of the preparation.

Levine: Are you telling me you have a signed declaration by Gathii too?

Cohen: Sure. Would you like to see it?

Levine: This is outrageous. You were well aware that Build a Burger's attorneys of record were representing the company's Area Training Directors. You have clearly violated professional ethics by communicating *ex parte* with both Mr. Dubroff and Mr. Gathii without the consent of Build a Burger's counsel. You've compounded this misconduct by obtaining declarations from these individuals with an intent to use them against Build a Burger. Such conduct is intolerable.

Cohen: Oh, come on. These people are not high-level management employees. There was nothing improper.

Levine: I think we will end this deposition.

Cohen: I think we should call the judge right now.

RECESS

JUDGE SPAIN ON SPEAKER PHONE: Are we on the record?

Levine: Yes, your honor.

Judge Spain: So, talk to me.

Levine: Your honor, it is outrageous that Ms. Cohen talked *ex parte* to two of the managers of my client. As lawyer for the company, I represent all of its employees. I don't ever let them talk to lawyers suing the company unless I'm present. I even met with one of the employees, Mr. Gathii, to prepare our defense and assumed our conversation was in confidence. Ms. Cohen and her firm should be disqualified from representing Ms. Hensen.

Cohen: Mr. Levine is not happy that I talked to some employees that he wants to label as high-level management. In fact, either one of these gentlemen could have been potential plaintiffs. The logical conclusion of what Mr. Levine is saying is that an employee can never hire an attorney to sue his or her employer. My behavior was above reproach.

Judge Spain: Okay, counselors, I can't resolve this today. Be in my court tomorrow at 2:00 p.m. Submit briefs by the end of today. Goodbye.

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

MEMORANDUM

To: File

From: Beverly Cohen

Date: January 6, 2006

Re: Hensen v. Build a Burger – Gathii Interview

Mr. James Gathii called to set up an appointment with me today. He is employed by Build a Burger as an Area Training Director. He is Gail Hensen's direct supervisor. He is not particularly happy with the company and felt that he had some information that would help in our preparation of our lawsuit against Build a Burger.

I asked him if he was represented by anyone and he indicated no. I asked if he had talked to counsel for Build a Burger concerning Gail Hensen and he indicated that he had been called to a meeting at corporate headquarters a couple of weeks ago and that Build a Burger's General Counsel, Neil Levine, asked him some questions about both the general role of Area Training Directors and Ms. Hensen.

I explained to Mr. Gathii that I was going to stay away from asking him what he told Mr. Levine, but that it was okay for him to answer my questions, even if he had been asked the same thing by Mr. Levine.

Mr. Gathii described to me the general duties of the Area Training Directors, as well as the duties of general managers of restaurants. Regarding the general managers, he

said that they handle the day-to-day operation of the specific restaurants. They supervise employees, establish weekly schedules, and work the counter during rush periods and when someone calls in sick. They monitor running the cash registers. They do anything that needs to be done by any level of employee. I asked Mr. Gathii if he would sign an affidavit that summarizes the role of the general manager. He indicated he would.

Regarding Area Training Directors, I asked if he had responsibility for Ms. Hensen's job classification as an exempt employee. He indicated that job classifications are handled at company headquarters and that, as far as he knew, all general managers are classified exempt; at least all those that work in his restaurants are so classified. Gathii told me he has no involvement in the development of this or any other policy for the company.

I asked him what his duties were. He said Area Training Directors assist general managers and deal with problems that arise on a day-to-day basis in the restaurants in their area. They are in charge of hiring and firing and handle matters related to benefits. Area Training Directors also ensure that general managers know about and carry out all procedures regarding services to customers, scheduling of employees, sanitation and daily receipts.

I asked him about his contacts with his supervisors and other management above him. He meets with his Vice President once a month to report on the five stores he supervises. He does not attend Vice President meetings or Board of Directors meetings and sees the President and Board only at the annual staff holiday party and on other ceremonial occasions.

As he was leaving, Mr. Gathii asked for more details about the nature of the lawsuit. After I explained the basic theory, he asked whether he should think about hiring a

lawyer since he used to be a general manager and maybe he could receive back wages. I told him I would need to look at the statute of limitations and we could talk about it when he came back to sign the declaration.

ADDENDUM JANUARY 23, 2006:

Mr. Gathii returned today to sign the declaration. He indicated that, on reflection, he thought suing Build a Burger was not worth the aggravation, since it would clearly harm his career opportunities with the company.

Affidavit of Harold Dubroff

September 27, 2004

My name is Harold Dubroff. I am not a party to any potential lawsuit between Gail Hensen and Build a Burger. On or about September 17, 2004, I was contacted by Beverly Cohen, who suggested I might be of some help in her litigation against Build a Burger. I have no personal knowledge of Gail Hensen, but as a member of the Build a Burger management team, I have knowledge of the operation of the company.

Since November 1997, I have held the position of an Area Training Director. I reported to the Regional Vice President who, in turn, reported directly to the President of Build a Burger. As one of the Area Training Directors in Columbia, I am responsible for the management of five Build a Burger restaurants in Southern Columbia. I am the direct supervisor of the restaurant general managers. Throughout my tenure as the Area Training Director, I saw what they did on a day to-day-basis.

The general managers perform menial tasks; they do not exercise independent judgment and discretion in the operation of the restaurant; they have no managerial authority. The general managers do no hiring, firing, or promoting; they have minimal time to supervise the other employees employed in the restaurant. Up to 80% of the general managers' time is spent on manual, non-managerial type of activities and the remaining time they spend performing administrative clerical chores.

_____
Harold Dubroff

Acknowledged before me this _____ day of _____, 2004

_____
Lisa Empe
Notary Public

Affidavit of James Gathii

January 23, 2006

My name is James Gathii. I am not a party to this action. I have been employed by the Defendant Build a Burger from May 1991 to present. I currently hold the position of an Area Training Director. As a member of the Build a Burger management team, I have knowledge of the operation of the company.

As the Area Training Director, I am responsible for the management of five Build a Burger restaurants in Henniker, Columbia. I am the direct supervisor of the restaurant general managers. Throughout my tenure as the Area Training Director, I see what they do on a daily basis.

The general managers perform menial tasks; they do not exercise independent judgment and discretion in the operation of the restaurant; they have no managerial authority. General managers do no hiring, firing, or promoting; they have minimal time to supervise the other employees employed in the restaurant. Up to 80% of the general managers' time is spent on manual, non-managerial type of activities and the remaining time they spend performing administrative clerical chores.

_____
James Gathii

Acknowledged before me this _____ day of _____, 2006

_____
Lisa Empe
Notary Public

TUESDAY AFTERNOON
FEBRUARY 21, 2006

California
Bar
Examination

Performance Test A
LIBRARY

HENSEN v. BUILD A BURGER

LIBRARY

Snider v. Quantum Productions, Inc.

Columbia Court of Appeals (2003)

In this appeal we are presented with the question whether the trial court properly disqualified attorney Dale Larabee from representing David Snider because of his contacts with two employees, one a sales manager and the other a director of production, of respondent Quantum Productions, Inc. The trial court found that Larabee violated Columbia's State Bar Rules of Professional Conduct, Rule 2-100 that provides in part:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a *party* the member *knows to be represented by another lawyer in the matter,* unless the member has the consent of the other lawyer.
>
> (B) For purposes of this rule, a '*party* ' includes:
>
> > (1) *An officer, director, or managing agent of a corporation* or association, and a partner or managing agent of a partnership; or
> >
> > (2) An association member or *an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.* (Italics added.)

We conclude that there was no violation of Rule 2-100 as the contacted employees were not "represented parties" within the scope of that rule as (1) they were not "officer[s], director[s] or managing agent[s]" of the organization; (2) the subject matter of

the communications was not an act or omission of the employees that could be binding or imputed to the organization; and (3) they were not employees whose statements might constitute admissions on behalf of the organization. We further conclude that if the employees were subject to Rule 2-100, the court still erred in ordering the disqualification of Larabee, as the evidence did not show that he had actual knowledge the employees were represented parties.

We emphasize, however, that counsel desiring to contact an employee of a represented organization should endeavor to ensure, prior to the contact, that the employee, either because of his or her status within the organization or the subject matter of the proposed communication, does not come within the scope of Rule 2-100. Further, once contact is made, counsel should at the outset pose questions designed to elicit information that would determine whether the employee comes within the scope of Rule 2-100 and should not ask questions that could violate the attorney-client privilege. By the same token, if organizations do not want employees within the scope of Rule 2-100 to have contact with opposing counsel, it is incumbent upon them to take proactive measures to ensure that the employees and opposing counsel understand the organization's position. Ethical violations and unnecessary litigation over such *ex parte* contacts would largely be obviated by prudent actions taken by counsel and organizations in applying Rule 2-100.

Snider was employed by Quantum, an event design company, as a sales manager. In 2002 Snider resigned and formed his own business. Quantum alleged that Snider misappropriated confidential and secret business information and used that information to compete with Quantum. In July 2002, Quantum filed a complaint against Snider, alleging misappropriation of trade secrets, breach of contract and intentional interference with contractual relations.

In the joint pretrial statement, Quantum listed as a percipient witness its employee Toni

Lewis. Snider listed as a percipient witness Laura Janikas, also a Quantum employee.

Thereafter, before trial, Larabee contacted Lewis and Janikas to talk about the pending case. When counsel for Quantum discovered the contacts, he brought a motion to disqualify Larabee.

In support of the motion, Quantum submitted the declaration of its president, Pam Navarre, as well as declarations from Janikas and Lewis. In Navarre's declaration she stated that Quantum employs 40 people. She stated that she and Quantum's vice-president, Bill Hardt, were the only executive-level personnel. Below the executives were two sales managers, a director of operations, and a director of production. Janikas was a sales manager, and her duties included selling Quantum's goods and services and directly supervising two subordinate employees. She was also responsible for enforcing Quantum's rules, policies and procedures. According to Navarre, the position of sales manager was a position of great confidence, and she relied on the counsel of Janikas in making corporate policies and decisions. Navarre did not describe Lewis's position at Quantum.

In her declaration, Janikas described her work for Quantum as including "management responsibilities." She stated that she had been aware of the litigation for months but had not discussed it at length with her superiors. She stated that in January 2003 Larabee called her at home on two occasions and left messages for her. She returned one of his calls and left a message for Larabee. Larabee was able to reach her on her work cellular phone. According to Janikas, she talked to Larabee for about 10 minutes.

Janikas stated that Larabee "asked [her] many questions about this lawsuit, and made [her] feel like [she] was on the witness stand." He asked her if she knew the "real reason" why Quantum had sued Snider. She replied that she understood that he had been sued because he breached his contract with Quantum. Larabee asked if she had

seen Snider's contract with Quantum. She replied that she had not. Larabee asked her if she had signed a contract. She replied that she had, as had all other employees. Larabee asked her what she thought the contract meant, and Janikas attempted to explain it to him. Larabee also asked her about a meeting of key employees in October 2001. Larabee also asked her if she took a pay cut after September 11, 2001, and whether that made her want to leave Quantum. At the end of the conversation Larabee asked her if Quantum's counsel had ever called and talked to her. She responded that he had not.

In her declaration, Lewis stated that she was the director of productions for Quantum, and described her work there, which included supervising the production department and its 19 employees. Larabee first called her before Christmas 2002. He left multiple messages but she never spoke to him.

Larabee filed a declaration in opposition to Quantum's motion. In that declaration he stated that he had no intention of calling Janikas or Lewis as witnesses in the case. He also confirmed that he never spoke with Lewis concerning the case. He stated that he had asked Janikas if counsel for Quantum had talked to her about trial testimony and she stated that she had not. Before contacting them, he asked Snider what duties and responsibilities they had. Snider told Larabee that they were salespeople with no corporate responsibility. Based upon this he concluded that they were not within the "control group" of Quantum's management and he did not believe that they could bind or make an admission on behalf of the organization. Larabee only wanted to ask them about matters of which they had percipient knowledge, particularly about a meeting in the Fall of 2001 when Navarre told the employees that business was bad and that if they wanted to look for another job they could do so. Larabee admitted asking Janikas if she had any idea why Snider had been sued. According to Larabee, she stated that she did not.

Larabee also stated that he told Janikas and Lewis that he was Snider's counsel and they did not have to talk to him if they did not want to. He stated that Lewis had called him back as many times as he called her and that she wanted to talk to Larabee. According to Larabee, Lewis also contacted Snider on her own and told Snider that she had to rewrite her declaration multiple times because Quantum's attorneys did not like it and that they "told her what to say."

I. Were Janikas and Lewis Employees Subject to Rule 2-100?

A. Covered Employees

Contact with represented parties is proscribed to preserve the attorney-client relationship from an opposing attorney's intrusion and interference. Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright-line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. Further, Rule 2-100 must be interpreted narrowly because a rule whose violation could result in disqualification and possible disciplinary action should be narrowly construed when it impinges upon a lawyer's duty of zealous representation.

To determine whether Larabee violated Rule 2-100 by contacting Janikas and Lewis, we must first determine whether they were "covered employees," i.e., those with whom contact was proscribed under Rule 2-100. Rule 2-100 permits opposing counsel to initiate *ex parte* contacts with present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation

for purposes of establishing liability.

The drafters of Rule 2-100 characterize rule 2-100 as prohibiting contact only with members of an organization's "control group," citing the United States Supreme Court in *Upjohn Co. v. United States* (U.S. 1981). The actual text of paragraph (B)(2), however, suggests that the rule reaches beyond the control group. It is true that paragraph (B)(1) states the control group test: officers, directors and managing agents of the organization may not be contacted for any purpose. However, paragraph (B)(2) focuses on the subject matter of the communication. It applies first to employees outside of an organization's control group if the subject matter of the conversation is the employee's act or failure to act in connection with the matter at issue, *and* that act or failure to act could bind the organization, or be imputed to it, *or*, second, if the employee's statement could constitute an admission against the organization.

With regard to statements that could constitute admissions on the part of the organization, Evidence Code section 1222 provides in part:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> > (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement.

In Columbia this applies only to high-ranking organizational agents who have actual authority to speak on behalf of the organization.

B. *Janikas's and Lewis's Status at Quantum*

1. *Paragraph (B)(1)*

To determine whether Lewis and Janikas were within the ambit of Rule 2-100, we must

first determine whether they were officers, directors or managing agents. The parties agree that neither were officers nor directors. Quantum, however, argues that a broad interpretation must be given to the term managing agent, one that would include Lewis and Janikas even if they were mid- or lower-level employees, in order to protect the attorney-client privilege.

We must look to the meaning of the term managing agent and the intent of the drafters to determine whether it applied to Janikas and Lewis. Snider contends that the definition of "managing agent" in Rule 2-100 is the same as that in Civil Code section 3294, subdivision (b), which requires wrongdoing by an "officer, director, or managing agent" before punitive damages will be awarded against an organization for an employee's act. In *White v. Ultramar* (1999), a wrongful termination action, the Columbia Supreme Court defined managing agent for the purposes of organizational liability for punitive damages as including only an employee that exercises substantial discretionary authority over significant aspects of a corporation's business. In reaching this conclusion, the high court stated that the Legislature placed the term managing agent next to the terms officer and director, intending that a managing agent be more than a mere supervisory employee. The court also rejected a broader definition of managing agent, stating that, "if we equate mere supervisory status with managing agent status, we will create a rule where corporate employers are liable for punitive damages in most employment cases."

We conclude that the definition of managing agent in *White* applies equally well to Rule 2-100(B)(1). Like Civil Code section 3294, the term managing agent immediately follows the terms officer and director, indicating an intention to limit the term to high-level management, not mere supervisory employees.

There is no evidence that Janikas and Lewis fit the definition of managing agents. Quantum's president Navarre describes Janikas as a supervisory employee that could enforce Quantum's policies, and that she relied upon Janikas in setting corporate policy.

However, Navarre does *not* state that Janikas had the discretion and authority to set corporate policy as to any issues, much less the matter involved in this litigation. Navarre stated nothing concerning Lewis's status. Therefore, Janikas and Lewis did not fall within the terms of paragraph (B)(1) of Rule 2-100.

2. *Paragraph (B)(2)*

Quantum argues that Janikas and Lewis fall within the terms of paragraph (B)(2), as each was an employee whose "act or omission ... in connection with the matter ... may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

This argument fails because there is no evidence that the subject matter of the contacts with the employees was concerning "any act or omission of such person in connection with the matter." The interview with Janikas did not concern her own actions or omissions concerning the dispute, but her percipient knowledge of events surrounding the dispute.

Quantum focuses on the second category in paragraph (B)(2), those employees whose statements "may constitute an admission on the part of the organization." However, as discussed, this category only applies to high-ranking executives and spokespersons with the authority to speak on behalf of the organization. This interpretation is again consistent with the drafters of Rule 2-100's rejection of the broader interpretation of the no-contact rule under former Rule 7-103.

Rule 2-100(B)(2) applies to persons outside the "control group" if the management-level employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation. Under this "managing-speaking agent" test, those employees having managing authority sufficient to give them the right

to speak for, and bind, the corporation are covered by the rule. This interpretation best reconciles the language of the statute and the drafters' intent to narrowly circumscribe the type of employees who would be covered by the rule.

Even under this test there is no evidence presented that Janikas or Lewis had authority from Quantum to speak concerning this dispute or any other matter, or that their actions could bind or be imputed to Quantum concerning the subject matter of this litigation.

C. *Attorney Larabee's Knowledge*

Even if Quantum could demonstrate that Janikas or Lewis were subject to the terms of Rule 2-100, we still would not conclude there was a violation of Rule 2-100 as Quantum did not demonstrate that Larabee had actual knowledge that Janikas and Lewis were deemed "represented parties" under that rule.

Quantum argues that it is enough that Larabee should have known that Janikas and Lewis were employees subject to Rule 2-100, that there was a duty to inquire of opposing counsel, and if an agreement could not be reached as to the contact, Larabee was required to submit the matter to a court.

Actual knowledge is required before an attorney can be held to have violated Rule 2-100. Nor does Rule 2-100 require advance permission of opposing counsel or an order from the court prior to contacting employees that are not within the scope of Rule 2-100. A bright- line rule is necessary because attorneys should not be at risk of disciplinary action for violating Rule 2-100 because they should have known that an opposing party was represented or would be represented at some time in the future. Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge.

Nevertheless, to avoid potential violations of Rule 2-100, an attorney contacting an

employee of a represented organization should question the employee at the beginning of the conversation, before discussing substantive matters, about the employee's status at that organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization's counsel concerning the matter at issue. If a question arises concerning whether the employee would be covered by Rule 2-100, the communication should be terminated. Once a dispute arises that could lead to litigation, it is also incumbent upon an organization and its counsel to take proactive measures to protect against disclosure of privileged information by informing employees and/or opposing counsel their position concerning communications between employees and opposing counsel. The exercise of caution and prudence on both sides will avoid much of the potential for violations of Rule 2-100.

There is no evidence that in this case Larabee had actual knowledge that Janikas and Lewis were "represented parties" under Rule 2-100. Without such actual knowledge, there can be no violation of Rule 2-100.

We, therefore, reverse.

Jorgensen v.Taco Bell Corp.

Columbia Court of Appeals (1996)

Defendant Taco Bell Corp. (Taco Bell) contends the trial court abused its discretion by denying its motion to disqualify counsel for plaintiff Noelle Jorgensen (Jorgensen). Jorgensen's counsel had retained an investigator to interview witnesses concerning facts relevant to Jorgensen's claims of sexual harassment before her lawsuit against Taco Bell and one of its employees was filed.

Taco Bell contends these interviews with its employees violated Rule 2-100 of the Columbia Rules of Professional Conduct, because counsel for Taco Bell was not informed of the interviews, and they constituted attempts to interview parties without the consent of their counsel. Jorgensen argues that no lawsuit had been filed at the time of the interviews, and neither the employees of Taco Bell nor Taco Bell itself were parties represented by counsel at the time of the interviews. We conclude that the trial court did not abuse its discretion.

Jorgensen, a former employee of Taco Bell, filed this action in June 1995, alleging that she was sexually harassed and sexually assaulted by another Taco Bell employee, Javier Hernandez (Hernandez), her supervisor, in July of 1994.

By November of 1994, Jorgensen had retained counsel. Jorgensen's counsel retained a private investigator, Linda Hoen, who interviewed the alleged harasser, Hernandez, and two other Taco Bell employees. No counsel for Hernandez, Taco Bell, or the other employees gave their consent for the interviews. Seven months after the interviews, Jorgensen filed this action against Hernandez and Taco Bell.

Taco Bell moved to disqualify Jorgensen's counsel. The basis for Taco Bell's motion was that the interviews violated Rule 2-100, which provides as follows, in pertinent part:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

Jorgensen argued that Rule 2-100 was not violated because there was no lawsuit pending, and her counsel did not know that either Taco Bell or any of its employees were a "party the member knows to be represented by another lawyer in the matter."

On these bases, the trial court denied the motion to disqualify.

The employees and Taco Bell were not represented by counsel in "the matter," since no such matter had yet been asserted against Taco Bell by Jorgensen.

Taco Bell advocates a broad interpretation of Rule 2-100, contending that it should apply not simply where a lawyer "knows" the other person is represented, but also where the lawyer "should have known" that the other person *would* be represented.

The interviews in issue occurred not on the eve of the filing of the lawsuit, but seven months prior. The record does not support Taco Bell's speculation that these interviews were conducted prior to the filing of the lawsuit as a subterfuge to allow violation of Rule 2-100. These interviews were routine prelitigation investigation activities, which many counsel engage in before deciding whether to send a demand letter or file a lawsuit.

Taco Bell's proposal has wide and troubling implications. Under it, counsel for a plaintiff who is a tort victim would risk disciplinary action by interviewing adverse parties or their employees, if that counsel "should have known" such interviewees would be represented by some unidentified counsel *after* a complaint is filed. Reasonable investigations by counsel in advance of suit being filed to determine the bona fides of a

client's claim would be precluded.

Taco Bell's proposed expansion of Rule 2-100 would mean that attorneys would be subjected to disciplinary action for violating Rule 2-100 if they directed interviews of claimants or alleged tortfeasors, although no determination to file suit had been made and no lawyer to file or defend it had been retained.

Taco Bell contends that it had "house counsel," as Jorgensen's attorney "should have known," available to communicate with Jorgensen's attorney before her investigator conducted interviews. Numerous corporations in America have full or part-time house counsel. That knowledge or presumptive knowledge does not trigger the application of Rule 2-100, unless the claimant's lawyer knows *in fact* that such house counsel represents the person being interviewed when that interview is conducted.

It became apparent at oral argument that Taco Bell's contention had a curious and defense oriented hook in it. Before suit was filed, defense counsel would be unimpeded by Rule 2-100 in investigating employees and taking their statements for purposes, inter alia, of evaluating their claims. Counsel attempting the same evaluation for their plaintiff clients will be precluded from the same action as to prospective defendants, because they "should have known" any lawsuit filed, post such investigation, will be defended by a lawyer. We cannot approve such an uneven playing field.

Frivolous litigation is frequently avoided by a careful lawyer's investigation of a client's claims. Rule 2-100 should not be applied to prevent investigation of such claims before suit is filed because the party or employee investigated *may* obtain counsel at a future time.

We will not interpret Rule 2-100 to make the routine investigation of claims prior to filing of a lawsuit more difficult, when the persons being interviewed are *not* in fact known to

be represented by counsel in the matter at the time of that interview.

Affirmed.

THURSDAY AFTERNOON
FEBRUARY 23, 2006

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

ESTATE OF SMALL

FILE

ESTATE OF SMALL

INSTRUCTIONS

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

WASHINGTON & SHEEHAN, LLP
1000 Greenpoint Avenue
Valley Stream, Columbia 09546

MEMORANDUM

To: **Applicant**
From: **Jonathan Washington**
Date: **February 23, 2006**
Subject: **Estate of Small**

We represent Patricia Sanchez Small. Ms. Small was the wife of Robert Small, a prominent Valley Stream businessman who died more than a year ago. She is involved in litigation over Mr. Small's sizable estate with Mr. Small's heirs, who are his three adult children from two prior marriages. She filed a petition for determination of her entitlement to share in the estate as an omitted spouse. The superior court denied the petition, and she has appealed.

Last week, with Ms. Small's consent, I approached Lillian MacKenzie, who is counsel to Mr. Small's heirs, with a suggestion to try to settle the litigation by resort to appellate mediation. After obtaining her clients' consent, Ms. MacKenzie agreed.

Please draft *only* (1) the statement of facts and (2) the argument of an appellate mediation brief, following the accompanying guidelines. In the argument, take the position that the superior court erred in denying Ms. Small's petition because: (1) contrary to the court's conclusion, she is indeed an omitted spouse and, as such, is entitled to share in Mr. Small's estate (see Colum. Prob. Code, § 610); and (2) the conditions that might defeat her entitlement (see *id*., § 611)—which, in light of its conclusion, the court did not address—are not satisfied under the law and the evidence.

WASHINGTON & SHEEHAN, LLP

1000 Greenpoint Avenue

Valley Stream, Columbia 09546

MEMORANDUM

To: **All Attorneys**
From: **Executive Committee**
Date: **April 5, 2005**
Subject: **The Drafting of Appellate Mediation Briefs**

The Columbia Court of Appeal has recently instituted an appellate mediation program.

Mediation is an informal process in which a neutral person—the mediator—assists each of the parties to an appeal in understanding its own interests, the interests of the other party, and the practical and legal realities they each face. The mediator does not resolve the dispute, but simply helps the parties do so.

In approaching appellate mediation, the single most important step we take is the drafting of an "Appellate Mediation Brief." An appellate mediation brief is similar to an appellate brief, but shorter and more focused, since (1) its intended audience is primarily the opposing party, who is already acquainted with the law and the facts, and (2) its intended purpose is primarily to persuade the opposing party of the strength of the position it will encounter.

All appellate mediation briefs must include the following sections and conform to the following guidelines.

The *introduction* must briefly summarize the argument.

The *statement of the case* must concisely indicate the major procedural events from commencement of the proceeding to the judgment or order appealed from.

The *statement of facts* must contain the facts that support our client's position, and must also take account of the facts that may be used to support that of the opposing party. It must deal with all such facts in a persuasive manner, reasonably and fairly attempting to show the greater importance of the ones that weigh in our client's favor and the lesser importance of the ones that weigh in the favor of the opposing party.

The *argument* must analyze the applicable law and bring it to bear on the facts, urging that the law and facts support our client's position. It must respond to, or anticipate, the attacks that the opposing party has made, or may reasonably be expected to make, against our client's position. It must display a subject heading summarizing each claim and the outcome that it requires, such as, "Because the Contract Was Not Entered Into Freely, the Trial Court Erred in Holding It Enforceable." The subject heading should *not* state a bare conclusion, such as, "The Contract Was Unenforceable."

The *conclusion* must state, in simple fashion, that the appellate court would likely grant the relief sought by our client for the reasons set forth in the argument.

As with an appellate brief, an appellate mediation brief will have its cover, table of contents, and table of authorities prepared after approval of its substance.

WILL OF ROBERT SMALL

I, Robert Small, declare that this is my will.

First: I revoke any and all wills that I have previously made.

Second: I am not married. I was formerly married to Betty Harold Small and to Helen Barrett Small, from each of whom I have obtained a final judgment of dissolution. I have two children of my marriage to my former wife Betty Harold Small, whose names are John Small and Joseph Small. I have one child of my marriage to my former wife Helen Barrett Small, whose name is Rebecca Small. The term “my children” in this will refers to John Small, Joseph Small, and Rebecca Small.

Third: I give my estate as follows:

A. I give my estate in equal shares to my children who survive me.

B. If none of my children survives me, I give my estate to the University of Columbia.

Fourth: I nominate my sister, Frances Small Wiggins, as executor of this will, to serve without bond.

I subscribe my name to this will this 29th day of June 1976, at Valley Stream, Columbia.

_____

Robert Small

On the date above written, Robert Small having declared to us that this was his will, and having asked us to act as witnesses, in his presence and in the presence of each other, we hereby subscribe our names as witnesses.

_____	residing at	1021 Nebraska Street
Barbara Collier		Valley Stream, Columbia
_____	residing at	14 Herman Avenue
Judy Myers		Valley Stream, Columbia

PREMARITAL CONTRACT

OF

ROBERT SMALL AND PATRICIA SANCHEZ

Robert Small (Robert) and Patricia Sanchez (Patricia), having each separately consulted with independent counsel, enter into this agreement in contemplation of marriage in order to define their respective property rights.

1. At the time this agreement is entered into, Robert warrants that he owns the property listed in Exhibit A hereto, and Patricia warrants that she owns the property listed in Exhibit B hereto, both of which are hereby incorporated by reference.

2.. Robert and Patricia each acknowledge that he or she has read Exhibits A and B, and that he or she is entering into this agreement voluntarily and with knowledge of the facts stated herein.

3. Robert and Patricia each agree that all property belonging to the other at the commencement of their marriage shall be, and remain, the separate property of the other.

4. Robert and Patricia each agree to relinquish, disclaim, release, and forever give up any and all right, claim, or interest that he or she may acquire in the separate property of the other by reason of their marriage.

5. Robert and Patricia each acknowledge that he or she understands that, under the law of the State of Columbia, and in the absence of any agreement to the contrary, the earnings and income resulting from the personal services, skills, effort, and work of the

other during their marriage would be community property in which he or she would have a one-half interest. Robert and Patricia each agree that such earnings and income that would otherwise be community property shall be separate property, unless, as to any item of property, they each execute an express written agreement to treat such item as community property.

6. Robert agrees that if Patricia survives him as his lawful widow, there shall be paid to her from his estate the sum of $10,000.

7. If for any reason Robert and Patricia do not marry, this agreement will have no force or effect.

In witness whereof, Robert and Patricia have executed this agreement on the 5th day of July, 1981.

_____

Robert Small

_____

Patricia Sanchez

EXHIBIT A

Property of Robert Small

1. Home at 110 Haven Street, Valley Stream, Columbia, with furniture, appliances, and personal effects.

2. One 1981 Mercedes-Benz 300 sedan; one 1979 Corvette convertible; and one 1972 Datsun 240Z coupe.

3. Restaurant known as Sloane's and land at 1833 Summer Road, Valley Stream, Columbia.

4. Apartment building and land at 1083 Maple Avenue, Valley Stream, Columbia.

5. Commercial complex and land at 582-588 Parker Way, Fenton, Columbia.

6. Raw land of approximately 26,412 acres in Township 325, Range 38E, Kittridge County, Columbia.

7. Cash, stocks, bonds, and miscellaneous financial instruments in the approximate amount of $6.3 million.

EXHIBIT B

Property of Patricia Sanchez

1. Condominium at 13B Heald Avenue, Valley Stream, Columbia, with furniture, appliances, and personal effects.
2. One 1980 Mercury Cougar sedan.
3. Cash in the approximate amount of $1,500.

CODICIL TO WILL OF ROBERT SMALL

This is a change of executor of my will.

I, Robert Small, being of sound mind, appoint on this date my wife Patricia Small as executor of my will. I sign this freely and without any reservation as to what is being done. She is to comply with the laws of the State of Columbia as to the distribution of my estate according to my wishes dictated in my will.

Dated: September 3, 2004

_____

Robert Small

Witnessed on this date by:

_____

Lana Schmitz

_____

Ralph Schmitz

EXCERPTS OF DEPOSITION TESTIMONY OF PATRICIA SANCHEZ SMALL

* * *

Q [By Ms. Lillian MacKenzie (MacKenzie)]: Mrs. Small, you were the wife of Robert Small?

A [By Ms. Patricia Sanchez Small (Small)]: Yes, I was.

Q: When did you and Mr. Small marry?

A: On July 8, 1981.

Q: How long had you known each other prior to the date of your marriage?

A: Oh, almost three years.

Q: You met at his restaurant, Sloane's?

A: Yes, I worked there as a pastry chef.

Q: Mr. Small was not married at the time you met him?

A: No, he had been divorced from his second wife for a number of years.

Q: Before your marriage, did you sign a premarital contract with Mr. Small?

A: Yes, I did.

Q: You consulted with your own lawyer before signing it?

A: Yes.

Q: You understood it?

A: Yes.

Q: You signed it freely?

A: Yes.

Q: Mr. Small didn't force you to sign it, did he?

A: No, he didn't.

* * *

Q [By MacKenzie]: You were with Mr. Small when he drafted the codicil to his will?

A [By Small]: Do you mean that short document he wrote a month before he died?

Q: Yes.

A: Yes, I was.

Q: He drafted it himself, did he not?

A: Well, he copied it from a form he found on the Internet.

Q: But it was he who found it and copied it, is that correct?

A: Yes.

Q: And he had his wits about him?

A: Yes, he did.

* * *

Q [By Mr. Jonathan Washington]: About the codicil, did Mr. Small say why he drafted it?

A [By Small]: Yes.

Q: And what he did say?

A: He didn't want his sister Frances as executor.

Q: Did he say why?

A: He said he couldn't stand her any longer. After years of difficult relations, they had had a big fight. "That's it," he said.

Q: Did he describe the language he copied from the Internet?

A: Yes: "Boilerplate."

* * *

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF NEWALL

Estate of Robert Small,	)	No. 26-20519
	)	
Decedent.	)	**Order re Entitlement to Share**
_____	)	**in Estate as Omitted Spouse**
Patricia Sanchez Small,	)	
Petitioner,	)	
v.	)	
John Small, Joseph Small, and Rebecca Small,	)	
Respondents.	)	
_____	)	

The cause is before the court on petition by petitioner Patricia Sanchez Small (Patricia), who was the wife of decedent Robert Small (Robert), to determine her entitlement to share in Robert's estate as an omitted spouse. Respondents John Small, Joseph Small, and Rebecca Small, who are Robert's children and his heirs, oppose the petition.

On October 3, 2004, Robert died. Robert was survived by Patricia. Prior to their marriage, which was solemnized on July 8, 1981, Robert and Patricia entered into a premarital contract, which was executed on July 5, 1981. According to the terms of the premarital contract, Robert and Patricia agreed that all property each owned at the commencement of their marriage would remain separate property. They also agreed

that all property each acquired during their marriage would be separate property, unless, as to any item of property, they each executed an express written agreement to treat such item as community property. It turns out that during their marriage, Robert and Patricia did indeed expressly agree in writing to treat many of the items they each acquired as community property, including the family home and a surrounding vineyard, with a total value of about $13.6 million. In addition, Robert and Patricia each acquired separate property, valued at about $5.1 million for Robert and about $110,000 for Patricia.

On March 6, 2005, Patricia initiated this proceeding by submitting a petition asking for admission to probate of Robert's will, executed on June 29, 1976, and a codicil to that will, executed on September 3, 2004, and for appointment as executor.

On April 14, 2005, the court granted Patricia's petition and admitted Robert's will and codicil to probate and appointed Patricia as executor.

On November 23, 2005, Patricia submitted the present petition.

There is no dispute that Patricia is entitled to her separate property and to her share of the common property. What *is* disputed is whether she is entitled to share in Robert's estate, including its community property and/or separate property components, as an omitted spouse.

Columbia Probate Code section 610 states that "if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate," as specified therein. Columbia Probate Code section 601(a) defines "testamentary instrument" to include a will.

Patricia contends that she falls within Columbia Probate Code section 610 as an omitted spouse because Robert's will, which makes no provision for her, was executed prior to their marriage.

After consideration, the court rejects the claim. After the marriage, Robert executed a codicil to his will, which appointed Patricia as executor and directed her to distribute his estate "according to my wishes dictated in my will." Although it is true that a codicil is not defined as a "testamentary instrument" for purposes of Columbia Probate Code section 601(a), a codicil can republish a will (*Estate of Riddell* (Colum. Ct.App. 1981); but see *Estate of Challman* (Colum. Ct.App. 1984) (dictum)), which *is* defined as a "testamentary instrument" by Columbia Probate Code section 601(a). Thus, the will as republished by the codicil must be deemed executed *during the marriage*, and Patricia falls *outside* Columbia Probate Code section 610.

Patricia argues that in applying the doctrine of republication, the court must consider Robert's intent. The court has done so. The court finds that Robert's intent was to exclude Patricia from taking under his will. Robert executed the codicil to his will a month before he died, stating in pertinent part: "I . . . appoint on this date my wife Patricia Small as executor of my will. . . . She is to comply with the laws of the State of Columbia as to the distribution of my estate *according to my wishes dictated in my will*." (Italics added.) In her deposition testimony, Patricia stated that Robert found the language of the codicil in a form on the Internet, called it "boilerplate," and said his purpose was simply to remove as executor his sister Frances Small Wiggins, from whom he had become estranged. Patricia contends that this evidence calls into question Robert's intent to have his estate distributed "according to my wishes dictated in my will" and thereby to exclude her from taking under it. The court, however, finds no ambiguity in the plain language of the codicil. Whether the language is "boilerplate" or not, it is clear—and controlling.

In summary, the court finds that the codicil executed by Robert operated to republish his will, and that his will as republished must be deemed executed after Robert and Patricia were married, thereby putting Patricia outside Columbia Probate Code section 610 and precluding her characterization as an omitted spouse. Because of this result, the court need not, and does not, address whether any of the conditions, stated in Columbia Probate Code section 611, that might have defeated Patricia's "entitlement" to share in Robert's estate as an omitted spouse was satisfied.

For the reasons stated above, Patricia's petition to determine her entitlement to share in Robert's estate as an omitted spouse must be, and hereby is,

DENIED.

Dated: January 19, 2006

_____

Rachel Garaventa

Judge of the Superior Court

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FEBRUARY 23, 2006

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SELECTED PROVISIONS OF THE COLUMBIA PROBATE CODE

* * *

§ 88. Will

"Will" means an instrument by which a person directs the disposition of his or her property, to become effective only on his or her death.

§ 89. Codicil

"Codicil" means a later instrument that affects the terms or validity of an earlier will.

* * *

§ 600. Family Protection: Omitted Spouses and Children

Section 600 through Section 630 provides family protection to the benefit of omitted spouses and children.

§ 601. Definitions

(a) For purposes of Section 600 through Section 630, "decedent's testamentary instruments" means the decedent's will under Section 88 and any revocable trust.

* * *

§ 610. Omitted spouse; share of omitted spouse

Except as provided in Section 611, if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate, consisting of (1) the one-half of the community property that belongs to the decedent, and (2) one-half of the decedent's separate property.

§ 611. Omitted spouse not to receive share; circumstances

An omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if any of the following is established:

(a) The decedent's failure to provide for the omitted spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

(b) The decedent provided for the omitted spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

(c) The omitted spouse waived the right to share in both the community property portion and the separate property portion of the decedent's estate.

* * *

ESTATE OF RIDDELL

Columbia Court of Appeal (1981)

This is an appeal from an order of the superior court denying a petition by George Riddell, the surviving husband, to determine his entitlement to share, as an omitted spouse, in the estate of his wife, Ethel Riddell, pursuant to section 610 of the Columbia Probate Code.

Ethel made a will prior to her marriage to George leaving "all my estate to my daughter, Florence," her sole child by a former marriage, but did not mention George. She then married him. In a codicil she later signed, again leaving all her estate to her daughter, she made no provision for him.

George contends that the superior court's order denying his petition was erroneous. He argues that because Ethel made no provision for him in her will, which preceded their marriage, he is entitled to share in her estate as an omitted spouse.

After review, we cannot find any error. Under the doctrine of republication, a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during the marriage. By its terms, section 610 of the Columbia Probate Code comes into play only if the decedent marries "*after* the execution of all of the decedent's testamentary instruments," including a will. Here, by virtue of republication, Ethel must be deemed to have married *before* making her will. We recognize that republication may not be applied to defeat the purpose of the testator as indicated in the codicil. But in her codicil, Ethel's purpose was express—to leave all her estate to her daughter. By such language, George is wholly barred from sharing in Ethel's estate.

The order is affirmed.

ESTATE OF CHALLMAN

Columbia Court of Appeal (1984)

This cause comes up on appeal by James Challman, the son and beneficiary under the will of Eugene Challman, from a judgment of the superior court as follows:

"That Helen Challman, as surviving spouse, was not provided for in the will of Eugene Challman, nor was she mentioned therein in such way as to show an intention not to provide for her.

"That pursuant to Columbia Probate Code Section 610, Helen Challman, as an omitted spouse, is entitled to receive as her share of the estate one-half of the community property belonging to Eugene Challman and one-half of his separate property.

"That James Challman is entitled to the balance of the estate."

Eugene's will was dated, signed, and witnessed on June 2, 1978. In his will, Eugene made a specific bequest of $2,500 to Helen Dollinger, one of his oldest friends, with the residuary to his son James. On December 10, 1979, Eugene married Helen Dollinger, who then became Helen Challman. On November 1, 1980, Eugene deleted the specific bequest to "Helen Dollinger" in his will in his own handwriting and appended his signature; he inserted "Helen Challman, Wife," after his son James' name in the residuary clause by typewriting without any signature. Also on November 1, 1980, Eugene handwrote and signed the following on a separate piece of paper as a codicil: "Helen Challman should be repaid the $1,620 she paid to repair my car."

On July 6, 1981, following Eugene's death, the superior court made an order on Helen's petition admitting Eugene's will and codicil to probate and appointing Helen as executor. The order reads in part as follows: "The document, dated June 2, 1978, excluding the typewritten and unsigned additions . . . is hereby admitted to probate as the will of Eugene Challman; and the holographic document dated November 1, 1980, is hereby admitted to probate as a codicil to the will."

In the proceeding now engaging our attention, it must be kept in mind that Eugene's will, as admitted to probate, contained neither the specific bequest to his wife Helen under her maiden name, which he effectively deleted, nor Helen's married name in the residuary clause, which he ineffectively attempted to insert. Consequently, the only mention of Helen in the instruments as admitted to probate is in the codicil, which was merely an acknowledgment of a debt to her.

The superior court concluded that, notwithstanding Eugene's codicil, dated November 1, 1980, Helen was an omitted spouse because Eugene's will, dated June 2, 1978, preceded his marriage to her on December 10, 1979.

Relying on the doctrine of republication, James contends that the superior court erred.

We recognize that *Estate of Riddell* (Colum. Ct.App. 1981) held that, for purposes of the protection afforded omitted spouses under Columbia Probate Code section 600 et seq., a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during marriage. *Riddell* seems questionable. Columbia Probate Code section 610(a) defines the requisite "testamentary instruments" to include "will[s]" and "revocable trust[s]"—but *not* "codicils." In effect, *Riddell* added "codicils" to Columbia Probate Code section 601(a) through the doctrine of republication—contrary to what may be assumed to have been the Legislature's intent.

In any case, we need not pass on *Riddell*'s soundness. For even if the doctrine of republication is applicable, it does not aid James. As *Riddell* itself states, "[R]epublication may not be applied to defeat the purpose of the testator as indicated in the codicil." From the provisions of Eugene's codicil and its circumstances, the superior court found that Eugene intended that Helen be repaid out of his estate to cover his debt and that she share what remained of his estate with James. There is simply no basis to disturb that finding.

It follows that we may not apply the doctrine of republication to treat Eugene's will as though it had been executed during marriage. To do so would deprive Helen of her entitlement to share in Eugene's estate as an omitted spouse and thereby leave her unprovided for—a result that would be contrary to Eugene's intent in his codicil.[1]

The judgment is affirmed.

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[1] We note that James makes a perfunctory claim that the superior court erred by refusing to treat a certain letter Helen had written to Eugene as a waiver of any right to share in either the community property portion or the separate property portion of Eugene's estate, or both—a circumstance that would have defeated her entitlement to share in either portion of his estate (see Colum. Prob. Code, § 611(c)). A waiver of a right requires the knowing and intentional relinquishment of the right. The letter in question does not even purport to waive any right whatsoever.