FEBRUARY 2014
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

Three months ago, Dave was arrested for the burglary of a shoe store after a forensic investigation by the police department identified him as the burglar. Patty, a prosecutor, brought burglary charges against him.

A week ago, Patty saw a press release that the police chief was planning to issue to the media. It stated that Dave was a "transient" and had been "arrested for burglary by Inspector Ing, who is known for his ability to apprehend guilty criminals."

Four days ago, Patty received a report from a federal agency stating that the police department's forensic investigation identifying Dave as the burglar was unreliable.

Three days ago, Patty announced "ready for trial" at a pretrial conference.

Yesterday, Patty learned that two eyewitnesses had identified Dave as the burglar. Because she did not intend to use evidence from the forensic investigation, she did not disclose the federal agency report to Dave's attorney. Dave's attorney has never asked her to provide discovery.

This morning, Patty called the judge who will be presiding over Dave's trial to reassure him that there is ample non-forensic evidence to convict Dave.

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

Answer according to California and ABA authorities.

Question 2

Hank and Wendy are residents of California. Hank is a teacher and Wendy is an accountant.

In 2008, Hank and Wendy married. After their wedding, Wendy's mother deeded them a house as joint tenants. They moved into the house and used their earnings to furnish it in a lavish style, including an antique mirror in the entryway. One day, Hank gave the mirror to a friend who had admired it on a visit to the house.

In 2012, Wendy purchased a small office building where she established her own accounting practice. She paid for the building with funds saved from her earnings during her marriage and took title in her name alone.

In 2013, Hank and Wendy separated. Hank told Wendy that the house was henceforth her separate property and she said, "O.K."

After the separation, Wendy's income from the accounting practice tripled and she remodeled the office building with her increased earnings. Without Hank's knowledge, she then sold the building to Bob, who did not know that she was married.

In 2014, Wendy initiated dissolution proceedings.

1. What are Wendy's rights, if any, as to the antique mirror? Discuss.

2. What are Hank's and Wendy's rights, if any, as to the following:
   a) The house? Discuss.

   b) The accounting practice? Discuss.

   c) The office building? Discuss.

Answer according to California law.

Question 3

Paul, a resident of State A, had worked as a manager at the only hotel in State A owned and operated by Hotel, Inc. (Hotel), a large national chain. Paul's compensation was $100,000 per year. Hotel was incorporated in State B, where the majority of its hotels are located. Hotel's main corporate offices are located in State C.

Hotel terminated Paul's five-year employment contract when it had two years remaining. Paul immediately found new employment with compensation of $90,000 per year.

Paul timely sued Hotel in state court in State B, alleging wrongful termination of his employment contract. In his complaint, he sought reinstatement or, in the alternative, damages of $200,000 for the two years remaining on his employment contract at the time of termination. In State B, the measure of damages for wrongful termination of an employment contract is the amount a plaintiff would have earned absent the termination, less what the plaintiff actually earned during the post-termination contract period.

After the complaint was served on Hotel at its main corporate offices in State C, Hotel timely removed the case to federal district court in State B. Paul then filed a motion in federal district court to remand to state court. The federal district court denied the motion. Paul appealed the denial to the federal court of appeals.

Paul meanwhile filed a motion in the federal district court for an injunction requiring Hotel to reinstate him to his job. The federal district court granted Paul's motion and issued the injunction. A month and a half later, Hotel appealed the injunction to the federal court of appeals.

1. Did the federal district court correctly deny Paul's motion to remand the case to state court? Discuss.

2. How should the federal court of appeals rule on Paul's appeal? Discuss.

3. How should the federal court of appeals rule on Hotel's appeal? Discuss.

February 2014

California Bar Examination

Performance Test A

INSTRUCTIONS AND FILE

ADAMS v. KUSTOM SPAS, INC.

ADAMS v. KUSTOM SPAS, INC.

INSTRUCTIONS

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

MALLIN, BAINES & ARTHUR

ATTORNEYS AT LAW

Midvale, Columbia

MEMORANDUM

TO: **Applicant**

FROM: **William C. Baines**

DATE: **February 25, 2014**

SUBJECT: **Brianna Adams & Associates v. Kustom Spas, Inc.**

Our client, Brianna Adams, is a licensed broker who specializes in finding buyers for small businesses for sale in Columbia. Ms. Adams entered into a six-month listing agreement with Kustom Spas, Inc. to find a buyer for the business at a 10% commission. She was unable to put a deal together within the six-month term of the agreement, but several months later she learned that Kustom Spas was sold for $1.75 million to a person whom she had introduced to the transaction and that the broker who had handled the closing of that deal was Charles Smith. Both brokers lodged demands for a commission on the sale with the escrow office where the deal was pending. The deal closed, with the escrow agency holding in trust $175,000, just enough to cover Ms. Adams's commission, pending resolution of the contending claims of Adams and Smith.

We have just concluded an arbitration hearing. The issues are: (1) whether a commission is due; (2) who, if anyone, should receive a commission; and, (3) if a commission is due, how much should the commission be.

What I need from you is a draft of a post-hearing arbitration brief that persuades the arbitrator that Ms. Adams is entitled to a commission of $175,000 because she was the procuring cause of the sale, and that her claim is superior to Smith's claim. Please follow the format and guidance specified in the attached office memorandum regarding persuasive briefs. Although you will have to apply the facts in the Argument section of the brief, there is no need for an extensive Statement of Facts. Since we have just finished the hearing, the Arbitrator is quite familiar with the facts, so a fact statement of five or six sentences will suffice.

MALLIN, BAINES & ARTHUR

ATTORNEYS AT LAW

Midvale, Columbia

MEMORANDUM

September 14, 2013

SUBJECT: Persuasive Briefs

Unless otherwise instructed, attorneys shall include in all briefs a Statement of Facts written in such a way as to persuade the tribunal that the facts support our client's position. The Statement of Facts is not an indiscriminate recitation of all the facts in the case. 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 Argument section of the brief should contain separate segments, each labeled with carefully crafted 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. 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.

EXCERPTS FROM TRANSCRIPT OF ARBITRATION HEARING

Brianna Adams & Associates and Charles Smith, Claimants

v.

Kustom Spas, Inc.

DIRECT EXAMINATION OF CLAIMANT BRIANNA ADAMS by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Ms. Adams, please explain to the Arbitrator the nature of your business.

ADAMS: I'm the owner and principal of Brianna Adams and Associates in Midvale, Columbia. I'm a business broker. By that I mean that I represent companies or individuals who want to buy or sell a business, and I put the buyer and seller together and help them work out a satisfactory purchase and sale arrangement.

BAINES: How do you get paid for your services?

ADAMS: Usually it's by commission — a percentage of the price, varying from 5% to 10%, depending on the dollar magnitude of the deal.

BAINES: Which party to the transaction pays the commission — the buyer or the seller?

ADAMS: That depends on which side I'm representing. If my client is the buyer, the buyer usually pays, and vice versa if my client is the seller. In this case, I represented the seller, Kustom Spas, so that's who was supposed to pay me.

BAINES: At what point in the transaction do you get paid?

ADAMS: Ordinarily, it's at the time of the closing of the deal. The usual practice is to open an escrow with a bank or other fiduciary early in the process, and, as contract documents, escrow instructions, stock certificates, money, and other components of the deal are forthcoming, they are deposited in the escrow. And when the parties agree that the deal is ready to close, the escrow holder notifies everyone concerned. At that point, I file a formal written demand for my commission, and I'm paid from the proceeds of the sale.

BAINES: Okay, now, when did you undertake to represent Kustom Spas — that is, to find a buyer for that company?

ADAMS: Back in January 2013, I was in the bar at my country club, and I overheard two members talking about how one had sold his business and retired. The other one, Billy Koster — the owner of Kustom Spas — said he was trying to do the same thing but wasn't sure how to go about disposing of his business. I struck up a conversation with Billy, and one thing led to another.

BAINES: Tell us what happened after that.

ADAMS: Well, I told him that I was in the brokerage business specializing in small businesses and that maybe I could help him. We agreed to meet at his office on the next day — January 22, 2013.

BAINES: What happened then?

ADAMS: We met as planned. I asked a lot of questions, looked at his books of account, got an idea about the history of the business, and that sort of thing. He told me how much he hoped to sell for — $2.5 million cash. After we'd talked for some time, Billy — Mr. Koster — asked me what kind of arrangement I'd need in order to go forward.

BAINES: What did you tell him?

ADAMS: I said we'd need to sign my standard listing contract giving me the exclusive right to market his business for, say, six months or a year. The first thing I'd want to do after that would be to get a formal appraisal of the business. That would give both of us an idea of what the market for a spa manufacturing business would bear and what my commission range would be. He told me to go ahead and get things started.

BAINES: What did you do next?

ADAMS: First, I contacted an independent appraiser I usually work with – Martin Apple – and asked him to do an appraisal of Kustom Spas as soon as he could and to keep it confidential. He looked at comparables in the last year, examined Kustom Spas' books, made some inquiries about the company's market reputation, and came back with an appraisal of $1.75 million, including the company's good will and going-concern value. The company was debt-free except for trade creditors, so it looked like it would be a fairly clean deal without involving banks, lenders, and secured creditors.

BAINES: Why did you tell Mr. Apple to keep his work confidential?

ADAMS: Because, until the deal is made public, you don't want the news to hit the trade journals – to keep the wolves away. I mean keep other brokers from trying to horn in on the deal.

BAINES: Okay. What was the next step?

ADAMS: I met again with Mr. Koster. I knew he was going to be disappointed in the appraisal. It's not uncommon for sellers to overestimate the value of their businesses. Three things happened at this meeting that sent up red flags for me. First, he said he didn't want to give me an exclusive listing; second, he wouldn't agree to a one-year representation period; and third, he wouldn't budge from his $2.5 million price.

BAINES: Did Mr. Koster tell you why he didn't want to give you an exclusive listing or give you a one-year contract?

ADAMS: It was sort of vague – just that he didn't like to be tied down in case some other opportunity came along and that, if I had a one-year contract, he was concerned that I'd drag things out.

BAINES: Did you try to persuade him otherwise on any of those points?

ADAMS: No, not really. I've learned that it's not a good idea to start out the relationship by arguing with the client. Reality about the market and price range usually sets in later when the offers start coming in and negotiations start. So I said, "All right, let's go with a nonexclusive agreement for a six-month period and I'll do my best to market the company at your price."

BAINES: Let me show you a document we've marked in evidence as Exhibit A. Can you tell me what it is?

ADAMS: Yes. It's the listing contract Mr. Koster and I signed on February 1, 2013. It was for a six-month representation period ending July 31, 2013. It's my standard form, and, based on the size of the deal, we agreed to a 10% commission.

BAINES: Did Mr. Koster balk at all at the 10% commission?

ADAMS: Yes. He said he thought it was too high, but I said that is my standard commission for a deal of this size. I told him I might reduce it later if the deal didn't come in as high as he wanted. He grumbled but said okay.

BAINES: I notice that there's nothing in the contract concerning your right to receive a commission after the end of the representation period. Is that customary in the contracts you enter into?

ADAMS: No, I usually include an extension clause. That's a clause that covers the situation where a sale is made to someone I introduced to the deal after my contract is up. This time, however, I decided not to.

BAINES: Why is that?

ADAMS: Well, I sensed that Mr. Koster was going to be a hard sell – his asking price was just too high. And he was pretty clear that he didn't want to give me a contract for more than six months. He complained about the 10% commission. I was concerned that an extension clause in the contract might look to him like a back door effort to sneak in a representation period of more than six months. So I just settled for the language in paragraph 4B, which he didn't object to. It left it open-ended and I felt that I'd be in a position to claim a commission if I turned out to be the procuring cause of any sale, even if it happened after my contract expired.

BAINES: All right; how did you go about generating interest in buyers for Kustom Spas?

ADAMS: I advertised in the trade journals, you know, an ad describing the opportunity and stating, "See Brianna Adams and Associates for details." I contacted people I knew from prior deals who had expressed interest in buying a business. I also followed some leads Mr. Koster gave me – acquaintances of his who he said were hot prospects.

BAINES: Did your efforts generate any interest?

ADAMS: At first, beginning about the middle of February, there was the usual flurry of activity with maybe a dozen inquiries, but nothing very serious. The only one that seemed to hold any promise was from Artie Baylor, owner of Midvale Pool and Spa Service. In late April, a broker representing Mr. Baylor came to me and said that Mr. Baylor had been thinking about getting into the manufacturing end of the business and might be interested if the price was right. It was a fairly serious inquiry, and I really thought it was going to produce a deal.

BAINES: You said that, when you met with Mr. Koster, he gave you some leads of possible buyers. Was Mr. Baylor one of those leads?

ADAMS: No. As far as I know, Mr. Baylor and his broker responded to one of the ads I had placed in the trade journals.

BAINES: What happened next?

ADAMS: Well, I gave Mr. Baylor's broker the details about the company and the $2.5 million asking price, I introduced him to Mr. Koster, negotiated a confidentiality agreement, and made arrangements for Mr. Baylor's accountants to examine the

company's books. A few weeks later, Mr. Baylor's broker came back to me with an appraisal he obtained – that appraisal valued the business at $1.5 million. That was lower than my appraisal of $1.75 million.

BAINES: Did you keep Mr. Koster informed of what was going on?

ADAMS: Oh yes, every step of the way. We had frequent telephone conversations. I told him I was continuing to solicit offers but that, so far, the only credible prospect was from Midvale Pool and Spa. I told him about Baylor's $1.5 million appraisal, but that I was confident I could get him off that figure. So, Mr. Koster told me to keep negotiating — but he reminded me of his $2.5 million asking price and that he wasn't going to drop very much off that number, especially since my commission was so high.

BAINES: What did you do after that?

ADAMS: I got into some very intense negotiations with Mr. Baylor and his broker. I argued that my appraisal was more realistic than theirs, that their appraisal had not taken good will into account. I told them that, even if there was a bit of a premium in the $1.75 million appraisal, it was worth it to Mr. Baylor because Kustom Spas was a going concern, and he could capitalize on his existing connections in the spa industry.

BAINES: Did you make any headway?

ADAMS: Not at first. We kept talking intermittently through about mid-June. Mr. Baylor said he wasn't unalterably opposed to making an offer of $1.75 million, but the real problem was that he just couldn't get the bank financing to swing such a deal. I told him and his broker that I had some financing sources and that I might be able to help solve that problem. They told me to go ahead and see what I could do.

BAINES: Were you able to do anything?

ADAMS: Yes, I arranged for a loan broker I worked with a lot – Vinny Maniscalco Loan Company and Forcible Collection Agency – to commit to making Baylor a loan on fairly favorable terms. With that loan commitment in hand, Mr. Baylor agreed to make an offer of $1.75 million.

BAINES: Did you think there was any chance that Mr. Koster would accept such an offer?

ADAMS: Yeah, I thought there was a chance. I had kept him informed all along and told him that Baylor was the only serious prospect we had and that I didn't think he was going to meet the asking price.

BAINES: What did he say to that?

ADAMS: He was noncommittal. He said to bring him the best offer I could get and he'd consider it.

BAINES: What did you do next?

ADAMS: I helped Baylor's broker write up the offer at $1.75 million cash. I worked with Mr. Koster's attorney to draft some transfer documents, and then I took the whole package to Mr. Koster. Also, I opened an escrow at Columbia Title Company. That was about the end of June.

BAINES: What next?

ADAMS: I took the offer to Mr. Koster, and we discussed it at length. He said he wasn't happy with it and, if that was the best I could do, he was disappointed. I tried to convince him that the appraisal I had obtained was reliable and was probably the best he was going to be able to do. He told me that he was firm on his $2.5 million price and to go negotiate some more.

BAINES: Did you?

ADAMS: Yes, but I didn't get anywhere. Baylor just couldn't get the financing. It looked pretty much like a dead end, and no other prospects had developed. From that point on, I kept trying to call Mr. Koster – maybe six or seven times – to see if he'd had any second thoughts, but he wouldn't return my phone calls. July 31st came and went and my contract ran out.

BAINES: Is that your last contact with the transaction?

ADAMS: For a while it was. Then, in early November 2013, I heard through the grapevine that there was a deal pending between Kustom Spas and Midvale Pool and Spa Service. I called Mr. Baylor's broker, but he wouldn't tell me anything other than that Baylor had ended up contracting to buy the company and that he would receive his commission from Mr. Baylor. I found out that Columbia Title Company still had an escrow pending and filed a written demand for my 10% commission. In fact, I was surprised to learn that the escrow number was the same one I had opened back in June 2013.

BAINES: Let me show you a document we've marked as Exhibit B. Can you tell me what that is?

ADAMS: Yes. That's the demand I filed with Columbia Title Company for my commission.

BAINES: Tell us what more you heard about how the deal had gone down.

Objection by ANDREW WELLS, attorney for Claimant, Charles Smith: Objection, Ms. Arbitrator. That calls for hearsay.

ARBITRATOR: That's correct. Mr. Baines, how do you respond?

BAINES: I'll withdraw the question for now, Ms. Arbitrator. I believe we can get in the evidence we need through Charles Smith and William Koster, who are going to be called as witnesses. No further questions of Ms. Adams.

ARBITRATOR: Mr. Wells, do you wish to cross-examine Ms. Adams?

WELLS: Just a few questions, Ms. Arbitrator.

CROSS-EXAMINATION OF CLAIMANT BRIANNA ADAMS by Andrew Wells, attorney for Claimant Charles Smith:

WELLS: Ms. Adams, you testified that Mr. Koster declined to give you a contract term of more than six months — from February 1 to July 31, 2013. Is that right?

ADAMS: Yes, that's right.

WELLS: So, that must mean that you expected and understood that your representation of Kustom Spas completely ended on July 31st. Correct?

ADAMS: Yes.

WELLS: And that, after that date, you no longer had the contractual or agency power to deal with anyone regarding the sale of Kustom Spas?

ADAMS: I guess that's correct, but there was certainly nothing to stop me from following up or referring potential buyers to Mr. Koster after July 31st.

WELLS: Well, as a matter of fact, you never did refer anyone to him after July 31st, did you?

ADAMS: Not exactly, but he ended up selling to Mr. Baylor. I had worked up the deal and referred Mr. Baylor to Mr. Koster during my representation period.

WELLS: But it's true, isn't it, that you completely lost contact with the transaction and had absolutely nothing to do with referring Mr. Baylor after July 31st ?

ADAMS: That's right, but so what?

WELLS: No further questions.

DIRECT EXAMINATION OF CLAIMANT CHARLES SMITH by Andrew Wells, attorney for Claimant Charles Smith:

WELLS: Mr. Smith, will you please explain to the Arbitrator how you became involved in the purchase and sale transaction between Midvale Pool and Spa and Kustom Spas?

SMITH: Yes. I'm old friends with Artie Baylor, the owner of Midvale Pool and Spa. Back in September 2013, we met for lunch one day, and Artie started telling me about how he had tried to buy Kustom Spas but that he couldn't meet Mr. Koster's price. He said he'd still like to buy the company but that his own broker didn't hold out much hope. Anyway, I said that I knew Billy Koster and maybe I could talk to him.

WELLS: Are you a broker?

SMITH: Well, not in the business brokerage end of things. I'm actually a licensed real estate broker, but I've done business deals before.

WELLS: Did you make any effort to contact Mr. Koster?

SMITH: Yes. I had heard that Mr. Koster's wife had been very ill and that she had died recently. I figured he might be ready to reduce his price and get out of the business. So, on September 3, 2013, I met with him and we talked about that.

WELLS: Did you tell him that you had talked to Mr. Baylor?

SMITH: No, not at first. I told him I was sorry to hear about his wife and asked him about whether he had given any more thought to selling Kustom Spas. He said yes and, now that his wife was gone, he was ready to move on. I said I could probably help him and that I'd be willing to try to market his company.

WELLS: What did he say?

SMITH: He told me he had come pretty close to a deal with Artie Baylor, the owner of Midvale Pool and Spa, but that it had fallen through because of price. Back then, he was asking $2.5 million, but Artie had offered only $1.75 million. He said he wasn't sure if Mr. Baylor was still interested but that he — Mr. Koster — was now ready to drop his price.

WELLS: Did he say what his new price would be?

SMITH: No. He was pretty cagey about it. He said only that he'd drop it by "some."

WELLS: Did you tell Mr. Koster that you had talked to Mr. Baylor?

SMITH: No, not right then. I wanted to get my representation contract signed and sealed so I could be sure of a commission. Mr. Koster agreed to sign a 30-day exclusive representation agreement with me, so I went back to my office, prepared a contract, and faxed it to Mr. Koster for signature.

WELLS: Let me show you a document that's been marked as Exhibit C. Is this your contract with Kustom Spas?

SMITH: Yes. We both signed it. It ran from September 4, 2013 through October 4, 2013. Mr. Koster said the exclusive part of the agreement was okay. My usual commission was 8%, but we negotiated a 5% commission. He said that, since he was reducing his price, he thought 5% was fair. I went along.

WELLS: What happened next?

SMITH: I went back and met with Mr. Baylor and his broker. Mr. Baylor's broker said he still had all the paperwork from the first round of negotiations with Mr. Koster and that he still had a $1.75 million loan commitment from a loan broker named Vinny Maniscalco. He said he was prepared to make the same offer he had before.

WELLS: Did you take an offer from Baylor back to Mr. Koster?

SMITH: Well, sort of. There wasn't much for me to do, so I told Mr. Baylor and his broker to set up a meeting with Mr. Koster and make the offer. Actually, around September 15th, I called Mr. Koster and left a voicemail message for him telling him that Artie Baylor's broker was going to present a $1.75 million offer.

WELLS: Did you do anything else?

SMITH: Yes. I called Columbia Title Company about opening an escrow. The escrow officer I spoke with told me there was already an open escrow.

WELLS: Did you ask who had set up that escrow?

SMITH: No. I assumed that Artie Baylor's broker had done it.

WELLS: Did you stay in contact with the parties?

SMITH: Not really. I just assumed that Mr. Baylor or his broker would keep me in the loop. Besides, I was very busy with other deals.

WELLS: All right. Did there come a time when you learned that a sale had taken place between Midvale Pool and Spa and Kustom Spas?

SMITH: Yes. About October 24th I ran into Artie Baylor, and he told me Mr. Koster had accepted his offer of $1.75 million just the day before, October 23rd, and that they were about to close the deal. He said Mr. Koster had dragged out the negotiations and had told him he didn't want to close until after mid-October.

WELLS: What did you do next?

SMITH: Tried to get hold of Mr. Koster, but he wouldn't return my phone calls and I couldn't find him at his home. I got hold of the escrow officer at Columbia Title Company; found out the escrow number. The escrow officer told me that the escrow instructions didn't say anything about a commission being due me. So, I filed my demand for my 5% commission anyway.

WELLS: Is this document that's been marked as Exhibit D the demand you filed?

SMITH: Yes.

WELLS: No further questions.

ARBITRATOR: Cross-examination, Mr. Baines?

BAINES: Thank you. Yes, Ms. Arbitrator.

CROSS-EXAMINATION OF CLAIMANT CHARLES SMITH by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Mr. Smith, from the time in September 2013 when you first talked to Mr. Baylor about his continuing interest in buying Kustom Spas to the time in late October 2013 when you learned that he had in fact bought the company, did you do anything, other than the steps you described in your direct examination, to bring the parties together and aid in the consummation of the transaction?

SMITH: No. I've told you everything I did. I was the person who referred Mr. Baylor to Mr. Koster.

BAINES: How many times did you meet with Mr. Koster over the course of your representation of him and his company?

SMITH: Just the one time – September 3rd.

BAINES: And how long did that meeting last?

SMITH: Forty-five minutes to an hour.

BAINES: Did there ever come a time when you learned that my client, Ms. Adams, had represented Mr. Koster and Kustom Spas in an earlier effort to sell the company?

SMITH: Only when I learned that we had both filed demands with Columbia Title Company.

BAINES: In other words, you never asked anyone, correct?

SMITH: That's right. And no one ever told me, either. I mean, I assumed that the only other broker in the picture was Mr. Baylor's broker, and I knew he was being paid by Mr. Baylor. I also assume that Mr. Koster would have told me about Ms. Adams's involvement in the earlier failed deal if he thought it was important.

BAINES: As I understand your direct testimony, the offer that Mr. Baylor made in September or October of 2013 was exactly the same offer he had made back in June 2013 — $1.75 million — using the same documentation and with the same loan commitment he had obtained earlier. Is that right?

SMITH: I guess they had to update the documentation, but, yes, that's the way I understand it.

BAINES: So, your claim for a commission is based on the following facts: number one, you learned from Mr. Baylor that he had earlier tried to buy Kustom Spas; number two, Mr. Koster, without knowing you had talked to Mr. Baylor, told you the same thing and asked you to see if you could renew Mr. Baylor's interest; and number three, you told Mr. Baylor's broker to set up a meeting with Mr. Koster and renew his $1.75 million offer. Is that right?

SMITH: Yes, that's pretty much it. But don't forget -- If it hadn't been for my personal contacts and my reenergizing Mr. Baylor's interest and referring him to Mr. Koster, there would never have been a deal.

BAINES: In fact, Mr. Smith, the deal didn't happened during the period of your contract with Kustom Spas, did it?

SMITH: No, but I don't see what difference that makes. The extension clause in my contract gave me the right to a commission because the buyer turned out to be someone I had referred to Kustom Spas. I'm the one who referred Mr. Baylor, and the sale happened within a couple of weeks after the end of my contract. So, I don't see why there's any question about it.

BAINES: No further questions.

EXAMINATION OF RESPONDENT WILLIAM A. KOSTER by William C. Baines, attorney for Claimant Brianna Adams:

BAINES: Mr. Koster, when did you and Mr. Baylor actually come to an agreement regarding the sale of your business to Midvale Pool and Spa?

KOSTER: On October 23, 2013.

BAINES: When did he first make the offer that you ended up accepting?

KOSTER: Well, I can't be sure. We did a lot of negotiating when his broker first brought me the offer, but it was sometime in the last half of September 2013.

BAINES: And, isn't it correct that the offer he had submitted to you and that you accepted was exactly the offer he had submitted back in June 2013 through Ms. Adams? That is, $1.75 million and based on the same documentation?

KOSTER: Well, we had to update the paperwork, but, yeah, it was pretty much identical.

BAINES: Now, you have refused to authorize the title company to disburse any of the $175,000 the title company is holding in escrow to either one of the claimants – Ms. Adams and Mr. Smith – correct?

KOSTER: Absolutely. Neither one of them did me any good at all. Ms. Adams couldn't produce a buyer at my asking price because she wasn't a very effective negotiator. I should have just fired her, but she saved me the trouble when she just lost interest and let her contract run out. As for Mr. Smith, he didn't do anything other than send me someone I told him about. And, even then, all he did was send me an offer I had already rejected.

BAINES: You never told Mr. Smith that Ms. Adams worked on and presented Mr. Baylor's offer to you, did you?

KOSTER: No, I didn't see why that mattered, and Smith never asked.

BAINES: Regarding Ms. Adams, you knew, didn't you, that she's the one who found Mr. Baylor as an interested buyer, that she had done all the work to put the deal together, and negotiated on your behalf?

KOSTER: Well, I heard her testimony about all the work she says she did to put together the offer, and I have no reason to doubt any of it. All I know is that she didn't make it happen.

BAINES: In the final analysis, however, you ended up selling to a person she had referred to you and done all the work on and for the same price she had gotten for you, right?

KOSTER: Yeah, but no thanks to her. And it was under totally different circumstances. My wife had died in the meantime, so I was more motivated to take a lower price and get out of the business.

BAINES: No further questions.

EXHIBIT A

SELLER/BROKER AGREEMENT – NONEXCLUSIVE

Right to Represent

1. **Nonexclusive Right to Represent:** Kustom Spas, Inc. and William A. Koster ("Seller") grant to Brianna Adams & Associates ("Broker") for the representation period beginning on February 1, 2013 and ending at 11:59 p.m. on July 31, 2013 the nonexclusive irrevocable right to represent Seller in selling all corporate stock, assets and liabilities, including but not limited to land, buildings, equipment, accounts, and good will of the manufacturing business known as Kustom Spas, Inc. located at 1422 E. Industrial Parkway, Midvale, Columbia (hereinafter, "the property").

* * *

4. **Compensation to Broker:** Broker's compensation shall be on the following terms:
   - **A. Amount:** Broker shall be entitled to a commission of 10% of the gross sale price of the property.
   - **B. Broker Right to Compensation:** Broker shall be entitled to compensation specified in paragraph 4A if Seller enters into a binding agreement to sell the property for the $2.5 million cash asking price or on other terms agreeable to the Seller and the Buyer, if the Buyer of the property is a person or entity secured through the efforts of Broker.
   - **C. Payment of Compensation:** Compensation shall be payable upon completion of any transaction described in paragraph B and upon close of the escrow relating to said transaction.

* * *

9. **Dispute Resolution:** Seller and Broker agree that any dispute or claim arising between them and relating to this Agreement shall be resolved by final and binding arbitration pursuant to the Rules of the Columbia Association of Commissioned Brokers.

EXHIBIT B

Brianna Adams & Associates
Small Business Brokers
224 Fremont Place, Suite 129
Midvale, Columbia

November 4, 2013

Columbia Title Company
Attn: Harold Fraser, Escrow Officer
1465 Norden Street
Midvale, Columbia

RE: Escrow No. 421-344B-13
Midvale Pool and Spa/Kustom Spas

RE: Escrow # 421-344B-06
Midvale Pool and Spa/Kustom Spas

To whom it may concern:

The undersigned, on behalf of Brianna Adams & Associates, files this demand in the above-referenced escrow for a commission of 10% of the gross sale price in the purchase and sale transaction between Midvale Pool and Spa and Kustom Spas. I attach a copy of the Seller/Broker Agreement I entered into for the sale of Kustom Spas and represent to you that I was the procuring cause of the sale to Midvale Pool and Spa.

I hereby notify you that I have authorized my attorneys to file suit against Columbia Title Company if you close the escrow and disburse the proceeds without paying my commission or setting aside the required 10% pending settlement of any dispute.

Very truly yours,
Brianna Adams & Associates

By___*Brianna Adams* _____
Brianna Adams, Owner/Principal

EXHIBIT C

SELLER/BROKER AGREEMENT –EXCLUSIVE

Right to Represent

1. **Exclusive Right to Represent:** Kustom Spas, Inc. and William A. Koster ("Seller") grant to Charles Smith ("Broker") for the representation period beginning on September 4, 2013 and ending at 11:59 p.m. on October 4, 2013 the exclusive irrevocable right to represent Seller in selling Kustom Spas, Inc., including its corporate stock, assets, liabilities, land, buildings, equipment, accounts, and good will. Kustom Spas, Inc. is located at 1422 E. Industrial Parkway, Midvale, Columbia (hereinafter, "the property").

* * *

4. **Compensation to Broker:** Broker's compensation shall be on the following terms:
   - **A. Amount:** Broker shall be entitled to a commission of 5% of the gross sale price of the property.
   - **B. Broker Right to Compensation:** Broker shall be entitled to compensation specified in paragraph 4A if Seller enters into a binding agreement during the representation period or within 180 days thereafter to sell the property on other terms agreeable to the Seller and the Buyer, if the Buyer of the property is a person or entity referred to Seller by Broker.
   - **C. Payment of Compensation:** Compensation shall be payable upon completion of any transaction described in paragraph B and upon close of the escrow relating to said transaction.

* * *

10. **Dispute Resolution:** Seller and Broker agree that any dispute or claim arising between them and relating to this Agreement shall be resolved by final and binding arbitration pursuant to the Rules of the Columbia Association of Brokers.

EXHIBIT D

Charles Smith
Broker/Realtor
42 Empire Place
Midvale, Columbia

October 24, 2013

Columbia Title Company
Attn: Harold Fraser, Escrow Officer
1465 Norden Street
Midvale, Columbia

RE: Escrow No. 421-344B-13
Midvale Pool and Spa/Kustom Spas

RE: Escrow # 421-344B-06
Midvale Pool and Spa/Kustom Spas

Dear Mr. Fraser:

This is to advise you that I am entitled to a commission of 5% of the gross sale price in the above-referenced transaction. I enclose a copy of my representation contract with Kustom Spas; that contract is the basis of my claim. I hereby demand that you disburse said sum to me upon the close of escrow.

Sincerely,

Charles Smith

February 2014

California Bar Examination

Performance Test A

LIBRARY

ADAMS v. KUSTOM SPAS, INC.

LIBRARY

Quincy Sales v. North America Machinery Corp.
Columbia Court of Appeal (2004)……..…..……

Ellis Realty, Inc. v. Gable Holdings, LLC
United States Court of Appeals, 15th Circuit (2005)..……

AAA Business Brokers v. Wicks
Columbia Supreme Court (2004)…….…….

Columbia Association of Commissioned Brokers
Guidelines for Arbitrators in Commission Disputes
Between and Among Brokers...……..…….

QUINCY SALES v. NORTH AMERICA MACHINERY CORP.

Columbia Court of Appeal (2004)

Defendant, North America Machinery Corp. (NAM), appeals the entry of summary judgment in favor of Quincy Sales (Quincy). The case involves a dispute over unpaid post-termination commissions.

NAM manufactures industrial equipment to its customers' specifications. Quincy, an independent sales representative, acts as agent for various manufacturers to sell the manufacturers' products to third parties. In December 1994, NAM, through its vice president Richard Sears, and Quincy, through its owner James Quincy, entered into an oral agency agreement terminable at the will of either party. The parties agree that the only terms of the agency contract concerning payment were that Quincy's standard commission would be 5% and that Quincy would not get paid until NAM got paid. They also agree that, in making their oral agreement, the issue of post-termination commissions never came up.

During the agency relationship, Quincy approached Dorco, a Columbia company, and got Dorco interested in purchasing three machines from NAM. Quincy consulted with NAM, assisted Dorco in drawing up the specifications for the machinery, and negotiated a price and a delivery schedule. Because the machinery required by Dorco was expensive and technologically complicated, NAM was reluctant to commit to three machines at once. NAM's concern was that the machines might not perform as expected by Dorco.

As a result, in June 1998, Quincy negotiated the following arrangement: Dorco would purchase one machine, lease a second one with the option to purchase or return it if it did not perform well, and have the option to purchase a third machine. As an incentive to Dorco to exercise the options to purchase the second and third machines, Quincy offered with NAM's approval to sell those machines at discounted prices. Quincy prepared the necessary purchase, sale, and lease documents, caused Dorco to execute them, and delivered them to NAM. As part of the negotiation, Quincy agreed to reduce his sales commission on all three machines from the customary 5% to 4%. The first two machines were delivered to Dorco during 1999; it paid cash for the first one and commenced making payments on the second machine on which the lease was to run through March 2001. In December 2000, Quincy terminated his agency relationship with NAM, citing "bad blood" between him and certain NAM personnel. In April 2001, Dorco purchased the second machine, thus ending the lease, and, in

January 2002, Dorco exercised its option and purchased the third machine. NAM paid Quincy the commissions on the sale of the first machine and on the lease payments through December 2000, which was when Quincy quit, but refused to pay commissions on the lease payments and sales that occurred after that. Quincy filed suit seeking to recover the commissions for the remaining lease payments and for the sales of the second and third machines.

Quincy's theory of recovery rests on the procuring cause rule. The procuring cause rule allows a salesperson, in whatever field of endeavor, to recover commissions on sales made after the termination of the agency relationship if the salesperson procured the sales through his or her activities prior to the termination of the relationship. It is a common law, equitable doctrine designed to protect a salesperson who, although no longer an agent or employee when the sale is made, has done substantially everything necessary to effect the sale. The procuring cause rule does not apply, however, when the contract between the parties specifies whether and when post-termination commissions are earned, which is not the case here.

NAM argues that Quincy cannot avail himself of the procuring cause doctrine because Quincy, not NAM, terminated the agency relationship. NAM's theory is that the procuring cause doctrine is designed to protect salespeople who are discharged by their employers to avoid paying them a commission. We find little support for this proposition either in the authorities or in logic. Once the agent has put in motion the chain of events that lead to a sale and has done everything within his power and authority to bring about that result, it is irrelevant which party terminated the relationship.

NAM next contends that Quincy was not the *efficient* cause of the sale but, rather, that it was NAM's efforts that brought about the sales of the second and third machines. That is, NAM continued to provide services to Dorco after it had bought the first machine and leased the second, and it was through those services and the attention given by NAM, not by Quincy, that Dorco ended up buying the second and third machines.

We do not find that argument persuasive. First, Quincy's job was to sell NAM's machines, not to become engaged in post-sale service. Sears' deposition testimony established clearly that post-sales customer relations and service were the responsibility of NAM, not Quincy. Moreover, Sears could not identify anything that Quincy failed to do to bring about the sale. Also, it must be remembered that Quincy brought to NAM a buyer that was ready, willing, and able to buy three machines at the inception but that it was NAM who, albeit for legitimate reasons, declined to sell the three machines at once. Quincy negotiated the

sale-option-lease terms, prepared the documentation to conform to the altered transaction, and caused Dorco to execute all the necessary papers. The structure of the deal, by which Quincy agreed to reduce his commission to 4% on all three machines, clearly contemplated that Quincy would receive commissions on the second and third machines.

Thus, we conclude that Quincy was the procuring cause of the sales to Dorco, and we affirm the lower court's judgment.

ELLIS REALTY, INC. v. GABLE HOLDINGS, LLC

United States Court of Appeals, 15th Circuit (2005)

Ellis Realty (Ellis) agreed to be the exclusive broker for Gable Holdings, LLC (Gable) in trying to lease the Highland Tower Office Building (the Tower), a commercial property owned by Gable in Bay City, Columbia. Their written brokerage agreement provided that Ellis would receive a commission on all leases signed *during* the term of the agreement and that Ellis would receive a commission on all leases signed *after* the termination of the agreement so long as within 90 days of termination "negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis negotiated."

Barry Farley, a broker employed by Ellis, served as Gable's primary brokerage agent and, in the fall of 2001, was in negotiations with Firebridge Tire Co. (Firebridge), a potential tenant of the Tower. When Farley left his employment with Ellis in December 2001, Gable terminated its agreement with Ellis. Nine months later, Gable signed a lease with Firebridge, prompting Ellis to demand a commission under the terms of the brokerage contract.

The district court, applying its interpretation of Columbia law in this diversity case, granted summary judgment in favor of Gable, concluding that Columbia common law required Ellis to show that it was the "procuring cause" of the lease and that this tenet of Columbia law trumped any contrary terms in the brokerage contract, including the continuation-of-negotiations-within-90-days-of-termination provision. In our view, Columbia law places no such constraint on the rights of contracting parties to determine whether a commission is or is not due under a brokerage agreement, and, accordingly, we reverse.

On March 29, 2001, Gable signed an exclusive-brokerage agreement with Ellis to negotiate and consummate leases for office space in the Tower. Among other provisions, the agreement contained the following terms:

6. *Agreement to Refer Offers and Inquiries*. During the term of this agreement, Gable agrees to refer to Ellis any and all offers and inquiries by prospective tenants, and Ellis agrees to investigate and develop such offers and inquiries and to employ its best efforts to lease space in the Tower.

7. *Owner's Reservation to Preempt Broker*. Gable reserves the right to preempt Ellis and deal directly with the prospective tenant with the understanding that, should

Gable exercise such right, any commission otherwise payable under this agreement shall remain payable.

8. *Broker's Commission*. Gable agrees to pay Ellis a commission if, within 90 days after the expiration or termination of this agreement, the property is leased or negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis has negotiated or to whom the property has been introduced prior to the expiration or termination of this agreement.

In October 2001, Firebridge, a tenant of another property owned by Gable, made a proposal to Gable to rent space in the Tower. In accordance with section 6 of the agreement, Gable referred the inquiry to Barry Farley. Later that month, Firebridge's broker, Joseph Cherry, contacted Gable and requested that Gable negotiate directly with Firebridge because of their existing relationship. Gable agreed and informed Farley that Gable would be exercising its right under section 7 of the Ellis/Gable agreement to negotiate directly with Firebridge but that Gable would need Farley to "work behind the scenes" to bring the deal to a conclusion.

The parties agree on the following chronology of events: On November 19, 2001, Cherry sent Gable a lease proposal which contemplated that Firebridge would lease 140,000 square feet in the Tower and renew its existing lease in the other Gable property. Gable sent the proposal to Farley for his "input." On November 25, 2001, Farley submitted to Gable a "proposal" that he recommended and said should be presented to Firebridge. On November 30, 2001, Farley announced his intention to leave Ellis, and he became essentially *incommunicado* over the course of the next month, failing to respond to e-mails and phone calls. Gable continued to negotiate with Cherry and Firebridge during this period. Gable sent a letter to Ellis properly exercising its right to terminate their brokerage agreement effective as of February 3, 2002.

At this point, the parties part ways over what happened next. Gable claims that negotiations between Gable and Firebridge regarding the two-pronged lease proposal ended on March 20, 2002 and that the 90-day period during which negotiations must have resumed in order for Ellis to obtain a commission ended on May 3, 2002. Gable asserts that it did not resume negotiations with Firebridge until May 15, 2002, and that these new negotiations "took on a materially different character from the prior negotiations," i.e., that Firebridge would lease

65,000 square feet in the Tower and sublease additional space from the Columbia Redevelopment Agency, one of Gable's existing tenants. On September 6, 2002, Gable and Firebridge signed a lease on these new terms.

Ellis, on the other hand, asserts that negotiations between Gable and Firebridge "continued unabated from November 2001 until the deal was formalized by a June 5, 2002 letter of intent" and that the final lease was consistent with a proposal that Barry Farley had prepared and submitted to Gable in November 2001.

Without reference to the parties' differing presentations of the events or to the 90-day provision of the agreement, the district court held that Columbia law "establishes that a real estate broker earns a commission by actually consummating the transaction or by showing that his or her efforts were the procuring cause of the transaction." It then determined that Ellis was not the procuring cause of the Firebridge lease and granted Gable's motion for summary judgment.

Columbia common law clearly incorporates the doctrine that a contractually retained real estate agent is entitled to a commission if he or she is the "proximate, efficient, and procuring cause of the sale or lease." But it is not a sword that property owners may use to deprive brokers of a contractually guaranteed commission. Rather, it is a shield designed to protect brokers from being stripped of their commissions by sharp-elbowed property owners who fraudulently or in bad faith delay the consummation of a real estate transaction until after a brokerage agreement has ended.

The opposing contentions of the parties are these. Ellis argues that the district court erred by failing to appreciate the difference between Ellis's *contractual* commission claim and a common law claim. That is, asserts Ellis, the district court gratuitously wrote a procuring cause requirement into an unambiguously worded contract.

Gable, on the other hand, argues that, under Columbia law, a procuring cause requirement overshadows all brokerage contracts and prohibits a commission from being awarded unless the claiming broker was the procuring cause.

The relevant terms of the contract at issue in this case leave little room for interpretation regarding the right to a commission after the agreement has ended. Section 8 states that:

> Gable agrees to pay Ellis a commission if, within 90 days after the expiration or termination of this agreement, the property is leased or negotiations continue or resume leading to the execution of a lease with any person or entity with whom Ellis has

negotiated [directly or through another broker] . . . prior to the expiration or termination of this agreement.

By its terms, this provision gives Ellis the right to a commission so long as "within 90 days after the . . . termination . . . negotiations continue[d] or resume[d] leading to the execution of a lease . . ." There is nothing in the agreement that requires Ellis to establish that it was the procuring cause of the signed lease. To the contrary, Section 7 of the agreement requires Gable to pay a commission even if Gable itself "preempted" Ellis and conducted all the negotiations itself.

Thus, the factual issues inherent in the differing chronologies argued by the parties must be resolved. If the trier of fact finds that the negotiations that resumed after Ellis's contract expired on May 3, 2002 were, as Gable contends, new and of "a materially different character from the prior negotiations," then Gable would prevail. On the other hand, if the trier of fact found, as Ellis contends, that they were merely a continuation of the same negotiations that Ellis had commenced, then Ellis would prevail.

The proper forum for such a resolution is the district court, to which we remand with instructions to proceed in accordance with this opinion.

AAA BUSINESS BROKERS v. WICKS

Columbia Supreme Court (2004)

AAA Business Brokers (AAA) provides brokerage services to buyers and sellers of businesses, similar to the services of a real estate broker. Arnold Wicks, a Belmont, Columbia businessman, owned Homeguard Security Services (Homeguard), a company that provided antitheft and antiburglary security services for homes and businesses.

David Green, the general manager of Electronic Systems, Inc., a competitor of Homeguard, learned through an acquaintance that Wicks wanted to retire from business and was putting Homeguard up for sale. Green got in touch with Joy Jones, a broker employed by AAA and told her that he was interested in buying a home security business and that he understood that Homeguard was for sale. Based on the tip from Green, Jones contacted Wicks, confirmed that, indeed, he wanted to sell his company, and offered to assist him with the sale.

On behalf of AAA, Jones executed a listing agreement with Wicks for the sale of Homeguard. The contract was a nonexclusive agreement, the term of which was January 25, 2002 through March 24, 2002. It provided that, if Jones produced a ready, willing, and able buyer at $600,000, Wicks would pay AAA a commission of 10% of the sale price. The agreement also contained an "extension clause" that stated, "Seller agrees to pay the full commission to Broker in the event the property is within one year after termination of this agreement sold, traded, or otherwise conveyed to anyone referred to Seller by Broker and with whom Seller negotiated during the term of this agreement."

On January 26, 2002, Jones told Green she had confirmed that Wicks wanted to sell Homeguard – a fact that Green already knew – and directed Green to get in touch with Wicks and negotiate the deal. Green began negotiations with Wicks, but, because of a non-competition agreement in Green's employment contract with Electronic Systems, Inc., Green was constrained to consummate a sale until the end of his non-compete period. Green and Wicks eventually entered into a contract of sale, which closed on July 14, 2002.

Jones's involvement in the transaction consisted of spending about 45 minutes with Wicks on January 25, the day they executed the AAA listing agreement, exchanging two letters regarding the "confidentiality" terms of the transaction, telling two potential buyers, including

Green, by telephone that Homeguard was for sale for $600,000, and encouraging them to bid on the property.

Shortly before the close of escrow, AAA submitted a demand in the escrow for a 10% commission. Wicks refused to pay it, asserting that AAA had no right to a commission because AAA was not the procuring cause of the sale. AAA sued for breach of contract, and the trial court, holding that the inquiry began and ended with the "extension clause," entered judgment for AAA.

Wicks appealed, contending that the trial court erred in ruling for AAA because AAA did not establish that it was the efficient procuring cause of the sale. AAA's response is that it was not required to prove that it was the procuring cause because, under the "extension clause" of its contract with Wicks, the evidence established clearly that a sale to a person who AAA had "referred" to Wicks closed within a year after the end of the contract term.

The general rule, adopted by the courts of Columbia, is that the parties to a listing contract are free to frame their agreement in whatever terms they see fit, including a term that makes a broker's right to a commission conditional upon the occurrence of a particular set of circumstances even if the broker is not the procurer of the purchaser. The common law "procuring cause" doctrine – i.e., *a cause originating with a series of events, which, without break in continuity, result in procuring a purchaser ready, willing, and able to buy on the owner's terms* – applies only if the contract between the parties is silent on the issue of consummation of a sale after the expiration of the listing agreement. In other words, "procuring cause" is the default rule.

We agree with the general rule and hold that, because the listing agreement contained an extension clause, AAA need not prove that it was the efficient procuring cause. But that does not end the inquiry. The question remains whether AAA complied with the requirement in the listing agreement that the purchaser be a person who was "*referred* to Seller by Broker."

The term "referred" is nowhere defined in the contract, and the contract does not set out the conditions under which the broker will be deemed to have referred the buyer to the seller. The majority of the authorities in Columbia and other jurisdictions interpreting vague terms in listing agreements such as "refer," "solicit," or "introduce," and similar words have found that such terms necessarily incorporate an unexpressed but inferentially essential requirement that the broker do more than merely send or direct a potential purchaser to a seller. In other words, the majority rule is that, even with the existence of an extension clause, the broker must show

that there was at least a *minimal causal connection* between him and the ultimate sale before the broker becomes entitled to a commission.

We adopt the majority rule and hold that a broker seeking to recover under an extension clause must establish some causal connection between the broker's efforts and the eventual sale. This might include negotiations between the parties, facilitating the flow of information, or actual assistance with the closing of the sale. It is not necessary that the broker seeking the commission dominate the transaction, but the broker's participation must be palpable and something more than a mere incidental or contributing influence. A rule that would allow recovery for merely soliciting a buyer without a causal connection with the sale would burden the owner's right to dispose of the property, and we also believe it would be poor public policy to reward brokers with substantial commissions for merely notifying potential buyers of the possibility of a sale without requiring them to exert diligent efforts toward conclusion of the sale.[1]

In the present case, AAA's involvement through Jones was at best tangential. She was not involved in any negotiations or the closing of the sale. All she did was tell Green what he already knew and left the rest up to him. Although valid, the extension clause in the AAA contract cannot be interpreted to confer upon a broker a windfall commission so that the broker could simply content herself with sitting back and letting the other parties to the transaction do all the work.

We reverse and remand.

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[1] AAA alludes in its briefs to the Guidelines for Arbitrators promulgated by the Columbia Association of Commissioned Brokers and argues that AAA should not be completely foreclosed from claiming at least a portion of the commission for having had *some* involvement in the transaction. The court is cognizant of those Guidelines. They are inapposite here for two reasons: First, this case does not arise in the context of an arbitration. Second, those guidelines deal with disputes *between* brokers competing for the same commission, which is not the case here. An arbitrator has broad discretion under the Guidelines to invoke the equities to apportion the commission between the competing brokers, and the court's holding in this case is not to be read as a rule that infringes upon that discretion. The facts of this case do not lend themselves to apportionment of the commission.

COLUMBIA ASSOCIATION OF COMMISSIONED BROKERS

Guidelines for Arbitrators in Commission Disputes Between and Among Brokers

It is not uncommon in brokerage transactions that disputes arise between a broker who initiated the series of events leading to consummation of the transaction ("Introducing Broker") and another broker who entered the transaction later and closed the transaction ("Closing Broker"). The Columbia Association of Commissioned Brokers ("CACB"), by whose rules all licensed brokers in the State of Columbia agree to be bound, has promulgated the following guidelines for use by Arbitrators in such disputes. There is no predetermined rule or standard that prescribes which of the brokers is entitled to an arbitration award. All awards are based on the facts of a particular transaction. It often turns on the precise terms of the brokerage contract between the broker and the client. It frequently involves the principles of procuring cause, a doctrine defined and recognized by the courts of Columbia. The following factors reflect common characteristics that arise during the course of such disputes and are intended to serve as guidance to Arbitrators to aid them in reaching their decisions. Not all factors are applicable to all cases, but those that are applicable are to be considered as a whole. The factors are not necessarily weighted equally, nor is the outcome necessarily determined by a simple numerical weighting of the factors in favor of one or the other of the brokers. The Arbitrator has broad discretion, based on the law and the equities, in deciding which broker should prevail or whether the brokers should share in the commission.

GUIDELINES FOR ARBITRATORS IN PROCURING CAUSE CASES

Relevant Factor	Favors Intro Broker	Favors Closing Broker	Comments
1. Buyer is first introduced to the property by the Intro Broker.	Yes		
2. Closing Broker never showed the property.	Yes		
3. Closing Broker wrote and submitted an offer on the property on behalf of the client that was substantially similar to an offer written by Intro Broker within the short period of time.			If the two offers are close in substance or time, this factor moves to neutral.
4. A significant amount of time elapsed between the time Intro Broker showed the property and Closing Broker wrote an offer on the same property.		Yes	
5. Intro Broker provided significant information about the specific property, the neighborhood, value of the property, and other characteristics over a period of time.	Yes		Amount of time spent is not the determining factor; rather, it is the nature and usefulness of the information furnished in inducing the buyer's interest in the property.
6. Intro Broker fails to maintain contact with the client.		Yes	Consideration should be given to whether Intro Broker tried to maintain contact but the client did not respond.
7. Client expresses dissatisfaction with Intro Broker's professional abilities or conduct.		Yes	Where client's dissatisfaction does not rise to the level of "just cause" to end the relationship, the arbitrator can consider

Relevant Factor	Favors Intro Broker	Favors Closing Broker	Comments
For example: misrepresentations, lack of disclosure, lack of knowledge of the area and the property, nonresponsiveness to client's inquiries, self-dealing, lack of negotiating skills.			awarding the Intro Broker an amount in the nature of a "referral fee."
8. Closing Broker asked about client's relationship with another broker early in the process and determined that there was no existing contractual or exclusive relationship between client and any other broker.		Yes	Brokers failing to inquire about existing relationship do so at the risk of losing the commission. If Closing Broker asked about client's relationship with other broker late in the process, this factor would then favor Intro Broker.

FEBRUARY 2014
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

Jane owned a machine shop. It had one slightly buckled wall. It had been built years prior to Town's adoption of a zoning ordinance that permits office buildings and retail stores, but not manufacturing facilities.

Ira purchased the machine shop from Jane for $500,000. He gave her $50,000 in cash and a promissory note for an additional $50,000 secured by a deed of trust. He borrowed the other $400,000 from Acme Bank (Acme), which recorded a mortgage. Acme was aware of Jane's promissory note and deed of trust prior to the close of escrow.

Donna owns a parcel adjoining Ira's machine shop. She recently began excavation for construction of an office building. Ira complained to Donna that the excavation was causing the shop's wall to buckle further, but she did nothing in response.

Shortly thereafter, Ira's machine shop collapsed. Ira applied to Town for a building permit to rebuild the shop, but Town refused. He then defaulted on his obligations to Jane and Acme.

Ira has sued Donna seeking damages, and he has sued Town seeking issuance of a building permit. Acme has filed a foreclosure suit against Ira, and Jane has demanded a proportionate share of the proceeds from any foreclosure sale.

1. How is the court likely to rule on Ira's claim for damages against Donna? Discuss.

2. How is the court likely to rule on Ira's request that Town issue a building permit? Discuss.

3. How is the court likely to rule on Jane's claim for a proportionate share of the proceeds from any foreclosure sale? Discuss.

Question 5

For many years, the Old Ways Fellowship, a neopagan religious organization, received permission from the City's Building Authority to display a five-foot diameter symbol of the sun in the lobby of City's Municipal Government Building during the week surrounding the Winter Solstice. The display was accompanied by a sign stating "Old Ways Fellowship wishes you a happy Winter Solstice."
Last year the Building Authority adopted a new "Policy on Seasonal Displays," which states:

> Religious displays and symbols are not permitted in any government building. Such displays and symbols impermissibly convey the appearance of government endorsement of religion.

Previously, the Building Authority had allowed access to a wide variety of public and private speakers and displays in the lobby of the Municipal Government Building. Based on the new policy, however, it denied the Old Ways Fellowship a permit for the sun display.

After it was informed by counsel that courts treat Christmas trees as secular symbols, rather than religious symbols, the Building Authority decided to erect a Christmas tree in the lobby of the Municipal Government Building, while continuing to prohibit the Old Ways Fellowship sun display.

The Old Ways Fellowship contests the Building Authority's policy and its decision regarding the Christmas tree. It has offered to put up a disclaimer sign explaining that the Winter Solstice greeting is not endorsed by City. The Building Authority has turned down this offer.

The Old Ways Fellowship has filed suit claiming violation of the First Amendment to the United States Constitution.

What arguments may the Old Ways Fellowship reasonably raise in support of its claim and how are they likely to fare? Discuss.

Question 6

Angela hired Mark, a real estate broker, to help her find a house to buy.

A week later, Mark contacted Angela and told her that he had found the perfect house for her. She asked him what he knew about the house. He said that the house had been owned for some years by Carol, who had kept it in pristine condition. When she visited the house, Angela noticed what appeared to be animal droppings on the deck. Carol assured her that they were only bird droppings, had never appeared previously, and would be removed before closing. Carol added that she never had any problem with any kind of "pests." Angela made an offer of $500,000 for the house, and Carol accepted.

After closing, Angela spent $10,000 to move her household goods to the house. A few weeks after moving into the house, Angela made several discoveries. First, the house suffered from a seasonal infestation of bats, which urinated and defecated on the deck. Second, Carol was in fact Mark's cousin, had owned the house for about a year, and had been desperate to sell it because of the bats. Mark was aware of all of these facts.

After the sale, Mark evenly split the proceeds with Carol and invested his $250,000 in stocks that are now worth $750,000.

At trial, Angela has established that Mark and Carol are liable to her in tort and contract.

1. What remedy or remedies may Angela obtain against Carol? Discuss.

2. What remedy or remedies may Angela obtain against Mark? Discuss.

February 2014

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

ROCK v. DAVIS

ROCK v. DAVIS

INSTRUCTIONS

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

ANDREWS and OUELLETTE

Attorneys at Law

12 Jordan Lane

Grafton, Columbia

MEMORANDUM

TO: Applicant

FROM: Penny Andrews

RE: Rock v. Davis and Bond

DATE: February 27, 2014

Our firm represents Gerald Rock in an action against detectives of the Grafton City Police Department for violation of his civil rights. Defense counsel filed a motion *in limine* to have certain evidence excluded at trial as hearsay. I need to prepare our position, in anticipation of defendants' argument supporting their motion.

Before I write my reply, please draft an objective memorandum that identifies and discusses the arguments, resolution of which will determine whether the evidence in question should be admitted. Ultimately, motions *in limine* are won or lost on how well we use the facts. Therefore, your objective memorandum should relate specific facts to the potential arguments and conclude how your analysis establishes whether the evidence will be admitted.

United States District Court
Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 COMPLAINT AND DEMAND FOR JURY TRIAL

JURISDICTION

1. Plaintiff, Gerald Rock, is a citizen of the State of Columbia and a resident of Grafton City, Columbia.
2. Jurisdiction is based on 42 U.S.C. §§ 1983 and 1988. The amount in controversy exceeds $75,000.00 excluding costs and attorneys' fees.

CLAIM I

3. Defendant, Detective Richard Davis, was and is an employee of the Grafton City Police Department.
4. Defendant, Detective Thomas Bond, was and is an employee of the Grafton City Police Department.
5. On August 29, 2011, Plaintiff was lawfully present in the Grafton City Courthouse in the State of Columbia.
6. While at the Grafton County Courthouse on August 29, 2011, Plaintiff was, unlawfully and without just cause, falsely arrested and imprisoned by Defendants.
7. Each Defendant acted maliciously, willfully and wantonly, and outside the scope of his jurisdiction, although under color of law, and violated the right of Plaintiff to be free from unreasonable search and seizure, from warrantless search and seizure, and from summary punishment without trial and due process of law.

8. Defendants, by their conduct, intentionally, willfully and without justification, and under color of law, did deprive Plaintiff of his rights, privileges and immunities secured to him by the Constitution and the laws of the United States, and by 42 U.S.C. §§ 1983 and 1988.

CLAIM II

9. Plaintiff realleges and incorporates by reference the facts contained in paragraphs 1 through 8.
10. That after the accosting of Plaintiff by Defendants, Plaintiff was falsely arrested and imprisoned while awaiting trial for approximately nine months by the City of Grafton.

CLAIM III

11. Plaintiff realleges and incorporates the facts contained in paragraphs 1 through 10.
12. After the false arrest, imprisonment and violation of his civil rights, Plaintiff was maliciously prosecuted by the Defendants in Grafton County Superior Court.
13. Defendants knew the prosecution was false when commenced.
14. The false charge was eventually dismissed by Judge Charles Heffernan June 11, 2012.

WHEREFORE, Plaintiff prays judgment as follows:

1. General and special damages in the amount of fifteen million dollars ($15,000,000);
2. Punitive and exemplary damages in an amount that this Court shall consider to be just and fair;
3. Attorneys' fees in an amount that this Court shall consider just and fair; and
4. Costs and disbursements of this action and such other and further relief as this Court may deem just and proper.

ANDREWS and OUELLETTE

By: ____*Penny Andrews*_____
Penny Andrews
Attorney for Plaintiff

Dated: June 3, 2013

United States District Court
Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 ANSWER TO COMPLAINT

ANSWER

1. Defendants deny each and every allegation in paragraphs 1 and 6-14, except admit that Plaintiff was arrested by Defendants, subsequently tried and acquitted.
2. Defendants admit to the allegations in paragraphs 3-5.
3. Defendants lack sufficient information and belief of the allegations in paragraph 1 and therefore deny each and every allegation.
4. Defendants deny each and every allegation in paragraph 2, except admit that Plaintiff purports to invoke the jurisdiction of this court as stated therein.

FIRST AFFIRMATIVE DEFENSE

5. The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

6. Any injury alleged to have been sustained resulted from Plaintiff's own culpable or negligent conduct and/or the intervening culpable or negligent conduct of others and was not the proximate result of any act of Defendants.

THIRD AFFIRMATIVE DEFENSE

7. There was probable cause for Plaintiff's arrest and prosecution.

FOURTH AFFIRMATIVE DEFENSE

8. Defendants have not violated any clearly established constitutional or statutory right of which a reasonable person should have known, and therefore are protected by qualified immunity.

FIFTH AFFIRMATIVE DEFENSE

9. At all times relevant to the incident, Defendants acted reasonably and in the proper and lawful exercise of their discretion.

WHEREFORE, Defendants request judgment dismissing the complaint in its entirety, together with the costs and disbursements of this action and such other and further relief as the Court may deem just and proper.

____*Mary Lynch*_____

Mary Lynch
Attorney for Defendants

Dated: July 5, 2013

United States District Court
Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 NOTICE OF MOTION *IN LIMINE*

PLEASE TAKE NOTICE that, upon all previous papers and proceedings in this matter, the undersigned will move this Court at the Courthouse located at 677 Pearl Street, Columbia, on March 6, 2014 at 9:00 a.m., or as soon thereafter as counsel can be heard, for an order:

> Excluding as hearsay, evidence of all transcripts or testimony concerning the prior testimony of the witness Joe Watts in the criminal trial of Plaintiff, out of which Plaintiff alleges his cause of action arose.

____*Mary Lynch*_____

Mary Lynch
Attorney for Defendants

Dated: February 26, 2014

EXCERPTS OF INTERVIEW BETWEEN PENNY ANDREWS AND CRIMINAL DEFENSE ATTORNEY DIDI HILL

March 1, 2013

. . . . .

HILL: Thanks for agreeing to meet with me, Penny.

ANDREWS: No problem. So, I understand you want to talk about a client of yours.

HILL: Yes, actually a former client, I guess. I know you'll have to talk directly to him, but he asked me to run this by you first. He's a little wary of the justice system at the moment.

ANDREWS: No problem.

HILL: I represented Gerald Rock in a criminal matter. He was charged with shooting someone, was acquitted, and now I think he may have a good civil claim against two of the police detectives involved.

ANDREWS: You aren't interested in taking it?

HILL: Not really. You know my partner died last year and he handled the civil stuff in the office. I am pretty much sticking to the criminal side.

ANDREWS: Okay, so tell me what happened?

HILL: On August 29, 2011, a shooting took place at the Grafton County Courthouse. Apparently a stray bullet struck and wounded a fifteen-year-old girl, Margaret Terry.

ANDREWS: Was this at night?

HILL: No. It was about 5:00 p.m.

ANDREWS: Who was this Margaret Terry?

HILL: That's part of the tragedy. She was just an innocent bystander who never saw the person who shot her.

ANDREWS: Okay, so then what happened?

HILL: The shooting was investigated by a couple of detectives named Richard Davis and Thomas Bond. The story is that someone called 911 and eventually Davis and Bond were assigned to investigate. Bond went to the scene to interview any witnesses and Davis went to pick up a guy named Joe Watts.

ANDREWS: Why Watts?

HILL: The detectives claimed later that the 911 caller, anonymous of course, said he might have seen Watts at the scene.

ANDREWS: I assume Watts has issues with the police?

HILL: Yeah, mostly petty stuff, but he was clearly on the police radar screen.

ANDREWS: So, then what happened?

HILL: Bond went to the crime scene and Davis found Watts and took him to the police station, where he interviewed him.

ANDREWS: Let me guess. He denied everything.

HILL: Close. He admitted he was near the courthouse at the time of the shooting, but denied being involved. The problem was he identified Rock as one of the shooters. Rock was then arrested and he called me.

ANDREWS: Go on.

HILL: The grand jury indicted Rock, charging him with various counts of assault, reckless endangerment, and criminal possession of a weapon.

ANDREWS: Did Watts testify at the grand jury?

HILL: Yes, and he again said my client was one of the shooters.

ANDREWS: What happened at trial?

HILL: Watts recanted his prior statements, both to Davis and the grand jury, identifying Rock as a shooter. Long story short, my client was released approximately nine months after his arrest.

ANDREWS: I assume this surprised you.

HILL: The renunciation? No. All along we claimed Davis and Bond coerced Watts into falsely accusing Rock as one of the shooters on the day of the shooting, and then pressured Watts into repeating the false accusation before the grand jury.

ANDREWS: So what is the story with Watts?

HILL: At trial, Watts, the sole witness against my client by the way, recanted under oath and in open court before the jury, and stated that the detectives had forced him to falsely testify against my guy.

ANDREWS: The District Attorney must not have been happy. Did the DA get in the grand jury testimony or try to rehabilitate Watts in any way?

HILL: The District Attorney made no effort to rehabilitate him with his grand jury testimony, despite prompting from the Court. I've got the trial transcript right here.

ANDREWS: Thanks. Why would the DA do nothing?

HILL: You're never sure what the other side is thinking, but my best guess is that he knew the case was lost and he just wanted it to end. There certainly were a lot of dirty looks between the DA and the two detectives. I think the DA just wanted to cut his losses before Watts could say anything more that could subject the city to civil liability.

ANDREWS: Okay, so back to Davis questioning Watts. After Watts fingered your guy, what happened?

HILL: After interviewing Watts, Davis called Bond at the crime scene. Davis told Bond that Rock was a suspect in the investigation and should be apprehended, which he was.

ANDREWS: Did Davis and Bond testify at trial?

HILL: No, neither testified at the criminal trial.

ANDREWS: Who signed the criminal complaint?

HILL: Detective Davis.

ANDREWS: You said your theory all along was that Watts was coerced. What led you to that theory?

HILL: Well, of course, to begin with you look at Watts's motivation. He was at the scene. He had a criminal record; given, it was minor. He had to be scared and was looking for a way to get Davis off his back. But then something else happened.

ANDREWS: What?

HILL: I got a phone call from Watts on my answering machine. He said he needed to talk to me. I called him back and he told me that he had been pressured to identify someone, so he did. He denied ever seeing Rock shoot a gun that day. I've got transcripts of those conversations I can give you.

ANDREWS: Thanks. When did this happen?

HILL: It was a couple of days after the grand jury indicted Rock.

ANDREWS: Where is Watts now?

HILL: Well, that's a problem. Rock tried to contact Watts to thank him for being a stand-up guy, but he found out Watts died last week in a liquor store robbery.

. . . . .

STATE OF COLUMBIA

GRAFTON COUNTY
SUPERIOR COURT

State of Columbia v. Gerald Rock	Criminal Division 2011-2341

TRIAL TRANSCRIPT

BY THE DISTRICT ATTORNEY: The State calls Joe Watts.

. . . . .

DIRECT EXAMINATION OF **JOE WATTS** BY THE DISTRICT ATTORNEY:

. . . . .

DA: Are you now telling us you did not see the defendant shoot the victim?

WATTS: Yes.

DA: After you were arrested, did you give a statement to the police?

WATTS: Yes, sir.

DA: What did you tell the police?

WATTS: I told them I had nothing to do with it.

DA: Did you give them any other statements?

WATTS: Yes, sir.

DA: What else did you tell them?

WATTS: What happened -- I told them what they wanted to hear, sir.

DA: What was that?

WATTS: That I had nothing to do with it.

DA: What did you -- what did you think they wanted to hear?

WATTS: Who did the shooting.

DA: Did you tell them?

WATTS: Yes.

DA: Who did you tell them did the shooting?

WATTS: I said I saw one of them and it was Gerry Rock.

DA: You told them you saw defendant do the shooting?

WATTS: Yes, sir.

DA: Why did you testify to that?

WATTS: Because I was forced under pressure, sir.

DA: Were you lying then?

WATTS: Yes, sir.

DA: I have no further questions, your honor.

. . . . .

CROSS-EXAMINATION BY DEFENSE COUNSEL DIDI HILL:

HILL: It's your testimony here in Court under oath that you did not see Mr. Rock with a gun. Is that correct?

WATTS: Yes, ma'am.

HILL: It's your testimony here under oath that you did not see Mr. Rock place a gun in the car. Is that correct?

WATTS: I didn't see him do anything like that.

HILL: But did you ever tell that to the police?

WATTS: Yes, ma'am.

HILL: When you were questioned by the police, did you feel pressured by the police?

WATTS: Yes, ma'am.

HILL: Tell us how you felt pressured by the police?

WATTS: Because they said my mom's house could get –

BY THE DISTRICT ATTORNEY: Objection.

. . . . .

BY DEFENSE COUNSEL:

HILL: You called my office the day after your grand jury appearance. Is that correct?
WATTS: Yes
HILL: You left a voice message?
WATTS: Yes.
HILL: I then returned your phone call. Correct?
WATTS: Yes.

BY DEFENSE COUNSEL: Your honor, at this point we would like to introduce what have been previously marked as Defense Exhibits 1 and 2. They are transcripts of the audio recordings of both the voice message left by Mr. Watts and our subsequent phone conversation. The prosecution has previously stipulated to the accuracy of these recordings.

BY THE COURT: I think we should excuse the jury for a few minutes. Bailiff, will you please escort the jury back to the jury room? . . . . . The jury has been removed, so let's hear those tapes. . . . Well, now that we have heard those tapes — let me just say for the record that the jury is still out of the courtroom -- let me ask the government, where are you going after this witness?

DA: This is our last witness.
THE COURT: Do you have any other evidence at all?
DA: No, your honor.
THE COURT: Then if defense counsel is done with Mr. Watts, the prosecution will rest?
DA: Yes.
THE COURT: I assume the defense is done with Mr. Watts. Correct?
HILL: Yes.
THE COURT: And the prosecution rests? Your only witness is Watts?
DA: Yes.

THE COURT: Let me go out on a limb here now and guess that defense counsel wants to make a motion for a directed verdict. Is that safe to say?

HILL: Yes, your honor.

THE COURT: Granted.

DEFENSE EXHIBIT 1

TRANSCRIPT OF VOICE MAIL MESSAGE LEFT BY JOE WATTS TO DEFENSE ATTORNEY DIDI HILL, SEPTEMBER 9, 2011

BY JOE WATTS: Um, you know um, this is Joe Watts. I'm the guy who was arrested and the police took me down to the station. I, um, am the one who fingered Gerry for the shooting. I told them the wrong story. They were trying to blame me. They said that I needed to confess or tell them who did it. They were trying to use my story against my friend and it's not true. Now I just testified at the grand jury and I get the same pressure before I go in and, um, I lied again. I told them it was Gerry that did it. So I just want to correct my story because the police told it wrong. Can you call me back, please?

DEFENSE EXHIBIT 2

TRANSCRIPT OF TELEPHONE CONVERSATION BETWEEN JOE WATTS AND DEFENSE ATTORNEY DIDI HILL, SEPTEMBER 9, 2011

. . . . .

HILL: So you saw someone in your backyard shoot toward the courthouse?

WATTS: Yeah.

HILL: Was it Gerald who fired the gun?

WATTS: I never even saw him. I never saw him there. I couldn't even see him down the block, even if he was down the block.

HILL: Now I'm confused. You didn't see who?

WATTS: Um, Gerry.

HILL: He wasn't in the backyard?

WATTS: Nah.

HILL: Did you ever see Gerald Rock fire a shot?

WATTS: No.

. . . . .

HILL: Okay, just so I make sure that there's nothing bad going on. Are you being threatened by anybody? Is anyone telling you to say something?

WATTS: Yes.

HILL: Tell me about that.

WATTS: The detective, ma‘am.

HILL: What did the detective say?

WATTS: He said, “Oh, I know what happened -- blah, blah, blah,” and told me, “You better start talking -- blah, blah, blah,” and he slapped me.

HILL: Really?

WATTS: Yeah.

. . . . .

HILL: Okay. Are you being threatened at all -- I just have to ask you this -- by Gerald?

WATTS: No.

February 2014

California Bar Examination

Performance Test B

LIBRARY

ROCK v. DAVIS

LIBRARY

Selected Provisions of the Federal Rules of Evidence

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

. . . . .

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

. . . . .

Rule 804. Exceptions to the Rule Against Hearsay -- When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: . . . . .

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or . . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross, or redirect examination.

. . . . .

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

. . . . .

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Hannah v. City Of Overland

United States Court of Appeals, Fifteenth Circuit (1986)

Plaintiff, David Hannah, filed suit under 42 U.S.C. § 1983, against the City of Overland and two members of its police force alleging that he was arrested and detained without probable cause on a capital murder charge and that the arresting officers used unreasonable and excessive force in arresting him. The District Court found in favor of all defendants. On appeal Hannah contends that the District Court erred in excluding the deposition testimony of two persons not parties to the action.

Robert “Red” Musgrove was murdered on June 18, 1981, in the City of Overland. Evidence was introduced that a life insurance policy on the victim's life had been purchased just prior to the murder, and that the named beneficiary under the policy was the victim's estranged wife, Sharon Musgrove. Mrs. Musgrove's boyfriend at the time of the murder was David Hannah.

The two police officer defendants interviewed Danny Beede as part of their investigation into the murder. Beede told the police officers that on June 27, 1981, he was drinking at a local bar with David Hannah. According to Beede, Hannah had told him that he had shot a man four times in the chest with a .38 from an alley, and had silenced the shots by placing a baby bottle nipple over the revolver. Based in large part on Beede's statement, a grand jury indictment was obtained and Hannah was arrested and charged with capital murder.

As part of its continuing investigation following Hannah’s arrest, the Overland police interviewed Robert Mesko. During that interview Mesko provided evidence corroborating Beede’s version of his conversation with Hannah.

Subsequent to the police interview, Hannah’s defense counsel deposed Mesko. Overland’s city prosecutor was present at the taking of that deposition.

Hannah was detained in the Overland jail for approximately eleven months until the criminal charge was dropped on June 25, 1982. According to the city prosecutor's office, the capital murder charge was dropped when Danny Beede refused to testify or cooperate with the prosecutor unless he was given some kind of “deal” regarding a prison sentence he then was serving in Ohio on an unrelated conviction.

Citing Federal Rule of Evidence 804(b)(1), Hannah sought to introduce the deposition testimony of Mesko. Mesko stated in his deposition that he felt he was "pressured" and "threatened" by Overland police officers to cooperate in the Musgrove investigation and to implicate Hannah in the murder. Hannah sought to admit the deposition into evidence to establish defendants' bad faith in arresting and detaining him. Mesko himself died just before this action was commenced. Hannah's counsel stated at trial that the deposition "will show that the police did their damnedest to put David Hannah in jail in spite of the fact that Mesko said he wasn't guilty...." Hannah argues that the jury reasonably could infer that police officers who were willing to threaten third parties to gain evidence against Hannah acted in bad faith.

We affirm the District Court's exclusion of the deposition testimony of Mesko. Under Rule 804(b)(1), former deposition testimony taken in another proceeding is not excluded by the hearsay rule if, in a civil action, a "predecessor in interest had an opportunity and *similar motive* to develop the testimony by direct, cross, or redirect examination." (emphasis added)

The proper approach, therefore, in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.

An attorney from the Overland prosecutor's office represented the State at the depositions. There were no representatives on behalf of any of the defendants herein present. Assuming *arguendo* that the State was a "predecessor in interest" of the defendants in the present action -- a proposition that is by no means clear -- the prosecutor did have an "opportunity" to develop the testimony of Mesko. We do not believe, however, that he had a "similar motive" to develop his testimony.

When the deposition was taken, Hannah already had been indicted by a grand jury for capital murder, and was awaiting trial in the criminal prosecution. The State's case rested in large part on the testimony of Danny Beede. The fact Mesko testified he

was “threatened” and “pressured” by the police to implicate Hannah in the murder was of little, if any, concern to the State at that time. The State apparently thought it had sufficient credible evidence to prove Hannah's guilt beyond a reasonable doubt. The testimony of Mesko posed little danger, if any, to the State's case against Hannah. We do not believe that the State had any significant motive, much less a “similar” motive, to develop the testimony of Mesko regarding threats by the police. It follows that the deposition testimony of Mesko would not have been admissible under Rule 804(b)(1).

Affirmed.

United States v. Cabrera

United States Court of Appeals, Fifteenth Circuit (2004)

Luis G. Cabrera was found guilty of two counts of first-degree murder and now appeals.

In January, 1996, a pedestrian discovered the bodies of Brandon Saunders and Vaughn Rowe in a wooded area of Rockford National Park. Investigators eventually regarded the defendant, Luis Cabrera, as a suspect. Several items of physical evidence linked Cabrera to the victims, including a belt seized from the Cabrera residence.

Dr. Richard Callery testified that during the autopsy of Mr. Rowe he observed an injury that resembled the imprint of a belt buckle. The government then introduced expert testimony that drew a connection between the patterned injuries observed on Rowe and the belt seized from Cabrera's residence. Finally, regarding the belt, Milly Mathis testified at trial that she met Cabrera in 1994 and had sporadic sexual encounters with him over the course of several years. Mathis testified that she was familiar with Cabrera's clothing style and identified a distinctive belt seized from his residence as one that he likely would have worn. She also stated, however, that she did not specifically recognize the belt.

Several months after his conviction, Cabrera moved for a new trial based on post-trial, out-of-court statements made by Milly Mathis. In statements given to Cabrera's counsel after trial, Mathis purported to recant her testimony and claimed that she had been coerced into giving perjured testimony at trial. At an evidentiary hearing on the motion for a new trial conducted by the trial judge, Mathis declined to testify on grounds of self-incrimination. Thus, she became “unavailable” as a witness.

Cabrera's attorneys then sought to introduce Mathis' post-conviction statements. Those statements of the unavailable declarant, Mathis, constitute hearsay because they were offered to prove the truth of their contents. The question before the trial judge, therefore, was whether the post-conviction statements should be admitted under either of two exceptions to the hearsay rule: Federal Rule of Evidence 804(b)(3) that pertains to statements against interest, and Rule 807, the “residual exception” relating to statements not covered by other exceptions “but having equivalent circumstantial guarantees of trustworthiness.”

The trial judge ruled that Cabrera failed to carry this burden sufficiently to justify a new trial because the hearsay statements were inadmissible and the other evidence at the hearing suggested that it was Mathis' recantation, and not her trial testimony, that was false. Thus, the key issue is whether the trial judge abused his discretion in refusing to admit Mathis' post-conviction statements in evidence.

Hearsay statements are generally not admissible unless the statement falls within a recognized exception to the hearsay rule. Rule 804(b)(3) allows the admission of a statement against interest if the declarant is unavailable to testify as a witness. Rule 804(b)(3) also imposes two conditions to the admissibility of hearsay evidence in addition to the declarant's unavailability. First, a statement against interest will be admissible only if it so far tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. Second, a statement tending to expose the declarant to criminal liability and offered to exculpate the accused may be admitted only if corroborating circumstances clearly indicate the trustworthiness of the statement.

Mathis became unavailable to testify when she invoked her Fifth Amendment privilege at the evidentiary hearing. Mathis' statement that she did not testify truthfully at trial was against her penal interest because it amounted to a squarely self-inculpatory confession. A reasonable person would know that admitting to giving false testimony would subject the person to criminal liability for perjury. In addition, the government had not offered Mathis immunity from any potential perjury charges and had even threatened to bring perjury charges against her if she recanted her trial testimony.

Mathis' statements, nonetheless, fail the test of admissibility under Rule 804(b)(3) because they lack corroborating evidence. The trial judge also focused on the fact that Mathis' recanting statement was made more than six months after she testified at trial. Mathis corresponded with Cabrera numerous times before meeting with his attorney. Thus, Mathis' recantation was not spontaneous, but was part of her attempt to build a relationship with Cabrera. The trial judge concluded that such a large temporal gap and lack of spontaneity did not support the admissibility of the statement.

The District Court did not abuse its discretion by finding that Mathis' statement was inadmissible under Rule 804(b)(3). Cabrera failed to meet his burden of clearly demonstrating with corroborating circumstances the trustworthiness of the statement.

Mathis' statements also were not admissible under Rule 807. That Rule provides an exception to the hearsay rule where a statement has sufficient circumstantial guarantees of trustworthiness if the court determines (1) the statement is offered as evidence of a material fact, (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The requirements are construed narrowly so that the exception does not swallow the hearsay rule. Mathis' post-trial statements fail to satisfy the requirement that the evidence have circumstantial guarantees of trustworthiness for the same reasons that they were not admissible under Rule 804(3)—they were not supported by sufficient corroborating evidence. In addition, excluding the evidence does not pose a great risk of miscarriage of justice, because Mathis' trial testimony was weak and related to only one small link among several implicating Cabrera in the crime. The District Court did not abuse its discretion by denying Cabrera's motion for a new trial because it had no admissible evidence on which to base the granting of a new trial.

Affirmed.

United States v. Bryce

United States Court of Appeals, Fifteenth Circuit (2000)

Ewan Bryce appeals from the judgment of the United States District Court convicting him, after a jury trial, of (i) conspiracy to possess with intent to distribute, and distribution of, cocaine; and (ii) possession with intent to distribute, and distribution of, cocaine.

In 1997, federal law enforcement officers in Connecticut conducted surveillance of several persons suspected of narcotics trafficking, including the appellant, Ewan Bryce, and his co-defendant, Darren Johnson. On August 5 and 6, 1997, agents intercepted and recorded a number of telephone conversations, eight of which are relevant to this case: seven calls between Bryce and Johnson (the Bryce–Johnson tapes), and one between Johnson and another individual, Edwin Gomez (the Johnson–Gomez tape).

During their conversations, Bryce and Johnson used guarded and coded phrases to arrange a transaction in which Bryce would sell powder cocaine to Johnson for $22,500 per kilogram. In their initial call on August 5, Bryce claimed to possess a quantity of what he called “straight.” Johnson expressed interest in buying some of this “straight,” and Bryce told Johnson to call him back later that night, presumably to arrange a meeting. But when Johnson called Bryce's cellular phone, there was no answer.

In a call early the next morning, August 6, Bryce told Johnson that he had already “let off” “like 6 of 'em . . . at 22–5.” Approximately three hours later, Johnson telephoned Gomez and informed him, in less cryptic language, that Bryce was selling “straight powder” for “deuce deuce” and had “off’ed 7 of 'em yesterday [August 5].” Johnson and Gomez expressed concern that the price being quoted would depress the price in other transactions.

After discussing matters with Gomez, Johnson called Bryce back and said he would buy “two,” to which Bryce responded: “Okay. Alright I'm gonna, um, call you back then.” Two minutes later, before Bryce could return Johnson's call, Johnson called Bryce again and told him that he would actually buy more than two, so long as Bryce was indeed selling “straight.” They agreed to meet at Bryce's home in fifteen minutes.

That meeting apparently never happened, however, because Bryce called Johnson several hours later to say that he really only had “one” left, and that he did not “really wanna get rid of this one,” but Johnson (by now quite put out) pleaded with Bryce to sell the “one” to him. Reluctantly, Bryce agreed, and they arranged to meet later that day. It is apparent that this meeting also never happened, because Johnson called Bryce on August 11 and asked him whether he still had “it.” Bryce said he did, and they again agreed to meet.

On August 26, 1997, federal agents arrested Johnson and another individual, one Michael McCausland. The next day, Bryce terminated the service on his pager; less than a month later, he began using a new cellular telephone. Soon thereafter, Bryce was also arrested.

Bryce and Johnson were charged in a two-count indictment. Count One alleged that the two conspired together and with others to possess with intent to distribute, and to distribute, cocaine; Count Two alleged that between, on, or about August 5 and 6, 1997, Bryce possessed with intent to distribute, and distributed, cocaine.

A jury convicted Bryce on both counts. The district court then sentenced Bryce to 124 months of imprisonment on each count (to be served concurrently) and five years of supervised release, plus a fine and an assessment.

Bryce challenges his conviction on the ground that the district court erred in admitting certain hearsay evidence—specifically, the Johnson–Gomez tape, on which Johnson repeats Bryce's claim that he has cocaine for sale and has already distributed some to others. The district court admitted the tape pursuant to the catch-all exception to the hearsay rule, Fed.R.Evid. 807, which permits admission of hearsay if (i) it is particularly trustworthy; (ii) it bears on a material fact; (iii) it is the most probative evidence addressing that fact; (iv) its admission is consistent with the rules of evidence and advances the interests of justice; and (v) its proffer follows adequate notice to the adverse party.

Bryce does not dispute that the statements in the Johnson–Gomez tape were material, that the declarants were unable to testify, or that the government complied with the Rule's notice requirement. The resolution of this argument is therefore linked most importantly to an evaluation of trustworthiness or reliability.

Under the hearsay rules, courts must evaluate the totality of the circumstances to determine whether a statement contains particular guarantees of trustworthiness that make the declaration especially worthy of belief. The Court listed several factors to consider in determining reliability including 1) the spontaneity of the statement; 2) the consistency of the statement; 3) the lack of motive to fabricate; 4) the reason the declarant will not testify; and 5) the voluntariness of the statement.

The statements at issue in the Johnson–Gomez tape have a high degree of trustworthiness. As we noted in *United States v. Matthews* (15th Cir. 1994):

> [O]rdinarily, a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption. On the other hand, if the statement is made to a person whom the declarant believes is an ally rather than a law enforcement official, and if the circumstances surrounding the portion of the statement that inculpates the defendant provide no reason to suspect that that inculpatory portion is any less trustworthy than the part of the statement that directly incriminates the declarant, the trustworthiness of the portion that inculpates the defendant may well be sufficiently established that its admission does not violate the hearsay rule.

Several factors prove particularly relevant in this case: (i) the statements were obtained via a covert wiretap of which neither Johnson nor Gomez was aware; (ii) the statements were made during the same time period that Johnson was conversing with Bryce; (iii) Johnson's statements implicated both himself and Bryce as participants in a narcotics conspiracy; and (iv) Gomez was Johnson's colleague in the narcotics trade. Based on these factors, there is little reason to believe that Johnson and Gomez had any motive to lie, or were lying, during this telephone conversation. Accordingly, the district court's decision to admit the Johnson–Gomez tape was proper under Rule 807. Affirmed.