

FEBRUARY 2016
ESSAY QUESTIONS 1, 2 AND 3



California Bar Examination

Answer all 3 questions.

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

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

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

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

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

QUESTION 1

Wendy, a widow, owned a house in the city and a ranch in the country. She created a valid inter vivos trust, naming herself and her daughter, Dot, as co-trustees, and providing that she had the power to revoke or amend the trust at any time in writing, by a document signed by her and delivered to her and Dot as co-trustees. At Wendy's death, Dot was to become the sole trustee, and was directed to hold the assets in trust for the benefit of Wendy's sister, Sis, until Sis's death. At Sis's death, the trust was to terminate and all assets be distributed to Dot. The sole asset in the trust was Wendy's ranch.

Years later, Wendy prepared a valid will in which she stated, "I hereby revoke the trust I previously established, and leave my house and my ranch to my son, Sam, as trustee, to be held in trust for the benefit of my brother, Bob. Five years after my death the trust shall terminate, and all assets then remaining in the trust shall be distributed outright to Sam."

Wendy died. Following her death, both Dot and Sam were surprised to find her will.

Dot has refused to serve as trustee under the inter vivos trust, and claims that, as a result, the trust fails and that the ranch should immediately be given to her.

Sam has agreed to serve as trustee under the testamentary trust, and claims that the ranch is part of the trust. Sam then sells the house, at fair market price, to himself in his individual capacity, and invests all the assets of the trust into his new business, Sam's Solar. Bob objects to sale of the house and to Sam's investment.

1. What interests, if any, do Dot, Sam, and/or Bob have in the house and the ranch? Discuss.
2. What duties, if any, has Sam violated as trustee of the testamentary trust, and what remedies, if any, does Bob have against him? Discuss.

QUESTION 2

Jack believed that extraterrestrial aliens had come to earth, were living undercover as humans, and were planning a full-scale invasion in the future. Jack believed that his next-door neighbor, Nancy, was one of these aliens.

One day, Nancy called Jack on the phone to complain that Jack's children were playing in her yard. Jack yelled that his children could play wherever they wanted to. He also said that he was going to kill her.

The next day, Nancy approached Jack, who was playing in his yard with his children. She reminded him to keep his children out of her yard. Jack picked up a chainsaw and said, "When the invasion comes, I am going to use this baby to cut off your head!"

From the other side of the street, Ben saw Jack angrily raise the chainsaw at Nancy. Ben ran across the street and knocked Jack to the ground and injured him.

Later that week, Jack decided that he could wait no longer. He saw Nancy's car, which he believed to be an alien spaceship, parked on the street. He snuck over to her car and cut the brake lines, hoping Nancy would have a minor accident and be taught a lesson.

Unaware that her car had been tampered with, Nancy lent it to Paul. When the brakes failed to work, Paul drove off a mountain road and was severely injured.

1. What tort causes of action, if any, may Nancy bring against Jack, and how is each likely to fare? Discuss.
2. What tort causes of action, if any, may Jack bring against Ben, and how is each likely to fare? Discuss.
3. What tort causes of action, if any, may Paul bring against Jack, and how is each likely to fare? Discuss.

QUESTION 3

Contractor and Lawyer had been in a consensual sexual relationship for months. Contractor could not afford to hire an experienced lawyer to defend him against Plaintiff's complex construction defect case and to bring a cross-complaint. Contractor told Lawyer, who had never handled such matters, that he wouldn't sue her for malpractice if she would defend him for half her regular rate. Lawyer felt pressured because of their relationship.

Lawyer told Contractor she would defend him for half-price, but she would only bring his cross-complaint on contingency at her regular rate of 30 percent of any recovery. Contractor agreed. Although they continued to have sexual relations, their personal relationship deteriorated. Lawyer forgot to make a scheduled court appearance in the case.

At trial Plaintiff lost, and Contractor won \$100,000 on his cross-complaint. Lawyer deposited the \$100,000 in her Client Trust Account. She told Contractor she would send him \$70,000. Contractor said Lawyer must send an additional \$15,000 because she agreed to represent him for half-price on everything, including the contingency fee.

1. Did Lawyer commit any ethical violation by agreeing to represent Contractor? Discuss.
2. Did Lawyer commit any ethical violation by failing to make the court appearance? Discuss.
3. What should Lawyer do with the money in the Client Trust Account? Discuss.

Answer according to California and ABA authorities.



February 2016

**California
Bar
Examination**

**Performance Test A
INSTRUCTIONS AND FILE**

IN THE MATTER OF MILLY NOLAN FLECK

Instructions

FILE

Memorandum from Chief Trial Counsel to Applicant

Interview of Complaining Party (Liora Hersh)

Letter from Milly Nolan Fleck to Liora Hersh (November 28, 2014)

Telephone Interview of Respondent Fleck (October 15, 2015)

Examination of Respondent's Records

State Bar Investigator's Reconciliation of Fleck's CTA

IN THE MATTER OF MILLY NOLAN FLECK
INSTRUCTIONS

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

**OFFICE OF CHIEF TRIAL COUNSEL
STATE BAR OF COLUMBIA**

TO: Applicant
FROM: Chief Trial Counsel
DATE: February 23, 2016
SUBJECT: In the Matter of Milly Nolan Fleck, Respondent

We have completed our investigation and are ready to decide whether to file charges against respondent Milly Nolan Fleck. The investigation arose out of claims made by a client Fleck represented. Ms. Liora Hersh asserted that Fleck had misappropriated and withheld \$500 from a personal injury settlement. During discovery there came to light a problem resulting from the negligent handling of Fleck's client trust account (CTA). Fleck may have commingled her own funds in her CTA, and it appears that the balance in Fleck's CTA fell below the amount it should minimally have contained for a period of six weeks. We have double-checked the investigator's CTA reconciliation, and it is accurate.

The State Bar investigator has recommended that we charge Fleck with violations of:

1. Rule 4-100(A) for failure to maintain appropriate funds in her CTA;
2. Rule 4-100(B) for failing to promptly pay funds to a client;
3. Rule 4-100(A) for commingling her own funds in her CTA: and
4. Section 6068 for failure to cooperate with a disciplinary investigation.

Prepare a memorandum evaluating whether we can prevail on each of these charges.

**OFFICE OF CHIEF TRIAL COUNSEL
STATE BAR OF COLUMBIA**

SUBJECT: In the Matter of Milly Nolan Fleck, Respondent
FROM: Ignacio Gomez, Investigator

Interview of Complaining Party (Liora Hersh)

On June 23, 2015, Liora Hersh (Hersh) filed a complaint against Milly Nolan Fleck (Fleck).

Fleck has been an active member of the State Bar of Columbia since May 2009.

In October 2013, Liora Hersh, a paralegal, employed Fleck to represent her on a contingency basis in a personal injury matter. Hersh did not execute the written agreement prepared and sent to her by Fleck for such representation. [I reviewed it, a standard personal injury contingent fee agreement, and Hersh does not dispute its terms.]

Several weeks later, Hersh asked Fleck to handle a separate child custody matter. Fleck and Hersh discussed the fees for the handling of the child custody matter, including Fleck's usual requirement of a retainer plus monthly payments. Fleck wanted a retainer of \$500 as an advance on fees that would be incurred. Because Hersh told Fleck that she could not provide a retainer, Fleck offered to handle the child custody matter if Hersh would make her best efforts to pay the monthly bills and if Fleck could use the anticipated recovery from the personal injury matter for the retainer and to pay off any unpaid balance in the child custody matter. Hersh agreed, and she employed Fleck in the child custody matter.

Shortly thereafter, Fleck sent Hersh a written agreement that set forth Fleck's fee at an hourly rate, but did not mention the use of the proceeds from the recovery in the personal injury matter to satisfy any unpaid fees in the child custody matter. Hersh did not sign the agreement for the child custody matter. Fleck billed her monthly, but Hersh did not make regular payments for Fleck's work. Hersh did, however, express satisfaction with Fleck's efforts on her behalf and sent payments to Fleck in December 2013 and in January, May, August, and October 2014.

In April 2014, Fleck met with Hersh to discuss possible settlement of her personal injury action. Hersh again agreed that Fleck could take a retainer of \$500 and pay off the outstanding balance in the child custody matter out of the anticipated recovery in her personal injury matter.

On October 29, 2014, Fleck settled the personal injury matter for \$17,500. Fleck called Hersh and notified her of the settlement on that day. Hersh indicated that the settlement was very satisfactory, and in fact was \$5,000 more than she had anticipated and earlier approved.

A few days later, Hersh received from Fleck's office the \$17,500 settlement check made out to Fleck and Hersh for endorsement.

At first she did not sign the check. Hersh had two telephone conversations about the distribution of the settlement from the personal injury matter with Larry Gold, a secretary or assistant in Fleck's office. In the first conversation, Hersh challenged the intended deduction of the retainer and overdue fees in the child custody matter, asserting that she considered them to be totally separate matters. Gold said that he would talk to Fleck and call her back. A few days later, Gold called Hersh and reminded her of her agreement permitting Fleck to deduct the fees. Gold also said that no prior attempt had been made to collect the fees owed in the child custody matter because of the

agreement. When Hersh asked to speak with Fleck, Gold said that Fleck did not want to talk with her. Gold explained that if Hersh disagreed about the deduction of the fees in the child custody matter from the recovery in the personal injury matter, she could refuse to sign the check and could come to the office to talk directly with Fleck. At the end of the conversation, Hersh said, "Okay, go ahead and distribute it." Hersh said that she would endorse the settlement check, but insisted that Fleck distribute the funds as quickly as possible. Hersh signed the check and returned it to Fleck's office.

A week later, Hersh received a check and a letter from Fleck. The letter (dated November 28, 2014) explained the distribution. The check covered the balance remaining after the deduction of all costs in the personal injury matter, Fleck's one-third contingency fee in the personal injury matter, the unpaid amount owed by Hersh in the child custody matter, and a retainer (\$500) for future work on the child custody matter. The letter also stated that Fleck would refund the \$500 retainer if Hersh sent back a signed form for substitution of attorney. Hersh was not surprised that Fleck offered to withdraw from the child custody case after she had disputed the distribution. Hersh signed and cashed the check. Hersh never objected to the distribution of the personal injury settlement described in the letter. Hersh confirmed that she never communicated any retraction, oral or written, of the authorization she gave by telephone to distribute the funds.

A couple of months later, Hersh had second thoughts, and realized that in effect she had both paid off everything due to Fleck and another \$500, that she had called a retainer. The contingent fee Fleck had obtained from their settlement should have been a sufficient retainer. She felt she was taken advantage of and overcharged. Hersh decided to change lawyers. Hersh's employer said he'd finish the custody case, and charge her only if fees exceeded \$500. On February 26, 2015, Hersh signed and sent Fleck the substitution of attorney, and in a brief letter Hersh asked Fleck to sign and return the

substitution and to refund the \$500 retainer as soon as possible.

A little later Hersh received the signed substitution, but Fleck did not include the \$500. Hersh claims that Fleck has failed to return the \$500 retainer despite repeated requests. Hersh sent Fleck three letters demanding that she return the \$500. Fleck has been withholding the \$500 for almost 6 months, and she concluded that Fleck intends to keep it.

Milly Nolan Fleck
Attorney at Law
1959 Stingray Boulevard
yourattorney@millynolanfleck.com
Reunion, Columbia

November 28, 2014

Liora Hersh
P.O. Box 3333
Reunion, Columbia

Dear Liora,

Thank you for your cooperation in resolving the possible conflict. I am pleased to be able to enclose the check settling your claims in the personal injury case.

The settlement was for \$17,500. From that amount, I have deducted the following:

1. My contingent fee of \$5,775.
2. The pending unpaid balance due in your child custody case of \$2,250, previously billed to you.
3. My retainer of \$500 against future fees, for handling the custody matter.

The balance to you is \$8,975, and my check in that amount is enclosed.

Also, I am enclosing another copy of the Release of All Claims I previously sent you for signing. It should have been returned with the check for the full settlement. As you know, we must provide the release to the insurance company as a condition of the settlement and as a condition of signing the check for your recovery. Please sign and return in the enclosed, stamped envelope.

Finally, in case the recent exchanges with my office indicate a dissatisfaction with my services, I have enclosed a Substitution of Attorney in the custody matter. All you need to do is sign and return it, and you are free to obtain another counsel. Then, I will of course refund the retainer.

Best wishes,

Milly Fleck

Milly Nolan Fleck

MEMORANDUM
OFFICE OF CHIEF TRIAL COUNSEL

Telephone Interview of Respondent (Milly Nolan Fleck), October 15, 2015

QUESTION [Ignacio Gomez]: Okay, thank you Ms. Fleck. I have turned on the tape recorder to record our interview.

ANSWER [Milly Fleck]: That's fine, Mr. Gomez. I simply don't have time to come down to your office, now that I have started working at a new job at this firm. I have shut down my private practice, completed or handed off all my cases and clients, and don't really understand why the State Bar is pursuing this petty complaint. I take my obligations as an attorney very seriously and was always available for my clients. I gave 150% for my clients, and Liora Hersh was at the top of that list. What more could she want?

Q: I do have questions, especially since you didn't respond to our notices about the Hersh complaint. Notices were sent to you after the Hersh complaint, one dated June 28, 2015, another one dated July 20, 2015, and another August 30, 2015.

A: I didn't get them. The office was closed. The mail was forwarded to a Columbia Mail Boxes, Inc. office, and I was picking it up every week or so, but your notices apparently arrived when I was not checking often, and then I took a needed break to be with my mother for a couple of months. The first I heard about the Hersh complaint was when you called me here at the firm last month, after I sent my new address to the State Bar.

Q: Yes, but it was after four months. You are obligated to keep your address current.

A: I am obligated to my clients and I took care of those obligations, Mr. Gomez. I have a pre-trial conference this morning. Can we get to the complaint? Liora didn't like that I kept the \$500 retainer that she agreed to, and then that I held it because she would not sign the release. Is that it?

Q: You held the money for many months, even after you had withdrawn as her lawyer. What's this about the release?

A: I sent her the full settlement check, with the release from the insurance company. After first trying to back out of their agreement, Liora told Larry -- Larry Gold, my assistant -- that she would sign and return both. The \$500 was my retainer, against future fees. She hadn't been paying monthly as promised. But I had told Larry not to attempt to collect the large outstanding bill in the child custody matter because of her agreement to pay the balance owed out of anticipated recovery in the personal injury matter. Then, that money came in, and Liora didn't want to pay. That was a red flag that we had problems, and so I offered to withdraw and let her get a new lawyer. She did so, but she just wouldn't sign the release, and the insurance company kept asking for it, even after I had dismissed the case. I sent Liora several letters about the release. Did she tell you that?

Q: Well, I didn't know that the release was a problem. Is that why you kept her money?

A: Yes. The only reason. We worked out the distribution of the settlement, I thought, but she decided to switch lawyers, which was okay with me, but for some reason, she just would not sign and return the release. I still don't know why. It still isn't signed, and I guess the insurer has just forgotten or let it go.

Q: But you know that, pursuant to the rules, once you signed the substitution and had withdrawn you must promptly refund any unearned fees, and the \$500

was unearned fees.

A: I kept it, to try to encourage Liora to sign the release. She was obligated by the settlement to sign it, and I was concerned about the possibility of a motion for compliance with the terms of the settlement. Technically, she was not entitled to any of the proceeds until she had signed the release.

Q: Don't you think it was reasonable for Hersh to think that you were withholding the \$500 because of the admittedly deteriorated relationship with her?

A: Absolutely not. Liora was savvy, and she was probably holding the release to pressure me, not the other way around.

Q: You closed your private practice in June 2015.

A: Yes. I spent much of March and April helping my father with his business. He had a terminal illness, and was in and out of the hospital during this period until his death in late April 2015. I ran his business in addition to my own practice through May 2015.

Q: You started your present job in early September 2015?

A: Yes, just a few weeks ago.

Q: You did not send the \$500 to Ms. Hersh until after I first called you last month?

A: Yes. I had forgotten about it, probably after the insurance company gave up, and the funds sat there in my client trust account.

Q: May I ask you about your client trust account?

A: Yes. Larry told me you looked at the records and asked him about it.

Q: You kept track of your client trust account?

A: Yes. Larry helped, but I signed any withdrawal, kept my own ledger of the CTA, and would reconcile my ledger with the bank records periodically, at least annually.

Q: Did you do that at the end of 2014?

A: No, not then. Between my father's illness and his business, I didn't get to it. Also, I knew that there had been very few deposits and withdrawals from late 2014 until I closed the practice, and I thought everything was in order.

Q: I noticed that during that time your client trust account had \$125 that doesn't appear to have been from any client. Was that your money?

A: Let me think. Oh, yes, when I opened a new trust account, I added about \$125. I thought we needed new checks and a new check ledger, and kept that there to pay for them.

Q: \$125, for checks?

A: Yes. The ledger was leather, and I anticipated that it and the checks would cost over \$100.

Q: Ms. Fleck, in view of the months of delay in responding, and now only talking by phone, could you please come in to our office for a more extensive review?

A: I really can't. Feel free to call me. Mr. Gold will meet if necessary. My files are open to you. But really, this is only about a client who became disgruntled

about the deal she made, and is now using the State Bar complaint process to undo the agreement.

Q: Well, if you will not come in, then we will leave it there for the moment.

MEMORANDUM
OFFICE OF CHIEF TRIAL COUNSEL
STATE BAR OF COLUMBIA

SUBJECT: Examination of Respondent's Records

In the Matter of Milly Nolan Fleck, Respondent

FROM: Ignacio Gomez, Investigator

On October 1, 2015, Larry Gold came to the office to drop off Milly Nolan Fleck's correspondence file with Liora Hersh, and the records of Fleck's client trust bank account (CTA) for 2014 and 2015 (which I had asked for to determine what had been done with Hersh's \$500 before it was returned to her).

Mr. Gold appeared to freely answer my questions, and he volunteered that Fleck had asked him to cooperate in any way -- "to get it over with," he quotes her as saying.

Mr. Gold confirmed Hersh's version of his two telephone conversations with her in November 2014, although he characterized Hersh's tone as "emotional, dramatic, and unprofessional for a paralegal." Hersh agreed to cover the unpaid fees and the \$500 retainer by letting Fleck deduct them from the settlement. Fleck instructed him to prepare the accounting and cut the checks, and he did so immediately.

Mr. Gold was in charge of Fleck's clients' trust, operating and payroll bank accounts. However, he said that Fleck herself would sign any withdrawals from the client trust account, and she would reconcile and double-check the CTA.

Fleck had just switched banks, and opened a new CTA for all client funds. After they received the signed settlement check back from Hersh, Gold deposited the \$17,500 in the new account. He deducted Fleck's contingent fee (\$5,775),

the unpaid balance due in the child custody case, \$2,250 (for 15 hours at \$150 / hr), and the \$500 retainer, and prepared a check for Fleck's signature to Hersh for the balance of \$8,975. He then transferred the contingent fee and unpaid fees to Fleck's operating account. Fleck signed and sent the check, and okayed the transfers.

Gold's explanation should have meant a balance of \$500 in Fleck's new CTA. However, on December 31, 2014, the total balance in Fleck's new trust account was \$625. This balance represented the \$500 retainer for future work on the child custody case plus another \$125 (later determined to be Fleck's own funds, commingled in the CTA, below).

On February 18, 2015, Fleck deposited a check for \$250 from Client A into this trust account. On March 19, 2015, Fleck wrote a check drawn on the CTA to Client A for \$385. Although Fleck did not realize it at the time, this check reduced the balance in the trust account to \$490 when it cleared on March 27, 2015.

I asked Mr. Gold about it, and he said, "It was a mistake." They had received two checks from Client A, each for \$250, but he had mistakenly thought only one was an advance and deposited only one of the checks in the CTA, and the other in the operating account. Fleck had assumed that both checks were deposited into the CTA, and that there was a balance of \$500 for the credit of Client A in the CTA.

However, when Fleck wrote the \$385 check to Client A on March 19, 2015, it was obvious from the face of the statement from the bank that the new trust account did not contain both deposits on behalf of Client A. It should have been patently obvious that the balance would dip below the \$500 that Fleck had received as a retainer from Hersh. From March 27, 2015, to April 30, 2015, the balance in Fleck's trust account remained at \$490, slightly less than the \$500 that

Fleck should have kept in it. On April 30, 2015, a \$4,807 deposit from another matter raised the balance in the account to \$5,297.

I have prepared and attached a reconciliation if it would help. However, there can be no doubt that from March 27, 2015 until April 30, 2015, the balance in Fleck's CTA was \$490, below the requisite balance of the \$500 due to Hersh.

It did not appear that Fleck ever determined on her own that a trust account problem had occurred. I believe she realized this for the first time when I called and told her about it after my review. Gold was responsible for making deposits into the operating account, and Fleck did not inspect the checks that went into the operating account. The misdeposit was the first of a series of events that eventually caused the balance in Fleck's trust account to fall below the necessary amount. Thus, the \$250 misdeposit from Client A remained undetected.

It is my conclusion, from these records, that Fleck committed a violation of Rule 4-100(A) because she negligently failed to keep in her trust account the entire \$500 held for Ms. Hersh.

It also appears that the commingling of \$125 of Fleck's personal funds is a clear violation.

The correspondence file confirmed Fleck's assertion that, in each letter she sent to Hersh after the settlement, she asked her to sign and return the release. There were three letters solely requesting the release. In all, Fleck made written requests to Hersh for the signed release seven times, and sent her copies of the release in three of the requests. Her files included three requests to her from the insurance company's counsel for the release. However, Fleck made no more efforts since concluding her practice, and retained Hersh's money until she learned about her complaint from my contact. I conclude that Fleck

improperly failed to refund the advance fee.

Fleck failed to keep the State Bar informed of her current address, did not respond to our inquiries, and is reluctant to meet. This has hampered further investigation, and forced me to conclude the matter and refer it to the Chief Trial Counsel.

**State Bar Investigator's Reconciliation
of Millie Nolan Fleck's CTA**

			<u>CTA Balance</u>
11/28/14:	Fleck opens new CTA and deposits check in settlement of Hersh PI case	\$17,500	\$17,500
11/28/14:	Check to Fleck's operating account (contingent fee)	\$5,775	\$11,725
11/28/14:	Check to Fleck's operating account (billed/unpaid fees for Hersh child custody matter)	\$2,250	\$9,475
11/28/14:	Check to Hersh for balance of settlement	\$8,975	\$500
12/15/14:	Unidentified deposit by Fleck	\$125	\$625
2/18/15:	Deposit of "advance" from Client A	\$250	\$875
3/27/15:	Check to Client A cleared bank	\$385	\$490
4/30/15:	Deposit from another Fleck case	\$4,807	\$5,297



February 2016

**California
Bar
Examination**

**Performance Test A
LIBRARY**

IN THE MATTER OF MILLY NOLAN FLECK

LIBRARY

**Selected Provisions of Columbia Professions Code
and Columbia Rules of Professional Conduct**

Paul Palomo v. State Bar of Columbia
Columbia Supreme Court (2004)

Butts v. State Bar
Columbia Supreme Court (1977)

In the Matter of Jon Michael, A Member of the State Bar
Review Department of the State Bar Court (2009)

In the Matter of Stephine Webb, A Member of the State Bar
Review Department of the State Bar Court (2006)

**SELECTED PROVISIONS OF
COLUMBIA PROFESSIONS CODE
AND
COLUMBIA RULES OF PROFESSIONAL CONDUCT**

Columbia Professions Code

Section 6068

It is the duty of an attorney to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself.

Columbia Rules of Professional Conduct

Rule 3-700. Termination of Employment

(A) In General.

* * * * *

(D) Papers, Property, and Fees. A member whose employment has terminated shall:

* * * * *

(2) Promptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter.

Discussion:

Paragraph (D) also requires that the member "promptly" return unearned fees paid in advance. Further, Paragraph D(2) recognizes the validity of true retainers, and is consistent with the Columbia Supreme Court's definition of a retainer: "A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client." *Baranowski v. State Bar* (1979). However, an advance against future fees is not a retainer, even if denominated as a "retainer" or even a "non-refundable retainer."

Rule 4-100. Preserving Identity of Funds and Property of a Client

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import. A member is not required to maintain a separate trust account for each client. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

- (1) Funds reasonably sufficient to pay bank charges.
- (2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A member shall:

* * * * *

- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them.
- (4) Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive.

Paul Palomo v. State Bar of Columbia

Columbia Supreme Court (2004)

Paul Palomo was admitted to practice law in 1984. He has one instance of prior discipline. Here, the Hearing Department of the State Bar Court sustained allegations that Palomo willfully violated his oath and duties as an attorney and committed acts of dishonesty and moral turpitude when he (1) deposited the proceeds in his payroll account rather than his trust account, (2) failed promptly to notify the client he had received the check and to pay over the funds due. We uphold the findings of fact and adopt the disciplinary recommendation.

In December 2000, Jose Antonio Torres retained Ronald Roman, a member of Palomo's law firm, to represent Torres in connection with the New York probate of his father's estate. Torres paid a retainer fee of \$75 and signed a retainer agreement. Roman left Palomo's employ around March 2001. On April 20th, Palomo's firm received a partial distribution check for \$3,000 from the estate's representatives. The check was mistakenly deposited in the firm's *payroll* account. Five months later, after several inquiries from Torres, Palomo sent Torres a *trust* account check for \$3,150, representing the earlier distribution plus "interest."

Palomo concedes his office mishandled the Torres check, but he disputes the finding of willful violations of an attorney's oath or duties. As he notes, his un rebutted testimony placed the blame on human error by an employee of his firm. Thus, he urges, while the record may show his negligence, it does not demonstrate intentional misconduct or dishonesty.

Palomo testified he told his office manager, Ms. M, to deposit the Torres check in the trust account; she mistakenly placed it in the payroll account instead. According to Palomo, Ms. M had complete banking and bookkeeping control; she could draw checks on the payroll account without his specific approval by using a stamp bearing his signature. Ms. M had previously handled

client, operations, and payroll accounts for a major law firm. He also contends that he met with his accountant monthly to review the status of office accounts.

However, Palomo acknowledged that he gave Ms. M no supervision, *never* instructed her on trust account requirements and procedures, and *never* examined either her records or the bank statements for any of the office accounts. In any event, Palomo's office administration permitted the fact that a substantial client check endorsed by him had been misdeposited, commingled, and misappropriated to escape his notice for four months. There is no indication the error would ever have been discovered but for outside inquiry. Any procedure so lax as to produce that result was grossly negligent.

Palomo's contention overlooks the fact that attorneys assume a personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds. Attorneys cannot be held responsible for every detail of office operations. However, where fiduciary violations occur as the result of serious and inexcusable lapses in office procedure, they may be deemed "willful" for disciplinary purposes, even if there was no deliberate wrongdoing. Indeed, mere evidence that the balance in a trust account fell below the amount credited to a client has been said to support a finding of willful misappropriation.

We have repeatedly held that trust account deficiencies are attributable to attorneys, not to their employees. Some decisions imply that only "gross" negligence or "habitual" disregard of client interests warrants discipline, but the record demonstrates such pervasive carelessness here.

Palomo's own testimony thus describes a pattern of gross negligence involving serious violations of an attorney's duty to oversee client funds entrusted to his care, and to keep detailed records and accounts thereof. These omissions resulted in a four-month delay in notifying the client that money due him had arrived, and in transmitting the funds promptly due. In the meantime, the funds

were converted to the use of Palomo's office. There is no indication that Palomo would have remedied the irregularities if not pressed by the interested parties.¹

Discipline

We conclude that Palomo's conduct warrants at least the lenient discipline recommended by the State Bar Court.

Affirmed.

¹Petitioner points out that, when advised of his oversight, he promptly remitted the funds with “interest.” While this fact may weigh in mitigation of discipline, it does not detract from the finding of willful violation.

Butts v. State Bar

Columbia Supreme Court (1977)

The State Bar charged Leonard Butts with three acts of professional misconduct, amounting to moral turpitude and dishonesty, all committed in connection with his employment as an attorney by his client Janette Mack.

The Review Department concluded that Butts should be subjected to discipline for only one of the acts charged, that of wrongfully withholding \$253, and recommended that Butts be suspended from practice for a period of three months.

Butts was admitted to practice in 1971. About January, 1976, Robert Mack and his wife Janette separated and the husband commenced an action for divorce in Angeles County. Janette employed Butts to represent her in the matter. A property settlement agreement was executed by the spouses. This agreement provided for the payment to Janette of \$1,000, effected by having Robert deliver the \$1,000 to Butts for deposit in his trustee account. Butts was to hold the funds, subject to the fulfillment of the condition that Janette secure a decree of divorce in Nevada before November 1, 1976, but that in the event that Janette failed to deliver to Robert the decree of divorce, the \$1,000 was to be returned to Robert Mack.

Janette went to Nevada to establish a residence for divorce, but before she had completed her compliance with the residence requirements in that state, she returned to Columbia, retained a new attorney, and instituted a divorce action in Angeles County.

On October 30th, Butts wrote Janette's new attorney and Robert's attorney, telling them: "I consider myself to be purely an escrow holder and, not wishing to become personally liable to either party, I must refuse to disburse the fund in my hands until such time as the parties jointly agree upon the disposition. If no such joint agreement is reached, I shall interplead in the pending divorce action and pay the money into Court."

On November 9th Janette died, and on November 11th Butts again wrote the attorney for Robert, saying: "By reason of her death I am apparently required to return to you the monies I hold under my trust receipt. I advanced to Janette Mack, from my personal funds, \$200 for her living expenses since she had no personal funds with which to subsist. In addition to this advance there were other small advances, either to her or on account of court costs in the actions I handled for her, aggregating \$53. For convenience, I have deducted these amounts from the sum I held. If this arrangement is not satisfactory to you, please inform me and I will send my check for the deductions and seek other means of collection." After the writing of this letter, Butts drew checks on the \$1,000 fund, reimbursing himself in the sum of \$253 and making the balance of \$747 payable to Mr. Mack. Mr. Mack refused to accept the latter sum in full satisfaction of Butts's obligation and demanded an additional \$253, which Butts paid promptly.

Butts contends that he practiced no deceit or dishonesty upon anyone; that the \$253 represented amounts that he had advanced to the wife for necessaries, for which he thought he could hold the husband liable. Moreover, he thought that the wife's estate too would be liable for his claim. Further, Butts contends that the property settlement agreement was invalid because it was promotive of divorce and contrary to public policy.

The several legal points involving the validity of the challenged provision need not be determined; for purposes of this opinion the provision may be assumed to be valid. While Butts is in a doubtful position to claim exoneration upon the ground of an invalidity, his conduct should be appraised in the light of the situation as it presented itself to him at the time the alleged wrongful acts were committed.

The undisputed facts show that the error committed by Butts was not so much one of professional misconduct as one of failure to correctly assess his legal rights upon the death of the wife. That is, Butts in effect sought, by retaining the \$253, to compel an accounting between the husband and the wife's estate. However, he was in possession of the \$253 in a fiduciary and not a

personal capacity, and therefore was not entitled to withhold it to offset a personal claim.

However, in view of the unusual circumstances and the complex legal problems inherent in the situation, the mistake appears to have been one of poor judgment as to the law and the proper procedure to protect his rights. To hold that it involved moral turpitude or constituted an act of professional misconduct would not be justified. He had acted openly and in good faith in asserting a valid claim for \$253. He erred only in his attempted method of collection.

Further, we accept Butts's argument that he was legally obligated to keep the funds in trust when faced with the competing demands. Arguably, Butts was not obligated to pay the fund to either Janette's estate or Robert, since both sides claimed the funds. An attorney who receives money on behalf of a party who is not the attorney's client becomes a fiduciary to the party. When an attorney assumes the responsibility to disburse funds as agreed by the parties in an action, the attorney owes an obligation to the party who is not the attorney's client to ensure compliance with the terms of the agreement.

We conclude that there was no violation and that the discipline recommended should not have been imposed.

In the Matter of Jon Michael, A Member of the State Bar

Review Department of the State Bar Court (2009)

Jon Michael was admitted to practice law in 1993 and has no prior record of discipline. He was the sole attorney in a high-volume personal injury litigation practice in Central Valley for eleven years, and the firm grew to eight employees at its peak. In 1999 and again in 2003, Michael suffered significant back injuries. Michael's injuries and subsequent divorce left him in a depressed state. He also complained about his lack of desire, pain from his injuries, loss of energy due to Graves' disease (which was diagnosed around that time), emotional isolation and the need to be closer to his parents. Michael stopped coming to work regularly, and at the end of December 2004, he shut down his office, moved to southern Columbia, and filed for bankruptcy.

When he closed his office, Michael opened a post office box in Cerritos in December 2004, but did not update his State Bar membership records address until May 2005.

The disciplinary charges stem from Michael's handling of settlement funds on behalf of Kara Hughes, who hired him in 2002 to represent her after she was injured in an automobile accident. When the case settled in March 2004, State Farm Insurance (State Farm) sent Michael a check for \$10,000, which he deposited in his client trust account (CTA). Shortly thereafter, Hughes went to Michael's office and he provided her with a settlement breakdown statement as follows: \$5,405 to Hughes; \$3,000 for attorney fees and \$915 for costs to Michael; and the remaining \$680 to reimburse Blue Cross Insurance Company (Blue Cross) for medical costs it paid on behalf of Hughes in 2003. Michael gave Hughes a check for her portion of the funds, which she promptly cashed.

On July 20, 2004, Michael wrote a CTA check for \$680 to Blue Cross. Although Michael's standard office procedure was to have his office manager mail settlement checks, there is no evidence that the check was mailed or that Blue Cross received it. The check was not debited from the CTA.

Michael failed to realize that the check never cleared the bank because he did not have an adequate method of reconciling his CTA. Michael used a simple system for reconciling the CTA by comparing check withdrawals listed on monthly bank statements to check stubs in his checkbook. He did not review the stubs to ensure that all checks had cleared. He did not reconcile the monthly balance in his CTA with his bank statement.

When Michael closed his office in December of 2004, he did not close his CTA or reconcile the remaining balance in the account at the time. On February 15, 2005, the CTA balance dropped to \$312, where it remained until at least 2007. This amount was \$368 less than the \$680 of Hughes's remaining settlement funds owed to Blue Cross that should have been kept in the CTA. In late 2005, Hughes received notice from Blue Cross that it had not been reimbursed for her medical expenses. She attempted to contact Michael, but found his office closed and his telephone disconnected. Hughes filed a complaint with the State Bar and an investigator sent letters to Michael, but Michael rarely checked mail due to his pain and had delegated the responsibility of picking up his mail to his cousin, who was unreliable and prone to misplacing the mail. Michael did not receive the State Bar letters.

State Bar Deputy Trial Counsel eventually located Michael and informed him of the investigation. Michael then sent Hughes a personal check for \$680 within a week.

The State Bar served the formal notice of disciplinary charges (NDC) on Michael charging him with four counts of misconduct

After a two-day contested disciplinary hearing, involving the four counts of misconduct in one client matter, the hearing judge found Michael culpable of a single trust account violation and recommended that he receive a one-year stayed suspension and a two-year period of probation with no period of actual suspension. The Chief Trial Counsel of the State Bar sought review, contending that Michael should be found culpable of three additional counts of misconduct, including misappropriation, and that the recommended discipline should be

increased to include an actual suspension of one year. We adopt the hearing judge's finding of culpability but also find Michael culpable of misappropriation, failing to promptly return client funds and failing to cooperate with a State Bar investigation. In light of the additional culpability, as well as aggravating factors, we recommend a 90-day actual suspension as a condition of a one-year stayed suspension and a two-year period of probation.

Count One (Rule 4-100(A))

We agree with the hearing judge's finding that Michael failed to maintain client funds in his trust account in willful violation of Rule 4-100(A) because the balance fell below the \$680 required to be held in trust for Hughes. An attorney entrusted with client funds "assume[s] a personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." (*Palomo v. State Bar* (2004).) This duty requires an attorney to maintain client funds in the CTA until outstanding balances are settled. Although it may not be deliberate, a trust account violation caused by "serious and inexcusable lapses in office procedure" is "willful" for disciplinary purposes. (*Palomo v. State Bar, supra.*) There is clear and convincing evidence that Michael willfully violated Rule 4-100(A) by not maintaining the balance of Hughes's settlement funds in his CTA.

It is well-established that, even if an attorney's conduct is unintentional, carelessness leading to trust account violations may involve moral turpitude. We find that Michael's gross negligence in handling his CTA, and the resulting misappropriation, constitute a willful violation of the rules. (*Palomo v. State Bar, supra.*)

Michael failed to properly manage his CTA. Michael failed to implement or follow the most basic procedures to safeguard his CTA. From October 2003 until he closed his office in December 2004, Michael did not even attempt to reconcile the monthly balance in his CTA. His carelessness and gross negligence resulted in the misappropriation of \$368 of Hughes's settlement funds and constitutes conduct amounting to moral turpitude.

Count Two (Rule 4-100(B)(4))

We also find Michael culpable of violating Rule 4-100(B)(4). This rule requires an attorney to promptly pay funds to which the client is entitled, and extends to third parties to whom the attorney has agreed to distribute the client funds. Michael had notice of Blue Cross's medical lien and requests for payment. Michael testified that he negotiated a reduction in the amount owed and agreed to pay Blue Cross on behalf of Hughes. Further, as is evident from the settlement breakdown statement, Hughes anticipated that Michael would use the remaining funds to reimburse Blue Cross. Michael failed to satisfy his obligation to reimburse Blue Cross on behalf of Hughes as promised, in willful violation of Rule 4-100(B)(4).

Count Three (Section 6068)

The final count alleges that Michael failed to cooperate with the State Bar during its investigation, in violation of Section 6068. The hearing judge found that Michael was not culpable because Michael did not receive the letters the State Bar sent in December 2005 and January 2006, and then he fully cooperated once he was located in February 2007. We do not agree.

After Michael closed his practice in December 2004, he decided to "drop from the face of the earth." Michael failed to update his State Bar membership record address until five months later. Even after updating his State Bar records, for over a year he depended on his cousin, whom he knew to be unreliable, to check his mailbox. Michael's own gross carelessness in fulfilling his ethical duties prevented the State Bar from contacting him for over a year. Michael's carelessness showed indifference to his obligations to his former clients and to the State Bar, frustrated the investigation of this matter, and thus, constitutes a willful violation of Section 6068. To hold otherwise would only condone an attorney's ostrich-like behavior, which we are unwilling to do.

DISCIPLINE

The primary purposes of disciplinary proceedings are the protection of the public and the courts and the legal profession, the maintenance of high professional standards for attorneys, and the preservation of public confidence in the legal profession. There is no fixed formula for determining the proper level of discipline.

We do not find that Michael acted pursuant to a good faith belief that he had paid Blue Cross because this assumption was unreasonable in light of his inadequate accounting procedures. When Michael closed his office, the balance remaining in his CTA clearly should have alerted him to a problem requiring investigation. His decision to do nothing was unreasonable.

For all the reasons cited, we recommend that Jon Michael be suspended for one year, that execution of that suspension be stayed, and that he be placed on probation for two years on the conditions that he must be suspended from the practice of law for the first 90 days of probation.

In the Matter of Stephine Webb, A Member of the State Bar

Review Department of the State Bar Court (2006)

In this proceeding, the Office of the Chief Trial Counsel of the State Bar seeks disbarment for Stephine Webb's alleged commingling of client trust funds with personal funds, and her failure to cooperate with the State Bar.

Webb was admitted to the practice of law in 1984. Webb had been married, but is now divorced. As a result of the divorce, Webb obtained a post office box in San Fe, Columbia to be used as her official membership records address, so that her ex-husband could not track her down. Because this mailbox was used for such a limited purpose, she often did not check it.

In November 2004, Webb was diagnosed with breast cancer. She had surgery to remove the tumor in December 2004 and chemotherapy and radiation for her cancer. During the period, she felt very fatigued and uncomfortable, and was unable to attend to her regular duties at work. In fact, she only worked a couple days in the month.

Count One: Commingling Personal Funds in CTA

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account (CTA) and that no funds belonging to the attorney shall be deposited therein or otherwise commingled therewith.

The State Bar investigator reviewed the bank statements of the CTA. He identified several deposits that made him feel that Webb was commingling her own funds with those in the CTA. The State Bar attorneys simply adopted his numbers and inserted them in the notice of disciplinary charges, and then offered no other proof that the deposits and withdrawals were improper.

At trial, Webb satisfactorily explained the deposits and withdrawals identified by the investigator. The State Bar has therefore failed to sustain its burden of proof by clear and convincing evidence as to the commingling alleged in Count One.

Count Two: Failure to Cooperate in State Bar Investigation

Section 6068 provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

The State Bar investigator sent Webb a letter requesting a written response, dated February 25, 2005, addressed to Webb at her official membership records address. The letter was not returned by the post office, nor was it responded to by Webb. On March 18, 2005, the investigator sent a second letter to Webb's official membership records address requesting the same information. This letter was also not returned by the post office, nor was it responded to by Webb.

On April 21, 2005, the investigator spoke with William Hopkins, the named partner in Webb's firm, who is also Webb's son. Also on the same day, the investigator spoke with Webb. He learned from Webb that she was ill with cancer, and that because of her illness, she was not checking her post office box for mail. She told him that she would soon respond to his two letters. However, he never received anything from Webb.

On June 9, 2005, Webb changed her official membership records address to a post office box in Tiburon, Columbia. On October 13, 2005, the investigator sent Webb a letter to her new official membership records address. This letter was not returned by the post office, nor was it responded to by Webb. As before, a follow-up letter was sent to Webb's official membership records address requesting the same information. Again, the letter was not returned by the post office as undeliverable, nor was it responded to by Webb.

The charge of failing to cooperate with the State Bar in willful violation of Section 6068 is based solely on the failure to respond to these notices. Alone, that would establish a prima facie case of violation of Section 6068.

Webb's failure to cooperate with the State Bar was either in the middle of her chemotherapy and radiation treatment for cancer, or during her recovery, albeit near the end. During the entire period from her initial surgery through

November 2005, however, Webb credibly testified that she suffered from serious fatigue and an inability to focus on managing her business. Further, the State Bar investigator was aware of her medical condition. It is significant to note that when she was contacted prior to her diagnosis and commencement of treatment, she cooperated fully. Her timely correspondence with the State Bar only stopped when she received the bad news of her cancer and began her treatment.

As such, the court finds that, at least with respect to the alleged violation of Section 6068, compelling mitigating circumstances existed which clearly predominated. The State Bar has also failed to sustain its burden of proof by clear and convincing evidence as to the commingling alleged in Count One.

The charges therefore are dismissed with prejudice.

FEBRUARY 2016 ESSAY QUESTIONS 4, 5 AND 6



California Bar Examination

Answer all 3 questions.

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

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

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

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

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

QUESTION 4

Pop obtained a liability insurance policy from Insurco, covering his daughter Sally and any other driver of either of his cars, a Turbo and a Voka. The policy limit was \$100,000.

On the application for the policy, Pop stated that his cars were driven in Hometown, a rural community, which resulted in a lower rate than if they were driven in a city. However, Sally kept and also drove the Voka in Industry City while attending college there.

Subsequently, Pop asked Insurco to increase his coverage to \$500,000; Insurco agreed if he paid a premium increase of \$150; and he did so. Days later, as he was leaving for Sally's graduation, Pop received an amended policy. He failed to notice that the coverage had been increased to \$250,000, not \$500,000.

Unfortunately, while driving the Turbo in Industry City, Pop caused a multi-vehicle collision. At first, Insurco stated it would pay claims, but only up to \$250,000. Six months later, Insurco informed Pop that it would not pay any claim at all, because of his statement on the application for the policy that both the Turbo and the Voka were located in Hometown.

Insurco filed a complaint against Pop for rescission of the policy. Pop filed a cross-complaint to reform the policy to increase coverage to \$500,000.

1. What is the likelihood of success of Insurco's complaint, and what defenses can Pop reasonably raise? Discuss.
2. What is the likelihood of success of Pop's cross-complaint, and what defenses can Insurco reasonably raise? Discuss.

QUESTION 5

Mike, Sue, Pam, David, and Ed worked at Ace Manufacturing Company. Mike had been the president and Sue supervised Pam, David, and Ed.

Pam was fired. A week later, David circulated the following email to all the other employees:

I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.

A month later, Mike died.

Pam sued David for defamation.

At trial, Pam testified that, although it is true she was fired, the remaining contents of the email were false. Pam called Ed, who testified that he had received the email at work, that he had printed it, and that he had received hundreds of other unrelated emails from David. Pam introduced a copy of the email through Ed.

In defense, David called Sue, who testified that she had caught Pam stealing \$300 from the petty cash drawer, and that, when Sue confronted Pam and accused her of taking the money, Pam simply walked away. David himself testified that the contents of the email were true. He also testified that he had overheard Pam and Mike yelling at each other in Mike's office a few weeks before Pam left; that he recognized both of their voices; and that he heard Pam cry, "Please don't leave me!," and Mike, in a measured tone, reply, "Our affair is over — you need to get on with your life."

Assume all appropriate objections were timely made.

Should the court have admitted:

1. The email? Discuss.
2. Sue's testimony? Discuss.
3. David's testimony about
 - a. what Pam said to Mike? Discuss.
 - b. what Mike said to Pam? Discuss.

Answer according to the California Evidence Code.

QUESTION 6

On February 1, Bing Surfboards (“Bing”) ordered 400 gallons of epoxy from Super Chemicals (“Super”) using its standard purchase order. Bing’s purchase order provided that delivery would be no later than February 20, but stated nothing about warranties, disclaimers, or remedies. Super responded with its standard acknowledgment, which purported to accept the order and confirmed that delivery would be no later than February 20. It also provided: (1) “Seller disclaims all warranties of merchantability and fitness.” (2) “In no event shall Seller be liable for consequential damages.” (3) “This acceptance is expressly made conditional on your assent to the terms of this acceptance.”

On February 15, Bing received the epoxy.

On February 20, Bing tested the epoxy by manufacturing 50 surfboards. The epoxy did not harden properly, leaving the surfboards useless.

On February 23, Bing emailed Super stating that the epoxy had failed to harden properly and that it was returning the remaining epoxy.

On February 25, not having heard from Super, Bing bought 400 gallons of epoxy from one of Super’s competitors, paying a substantially higher price for quick delivery, which was necessary to avoid a shutdown of Bing’s production line.

On February 26, Super informed Bing that it was shipping replacement epoxy to arrive the following day. The original epoxy had failed to harden because of manufacturing defects of which Super was unaware. Although the replacement epoxy was not defective, Bing rejected delivery and refused to pay.

Bing has sued Super for the increased price of epoxy it had to pay to Super’s competitor, and for loss due to 50 defective surfboards.

Super has sued Bing for rejecting its replacement shipment and for not paying under the contract.

1. Is Bing likely to prevail in its suit? Discuss.
2. Is Super likely to prevail in its suit? Discuss.



February 2016

**California
Bar
Examination**

**Performance Test B
INSTRUCTIONS AND FILE**

JAY MINOR v. LUCINDA MINOR

Instructions

FILE

Memorandum from Sharon Jenson to Applicant

Guidelines for Persuasive Briefs and Memoranda

Notes on Interview with Lucinda (Luci) Minor

Settlement Agreement (excerpts)

Memorandum of Points and Authorities
in Support of Motion to Modify Settlement Agreement
and to Exclude Evidence

JAY MINOR v. LUCINDA MINOR

INSTRUCTIONS

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

O'HALLARAN, MEYER & JENSON

**224 Court Street
Hamilton, Columbia**

MEMORANDUM

TO: Applicant

FROM: Sharon Jenson

DATE: February 25, 2016

RE: Jay Minor v. Lucinda Minor

We represent Lucinda Minor ("Luci") opposing a post-dissolution motion filed against her by her ex-husband, Jay Minor. We had represented her during the dissolution three years ago, which the parties settled through mediation. They had one son, who was an adult at the time. The agreement divided the marital estate equally, and both parties waived their claims for spousal support.

Jay has filed a Motion to Modify the Settlement Agreement, alleging that the agreement rested on a mutual mistake, together with a motion to exclude the testimony of the parties and the mediator about what the parties said during the mediation.

Please draft a persuasive Memorandum of Points and Authorities rebutting Jay Minor's contentions, both as to mutual mistake and as to mediation confidentiality.

O'HALLARAN, MEYER & JENSON

**224 Court Street
Hamilton, Columbia**

MEMORANDUM

TO: All Attorneys
FROM: Executive Committee
RE: Persuasive Briefs and Memoranda

In drafting persuasive briefs, the firm conforms to the following guidelines:

Except when there is already an agreed or stipulated identification of the facts, the briefs should begin with a short and concise Statement of Facts, using only those facts supported by the record. The Statement of Facts is not an indiscriminate recitation of all the facts in the case. Include only those facts you need for your persuasive arguments. Although the facts must be stated accurately, careful selection of the ones pertinent to the legal arguments and that support our client is not improper.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The Argument section of the brief should contain separate segments, each labeled with headings that summarize the argument in the ensuing segment. Do not write a brief that contains only a single broad heading. Each heading should succinctly state the reasons why the tribunal should adopt the position you are advocating and not merely a bare legal or factual proposition.

The body of each argument should match the relevant facts to the legal authorities and argue persuasively how the facts as applied to those authorities support our client's position. Authority that favors our client should be emphasized, but contrary authority should be addressed in the argument and distinguished or explained, not ignored. Do not reserve argument for reply or supplemental briefs.

You need not prepare a table of contents, a table of cases, a summary of the argument, or an index. These will be prepared after the draft is approved.

NOTES ON INTERVIEW WITH LUCINDA (LUCI) MINOR

February 11, 2016

I met with Luci Minor today about her ex-husband's recent efforts to claw back some money out of their dissolution settlement. Her ex-husband, Jay Minor, has hired Joe Gaines to file a Motion to Modify the Settlement, as well as a motion to exclude certain testimony.

In the original settlement, Luci got the main house here in Hamilton, her own pension, and an additional \$200,000 taken out of their main investment account. Jay got the vacation home at the lake, his own pension, and the balance of the investment account, worth an additional \$300,000 at the time. She says that the papers seem to represent that much accurately.

According to her, her long-standing doubts about the investment account turned out to be true. Beginning about 15 years ago, Jay started investing with Saint Gaudens Investments ("SG"), based on a friend's recommendations that SG was producing returns that were well above market for a sustained period. Jay hoped that SG could help him fund their son, Jay Jr.'s, college education. (Jay Jr. had graduated at the time of the dissolution and was paying his way through grad school at the time.) SG did help out with that, and brought extraordinary returns, substantially increasing Jay's initial investment by the time of the dissolution.

However, Luci never believed that SG was for real. It was "too much of too good to be true," in her words. She never said as much to Jay, but by the time of the dissolution, she wanted out. That was why, in mediation, she insisted that Jay take over the SG account, and that she cash out as much as was needed to equalize their shares. Also in mediation, she told Jay that he should get out too.

What she remembers specifically is that in the mediation, she told Jay that SG had slowed down in recent years. She also told Jay that she had heard several fairly reliable rumors that major investors in SG were beginning to cash out in full. She said that she didn't want to take any risks with SG, and wanted cash. Jay said that he had heard those same rumors, but that he had investigated them, and had talked with Theodore Saint Gaudens, head of SG. He said that he was more than happy to take his chances, and that she would come to regret not keeping her money "where it would do the most work."

Luci is confident that the mediator will recall the conversation going exactly as she recalls it. How to handle the SG account was the major focus of their settlement discussions.

After the settlement, Jay withdrew the \$200,000 from SG and paid it to Luci promptly.

A little over a year ago, she said that SG crashed. She heard about it first from one of the friends who had advised her at the time of the dissolution, and then she heard it on the news. Then she heard from Jay. He said that he now realizes that the account had been bad all along, and that, as far as he was concerned, the account had a zero value, not only now, but back at the time of the dissolution. He then asked her for \$150,000. He said that they had always agreed that they should split things evenly. Without the SG money in the picture, she ended up with \$300,000 more than he had at the time of the dissolution, and that a \$150,000 payment would make them square.

Luci rejected him, quickly and angrily. She reminded him of what he said during the mediation, and said that she bet that the mediator would back her up. He threatened her with a lawsuit, and she said, "Fine."

SETTLEMENT AGREEMENT

Jay Simon Minor (the "Husband") and Lucinda Elaine Minor (the "Wife") enter into this Settlement Agreement as a full and final resolution of all claims between them arising out of their dissolution.

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4. The Wife will receive as her share of the marital estate the following assets:

- the parties' principal residence in Hamilton, Columbia, valued for purposes of this agreement at \$200,000.

- all of the value in her pension accounts as listed in the appendix to this agreement, valued for purposes of this agreement at \$200,000.

5. The Husband will receive as his share of the marital estate the following assets:

- the parties' vacation residence in Lakes County, Columbia, valued for purposes of this agreement at \$100,000.

- all of the value in his pension accounts as listed in the appendix to this agreement, valued for purposes of this agreement at \$200,000.

- the entire value of the parties' investment account with Saint Gaudens Investments, valued for purposes of this agreement at \$500,000. The wife will execute whatever documentation is required to transfer sole ownership of this investment account to the Husband.

6. The parties intend that they each receive one-half of the entire marital estate. In furtherance of this goal, the Husband agrees that, within two months of the final decree in this dissolution, he will withdraw \$200,000 from the investment account with Saint Gaudens Investments, and transfer that amount in cash to the Wife.

Joseph Gaines
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24 City Square
Hamilton, Columbia

Attorneys for Petitioner, Jay Simon Minor

**IN THE SUPERIOR COURT OF HAMILTON COUNTY
STATE OF COLUMBIA**

<p>JAY SIMON MINOR,</p> <p>Petitioner,</p> <p>v.</p> <p>LUCINDA ELAINE MINOR,</p> <p>Respondent.</p>	<p>Docket No. 43-4443</p> <p>MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY SETTLEMENT AGREEMENT AND TO EXCLUDE EVIDENCE</p>
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I. FACTS

Petitioner and Respondent received a dissolution from each other by final decree of this court, dated April 20, 2013. In a Settlement Agreement, the parties divided total assets with an approximate value of \$1,200,000. The parties agreed that each party should get an equal share of those assets, or \$600,000. As part of the marital estate, the parties discussed ownership of what they believed to be an account at the investment firm of Saint Gaudens Investments ("SG"). At the time of their agreement, they believed that account to hold roughly

\$500,000 in investment securities. Petitioner received the entire value of that account as part of his share. To equalize the values of each party's share, the parties agreed that Petitioner would withdraw \$200,000 from the SG account and transfer that amount in cash to Respondent. Petitioner accomplished this withdrawal and transfer within two months after the final decree of this court.

Thirteen months ago, Petitioner received notice from the Securities and Exchange Commission that the head of SG, Theodore Saint Gaudens, had been arrested for securities fraud. Petitioner learned that, for over 17 years, Saint Gaudens had been using SG to run a "Ponzi scheme." Under such a scheme, investments by current investors are used to pay returns to earlier investors, at rates of return well in excess of market averages. Twelve months ago, Petitioner received a preliminary accounting of the assets of SG, which indicated that the firm did not have and had never had any significant assets at any one time. Subsequent accountings of SG indicate that the total amounts entrusted to the firm came to over \$150,000,000, and that none of the present investors in SG would receive any portion of their investments.

On information and belief, Petitioner understands that Respondent intends to call the mediator as a witness in connection with Petitioner's Motion to Modify.

II. ARGUMENT

Petitioner requests that the court find that the parties entered into their Settlement Agreement in this case based on a mutual mistake. Petitioner and Respondent entered into their settlement agreement based on the belief that they would be able to recover funds that they had invested in SG, and indeed that those funds were available in full as of the date of the settlement. That belief was mistaken: An account as such did not exist at SG, and all of the funds invested by Petitioner and Respondent had been used to pay off earlier investors. Both Petitioner and Respondent suffered from the identical mistaken belief about the nature and reliability of the SG account at the time of the settlement agreement. The belief resulted in an allocation of \$500,000 in value

to Petitioner, and a transfer of \$200,000 to Respondent, out of an estate that totaled (without the SG “holdings”) no more than \$700,000.

Petitioner thus requests that the court reform the Settlement Agreement to require the equalization of the parties’ share at the time of the settlement agreement, without considering the value assigned to the SG investment account.

A. The Parties’ Mistake About the Existence of the Funds in the SG Account Existed at the Time of the Settlement Agreement.

The allegations in this motion provide a sufficiently specific basis on which the court can make a finding of mutual mistake. *Snyder v. Abrams* (Col. S. Ct. 2008). The mistake about the existence of the SG investment account existed at the time of the Settlement Agreement. At the time, both Petitioner and Respondent believed that the SG investment firm operated as a legitimate investment company, and that either or both of them would have the right to withdraw their funds in full from the account at any time, then or in the future. In fact, SG was nothing more than a Ponzi scheme, with all of the funds paid in by the parties already paid out to other earlier investors to generate the impression of favorable returns. As a result, Petitioner’s request comports with Columbia law, which requires that allegations of mutual mistake focus solely on mistakes existing “at the time the parties entered into the stipulation.” *Nathanson v. Nathanson* (Col. Ct. App. 2010).

B. The Existence and Availability of the Funds in the SG Investment Account Represent a Central Element of the Parties’ Settlement Discussions.

Moreover, the facts at issue are material, if not central, to the parties’ negotiation. *Snyder v. Abrams* (Col. S. Ct. 2008). Even including, for purposes of argument, the value of the SG “holdings”, the total value of the marital estate

came to \$1,200,000, of which those “holdings” constituted \$500,000. Removal of that value from the negotiations would have had a substantial impact on the discussions. Moreover, it seems beyond question that, had the parties both known of the fact that SG operated a Ponzi scheme, they would have negotiated a different settlement.

C. The Mistake in This Case Relates to Facts Existing at the Time of the Settlement, Not to Future Valuation of Assets or Uncertain Future Events.

This case does not present a mere dispute over future fluctuations in the valuation of assets; see *Edwards v. Edwards* (Col. Ct. App. 1985). Nor is it the same as those cases in which the parties were mistaken over an event that could not occur until some time in the future. *Laramee v. Laramee* (Col. Ct. App. 1972) (no mutual mistake where parties agreed to payments based on a future retirement date that later changed). Rather, this case presents a unique case, where the parties believed an asset existed that in fact did not exist.

D. Testimony About Statements Made During Mediation Between the Parties Only Prove the Amount of Claim and Should Not Be Admitted.

The parties’ Settlement Agreement is unambiguous in establishing the parties’ intentions to divide their existing marital estate equally between them. In the absence of ambiguity, the mediator’s testimony thus constitutes inadmissible extrinsic evidence. *Blalock v. Gross* (Col. S. Ct. 2008). The mediator’s testimony will only serve to highlight the parties’ discussions as to the size of the share to be allocated to each party pursuant to the agreement. It constitutes information sought to prove “the amount of the claim” and is thus inadmissible under Mediation Rule 2.11. *Blalock v. Gross* (Col. S. Ct. 2008).

For these reasons, and for the reasons stated in the foregoing statement of facts, Petitioner seeks reformation of the contract in accordance with his pleading, on the ground of mutual mistake, and requests that this court bar the admission of any testimony from the parties or the mediator about statements made by the parties during the mediation leading up to the parties' final settlement agreement.

DATE: February 8, 2016

GAINES, HOYT & STEPHENS, LLC

By: Joseph Gaines

Joseph Gaines

Attorneys for Petitioner,

Jay Simon Minor



February 2016

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JAY MINOR v. LUCINDA MINOR

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Columbia Mediation Rules, Rule 2.11

Snyder v. Abrams

Columbia Supreme Court (2008)

Nathanson v. Nathanson

Columbia Court of Appeal (2010)

Blalock v. Gross

Columbia Supreme Court (2008)

COLUMBIA MEDIATION RULES

Rule 2.11. Compromise and Offers to Compromise

Evidence of conduct or statements by any party or mediator at a mediation session is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Such evidence may be admitted to prove or disprove fraud, duress, or other cause to invalidate the mediation result in the proceeding with respect to which the mediation was held or in any other proceeding between the parties to the mediation that involves the subject matter of the mediation.

Snyder v. Abrams
Columbia Supreme Court (2008)

Sidney Snyder and Janeen Abrams married on May 26, 1991, and received a dissolution from a judgment dated March 28, 2005. The judgment of dissolution incorporated the parties' stipulation of settlement (hereinafter the "Agreement"), executed on February 2, 2005. The Agreement provides, in relevant part, that Snyder's stock awards from his employer, Alpine Investments Inc. ("Alpine"), would be "divided 50–50 in kind." The Agreement specified that 3,800 shares of the stock awards were available for division and allocated 1,900 shares to Abrams.

Abrams then sold her 1,900 shares. Later, Snyder learned that only 150 shares remained. According to an affidavit attached to Snyder's motion to modify, the number of shares on which the parties premised the Agreement (3,800) constituted the gross number of delivered and outstanding shares available prior to the payment of taxes, fees, and other withholdings. Alpine used a significant number of the total number of gross shares to pay taxes and fees, and make other withholdings. The net number of shares available for division by the parties thus totaled only 2,050.

Abrams rejected Snyder's demand that she remit to him the shares or the value thereof in excess of her 50% share. Snyder then commenced the instant action, eventually moving for summary judgment. Snyder argued that a mutual mistake led the parties to use the gross number of shares, 3,800, instead of the accurate number of 2,050. The plaintiff accordingly sought reformation of the agreement to reflect the net number of shares actually available for division. Abrams opposed the motion, arguing that the only mistake had been made by Snyder.

Snyder's motion for summary judgment was granted by the trial court.

Under Columbia law, settlement agreements in dissolution cases constitute independent contracts, subject to the principles of contract law. The parties may not seek relief from their own agreement, unless they can establish cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident. The party seeking to

demonstrate any of these grounds bears a heightened burden of proof, and must establish them by clear and convincing evidence.

To reform a settlement agreement on the ground of mutual mistake, a party must demonstrate that the mistake existed at the time the parties entered into the stipulation. *Baker v. Baker* (Col. Ct. App. 1995) (affirming finding of mistake where parties later discovered that a restrictive covenant barred subdivision of real estate to be subdivided pursuant to the agreement); *Franciosa v. Marinelli* (Col. Ct. App. 1998) (affirming finding of mistake where parties later discovered that a pension earned as a public employee could not be transferred).

Moreover, the mistaken fact must form so substantial a premise for the agreement that the stipulation does not represent a true meeting of the parties' minds. The alleged mistake must involve a fundamental assumption of the contract, in the sense that the mistake vitally affects the facts that form the basis of the parties' contract. Here, Snyder has established a prima facie case of mutual mistake. Both the final agreement and all five earlier drafts refer to the gross number of shares as available for division. Snyder repeatedly generated summaries of those shares in his capacity as an Alpine employee, and routinely shared those summaries with Abrams. Abrams concedes that both parties and their attorneys relied on those summaries throughout the negotiations.

However, neither the parties nor their counsel apparently realized that the number of 3,800 shares that they were using represented the gross shares, not the net shares Alpine would deliver after it paid taxes and fees, and made other withholdings. Due diligence might have advised that their attorneys pin down the net number of shares with greater precision. We have held that where information to correct a mistake is readily available, one party may not hold out the mistake as a reason for invalidating the agreement. And of course, unilateral mistake does not constitute a ground for reforming an agreement.

In this case, the parties used the figure of 3,800 shares throughout their negotiations, without question from either side. This constituted a mutual mistake that undermined their intent to divide the net shares available for division.

The trial court correctly focused the inquiry on the parties' intention as indicated in their language that the shares be "divided 50–50 in kind." A practical interpretation of this language supports the conclusion that the parties intended "in kind" to mean actual shares or their equivalent monetary value.

The trial court correctly reformed the agreement to refer to the net shares available for division, and to provide that each party should receive one-half of those net shares or their equivalent monetary value.

Affirmed.

Nathanson v. Nathanson

Columbia Court of Appeal (2010)

This appeal requires us to determine whether the trial court erred in reforming a provision in the parties' dissolution settlement agreement on the ground of mutual mistake. The parties had agreed that Respondent would promptly receive the proceeds from the sale of stock held in a privately-owned bank. Two years later, the sale had not occurred, the bank had failed, and the stock had no market or discernible value.

George and Verna Nathanson (respectively "Husband" and "Wife") married in 1978, and received a dissolution in 2007. They had two children, both adults at the time of the dissolution. During the marriage, they enjoyed a prosperous lifestyle. Their 2005 income tax return listed more than \$3,000,000 in earned and unearned income for the year. Filings in their dissolution in 2007 total gross assets of nearly \$19,000,000, and joint monthly expenses of \$44,000. The dissolution required disposition of numerous assets acquired during the marriage, including the marital home, a beach house, several vehicles, and many stocks, mutual funds, and investment accounts.

With the aid of their attorneys, the parties entered into a Property Settlement Agreement, which was then incorporated into a final judgment of dissolution entered on May 23, 2007. This Agreement explicitly provided that equitable distribution of the parties' assets substituted for any obligation of the husband to pay spousal support. Husband was expressly relieved from any current or future application for spousal support based on an understanding that the assets distributed to Wife would provide the income she needed to maintain her economic status and lifestyle.

Paragraph twenty-seven of the agreement listed eighteen accounts and securities with a total value of more than \$4,100,000 as assets to be retained by or conveyed to Wife exclusively. Among the eighteen assets was a listing for 62,000 shares of stock with a stated value of \$1,085,000 in privately-owned Aeolian Bank. Two handwritten notations accompanied the designation of this asset: the words "sale

directed on 5-18-07" written alongside the listing, and a footnote that stated "Salesman has been directed that the proceeds be promptly wired to the Wife." No other asset included any similar notation or footnote.

Husband said a call had been placed to William Decker (the president of Aeolian Bank) at the time of the settlement conference directing him to sell the stock, and that Wife and the attorneys were present during the call. Decker stated over a speaker phone that the Bank had purchased a large number of its own shares earlier that month and agreed that the parties' holdings would then be listed at \$1.085 million.

Two years after the dissolution, Wife filed a motion to enforce the parties' Agreement as to the Aeolian Bank stock, and directing defendant to sell that stock immediately. Husband opposed the motion, declaring that he had fulfilled his obligation under the settlement agreement, that the Aeolian Bank had gone out of business, and that the stock had no value.

Based on this testimony, the trial court found that the parties operated on the basis of a mutual mistake about the marketability and ultimately the value of the Aeolian Bank stock at the time of entering into the settlement agreement. It found that the parties had the specific intent that Wife would get the proceeds of the Aeolian Bank stock sale that had been directed on 5/18/07 "promptly wired" to her. It noted that both parties and the nonparty witness believed as of May 18, 2007, that the stock had a particular value and was immediately marketable. Contrary to this belief, the court found that both parties were mistaken in thinking that the total value of their marital estate was \$1.085 million more than it actually was.

Finally, the trial court reformed the relevant provisions of the settlement agreement. The trial court found that each party should bear the consequences of the mistake equally.

No genuine dispute exists regarding the parties' meaning and their intent with respect to distribution of the Aeolian Bank stock. The unique notations appended to the listing of the Aeolian Bank stock in the settlement agreement showed the parties intended to sell that stock immediately and transfer the proceeds promptly to Wife,

providing her with about \$1,085,000 in cash. Although Husband correctly argues that he did not guarantee the stock could be sold for that amount and at that time, he does not credibly dispute the parties' intention.

Husband argues that a finding of mutual mistake requires that both parties agree when they attempt to reduce their understanding to writing, but that the writing does not express the understanding correctly. He contends that he was not mistaken, because he did not believe that that the stock would be immediately sold for the \$1,085,000 asking price. But this argument misstates the basis of the trial court's ruling. The court found that the parties intended to provide \$1,085,000 in cash proceeds to Wife, but mistakenly thought that their intent could be accomplished by the prompt sale of the Aeolian Bank stock. They did not intend to distribute the Aeolian Bank stock to Wife as an investment asset.

Finally, Husband argues that Columbia prevents a finding of mutual mistake, where the mistake relates to a future fact. At the time of the dissolution, Husband contends, neither party anticipated that Aeolian Bank would fail, nor could they have done so. According to Husband, to reform an agreed-upon division of assets when one of the assets later becomes valueless directly contravenes the parties' own allocation of risks and benefits in their settlement agreement. In this case, Husband contends that Wife accepted and should bear the entire risk of Aeolian's failure.

Husband correctly notes that our courts do not generally reform dissolution agreements for mistakes relating to future events. For example, in *Laramie v. Laramie* (Col. Ct. App. 1972), the spouses agreed that the "Husband will pay one-half of his Civil Service Retirement payments to the Wife" when he retired. The wife assumed that the husband would retire at age 65, but he did not. The Court of Appeal refused to reform, noting that "mistaken expectations about the future are not grounds to set aside or reform a contract -- the mistake must relate to a past or present material fact."

Similarly, in *Edwards v. Edwards* (Col. Ct. App. 1985), a trial court refused to reform a division of property when, within months of the final decree, a rezoning decision substantially raised the value of a significant asset. The Court of Appeal

affirmed, stating that “to vacate a stipulation of settlement on the ground of mutual mistake, [a party must] demonstrate that the mistake existed at the time of the stipulation.” In its view, the mere possibility of a future rise (or fall) in the value of an asset did justify a finding of mutual mistake.

These cases all involve situations where, through settlement agreements, the parties clearly and specifically allocated and accepted the risks associated with future events. The critical inquiry in all of these cases focused on the parties’ intentions at the time of contracting. Where the parties’ intentions are clear, but where they have mistakenly selected means that make it impossible to carry out those intentions, the court may reform the contract to carry out the parties’ goals.

In the case at hand, the trial court found that the parties intended that Wife would receive a cash payout of \$1,085,000 from the sale of the Aeolian Bank stock. The court also found that the parties did not intend that Wife would receive the stock itself as an investment. These findings necessarily imply that the parties did not allocate to the Wife the risk of future fluctuations in the value of the stock, nor the complete failure of the Bank. Instead, Husband assumed these risks, by agreeing to assure the sale of the stock so as to produce the agreed-upon cash payout.

We find no basis to overturn the trial court’s ruling.

Affirmed.

Blalock v. Gross
Columbia Supreme Court (2008)

On December 31, 1996, Wife and Husband were married, and on October 3, 2001, Wife filed a petition for dissolution. On March 21, 2002, Wife and Husband took part in a mediation of the final settlement of their dissolution action, resulting in the Agreement. The trial court approved the Agreement and entered it as part of the final decree on March 22, 2002.

The Agreement provided in part that Husband would give Wife an interest in a Promissory Note, secured by a mortgage on newly constructed residential real estate. Husband retained ownership of the real estate, and agreed to pay Wife's interest in the Promissory Note out of the proceeds of sale, when the real estate sold.

The Promissory Note reads as follows: "Borrower [Husband] is to pay the sum of Twenty-three Thousand Dollars (\$23,000) and the total of all documented construction costs, not to exceed Eighty Thousand Dollars (\$80,000)." The note further requires that the proceeds of sale were to go into escrow pending resolution of all claims to the proceeds.

On February 6, 2003, Husband sold the property for a selling price of \$115,000. On the same date, Husband paid Wife \$23,000. Husband placed \$92,000, the balance of the proceeds, into escrow.

Wife then filed a motion to enforce judgment, arguing that she should receive an additional \$80,000 from the amounts in escrow. In reply, Husband argued that the Agreement and the Promissory Note unambiguously awarded only \$23,000 to Wife, allocating the balance of any proceeds to him.

At hearing, both the parties and the mediator who drafted the Agreement testified. The trial court concluded that Wife had a contractual right only to \$23,000. This appeal followed.

Wife contends that the trial court erred when it admitted the testimony of the mediator to resolve the alleged ambiguity in the agreement. We agree. No ambiguity exists in the Agreement which might justify the taking of extrinsic evidence concerning its terms. Moreover, to the extent that any ambiguity exists, Columbia's Mediation Rules bar the introduction of the mediator's testimony on this issue.

General principles of contract law govern settlement agreements in the same way as any other agreement. A court should enforce a settlement agreement if the contract contains no ambiguities and if the court can discern the parties' intent from the written terms. Absent an ambiguity, the terms themselves control. We do not construe the contract or look to extrinsic evidence, but will merely apply the contractual provisions.

Here, the note requires Husband to pay Wife "the sum of Twenty-three Thousand Dollars (\$23,000) and the total of all documented construction costs, not to exceed Eighty Thousand Dollars (\$80,000)."

At trial, the court permitted testimony from the mediator about the parties' conversations concerning this particular Promissory Note. Testifying from his notes of the mediation sessions, the mediator stated that the parties continually referred to the Note as "the \$23K Note", and discussed what would happen when Husband paid Wife the \$23,000 stated on the face of the Note. In addition, the mediator testified that it was his understanding, based on the parties' discussions, that Wife "was to receive \$23,000" from the Note.

This testimony appears to contradict the unambiguous language of the Agreement and the Promissory Note. The Note specifically entitles Wife to receive both \$23,000 and up to \$80,000 in construction costs. Nothing in the Agreement or in the Note contradicts this outcome. The parties unambiguously expressed their intention that Wife should receive up to \$103,000 upon the sale of the property. The trial court erred in finding otherwise.

Given the lack of ambiguity in the Agreement, we could resolve this case with a finding that the admission of the mediator's testimony as extrinsic evidence was itself in

error. However, important policy considerations compel us to state an additional ground for our decision.

Mediation Rule 2.11 of the Columbia Mediation Rules states that statements by any party at a mediation “is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim”, but “may be admitted to prove fraud, duress, or other cause to invalidate the mediation result.”

Here, Husband called the mediator as a witness in an attempt to establish the amount of the claim, in contravention of the foregoing mediation rule. The trial court’s decision to permit this testimony thus directly contravenes Rule 2.11.

Husband contends that the disparity in the parties’ contentions concerning the amount owed to Wife constitutes a “cause to invalidate the mediation result” under Rule 2.11. Husband’s argument must fail. The listed grounds for “invalidation” include fraud, duress, or “other cause” for invalidation. The clear tenor of this list focuses on grounds for invalidation, and includes such other grounds as mutual mistake or unconscionability. In all these cases, parties may avail themselves of the mediator’s testimony for purposes of resolving a present issue about the validity of the agreement itself, and of seeking the court’s aid in reforming or rescinding the contract.

In this case, Husband has consistently pled and argued the ambiguity of the underlying contract, and used that ambiguity as grounds for introducing extrinsic evidence in support of his interpretation. Ambiguity may represent an interpretive challenge for any court in reading a contract. But under the law, a finding of ambiguity merely permits the court to consider other information in interpreting the contract. It does not give rise to the same “invalidation” that the grounds stated and implied that Rule 2.11 might support.

Mediation offers a vital tool to parties and to the courts in resolving disputes. We have long expressed the opinion that evidentiary protection for statements made during mediation facilitate candor in important negotiations that rely on the sharing of sensitive information. Rule 2.11 encourages litigants to speak freely in mediation without the concern that statements made while pursuing settlement through mediation would be

used at a trial on the merits if the mediation failed. The same considerations apply when one party seeks to undo the work that both parties have done in mediation, especially when that work produces an unambiguous result.

The trial court erred in permitting the mediator to testify to the parties' discussions in mediation, and in relying on that testimony in reaching its result.

Reversed.