

**JULY 2013**

**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

Patty was hit by a car, whose driver did not notice her because he was texting. Joe, a journalist, wrote a story about Patty's "texting" accident. Patty contacted Tom, a real estate attorney, and asked him to represent her in a claim against the driver. Tom agreed, and entered into a valid and proper contingency fee agreement. Tom later told Patty that he had referred her case to Alan, an experienced personal injury attorney, and she did not object. Unknown to Patty, Alan agreed to give one-third of his contingency fee to Tom.

Thereafter, Alan sent a \$200 gift certificate to Joe with a note stating: "In your future coverage of the 'texting' case, you might mention that I represent Patty."

Patty met with Alan and told him that Walter, a homeless man, had seen the driver texting just before the accident. Alan then met with Walter, who was living in a homeless shelter, and said to him: "Look, if you will testify truthfully about what you saw, I'll put you up in a hotel until you can get back on your feet."

1. What ethical violation(s), if any, has Tom committed? Discuss.
2. What ethical violation(s), if any, has Alan committed? Discuss.

Answer according to both California and ABA authorities.

## Question 2

The Legislature of State X recently completed a study on the behavior of teenagers residing in the state that revealed a connection between an increase in the school dropout rate and an increase in the level of criminal activity. The study indicated that the connection was most pronounced among boys ages 15 to 18 years old.

Troubled by what it perceived as a breakdown in personal responsibility and social order among its teenagers, State X's Legislature has enacted a statute creating the State Forestry Corps ("Corps"). The Corps drafts boys ages 15 to 18 who have dropped out of school. It sends them to camps located on public lands administered by the State Forest Service. It also provides them with a comprehensive education leading to a high school diploma. To defray a portion of the costs, the Corps requires the boys to work on reforestation projects for a few hours each day.

Pete, age 15, has dropped out of school and, consequently, has been drafted into the Corps. Pete and his parents have filed a declaratory relief action attacking the validity of the statute under three provisions of the United States Constitution: (1) the Thirteenth Amendment's Involuntary Servitude Clause; (2) the Fourteenth Amendment's Due Process Clause; and (3) the Fourteenth Amendment's Equal Protection Clause.

What arguments could Pete or his parents reasonably make in support of their action, and how should the court rule on each? Discuss.

### Question 3

In 2007, while married to Hank and residing in California, Wendy inherited \$150,000. Wendy used the money to purchase \$50,000 worth of Chex Oil stock and a restaurant that cost \$100,000. Hank managed the restaurant and, solely through his own efforts, it prospered and is now worth \$300,000.

In 2008, Hank inherited an unimproved lot in California worth \$75,000. Hank and Wendy obtained a construction loan from a bank for the purpose of building a rental house on the lot. In making the loan, the bank relied upon the salaries earned by both Hank and Wendy and, in addition, required that Wendy pledge the Chex Oil stock. A rental house was constructed on the lot. The present market value of the property, as improved, is \$500,000.

In 2011, Cathy, a customer at the restaurant, tripped and fell over a box carelessly placed in the entryway by Hank. She obtained a judgment against Hank for injuries suffered in the fall.

Hank and Wendy have now decided to dissolve their marriage.

1. What are Wendy's and Hank's respective rights in:
  - a. The Chex Oil stock? Discuss.
  - b. The restaurant? Discuss.
  - c. The rental property? Discuss.
2. To satisfy her judgment, may Cathy reach the community property, Hank's separate property, and/or Wendy's separate property? Discuss.

Answer according to California law.



**July 2013**

**California  
Bar  
Examination**

**Performance Test A  
INSTRUCTIONS AND FILE**

**IN RE SIA**

Instructions . . . . .

**FILE**

Memorandum from Sonia Sanchez to Applicant . . . . .

Transcript of Interview with Karen Barber . . . . .

Letter from Matt Conyers to Karen Barber . . . . .

Complaint to Attorney General on a Nonprofit Organization . . . . .

SIA Information Sheet . . . . .

SIA Board of Directors Quarterly Meeting Minutes . . . . .

## IN RE SIA

### 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.

**SANCHEZ & MARTIN  
ATTORNEYS AT LAW**

1600 K STREET, SUITE 250  
P.O. BOX 423, FRANKLIN, CL 94203-4470  
Telephone: (926) 445-2021 Facsimile: (926) 444-3651

**MEMORANDUM**

**TO:** Applicant

**FROM:** Sonia Sanchez

**DATE:** July 30, 2013

**RE:** In re SIA

Sensory Integration Alliance, Inc. (SIA) is a nonprofit corporation. Two weeks ago, SIA received a letter from the State Attorney General's Office, enclosing a consumer complaint filed with the Registry of Charitable Trusts. According to the complaint, SIA failed to refund fees for canceled seminars.

As a result of the letter and complaint, SIA's new Executive Director, Karen Barber, did an investigation. To her surprise, she discovered additional serious issues related to the operation of SIA.

Given what she has discovered, Ms. Barber seeks our advice. I need to counsel her concerning what potential liability SIA has for the following acts:

1. Canceled or unscheduled seminars;
2. Payments for Klene Up Kroo janitorial services;
3. Unfiled Form 990s;



4. Expense account reimbursements to Vernon Ellis; and
5. Cruise taken by board members.

Please prepare an objective memorandum that:

1. For each of the above-listed acts:
  - A) States the potential remedies;
  - B) States what statute and section prescribes the remedy; and
  - C) Discusses whether the available facts would support an effort by the Attorney General to impose the remedy;

and,

2. Discusses whether the Attorney General could successfully seek a receivership or dissolution of the corporation.

Another associate is looking at SIA's remedies against the individual transgressors, so do not discuss either SIA's rights against these individuals or the Attorney General's remedies against these individuals.

## TRANSCRIPT OF INTERVIEW WITH KAREN BARBER

(July 30, 2013)

**SONIA SANCHEZ:** Ms. Barber – Karen – from what you told me over the phone, it sounds as if you have some fairly troublesome things you want to talk about. Why don't we go back to the beginning?

**KAREN BARBER:** Right. First let me say how glad I am that you could see me right away. As I understand it, your firm is counsel to Sensory Integration Alliance, Inc. – SIA.

**SANCHEZ:** Yes, that's right. We've represented them for the past 10 years or so. I did the original incorporation papers and took care of registering SIA with the Registry of Charitable Trusts. My contact has always been with Vernon Ellis.

**BARBER:** I'm his replacement. I've just started working as the new Executive Director.

**SANCHEZ:** When did you start?

**BARBER:** Two weeks ago.

**SANCHEZ:** What's your function as Executive Director at SIA?

**BARBER:** Basically, the same as Vernon Ellis's was. I'm responsible for financial and operational aspects of the corporation and supervising the staff. I report to the five-member Board of Directors, and I work closely with Alan Zackler, the Chair of the Board's Budget and Finance Committee.

**SANCHEZ:** What happened to Vernon?

**BARBER:** Unfortunately, about three months ago, he was killed in an auto accident.

**SANCHEZ:** I'm so sorry to hear that. What is it that brings you here?

**BARBER:** Well, on my first day of work, I received a letter from the Attorney General's Office enclosing a complaint from a person who claims that she had sent in a check to cover the cost of her attendance at a series of classes that SIA was sponsoring. The Attorney General's letter says I have 30 days to respond. Well, now two weeks.

**SANCHEZ:** Was the complainant right – that is, did she pay and did she not get a refund?

**BARBER:** Well, I haven't been able to pinpoint that exactly as yet, but in the course of looking into it, I found something that really looks suspicious. I was – and still am – in the process of getting familiar with the operation, so what I'm going to tell you is what I've found so far.

**SANCHEZ:** What was suspicious?

**BARBER:** It's pretty complicated, but let me try to outline it for you. As best I can tell at this point, SIA sponsors seminars and classes on sensory integration several times a year. There's a separate file for each seminar or class, containing spreadsheets showing the names and contact information for each of the people who signed up and recording each person's advance payment. Occasionally, the classes get canceled for one reason or another. When a seminar got canceled, apparently Vernon Ellis sent out letters to the people who had paid telling them of the cancellation and asking whether they wanted a refund or whether they would agree to donate their payment to SIA as a charitable contribution.

**SANCHEZ:** So, after notice goes out to the public and all arrangements are made, the classes get canceled? Did people who wanted their money back usually get a refund?

**BARBER:** Well, I found refund checks written to those individuals but when I tried to track them so I could respond to the Attorney General's letter, what I found is that all of those checks had been deposited at Balfour Bank, into an account in Vernon Ellis's name.

**SANCHEZ:** These were refund checks for all canceled seminars?

**BARBER:** That's partly right. There are some where all the rooms were booked and instructors engaged and then canceled, apparently because there wasn't enough enrollment. There are about an equal number for which public announcements went out, but as to which I can find absolutely no evidence that anything was ever done to arrange for the events – no rooms booked, no instructors contacted, or anything.

**SANCHEZ:** You mean nonexistent seminars?

**BARBER:** Apparently so.

**SANCHEZ:** Why would anyone do that?

**BARBER:** Well, here's where it gets complicated. When I moved into Vernon Ellis's office, I was trying to clear out his desk and get mine set up. The three drawers on the

right side were locked, and no one knew where the key was. I actually had to call a locksmith to open the drawers. And what I found really surprised me. There were some bank records for an account set up at Balfour Bank in Vernon Ellis's name.

**SANCHEZ:** I take it that Balfour Bank is not the bank SIA uses for its own accounts, right?

**BARBER:** Right.

**SANCHEZ:** Is there any connection between the Balfour Bank records and the "refund" checks that you just told me about?

**BARBER:** Yes. Here's what I've been able to figure out. As to any person who responded that he wanted his money back, Vernon would write a check in the proper amount payable to that person, then, in what I've been able to recognize as his handwriting, he'd endorse the check with that person's name and deposit it into his account at Balfour Bank. Then, periodically, he would write checks from that account to someone named Adele Stevens, who I've found out is Vernon's sister.

**SANCHEZ:** Did this pattern appear with respect to the seminars that were canceled after they had actually been planned and also as to the never-planned or "phony" seminars?

**BARBER:** Pretty much the same.

**SANCHEZ:** Do you have any idea how much money we're talking about?

**BARBER:** For the past three years, I've been able to track about \$18,000 in refund checks that were written to the paying customers but actually deposited into Vernon Ellis's account at Balfour Bank.

**SANCHEZ:** On the face of it, it sounds as if Vernon was running a scam. What else did you find in Vernon's desk drawers?

**BARBER:** There was a whole other series of bank records, and this one is even scarier. There were a series of invoices from a company called The Klene Up Kroo for janitorial services and checks written to that company for the amounts of the invoices. The checks, totaling \$22,000 over an 18-month period, were drawn on SIA's account and signed by Vernon Ellis. Those checks were endorsed in the name of Howard Klene and then deposited into an account in Howard Klene's name at First Bank. Regular withdrawals made from the Howard Klene account were then deposited into an account

opened in Vernon Ellis's name at Arden Bank. Disbursements from the Arden Bank account were made regularly to Vernon Ellis and Alan Zackler – each of them received cumulatively about \$8,000. The current balance in the account is about \$6,000.

**SANCHEZ:** Oh! Is that the same Alan Zackler you report to – a member of SIA's Board and the Chair of the Budget and Finance Committee?

**BARBER:** I'm certainly assuming so. I mean, I don't know any other Alan Zackler.

**SANCHEZ:** What else did you find?

**BARBER:** There's something called a Form 990 that SIA is supposed to file annually with the Attorney General and the Internal Revenue Service.

**SANCHEZ:** Yes. That's basically an informational tax return for charitable organizations. It includes information such as the major donors, the members of the board, the amounts of compensation paid to board members and staff, and the operational expenses.

**BARBER:** In the bottom drawer of the desk, there was a file labeled "990s." There were Form 990s that appeared to be completely filled out and signed by Alan Zackler – they were for 2010, 2011, and 2012 and they looked like the originals. Also, memos to the Board from Vernon Ellis, dated the last two years, stating that the 990s for 2010, 2011, and 2012 were timely filed. And there was also a letter from the IRS to Mr. Zackler dated April 20, 2012 stating that the 990s for 2010 and 2011 had never been received by the IRS. On the IRS's letter, there was a handwritten note across the top, "Vernon, please handle this. AZ."

**SANCHEZ:** Were you able to tell from the forms whether they had been accurately filled out?

**BARBER:** Not really, but I can tell you that the numbers didn't seem to add up. I mean, I know who the major donors are, and I saw only a few of them listed. Also, the operational expenses reported on the form seemed to me to be overstated quite a bit.

**SANCHEZ:** What else?

**BARBER:** One of the folders in the drawer was labeled "Expense Accounts – Vernon/2011." The expense vouchers were filled out in Vernon Ellis's handwriting. A few of them had receipts and other supporting documents attached, but not many. Many entries had to do with SIA travel and entertainment – dinner parties, cocktails, and

the like. What I found with respect to a couple of the dinner parties is that Vernon had written an SIA check to the restaurant where the party was held. Then, he'd sometimes attach the restaurant dinner bill to his expense report and get personal reimbursement for it. Also, he would use an SIA credit card, pay the credit card bill with an SIA check, and then also seek personal reimbursement -- double-dipping, so to speak. He got some other reimbursements not supported by receipts. All in all for 2011, the total reimbursement to Vernon was close to \$12,500 and only about \$4,000 was supported by back-up receipts.

**SANCHEZ:** Was there any procedure for verifying expense reimbursements and approval of them?

**BARBER:** As I understand it, expense reports of the Executive Director are supposed to be submitted to the Board of Directors for approval. I checked the board minutes to see if that had been done, and what I found is that Vernon Ellis would attend the board meeting and present his expense reports about once a quarter. The minutes showed that, on each occasion, Alan Zackler "assured the Board" of the accuracy of the expense reports and made a motion that they be accepted as submitted.

**SANCHEZ:** Is there anything else that gives you pause?

**BARBER:** While I was going over the check registers, I noticed a \$70,000 check written to Wanderly Travel Service. Melanie Wanderly is a member of the Board and she owns Wanderly Travel Service. I tracked it back to an invoice for a Caribbean cruise last summer for the Executive Committee of the Board -- the members of the Executive Committee are Alan Zackler and Melanie Wanderly. The Executive Director is an ex officio member of that committee.

**SANCHEZ:** What was that all about? Do you know?

**BARBER:** The best I can tell from the records is that Alan Zackler, Melanie Wanderly, and Vernon Ellis and their spouses went on this 10-day cruise. The written agenda described it as a "long-range planning" meeting of the Executive Committee -- meeting at breakfast each day for one hour to discuss long-range planning followed by "free time."

**SANCHEZ:** I agree it sounds suspicious, but maybe not if they really did conduct official business during a substantial portion of the time. Is there any record of what they accomplished by way of long-range planning?

**BARBER:** None that I could find. In fact, the \$70,000 expenditure showed up on the financial statements for that period as “accumulated organizational expenses,” and the minutes of that meeting do not show that there was any discussion of the item during Alan Zackler’s presentation of the financial report in his capacity as Chair of the Finance and Budget Committee.

**SANCHEZ:** By the way, what’s your sense of the overall financial health of SIA?

**BARBER:** As far as I can tell, it’s pretty healthy. We have a steady stream of charitable donations coming in. We also have a number of foundation grants that are on track for renewal. We also have a half a million dollars in reserves.

**SANCHEZ:** Well, that’s good to hear. I remember reading about problems of charities using commercial fundraisers. Does SIA use any fundraisers?

**BARBER:** You mean, telemarketers or mass mailers, no, no. We don’t do any fundraising appeals to the general public, either on our own or through professional solicitors.

**SANCHEZ:** How much of this have you disclosed to the Board?

**BARBER:** Nothing. Fortunately, the Board is changing. The terms of Wanderly and Zackler are up, and they have said that they are stepping down from the SIA Board. At the next meeting, two new board members have been nominated by the other board members, and then new officers and a committee chair will be selected by the new Board.

**SANCHEZ:** That will make things easier for us to keep this between us for the time being, at least until the next board meeting, and there is a new Board. Our firm represents SIA, not the individual directors. I think there’s some exposure here.

**BARBER:** Well, that’s what I want to know. I need to respond to the Attorney General and I’m obviously in a bind.

**SANCHEZ:** Yes, I agree, and although there are others we probably need to be concerned about, the primary regulator is the State Attorney General. She has broad powers of supervision over charitable organizations like SIA, and there’s an extensive

statutory scheme for regulations that range from a mere slap on the hands to taking over completely or even dissolving the entity. Given your time constraints, let's focus for now on the Attorney General. I'm going to have to see how all the things you've told me interact with the statutes and what the consequences are. I'll piece it all together and give you written advice.

**BARBER:** OK. I look forward to hearing from you.

**SANCHEZ:** I'll be in touch soon. Thanks for coming in.



**State of Columbia Department of Justice**

1300 I Street, Suite 125  
P.O. Box 903447  
Franklin, CL 94203-4470

Rosalie Edmonds, Attorney General

July 15, 2013

Karen Barber  
Executive Director  
Sensory Integration Alliance, Inc.  
465 Monument Boulevard, Suite 325  
Martinville, CL 93625

Re: Complaint # 2555

Dear Ms. Barber:

The Registry of Charitable Trusts of our office has received the enclosed complaint regarding an unpaid refund for a seminar sponsored by Sensory Integration Alliance, Inc. and subsequently canceled. We are considering whether to initiate an investigation. Please provide us with an explanation for this problem, state what you intend to do to remedy it, and any other pertinent information. If you do not respond in writing within 30 days, our Investigations Unit will proceed with an investigation.

Sincerely yours,

Matt Conyers  
Deputy Attorney General

**ROSALIE EDMONDS, Attorney General**

State of Columbia  
**DEPARTMENT OF JUSTICE**  
1300 I Street, Suite 125  
P.O. Box 903447  
Franklin, CL 94203-4470

Public: (926) 777-3200  
Facsimile: (926) 777-4446

**COMPLAINT TO ATTORNEY GENERAL  
ON A NONPROFIT ORGANIZATION**

Name of organization: **Sensory Integration Alliance, Inc.**

List any other names it uses: **Unknown**

Address of organization: **465 Monument Blvd., #325**

City, State, ZIP: **Martinville, CL 93625**

Telephone number of the organization: **(555) 329-4686**

Briefly summarize the main points of your complaint here: (Attach additional pages for the details of your complaint, if necessary.)

**I signed up for a 5-session class for \$895 that I paid for in advance. I was notified that the classes were canceled and have been promised a refund, but it's been over 6 months and I haven't received a refund yet.**

Have charitable funds or other assets been lost, wasted or diverted from proper charitable purposes? Or, is there a danger that such loss will soon occur? Please explain, giving your best estimate of the amount lost or at risk, if you know:

**I have no idea whether the funds have been diverted.**

What action has already been taken, either within the organization or with other law enforcement agencies, to try to resolve this problem? Please include dates if available:

**I had at least four calls with Vernon Ellis. He assured me that the funds were being refunded, but I never received them.**

List the names, addresses and telephone numbers, if known, of all persons you believe may be responsible for this problem:

**Unknown**

Your name, address and telephone number:

**Alice Rayburn  
14 Stonecrest Manor  
Jackson, CL  
(555) 206-3872**

Date: January 30, 2013

Check here, if you request that your identity be kept confidential.

Mail the completed form and any attachments to:

Registry of Charitable Trusts  
Office of the Attorney General  
P.O. Box 903447  
Franklin, CL 94203-4470

**Sensory Integration Alliance, Inc.**  
**Research, Education, Accommodation, Treatment**  
A 501(c)(3) Nonprofit Corporation

Nearly one out of every thousand people has difficulty processing information from one or more of their five basic senses:

- Vision
- Auditory
- Touch
- Olfaction (smell)
- Taste

Plus two lesser-known senses:

- Vestibular (sense of movement)
- Proprioception (sense of position)

The disability includes over-response (for example, when a person finds the touch of clothing or physical contact unbearable) and under-response (for example, when a person shows little or no reaction to pain or temperature extremes).

Sensory Integration Alliance, Inc. (SIA) exists to help people who live with sensory disorders and their families.

**Services to Individuals with Sensory Disabilities**

Information - SIA collects and disseminates up-to-date information to enable individuals to understand their disability, to find treatment, and to seek accommodations at school or in the workplace. This information is available on the SIA website, [www.senses.org](http://www.senses.org).

Referral - SIA maintains a database of medical and education specialists and is able to make referrals for individuals to receive the services necessary and appropriate for their condition.

## **Services to Families of Individuals with Sensory Disabilities**

Education - SIA convenes presentations and seminars to explain sensory integration disorder (SID) and its treatments, therapies, and other interventions to parents and other family members. Seminars feature qualified professionals, doctors, occupational therapists, psychologists, educators, etc. Topics include new therapies, special education programs at schools, available community resources and more.

## **Services to Professionals**

Education - SIA will convene presentations and seminars to bring the latest information to professionals working in the field of sensory disability. Seminars will feature expert practitioners and researchers. Topics may include new therapies, special education programs at schools, available community resources, and more.

Referrals - Professionals have the opportunity to be part of SIA's referral network. Please contact Karen Barber, SIA Executive Director, for details. [kbarber@senses.org](mailto:kbarber@senses.org).

## **Minutes of the Quarterly Meeting, SIA Board of Directors**

September 15, 2011

The meeting was convened at 5:00 p.m. at the SIA offices. All board members were present, and the Chair declared that a quorum was present.

Moved, seconded and resolved to approve the minutes of the June 6, 2011 meeting.

Executive Director, Vernon Ellis, provided his report to the Board. Director Alan Zackler orally presented his Budget and Finance Committee Report, concluding that the financial status of SIA was solid, and asked that the Board approve all of the expense reimbursements of the previous quarter. Directors Jeff Garcia and Warrick Dunne questioned certain expenditures. Director Zackler responded that he had reviewed each of them and that each was bona fide. The Board moved, seconded and resolved approval of payment of the quarterly expenditures.

The Board discussed the status of the public seminars. Executive Director Ellis reported that the programs were on track and had been well received.

The meeting was adjourned at 5:45 p.m.

## **Minutes of the Quarterly Meeting, SIA Board of Directors**

April 15, 2012

The meeting was convened at 5:15 p.m. at the SIA offices. All board members were present, and the Chair declared that a quorum was present.

Moved, seconded and resolved to approve the minutes of the January 15, 2012 meeting.

Director Alan Zackler orally presented his Budget and Finance Committee Report, and reported that expenditures were under the budgeted amounts and that revenues were on target. Director Warrick Dunne led a discussion by several directors about the apparent increase in staff travel reimbursements. Director Zackler explained that these were legitimate expenses associated with the increase in public seminar programs, and that all of the expenditures had been reviewed and each was well-documented in the files of SIA.

The meeting was adjourned at 5:45 p.m.

## **Minutes of the Quarterly Meeting, SIA Board of Directors**

January 15, 2013

The meeting was convened at 5:00 p.m. at the SIA offices. All board members were present, and the Chair declared that a quorum was present.

Moved, seconded and resolved to approve the minutes of the September 15, 2012 meeting.

Director Alan Zackler reported that preparation of the annual budget had been delayed because all of the previous year's income and expense data were not ready. Executive Director Vernon Ellis was still working on it. Several directors expressed serious concern. Director Zackler reassured them that everything was in order; just a little slow this year. Director Jeff Garcia asked if SIA's reports to the IRS and State Franchise Tax Board had been filed, and Director Zackler assured the Board that all reporting requirements had been met.

The meeting was adjourned at 5:45 p.m.



**July 2013**

**California  
Bar  
Examination**

**Performance Test A**

**LIBRARY**



**IN RE SIA**

**LIBRARY**

**Selected Provisions of the Columbia Corporations Code,  
Nonprofit Corporation Law** .....

**Selected Provisions of the Columbia Government Code,  
also known as the Columbia Uniform Supervision of  
Trustees for Charitable Purposes Act (the Uniform Act)** .....

**People v. Orange County Charitable Services**  
Columbia Court of Appeal (1998) .....

**Attorney General v. Sidley Memorial Hospital**  
Columbia Supreme Court (1994) .....

## **Selected Provisions of the Columbia Corporations Code, Nonprofit Corporation Law**

### **Section 5231.**

- (a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.
- (b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:
  - (1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;
  - (2) Counsel, independent accountants, or other persons as to matters which the director believes to be within such person's professional or expert competence; or
  - (3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.
- (c) Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated.

### **Section 5233.**

- (a) Except as provided in subdivision (b), for the purpose of this section, a self-dealing transaction means a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest and which does not meet the requirements of subdivision (d). Such a director is an "interested director" for the purpose of this section.

- (b) The provisions of this section do not apply to any of the following:
- (1) An action of the board fixing the compensation of a director as a director or officer of the corporation.
  - (2) A transaction which is part of a public or charitable program of the corporation if it:
    - (i) is approved or authorized by the corporation in good faith and without unjustified favoritism; and
    - (ii) results in a benefit to one or more directors or their families because they are in the class of persons intended to be benefited by the public or charitable program.
  - (3) A transaction, of which the interested director or directors have no actual knowledge, and which does not exceed the lesser of 1 percent of the gross receipts of the corporation for the preceding fiscal year, or one hundred thousand dollars (\$100,000).
- (c) The Attorney General may bring an action in the superior court of the proper county for the remedies specified in subdivision (e).
- (d) In any action brought under subdivision (c) the remedies specified in subdivision (e) shall not be granted if the following facts are established:
- (1) The corporation entered into the transaction for its own benefit;
  - (2) The transaction was fair and reasonable as to the corporation at the time the corporation entered into the transaction;
  - (3) Prior to consummating the transaction, the board authorized or approved the transaction in good faith by a vote of a majority of the directors then in office without counting the vote of the interested director or directors, and with knowledge of the material facts concerning the transaction and the director's interest in the transaction; and,
  - (4) Prior to consummating the transaction in good faith, determined after reasonable investigation under the circumstances that:
    - (i) the corporation could not have obtained a more advantageous arrangement with reasonable effort under the circumstances, or
    - (ii) the corporation in fact could not have obtained a more advantageous arrangement with reasonable effort under the circumstances.
- (e) If a self-dealing transaction has taken place, the interested director or directors shall do such things and pay such damages as in the discretion of the court will provide an equitable and fair remedy to the corporation, taking into account any benefit received by the corporation and whether the interested director or directors acted in good faith and with intent to further the best interest of the corporation. Without limiting the

generality of the foregoing, the court may order the director to do any or all of the following:

- (1) Account for any profits made from such transaction, and pay them to the corporation;
- (2) Pay the corporation the value of the use of any of its property used in such transaction; and
- (3) Return or replace any property lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate. In addition, the court may, in its discretion, grant exemplary damages for a fraudulent or malicious violation of this section.

#### **Section 5250.**

A corporation is subject at all times to examination by the Attorney General, on behalf of the State, to ascertain the condition of its affairs and to what extent, if at all, it fails to comply with trusts which it has assumed, or has departed from the purposes for which it is formed. In case of any such failure or departure, the Attorney General may institute, in the name of the State, the proceeding necessary to correct the noncompliance or departure.

#### **Section 6511.**

- (a) The Attorney General may bring an action against any corporation or purported corporation, in the name of the people of this State, upon the Attorney General's own information or upon complaint of a private party, to procure a judgment dissolving the corporation and annulling, vacating or forfeiting its corporate existence upon any of the following grounds:
  - (1) The corporation has seriously offended against any provision of the statutes regulating corporations or charitable organizations.
  - (2) The corporation has fraudulently abused or usurped corporate privileges or powers.
  - (3) The corporation has violated any provision of law by any act or default which under the law is a ground for forfeiture of corporate existence.
- (b) If the ground of the action is a matter or act which the corporation has done or omitted to do that can be corrected by amendment of its articles or by other corporate action,

such suit shall not be maintained unless: (1) the Attorney General, at least 30 days prior to the institution of suit, has given the corporation written notice of the matter or act done or omitted to be done; and (2) the corporation has failed to institute proceedings to correct it within the 30-day period, or thereafter fails to duly and properly make such amendment or take the corrective corporate action.

- (c) In any such action, the court may order restitutionary and/or injunctive relief to compensate or protect members of the public who have been harmed by the corporation's violations of the law. The court may order dissolution or such other or partial relief as it deems just and expedient. The court also may appoint a receiver for winding up the affairs of the corporation or may order that the corporation be wound up by its board, subject to the supervision of the court.

**Selected Provisions of the Columbia Government Code,  
also known as the Columbia Uniform Supervision of Trustees for  
Charitable Purposes Act (the Uniform Act)**

**Section 125.**

- (a) Annually, every charitable corporation, unincorporated association, and trustee subject to this article shall file with the Attorney General a copy of the Form 990 submitted to the Internal Revenue Service.
- (b) Upon registration, a corporation shall file the first Form 990 not later than four months and 15 days following the close of the first calendar or fiscal year in which property is initially received.
- (c) In addition to a registration fee, a charitable corporation or trustee, or commercial fundraiser may be assessed a late fee of twenty-five dollars (\$25) for each month or part of the month it fails to file its first and subsequent Form 990s.

**Section 126.**

- (a) Any person who violates any provision of this Act with intent to deceive or defraud any charity or individual is liable for a civil penalty not exceeding ten thousand dollars (\$10,000).
- (b) Except as provided in subdivision (d), any person who violates any other provision of this Act is liable for a civil penalty, as follows:
  - (1) For the first offense, a fine not exceeding one thousand dollars (\$1,000).
  - (2) For any subsequent offense, a fine not exceeding two thousand five hundred dollars (\$2,500).
- (c) Any offense committed under this Act involving a solicitation may be deemed to have been committed at either the place at which the solicitation was initiated or at the place where the solicitation was received.
- (d) Any person who violates only subdivision (a) or (b) of Section 125 shall not be liable for a civil penalty under subdivision (b) if the person: (1) has not received reasonable notice of the violation; and (2) has not been given a reasonable opportunity to correct the violation. The Attorney General shall notify in writing a person who violates only subdivisions (a) or (b) of Section 125 that he or she has 30 days to correct the violation.
- (e) The recovery of a civil penalty pursuant to this section precludes assessment of a late fee pursuant to Section 125 for the same offense.

**Section 127.**

- (a) The primary responsibility for supervising charitable trusts in Columbia, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations, resides in the Attorney General. The Attorney General has broad powers under common law and Columbia statutory law to carry out these charitable trust enforcement responsibilities. These powers include, but are not limited to, charitable trust enforcement actions under all of the following:
- (1) This Act;
  - (2) The Nonprofit Corporation Law, Corporations Code sections 5000, et. seq.
- (b) The Attorney General may refuse to register or may revoke or suspend the registration of a charitable corporation or trustee or commercial fundraiser whenever the Attorney General finds that the charitable corporation or trustee or commercial fundraiser has violated or is operating in violation of any provisions of this Act.

## **People v. Orange County Charitable Services**

Columbia Court of Appeal (1998)

This appeal arises from a case brought by the Attorney General against more than 130 individual and business entities engaged in commercial fundraising, and related charitable organizations. After a bench trial, the court entered a judgment enjoining the defendants from engaging in the business of soliciting funds for charitable purposes until they had made a complete accounting of nearly \$15 million in funds raised from the public through telephone solicitations. The court further enjoined them from making false or misleading statements in their solicitations and directed them to make specific, statutorily mandated affirmative disclosures. It also imposed a constructive charitable trust on the funds.

The appellant, Mitchell Doyle, dba Orange County Charitable Services, the only party pursuing this appeal, challenges the court's factual findings as unsupported by sufficient evidence and its legal conclusions as erroneous. We affirm.

Orange County Charitable Services (OCCS) is a sole proprietorship established by Mitchell Doyle (Doyle) in 1987. It is in the business of raising funds for charities through telephone solicitations for contributions from members of the public. In the years 1990 through 1994, OCCS was registered as a commercial fundraiser, as required under Columbia's Uniform Supervision of Trustees for Charitable Purposes Act (the Uniform Act), Government Code sections 125, et. seq.

In order to increase OCCS's profitability, Doyle created charities that would contract their fundraising with OCCS, American Veterans Assistance (AVA) and Columbians Against Drugs (CAD). He then hired OCCS to raise funds for both charities. AVA and CAD agreed to pay OCCS 92 percent and 93 percent, respectively, of the gross revenues secured by the fundraiser.

Doyle controlled the finances and, to a significant degree, the operations of AVA and CAD from their inception dates. The charities were incorporated as Columbia public benefit corporations. Each charity's articles of incorporation contained substantially the following clause: "This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. This corporation is organized and operated exclusively for charitable purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code. The property of this corporation is irrevocably dedicated to charitable purposes and no part of



the net income or assets of this corporation shall ever inure to the benefit of any director, officer, or member or to the benefit of any private person.”

OCCS entered into more than 100 subcontracts with various parties to conduct commercial fundraising for various charities, including AVA and CAD. Under the customary subcontract, 10 percent or less of the gross revenues would be paid to the charitable organizations. The subcontractor and OCCS divided the 90 percent fee, according to the terms of the agreement.

OCCS operated telemarketing rooms -- “boiler rooms” -- throughout the state. The boiler room managers were instructed to have telemarketers inform the donors that 75 to 80 percent of the money being raised was used for “program services.” OCCS gave similar instructions to its subcontractors. Telemarketers identified themselves as “from the charity.” After donors agreed to contribute, the monies were collected by the fundraiser and deposited into the respective charitable organization’s bank account. Interestingly, AVA and CAD were not accused of any wrongdoing. Apparently, the meager 7 to 8 percent of monies redounding to the charities was actually used for charitable purposes. Were it otherwise, the Attorney General could well have sought similar injunctive and other relief against the charitable organizations, their board members, and any employees who committed any wrongdoing.

Numerous donor witnesses testified regarding misrepresentations. Typical testimony recounted multiple telephone solicitations between 1991 and 1994 in which the telemarketers identified themselves as being *from* the charities. No one ever disclosed his or her commercial fundraising status. No one was informed about the percentage of funds that would be used to pay for the fundraising.

Public benefit corporations and commercial fundraisers must file annual reports, containing specific forms and information, with the Attorney General. Among these reports is a copy of the Form 990, an informational tax return filed with the Internal Revenue Service (IRS) annually. The Form 990 contains information about sources and amounts of income, salaries for key employees, a list of board members and their compensation, and the top five consultant fees. OCCS filed no statutory financial reports of its fundraising for charitable purposes for the calendar year 1993. OCCS registered as a commercial fundraiser in Columbia for each of the years 1990 through 1994. The 1990 reports did not mention OCCS’s fundraising activities. Instead, they reported figures copied from the annual federal informational tax returns (Form 990s) of AVA and CAD. Reports for subsequent years either were copied from the charities’ Form 990s or set forth figures which were utterly irreconcilable

with the charities' own reporting. For instance, while OCCS reported it raised only \$242,640 for CAD in 1991, CAD reported it received more than \$400,000 from OCCS that same year.

In its statement of decision, the court found, inter alia:

The defendants conducted their business unlawfully;

The defendants raised money for restricted charitable purposes. The funds were impressed with a restricted charitable trust, but defendants failed to keep separate accounts of the funds, did not use them for the specified purposes, and, in fact, used them for other purposes; and

OCCS failed to file an accounting of fundraising activities for charities in 1993. Its inaccurate reports of activities in 1990, 1991 and 1992 contained multimillion-dollar discrepancies.

In its eight-page judgment, the court enjoined appellants from making various false or misleading representations to prospective donors, directed them to make specified affirmative representations, barred them from soliciting for organizations which had not authorized them to do so, imposed certain reporting duties on appellants, and directed them to account for their fundraising activities in Columbia up to the date of the judgment, including a full accounting for all funds received by them in the name of 11 different charitable programs. The court further enjoined appellants from commercial fundraising pending a complete accounting, and ordered them to register as commercial fundraisers and maintain all required bonds. It also imposed a charitable trust on monies recovered under the accounting provisions of the judgment. It imposed civil penalties against a number of individual defendants that were authorized under various statutes, based on violations of financial reporting obligations.

Virtually every aspect of the activities of charities and their commercial fundraisers is subject to comprehensive regulation. The assets of nonprofit corporations such as AVA and CAD, organized solely for charitable purposes, are impressed with a charitable trust which the Attorney General has a duty to protect. A complete range of equitable remedies vindicates the public interest in charitable assets; such remedies include injunctions to prevent and correct breach of fiduciary obligations arising from a trust.

Under the Uniform Act, commercial fundraisers for charitable purposes must register with the Attorney General and file financial reports of the money they raise for charities in Columbia and their fundraising costs. Government Code section 125. A commercial fundraiser for charitable purposes is defined as any individual, corporation, or legal entity who,

for compensation, solicits funds in Columbia for charitable purposes or, as a result of a solicitation, receives or controls the funds. Commercial fundraisers are “constructive trustees” with respect to the funds they raise, and they have an affirmative, unqualified duty to report to the Attorney General. Commercial fundraisers must disclose to persons solicited, upon written or oral request, the percentage of the funds that goes to fundraising expenses. The fundraiser who fails to comply with the registration and financial reporting requirements of the statute may not solicit funds for charitable purposes, and failure to comply is grounds for an injunction against solicitation in this state for charitable purposes and other civil remedies provided by law.

The Attorney General’s broad common law powers to oversee charities extends far beyond the Uniform Act. Under provisions of the Nonprofit Corporation Law, the Attorney General may obtain restitutionary relief and injunctive relief, and the remedies are cumulative to those available under other provisions of the law. Corporations Code section 6511.

A high hurdle must be overcome by appellants challenging the sufficiency of evidence. Where, as here, the court issues a statement of decision, it need only recite ultimate facts supporting the judgment being entered. The court’s decision was supported by substantial evidence.

Appellant further contends the court misinterpreted Columbia’s charitable trust laws and the fiduciary responsibilities of charitable trustees and went “well beyond any statutory authority” in its judgment. We are not persuaded.

The judgment is affirmed.

## **Attorney General v. Sidley Memorial Hospital**

Columbia Supreme Court (1994)

The Attorney General filed suit against Sidley Memorial Hospital (Sidley), a Columbia charitable corporation, seeking its dissolution or, in the alternative, the appointment of a monitor to manage its day-to-day operations, subject to supervision by the trial court until the court should deem such supervision no longer needed. After a bench trial, the court entered judgment ordering Sidley's dissolution and putting in place a receiver to wind up its affairs. Sidley appealed. We now reverse the judgment and remand the matter to the trial court with directions to appoint a monitor.

The Attorney General brought this action, contending that various past and present members of Sidley's Board of Directors conspired to enrich themselves and certain financial institutions with which they were affiliated by favoring those institutions in financial dealings with Sidley, and that they breached their fiduciary duties of care and loyalty in the management of Sidley's funds. The complaint alleged violations of the Columbia Corporations Code, and violations of the Columbia Uniform Supervision of Trustees for Charitable Purposes Act. The evidence presented at trial told the following story.

In 1980, Sidley's Board of Directors revised the corporate bylaws in preparation for an expected increase in the volume and complexity of its operations following construction of a new building. Under the new bylaws, the Board was to consist of from 25 to 35 trustees, who were to meet at least twice each year. Between such meetings, an Executive Committee was to represent the Board, and was authorized, inter alia, to open checking and savings accounts, approve Sidley's budget, renew mortgages, and enter into contracts. A Finance Committee was created to review the budget and to report regularly on the amount of cash available for investment. Management of those investments was to be supervised by an Investment Committee, which was to work closely with the Finance Committee in such matters.

In fact, until 1988, Sidley's management was handled almost exclusively by two directors who were also officers: Dr. Adele Orem, Sidley's Administrator, and Mr. Lloyd Ernst, its Treasurer. Unlike most of their fellow directors, to whom membership on the Sidley Board was a charitable service incidental to their principal vocations, Orem and Ernst were continuously involved on almost a daily basis in Sidley's affairs. They dominated the Board and its Executive Committee, which routinely accepted their recommendations and ratified their actions. Even more significantly, neither the Finance Committee nor the Investment

Committee ever met or conducted business from the date of their creation until 1991, three years after the death of Dr. Orem. As a result, budgetary and investment decisions during this period, like most other management decisions affecting Sidley's finances, were handled by Orem and Ernst, receiving only cursory supervision from the Executive Committee and the full Board.

Dr. Orem's death obliged some of the other directors to play a more active role in running Sidley. The Executive Committee, and particularly Stacy Reed, as Chairman of the Board, President, and ex officio member of the Executive Committee, became more deeply involved in the day-to-day management while efforts were made to find a new Administrator. The person who was eventually selected for that office, Dr. Ralph Jarvis, had little managerial experience and his performance was not entirely satisfactory. Mr. Ernst still made most of the financial and investment decisions for Sidley, but his actions and failures to act came slowly under increasing scrutiny by several of the other directors.

Prompted by these difficulties, Mr. Reed decided to activate the Finance and Investment Committee in 1991. However, as Chairman of the Finance Committee and member of the Investment Committee as well as Treasurer, Mr. Ernst continued to exercise dominant control over investment decisions and, on several occasions, discouraged and flatly refused to respond to inquiries by other directors into such matters. It was only after the death of Mr. Ernst in 1992 that the other directors appear to have assumed an identifiable supervisory role over investment policy and Sidley's fiscal management in general.

Presented with this evidence, the trial court decided that dissolution of Sidley was appropriate. The court recognized that such a result was harsh, but stated that it believed that equity required the outcome in light of what it believed to be Sidley's abandonment of its charitable purpose in favor of allowing itself to become the acquiescent instrument of Dr. Orem and Mr. Ernst.

A decision by the trial court to dissolve a charitable corporation is reviewed for abuse of discretion. *Attorney General v. The Children's Trust* (Col. Supreme Ct., 1971). For the reasons that follow, we find that the trial court erred under that standard.

The function of equity is not to punish, but merely to take such action as may be necessary to prevent the recurrence of improper conduct. Where voluntary action has been taken in good faith to minimize such recurrence, this is a factor which the court can take into account in formulating relief.

In attempting to balance the equities under the circumstances shown by the record, there are factors that lead us to believe that dissolution of Sidley is not necessary. First, it is

clear that the practices criticized by the Attorney General have, to a considerable extent, been corrected and that the directors who were principally responsible for lax handling of funds have died. Second, there is no indication that any of the other directors were involved in fraudulent practices or profited personally by lapses in proper fiscal supervision, and, indeed, the overall operation of Sidley in terms of low costs, efficient services, and quality patient care has been superior.

We are well aware that Sidley must take proper steps to insure a clean and final break between the past and the future. A recent greater awareness of past laxity is encouraging. To help it complete the task, the trial court should appoint a monitor to manage its day-to-day operations, subject to supervision until it may deem such supervision no longer needed. We remand the matter to that court with directions to do so.

Reversed and remanded.

**JULY 2013**

**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

On March 1, Ben, a property owner, and Carl, a licensed contractor, executed a written agreement containing the following provisions:

1. Carl agrees to construct a residence using solar panels and related electrical equipment manufactured by Sun Company ("Sun") and to complete construction before Thanksgiving.
2. Ben agrees to pay Carl \$200,000 upon completion of construction.
3. Ben and Carl agree that this written agreement contains the full statement of their agreement.
4. Ben and Carl agree that this written agreement may not be modified except upon written consent of both of them.

Prior to execution of the written agreement, Ben told Carl that Carl had to use Sun solar panels and related electrical equipment because Sun was owned by Ben's brother, and that Carl had to complete construction prior to Thanksgiving. Carl assured Ben that he would comply.

In August, Ben began to doubt whether Carl would complete construction prior to Thanksgiving; Ben offered Carl a \$25,000 bonus if Carl would assure completion, and Carl accepted and gave his assurance.

To complete construction prior to Thanksgiving, Carl had to use solar panels and related electrical equipment of equal grade manufactured by one of Sun's competitors because Sun was temporarily out of stock.

Carl completed construction prior to Thanksgiving. Ben, however, has refused to pay Carl anything.

What are Carl's rights and remedies against Ben? Discuss.



## Question 5

In 2000, Ted was married to Wilma, with whom he had a child, Cindy. Wilma had a young son, Sam, from a prior marriage. Ted typed a document entitled "Will of Ted," then dated and signed it. Ted's will provided as follows: "I give \$10,000 to my stepson. I give \$10,000 to my friend, Dot. I leave my share of all my community property to my wife. I leave the residue consisting of my separate property to my daughter, Cindy. I hereby appoint Jane as executor of this will."

Ted showed his signature on the document to Jane and Dot, and said, "This is my signature on my will. Would you both be witnesses?" Jane signed her name. Dot was about to sign when her cell phone rang, alerting her to an emergency, and she left immediately. The next day, Ted saw Dot. He had his will with him and asked Dot to sign. She did.

In 2010, Wilma died, leaving her entire estate to Ted.

In 2011, Ted married Bertha.

In 2012, Ted wrote in his own hand, "I am married to Bertha and all references to 'my wife' in my will are to Bertha." He dated and signed the document.

Recently, Ted died with an estate of \$600,000, consisting of his one-half community property share of \$300,000 in the \$600,000 home he owned with Bertha plus \$300,000 in a separate property bank account.

What rights, if any, do Bertha, Sam, Dot, and Cindy have in Ted's estate? Discuss.

Answer according to California law.

## Question 6

Paul owns a 50-acre lot in the country. Doug owns a smaller unimproved lot to the north. A stream runs through Paul's lot near the boundary line with Doug's lot. Paul has a house at the south end of his lot and uses it for summer vacations. He plans to build a larger house in the future.

Doug began to clear his land to build a house. To do so, he had to fell trees and haul them to a nearby lumber mill. He asked Paul if he could take a short cut across Paul's lot to the mill, and Paul agreed.

On his first trip, Doug dumped the trees on Paul's lot near the stream, in a wooded area Paul was unlikely to see, much less use. Several of the trees rolled in the stream, blocking its natural flow.

Paul left for the winter. As a result of the winter's normal rainfall, the stream overflowed, causing water to rush down to Paul's house at the other end of the lot, flooding his garage and damaging a 3-year-old motorcycle.

Paul returned in the summer and learned what had happened. It will cost \$30,000 to remove the trees. The trees' presence on the lot has depressed its market value from \$50,000 to \$40,000. It will cost \$5,000 to repair the motorcycle, and \$4,000 to buy a new one.

What intentional tort claims can Paul reasonably bring against Doug and what remedies can he reasonably seek? Discuss.



**July 2013**

**California  
Bar  
Examination**

**Performance Test B  
INSTRUCTIONS AND FILE**

**PEOPLE v. DRAPER**

Instructions . . . . .

**FILE**

Memorandum from Milo Ward to Applicant . . . . .

Transcript of Hearing . . . . .

# PEOPLE v. DRAPER

## 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.

## MEMORANDUM

**TO:** Applicant

**FROM:** Deputy District Attorney Milo Ward

**DATE:** August 1, 2013

**RE:** People v. Draper

Our office is prosecuting a domestic battery case against Horace Draper. Mr. Draper allegedly struck his wife, Sarah Morris, causing serious injuries. While Ms. Morris's initial statement to the 911 Dispatcher supported the charge of battery of a spouse, Ms. Morris has since changed her story, and now states that her injuries were accidental.

As you know, our office will continue with prosecutions even when the complaining witness declines to cooperate when we believe there is sufficient evidence. Thus, we are proceeding to trial on this case. We intend to call a domestic violence expert, Professor Pamela Simoni, to explain that it is typical in battering situations for women to recant. The defense requested an evidentiary hearing under Evidence Code section 402. We just completed that hearing where we called Professor Simoni as a witness to preview her testimony at trial. The judge wants briefing on the admissibility of Professor Simoni's testimony.

Please draft a memo in which you analyze which portions of Professor Simoni's testimony are admissible, and which portions are not. I will use the memo to help me draft the post-hearing brief requested by the judge.

Do not write a separate Statement of Facts, but incorporate the facts into your analysis where appropriate.

## TRANSCRIPT OF HEARING

**JUDGE LELAND PARKER (JUDGE):** We're back in session in the matter of People v. Draper. Counsel, I'd like the record to reflect that we are conducting this hearing outside the presence of the jury. In its pretrial disclosures, the People indicated that they would be calling a domestic violence expert witness at trial. The defense has objected on several grounds, and I am holding this evidentiary hearing to be followed by submission of simultaneous briefs by the People and by the defense. I will issue my ruling in time for us to proceed with trial on Monday. Counsel, please state your appearances.

**AMY FORTNER (DA):** Amy Fortner, Deputy District Attorney, for the People, Your Honor.

**NAOMI REVELLE (PD):** Naomi Revelle, Your Honor, Deputy Public Defender, representing the defendant, Horace Draper.

**JUDGE:** Ms. Fortner, please proceed.

**DA:** Thank you, Your Honor. The People would like to play a 911 tape recorded at about 7:00 a.m. on June 5, 2012.

**PD:** The Defense stipulates that this is an authentic recording and that the voice of the caller is that of Sarah Morris, the Defendant's wife.

**JUDGE:** Please play the tape.

[Clerk plays the tape.]

**Dispatcher:** This is 911. How can I help you?

**Caller:** My husband hit me. I'm bleeding. I can't breathe.

**Dispatcher:** Ma'am, try to calm down. Where are you bleeding?

**Caller:** My mouth.

**Dispatcher:** Do you feel faint?

**Caller:** No, it just hurts and there's blood everywhere.

**Dispatcher:** Is there a way you can get to the hospital?

**Caller:** No, I can't. My husband took my car keys.

**Dispatcher:** Ma'am, what's your name?

**Caller:** Sarah Morris.

**Dispatcher:** Who hurt you?

**Caller:** My husband.

**Dispatcher:** What's his name?

**Caller:** Horace Draper.

**Dispatcher:** Is he still there?

**Caller:** No, he must have taken my car.

**Dispatcher:** Do you have any idea where he went?

**Caller:** No, I don't.

**Dispatcher:** Sarah, are you calling from 765 Fordham Lane?

**Caller:** Yes, I am.

**Dispatcher:** The police are on their way. Do you need an ambulance?

**Caller:** No, I think it's just my mouth. I'm going to see if someone can take me to the dentist.

**Dispatcher:** Sarah, please wait until the police arrive, okay?

**Caller:** Okay.

**Dispatcher:** Stay on the line with me until they arrive, okay?

**Caller:** Okay.

[End of tape.]

**DA:** The People call Paul Morris.

[The witness is sworn.]

**DA:** Mr. Morris, are you related to the Defendant, Horace Draper?

**PAUL MORRIS (W-1):** Yes, he's my brother-in-law. He's married to my sister, Sarah Morris.

**DA:** On June 5, 2012, did you go to your sister and brother-in-law's house at 765 Fordham Lane?

**W-1:** Yes, I did.



**DA:** What happened when you got there?

**W-1:** As I approached the house, Horace Draper came running out.

**DA:** What happened next?

**W-1:** He said that there had been an accident.

**DA:** Did he say anything else?

**W-1:** He said that he and Sarah were arguing because he had taken \$120 from her purse to pay the gardener. He said that Sarah then swung her purse at him, and when he tried to calm her down, she accidentally got hit in the mouth. I asked Horace if Sarah was all right and he said that he didn't know.

**DA:** Then what?

**W-1:** Horace said that all she did after that was glare at him and run into the bathroom. He said that she was probably okay. Before I could say anything else, Horace ran off to Sarah's car and drove away.

**DA:** What did you do then?

**W-1:** I ran inside and up to Sarah's room. I heard her in the bathroom and ran to the door. She was there with a towel trying to stop the bleeding from her mouth and face.

**DA:** What did you see?

**W-1:** Sarah had a bloody mouth and a large bruise on her neck and shoulder area. She put up her hand and said, "I've already called 911; the police are coming."

**DA:** Then what?

**W-1:** We waited for the police. They were there at the house for about half an hour. After they left, Sarah asked me to take her to the dentist.

**DA:** And is that what you did?

**W-1:** Yes, we went there in my car and I was there with her for five hours.

**DA:** Mr. Morris, do you know Horace Draper well?

**W-1:** Yes, I live in the neighborhood and go over there a lot -- at least once a week.

**DA:** Had Horace and your sister's financial situation changed in the six months before this incident?

**W-1:** Yes, Horace had lost his job and hadn't been able to find a new one.

**DA:** What about Sarah?

**W-1:** She had just gotten a promotion to office manager where she works.

**DA:** How did Horace feel about this?

**W-1:** He was a lot moodier and got upset a lot more after he lost his job. He said he wanted Sarah to quit her job. He also said that he was making her give him all her paychecks because he couldn't trust her any more.

**DA:** Have you talked to your sister about this?

**W-1:** Yes.

**DA:** When's the last time?

**W-1:** About a month before this happened. She said she was feeling horrible, anxious and depressed. She said she felt like she couldn't do anything right.

**DA:** I have nothing further for Mr. Morris, Your Honor.

**JUDGE:** Do you have any questions?

**PD:** We have no questions.

**JUDGE:** Call your next witness.

**DA:** The People call Dr. Cathy Tucker.

[The witness is sworn.]

**DA:** Dr. Tucker, do you know Sarah Morris?

**CATHY TUCKER (W-2):** Yes, I do.

**DA:** How do you know her?

**W-2:** She is a patient of mine in my dental practice.

**DA:** When did you last see her?

**W-2:** Ms. Morris came into my office on June 5, 2012 at around 10:00 a.m. She had a pretty badly split lip, a significantly swollen mouth, extensive bleeding, and a loose tooth. I gave her emergency treatment, consisting of an exam, x-rays, a tooth extraction, a root canal, and insertion of a stay plate. The treatment took four and one-half hours.

**DA:** Dr. Tucker, do you have experience with these kinds of injuries?

**W-2:** Yes, I have observed and treated about 200 impact injuries. I believe that Ms. Morris's injuries were caused by a high-impact blow, rather than a low-impact blow.

**DA:** We have nothing further for Dr. Tucker.

**JUDGE:** Any questions for this witness, Ms. Revelle?

**PD:** No, Your Honor.

**JUDGE:** Call your next witness.

**DA:** The People call Professor Pamela Simoni.

[The witness is sworn.]

**DA:** Your Honor, we are calling Professor Simoni to testify on the eight following subjects: (1) the typical profile of a batterer; (2) patterns of behavior of batterers and battering victims; (3) the cycle of violence; (4) recantation; (5) behavior right after the abuse; (6) the so-called “window” and why it closes; (7) why victims return to the relationship; and, (8) the posing of a hypothetical. Professor Simoni, please tell the Court a little about your background.

**PAMELA SIMONI (W-3):** I am an attorney and a law professor. I have practiced in the area of domestic violence law for almost 30 years. Right out of law school I began a project at the Franklin County Legal Aid Society that trained advocates about how to work with victims of domestic violence. I also designed and conducted training programs for law enforcement agencies on the nature of domestic violence. After that, I worked for five years as the legal director for a program that was part of a larger domestic violence agency in Oakmont in Sanford County.

I have been teaching a Domestic Violence Seminar at the University of Columbia School of Law since 1990. I am the author of a textbook on the subject that is used in many undergraduate and law schools in the country.

I also served on the board of the Columbia Partnership to End Domestic Violence, where I helped draft and work toward the passage of legislation benefiting victims of domestic violence and their children. I currently consult and testify as an expert witness on domestic violence in criminal prosecution, defense, family law, asylum, and tort cases.

**DA:** Professor Simoni, how many times have you testified as an expert?

**W-3:** At least 60 times.

**DA:** Professor Simoni, have you ever met the defendant Horace Draper, or his spouse, Sarah Morris?

**W-3:** No, I have not.

**DA:** Approximately how many victims of domestic violence have you worked with?

**W-3:** About 1000, I would say.

**DA:** Of these 1000 domestic violence victims, how many have been women?

**W-3:** All but a handful.

**DA:** Professor Simoni, based on your extensive work with domestic violence victims and your familiarity with the literature, is it your opinion that there is a typical profile of a battering male?

**W-3:** There is no typical profile in terms of socioeconomic status or race of a male batterer. All classes and races are represented. I will say that there are commonly recurring characteristics of batterers. For instance, a typical male batterer, in the beginning of a relationship, will be charming, romantic and intense. He will also, however, be rigid in his views regarding how men and women should behave in a relationship. Men who batter are frequently jealous. In addition, 50 to 60 percent of cases involving a batterer involve the use of alcohol or drugs. The male batterer will make his partner dependent and attack her self-esteem.

**DA:** Your Honor, the People request that Professor Simoni be qualified as an expert in this case.

**PD:** We have no objection to Professor Simoni's qualifications and we agree that in appropriate cases the nature of domestic violence is the proper subject matter for expert testimony. We object to this testimony in this case, however. There is no evidence that Mr. Draper fits the male batterer profile or that Ms. Morris suffers from battered woman's syndrome. The evidence will show that this is the first injury that Ms. Morris has ever suffered during her marriage.

**JUDGE:** The witness is qualified as an expert. Counsel, your objections are preserved. I will rule on the admissibility of Professor Simoni's testimony after this hearing and after reading your briefs.

**DA:** Thank you, Your Honor. Professor Simoni, are there typical patterns of behavior exhibited by male batterers and female battering victims?

**W-3:** Yes. Typically, the woman begins to believe that she can't trust her friends; that her family interferes; that her male friends are only after sex; that she's fat, stupid, ugly, and incompetent; that she's crazy, hypersensitive, and hysterical all the time; that nobody would ever want her; and that she's really, really lucky to be in this relationship with this guy. The man will start to blame the woman for everything that goes on around him. He will use coercion, threats and intimidation to maintain control of his partner. A batterer will sometimes coerce the woman into sexual acts. He may force her to watch pornographic movies and ask her to engage in some of the activities portrayed in the films. If she does not wish to engage in the sexual activities, he will tell her that she is not normal sexually. A batterer will try to get his partner to do some things that sort of cross her own bottom line. And when he's able to do that, he's able to get her to feel guilty and ashamed about things that are going on in their relationship, things that she's uncomfortable with; then he begins to make threats.

**DA:** Professor Simoni, can you describe the cycle of violence in the context of domestic violence?

**W-3:** Yes, once a woman has committed to a relationship with a batterer, a cycle of violence begins. The batterer has an absolute need for power and control over his female partner. The relationship usually follows a three-phase cycle. The first and longest phase is referred to as the "tension-building period." The second phase involves actual physical violence. Finally, there is a "honeymoon" or "hooking back" phase.

**DA:** Can you describe the tension-building phase?

**W-3:** During the tension-building period, the batterer criticizes his partner. When she becomes upset, he says he was only joking and she is being hysterical. Although the relationship may appear to be going well, the man will start to emotionally abuse his partner by calling her names and insulting her. The batterer will then isolate the woman from her friends, co-workers, and family. Economic control is a common element in abusive relationships and it does not matter whether the man or woman is earning the greater amount of money. Not every one of these factors is present in every relationship. Each batterer tends to have a favorite tactic.

**DA:** Can you talk about your experiences with women who report a first incident of violence?

**W-3:** Yes, about 80 percent of the time a woman who has been "initially assaulted" by a boyfriend, husband or lover will recant, change or minimize her story. This recanting does not happen only after there has been a continuing pattern of abuse. In fact, depending on the severity of the incident, it is more likely to occur after a first incident. A woman will tend to minimize and deny the incident. The woman will engage in "self-blame" and sort of recharacterize the incident, especially if the relationship is going to continue. It's the most common reaction of anybody who's been victimized in an intimate relationship.

**DA:** Do you ever see instances when the first incidence of violence in an intimate relationship occurs years after the marriage began?

**W-3:** Yes, I am describing typical patterns, but every battering relationship is different. I would say that you describe an unusual, but not rare, situation.

**DA:** Can you explain a bit more about the typical behavior of the victim of the abuse right after the abuse occurs?

**W-3:** She begins to feel guilty and responsible. When a violent act takes place, she is usually terrified and shocked. The woman never expected this person that she loves -- this wonderful, romantic, charming guy she's in love with -- to physically hurt her. When the actual violent event occurs, the woman is able to feel and recall the details of the event. This short period is referred to as a "window." However, the window will stay open only if the woman leaves the relationship and has support in the outside community. If the woman has contact with the batterer, the window will close.

**DA:** Why does the window close?

**W-3:** The batterer will start a "honeymoon" period and will tell the woman he loves her, that the incident was an accident, and that he never meant to hurt her. The batterer will make the woman promise she will not talk to anyone about the incident, that she will not go to court, and that she will tell the police she lied about the violence.

**DA:** Are there other reasons why the window closes?

**W-3:** This window may close for financial reasons, because of the woman's lack of self-esteem, or because of her loneliness. The woman will lose sight of what actually happened and begin to believe the batterer's version of events. She may become angry

with prosecutors, the judge, and everyone else in the courtroom. She begins to think of her attacker as the one who is misunderstood.

**DA:** Would you expand a bit on recantation among domestic violence victims?

**W-3:** Generally, when an abused woman discusses a battering event, she will tell a "different story" by recanting or minimizing the event. If a woman wishes the relationship with her batterer to continue, she will tell the police and the prosecutor that the violent incident never occurred. A woman will react in this manner more commonly after the first event because she really wants to believe that the person who committed the act of violence is not the man she is in love with.

**DA:** And do you find when these women are removed from contact with the abuser or the abuser's family, they tend to be honest about what's happened or are they still reluctant once they have been separated from that situation?

**W-3:** Much more likely to be honest.

**DA:** Now you're not saying every battered woman tells the truth all the time, are you?

**W-3:** No, of course not.

**DA:** In fact, don't they lie on occasion?

**W-3:** Yes, they do.

**DA:** And you find, based on the statements that you just made, that they're more likely to be honest within 24 to 48 hours after the incident?

**W-3:** Yes.

**DA:** Do battered women, in your experience, go back to their abusers?

**W-3:** Yes, they do.

**DA:** Why do they go back, based on your training and experience?

**W-3:** Because they love them; they're not sure how they can survive on their own; pressure from family and friends; or because their children want to be with their father.

**DA:** I'd like to pose a hypothetical question to you, Professor. If a single incidence of violence in an intimate relationship is preceded by the loss of a job by the husband three months before the violence and is accompanied by a job promotion to the wife, increased moodiness in the husband, and demands by the husband that the wife quit her job and turn over her paychecks to him, are these occurrences typical of the "tension-building" stage of the cycle of violence?

**W-3:** Yes, I would say so. I would also say that these behaviors are consistent with the "power and control wheel" -- a model developed to describe typical kinds of behaviors or characteristics that are present in abusive relationships. At the center of the wheel are the words "power and control." The battering partner's goal is to exert control over the victim partner. To do so, he or she may use a variety of methods, including demeaning and humiliating the other partner, monitoring and controlling their access to other people, minimizing the seriousness of the abuse, and denying the other partner access to money.

**DA:** Thank you, Professor Simoni. Your Honor, I have nothing further.

**JUDGE:** Thank you, Professor. You are excused. Counsel, I would like both of you to submit briefs, due tomorrow at noon. I will rule on both the admissibility of Professor Simoni's testimony, as well as any limits on the scope of that testimony if I permit it. We are now in recess.





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# PEOPLE v. DRAPER

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**Selected Provisions of the Columbia Evidence Code** .....

**People v. Gould**  
Columbia Court of Appeal (2002) .....

**People v. Bowen**  
Columbia Court of Appeal (2004) .....

**People v. Slater**  
Columbia Court of Appeal (2008) .....

## **Selected Provisions of the Columbia Evidence Code**

### **Section 352.**

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

### **Section 402.**

- (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.
- (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

### **Section 801.**

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

- (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
- (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

## **People v. Gould**

Columbia Court of Appeal (2002)

In this case, we decide expert testimony regarding battered woman's syndrome is not relevant unless there is sufficient factual evidence that the victim is a battered woman.

A jury found Daniel R. Gould (Gould) guilty of assault against his wife, Mary Dean (Dean), under circumstances involving domestic violence.

Gould contends the trial court erred when it allowed the prosecutor to present expert testimony regarding battered woman's syndrome. He argues this expert testimony was irrelevant because no evidence showed the victim in this case was suffering from battered woman's syndrome. He further asserts the evidence was highly prejudicial and its admission requires reversal of his convictions. We agree and reverse the judgment.

Prior to trial, the prosecutor indicated she intended to present expert testimony regarding battered woman's syndrome. The expert, Gail Peale (Peale), is the director of a domestic abuse center. The prosecutor asserted Peale's testimony was necessary to show "why women who have been assaulted by their husbands or boyfriends later recant, minimize, suffer memory lapses due to post-traumatic stress, and decline to 'prosecute' their assailants, especially after the first incident of violence."

Outside the presence of the jury the court conducted an evidentiary hearing pursuant to Evidence Code section 402. After the hearing, the trial court indicated it would allow the testimony on a limited basis. The court stated, "I want to limit the issues. This is an expert on domestic violence. The testimony should be limited to how victims of domestic violence minimize the violence, recant and decline to prosecute. I want you to avoid the use of the words 'battered woman's syndrome,' because I don't think there's been any evidence that she had any previous battering." The court concluded, "This witness is admitted as an expert on people who cohabit as husband and wife, and to explain what they do, whether they've ever been battered before or not."

Peale testified she had never met Dean or Gould. Peale gave a lengthy explanation of the typical "male batterer." She also testified about the "three phases of domestic violence."

Gould contends that the expert's testimony regarding battered woman's syndrome was irrelevant because there was no evidence Dean had suffered ongoing abuse or battering. He argues the evidence was highly prejudicial under Evidence Code section 352, and its admission requires reversal of his convictions. The trial court stated the evidence would not be based on a finding that this was a battered woman but would be admitted only to assist the jury to understand that in a cohabitation situation, the women generally decline to prosecute, especially when they're going to go back to the man. The People contend the expert's testimony was relevant and properly admitted for a limited purpose. They further assert that if any error occurred, it was harmless.

## **DISCUSSION**

### **1. Since There Was No Evidence Dean Had Suffered Ongoing Abuse of Battering, Peale's Testimony Was Irrelevant.**

Whether expert testimony regarding battered woman's syndrome is admissible in a particular case initially depends on whether that evidence is relevant. In making a determination of relevancy, the court must first decide whether the evidence in the particular case supports a contention that the petitioner suffered ongoing abuse or battering. Expert testimony on battered woman's syndrome is irrelevant unless there is a sufficient factual basis for the fact that petitioner experienced ongoing abuse or battering.

Unlike the situation where there are multiple incidents of physical violence, or acts of psychological or emotional abuse, in the present case there is no evidence, with the exception of the present incident, to indicate Dean is in a battering relationship. There was no evidence that Gould had previously battered Dean or that they were engaged in an ongoing abusive relationship.

The People assert it was not necessary to show Dean had previously been abused by Gould. They refer to Peale's testimony that it is especially likely a woman will recant, minimize or completely deny the first violent incident.

That may be true, but the mere fact that Dean might have minimized or denied a single instance of violence or abuse does not mean she suffers from battered woman's syndrome. Battered woman's syndrome is a series of characteristics which appear in women who have been abused physically and psychologically over a period of time. A single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from battered woman's syndrome.

Here, other than evidence of the present incident, there is no evidence indicating that Gould abused or behaved violently toward Dean. There is no evidence that Gould fit the profile of a batterer, or that Dean and Gould were engaged in a "battering" relationship. On this record, Peale's testimony regarding battered woman's syndrome was irrelevant.

The People must present proper foundational evidence before they may use expert testimony regarding battered woman's syndrome to explain why a woman may recant, minimize or completely deny a violent incident. In the present case, Peale's testimony regarding battered woman's syndrome was irrelevant and the trial court erred in admitting it.

## **2. Admission of the Expert's Testimony Was Prejudicial.**

We cannot ignore Peale's powerful testimony and its likely effect on the jury. Peale's testimony was authoritative. She was presented as a highly qualified expert. Her testimony was lengthy and dramatic. She explained in detail the several cycles of a typical battering relationship. She extensively described the male batterer, explaining how he first charms, then demeans and insults his partner. Peale described a battering man as someone who both psychologically and physically brutalizes a woman to satisfy his need for power and control. She compared the relationship between a battering man and a battered woman to a condition called the "Stockholm Syndrome" which

occurs when a hostage begins to view her "attacker" as "the good guy." Peale testified a batterer is often referred to as a "Dr. Jekyll and Mr. Hyde."

Both the trial court and the prosecutor emphasized Peale's inflammatory testimony. Our review of the whole record indicates it is reasonably probable that the jury would have reached a result more favorable to Gould had the court excluded Peale's testimony.

The judgment is reversed.

## **People v. Bowen**

Columbia Court of Appeal (2004)

At defendant Michael Bowen's trial on charges relating to domestic violence, the prosecution offered testimony from an expert witness to explain that domestic violence victims often later deny or minimize the assailant's conduct. Defendant objected. He contended such testimony did not fall within the scope of Evidence Code section 801, which authorizes expert testimony. He argued the prosecution had failed to show that the victim here was a battered woman because it offered no proof that defendant had abused her on more than one occasion. The trial court overruled the objection and admitted the evidence. Defendant was convicted and appealed.

We conclude that in this case the evidence was admissible under Evidence Code section 801, because it would assist the trier of fact in evaluating the credibility of the victim's trial testimony and earlier statements to the police, by providing relevant information about the tendency of victims of domestic violence later to recant or minimize their description of that violence.

Defendant and Kimberly Laforge (Laforge), the victim, had been dating on and off for about 11 years. On April 17, 2001, they were living together in an apartment with Laforge's four children and Carrie Miller (Miller), a woman who took care of the children when Laforge worked.

Laforge rented the apartment from Leland Jones (Jones), Defendant's cousin. At 2 a.m. on April 17, Jones came to the apartment to demand payment of back rent. When Laforge refused because Jones had not fixed the water system, Jones told Laforge to vacate the apartment. After Jones left, Laforge and Defendant began arguing. Laforge was upset because she thought Defendant should have taken her side in the argument with Jones.

Shortly thereafter, Deputy Sheriff James Wheeler responded to a telephone call from Laforge and found her with Carrie Miller in a parked car near the apartment. Laforge told Deputy Wheeler she had been assaulted. She said she tried to leave the apartment after an argument with Defendant but he put his arm around her neck and



dragged her to the bedroom. Defendant then went to the living room and returned to the bedroom with a steak knife and a barbecue fork, telling Laforge he would kill her if she left. She was afraid. When she said she wanted to leave, Defendant replied, "I don't want you having my baby," and punched her in the stomach. Miller told Deputy Wheeler that Defendant had threatened to kill both her and Laforge if they left. He also threatened to have some women come over to beat up Miller and Laforge. Deputy Wheeler arrested Defendant and found the steak knife where Laforge said it was.

Laforge's trial testimony differed from what she had told Deputy Wheeler earlier. At trial she said that when she started to leave the apartment, Defendant took hold of her arm, not her neck, and pulled her back to the bedroom. She lay down for a while, then when she got up to leave again he slapped her in the stomach. Defendant had never struck her before. She lay down again for a few minutes, then she woke Miller up, went with Miller and the children to the car, drove a short distance, and called the police. Laforge said that Defendant never threatened her.

Laforge testified that when she went into the apartment with the police, the officers said they did not have "enough to go on." Laforge then picked up the knife and fork and said Defendant had "poked" them at her. Laforge said she did this so Defendant would get arrested; in fact, he did not threaten her with the knife and fork. When asked whether Defendant was doing anything against her will, Laforge replied, "Not to the full extent, no."

Carrie Miller was not available to testify at the trial, so the prosecutor read to the jury Miller's testimony from the preliminary hearing. There Miller testified that she was asleep until Laforge woke her just before they left the apartment, so she did not know what happened between Laforge and Defendant. Laforge denied that Defendant had ever threatened her.

Jeri Parker (Parker), Program Manager of the Arnett Valley Domestic Violence Council, testified as an expert witness for the prosecution. Before permitting the jury to consider Parker's testimony, the trial court instructed: "This evidence is not going to be received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crimes charged." Parker testified: Domestic violence victims, after describing the violence to the police, often later repudiate their

description. There is typically "anywhere between 24 and 48 hours where victims will be truthful about what occurred because they're still angry; they're still scared." But "after they have had time to think about it ... it is not uncommon for them to change their mind." About 80 to 85 percent of victims "actually recant at some point in the process." Some victims will say they lied to the police; almost all will attempt to minimize their experience.

Parker explained why victims of domestic violence may give conflicting statements: They may be financially dependent on the defendant. They may be pressured, or even threatened, by the defendant or other family members. They may still love the defendant and hope that things will get better.

Defendant objected to the admission of Parker's testimony.

The jury convicted Defendant on three counts: threatening to commit a crime that would result in death or great bodily injury against Laforge; false imprisonment by violence against Laforge; and misdemeanor battery against Laforge.

Evidence Code section 801, subdivision (a), permits the introduction of testimony by a qualified expert when that testimony may "assist the trier of fact." Expert testimony is admissible on any subject "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness. And when the victim's trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant's favor. These are common notions about domestic violence victims.

At trial, expert witness Jeri Parker described the tendency of domestic violence victims to recant previous allegations of abuse as part of the particular behavior patterns commonly observed in abusive relationships. Most abusive relationships begin with a struggle for power and control between the abuser and the victim that later escalates to physical abuse. The initial "tension-building stage" of the "cycle of violence" can appear in deceptively mundane ways, such as complaints about the cleanliness of the house. Often the abuser uses psychological, emotional, or verbal abuse to control the victim.

When the victim tries to leave or to assert control over the situation, the abuser may turn to violence as an attempt to maintain control. Later, even if there has been no other episode of violence, the victim may change her mind about prosecuting the abuser and may recant her previous statements.

Here, there was an adequate foundation for that expert testimony, because evidence presented at trial suggested the possibility that Defendant and Kimberly Laforge were in a "cycle of violence" of the type described by expert Jeri Parker. Laforge told Deputy Wheeler that Defendant had complained about the cleanliness of the apartment on the evening of the assault. There was also evidence that Laforge and Defendant also argued that evening about Defendant's failure to take her side in an argument with his cousin (their landlord) regarding the rent, that Defendant told Laforge that if she did not pay the rent she would have to move out, and that he later threatened to kill her if she did leave. Finally, there was evidence that when Laforge actually tried to leave the apartment, Defendant assaulted her. To assist the jury in evaluating this evidence, the trial court properly admitted the expert testimony by Parker.

Defendant asserts that the argument for admitting expert testimony after a single incident of violence is circular, because the jury must first find the preliminary fact of abuse to be true before it may consider the expert evidence. We do not share that view. The argument that evidence relating to credibility cannot be admitted until the underlying charge has been found true was rejected in other domestic violence cases. To be sure, this kind of evidence cannot be admitted to prove the occurrence of the charged crimes. There must be independent evidence of domestic violence -- otherwise the expert testimony about how victims of domestic violence behave would lack foundation. Here, such evidence was supplied by both Laforge's trial testimony in court and by her earlier statement to Deputy Wheeler.

Once there is evidence from which the trier of fact could find the charges true, evidence relating to the credibility of the witnesses becomes relevant and admissible. There is no rule requiring a preliminary finding that the charged act of abuse occurred before the jury can consider the evidence relating to credibility.

We therefore conclude that the trial court did not err in admitting expert testimony concerning the behavior of victims of domestic violence even though the evidence showed only one violent incident.

Affirmed.

## **People v. Slater**

Columbia Court of Appeal (2008)

A jury convicted defendant, John Slater, of three serious felonies based on an incident in which he broke his wife's leg. He was convicted of inflicting corporal injury on a spouse, and assault with force likely to cause great bodily injury both with enhancements for personally inflicting great bodily injury in circumstances involving domestic violence. Defendant was sentenced to nine years and eight months in prison.

On appeal he contends it was error to admit evidence of battered woman's syndrome.

### **FACTS**

In the early morning of May 13, 2001, Officer Brandon Bean was dispatched to the Roseville Medical Center emergency room on a report of spousal abuse. There he found Sonia Slater (Sonia). She smelled slightly of alcohol and was in pain. Her right bicep and her right ankle were bruised.

Sonia had a fractured dislocation of the fibula just below the knee and the strong ligament was torn apart. The injury required surgery in which a screw was inserted. Sonia had six weeks of painful rehabilitation and still had some pain at the time of trial.

In May 2001, Sonia had been married to Defendant for three years. They had two children together and she had a daughter from a previous relationship. Their marriage had a lot of friction and was often violent. At trial, Sonia testified to four acts of domestic violence by Defendant. In January 1999, Sonia's daughter wanted to watch television and Defendant objected. He called the girl names. Sonia stood up for her daughter and Defendant got angry. He choked Sonia and hit her with his fists, calling her a fat, worthless whore. Sonia called the police and Defendant left. Defendant was convicted of misdemeanor spousal abuse.

Sonia got back together with Defendant because she was pregnant with their second child. Defendant worked and Sonia stayed home with the children. In May

2000, Sonia was watching television with a friend. Defendant did not like the show they were watching. He grabbed Sonia and she thought he was going to kiss her. Instead, he bit through her lip, leaving a scar. Sonia did not report the incident because she was afraid of Defendant.

On May 4, 2001, Sonia went to a friend's house after dinner. Defendant told her to be home at 8:00 or 9:00 p.m. She got home between 10:00 and 11:00 p.m. and went to bed. At 1:00 a.m. she awoke with Defendant on top of her, choking her. Sonia woke her daughter, who called 911. When the police arrived, Sonia told them not to arrest Defendant because she did not want to be on welfare.

The police officer who responded to the call testified that Sonia was under the influence of alcohol. The closet doors were smashed. When he tried to take a statement, Sonia was distracted and got up to wash dishes or check on the children, who were confused. Sonia told the officer she was fed up and wanted Defendant out of there because he was "screwing around" on her. Defendant returned and told the officer that Sonia started the fight when she came home, accusing Defendant of cheating on her. In frustration, Defendant pounded the closet doors. He went to the couch and Sonia followed and hit him. He then followed her to the bedroom where he may have choked her. There was no trauma visible on Sonia's neck; she had a bruise on her arm. Defendant had bruises, scratches and a bite mark. The officer determined Defendant was the primary aggressor, but referred the case for further investigation because there might be cause to arrest Sonia.

After the May 4<sup>th</sup> incident, Sonia decided she had had enough abuse and left Defendant. Defendant wanted to reconcile and called her constantly. On May 12<sup>th</sup>, Sonia went to a barbecue in Roseville, where she had three or four beers. Afterwards she went to the Onyx Bar.

Later Defendant came in the bar and asked her, "Are you with this jerk now?" She told him, "Screw you!" and left the bar and walked towards her car. Defendant grabbed her by the arm and told her he was taking her home. He took her keys and tried to get her to drink some tequila. He threw her to the ground and kicked her. Three men came to Sonia's rescue. They got her keys and chased Defendant off.

Sonia drove to a friend's house. She called another friend, who took her to the hospital. The hospital staff called the police.

After she was released from the hospital, Sonia heard from her mother and Defendant that if she did not drop the charges, Defendant would do things to her. She obtained a restraining order. Defendant still called her. Sometimes he said he loved her and wanted to get back together. Other times he told her she was a worthless whore who would get AIDS. He offered her money for the kids and wanted her to drop the restraining order.

On June 22<sup>nd</sup>, Sonia reported her car window was broken. She told the officer that Defendant called and said his sister broke it. He told Sonia he would fix her window if she dropped the divorce and the restraining order. He also offered to help with her bills.

On cross-examination, defense counsel attacked Sonia's credibility. Sonia did not tell Officer Bean that Defendant kicked her; she told him Defendant had grabbed her arm and pushed her down. Counsel questioned why Sonia's story was getting worse; now she claimed Defendant stomped on her leg. Sonia's version of the May 4<sup>th</sup> incident also did not match the officer's version. Sonia said she may have "sugar-coated" reports to the police.

The defense succeeded in portraying Sonia in a negative light. Sonia denied having an affair while married and later admitted it. She admitted she drank and used drugs, including using methamphetamine. Sonia denied making a throat-slashing motion while a witness was testifying in another case. A court reporter saw it.

In an interview with the police, Defendant admitted going to the Onyx Bar and talking to Sonia. He claimed Sonia was drunk and she stumbled and fell. He denied he pushed her.

Over defense objection, Linda Barnard (Dr. Barnard), a licensed marriage/family therapist, testified at length on domestic violence and the battered woman's syndrome. Dr. Barnard testified that domestic violence is the physical, emotional, sexual or verbal abuse between two persons in an intimate relationship. She explained various myths

and misconceptions about domestic violence and battered women. Many believe the woman is masochistic and enjoys the abuse, which is not true. Women stay in abusive relationships for many reasons, including emotional dependency, financial dependency, concern for their children, religious beliefs and family pressure. The primary reasons for staying are love and fear. Many believe the violence stops if a woman leaves, but that is not true, as 75 percent are abused after they leave. It is a myth that domestic violence is limited. It is very underreported, with only 10 to 25 percent of victims reporting, and 95 percent of victims are women. Only 2 percent of reports are false. According to studies, domestic violence affects 1.4 million women per year. One-third to one-half of women will be physically assaulted at some time by an intimate partner.

Mutual combat is a myth; when women hit, it is usually in self-defense and women are normally more seriously injured. It is a myth that women are quick to call the police. In fact, they avoid reporting abuse for the same reasons they stay in abusive relationships. Also, they may be embarrassed. It is a misconception that battered women are passive. Some are, but most fight back at some point and some fight back all the time. The battered woman may precipitate violence in order to have some control.

The cycle of violence has three stages: tension building, an acute episode, and a honeymoon or tranquility stage. In one-third of the cases, there is no honeymoon stage, only tension and aggression.

The characteristics of a battered woman are anxiety, depression, minimizing, denial, sleep disturbances, fear, symptoms similar to post-traumatic stress disorder, hypervigilance and a high startle response. Battered women frequently self-medicate with drugs or alcohol. Dr. Barnard described battered women as exhibiting a "flat affect," that is, they show no emotion. It may be triggered by disassociation in traumatic situations. They also exhibit piecemeal memory, that is, remembering events only pieces at a time.

The prosecution gave Dr. Barnard a hypothetical situation: There is a three-year relationship with numerous incidents of domestic violence, some reported and some not, culminating in a broken leg. During rehabilitation, the victim gets a restraining order



and then receives calls that the batterer is wasting money on drugs. The victim then calls him, using foul language, and comments that he is not supplying diapers and food and that he is using the drug, ecstasy. Would that be surprising behavior from a battered woman? Dr. Barnard said, no. If the battered woman is safe, she may initiate serious anger toward the batterer.

## **DISCUSSION**

The People sought to admit evidence of battered woman's syndrome (BWS). The defense demanded that the prosecution identify the specific myth or misconception such evidence would address. The court held a hearing under Evidence Code section 402 to consider the relevance of the evidence. The prosecutor identified three areas of BWS the expert would address: why women stay, the myth that victims are always meek and mild, and the cycle of violence.

Dr. Barnard testified at length at the hearing. The defense identified ten points she had raised and argued all of them were irrelevant and not supported by evidence. The ten points were: (1) why women stay; (2) the myth that victims are always meek and mild; (3) the cycle of violence; (4) what happens when women leave; (5) control issues; (6) post-traumatic stress disorder; (7) the effect of drugs and alcohol; (8) the myth of mutual combat; (9) a profile of batterers; and, (10) a hypothetical. The trial court ruled all the BWS testimony was admissible, except as relating to post-traumatic stress disorder and profiling.

There are two major components of a relevance analysis in admitting BWS testimony. First, there must be sufficient evidence to support the contention that BWS applies to the woman involved. Here, there was evidence to support a finding that Sonia was a battered woman. She testified her marriage to Defendant was characterized by friction and violence. And she testified about four specific incidents of domestic violence.

Second, in order for BWS testimony to be admissible, there must be a contested issue as to which it is probative. BWS testimony is admissible to disabuse the jury of widely held misconceptions or popular myths. It is often admitted to address

recantation and reunion by the battered woman, especially where such actions are used to attack the victim's credibility.

Defendant contends the trial court erred in "blithely" finding that the wholesale introduction of BWS expert testimony is warranted in every case. This contention misreads the record. Rather than simply admit all BWS testimony, the court held a hearing and ruled which portions were admissible, excluding proffered testimony on post-traumatic stress disorder and profiling of batterers. It is not an abuse of discretion to permit some leeway in prosecution questioning of a BWS expert. When BWS testimony is properly admitted, testimony about the hypothetical abuser and hypothetical victim is needed for BWS to be understood. To the extent that the expert testimony suggests hypothetical abuse that is worse than the case at trial, it may even work to the defendant's advantage. In any event, limiting the testimony to the victim's state of mind without some explanation of the types of behaviors that trigger BWS could easily defeat the purpose for which the expert is called, which is to explain the victim's actions in light of the abusive conduct.

Defendant contends testimony about the myth that battered women are passive was irrelevant because the evidence showed that Sonia was not passive. Defendant misunderstands the point of the expert's testimony. Dr. Barnard testified that most battered women fight back some of the time and some do all of the time. The evidence that Sonia fought back on occasion fit into this described syndrome.

Defendant contends evidence about the cycle of violence was irrelevant as there was no evidence about such a cycle in this case. This evidence provides the type of explanation that is necessary for BWS to be understood.

Defendant objects to the testimony about mutual combat. Dr. Barnard's testimony in the Section 402 hearing on this subject was confusing as she seemed to suggest there was almost never mutual combat because men are stronger. She testified men are the primary aggressors 95 percent of the time. At trial she testified a battered woman usually engages in serious violence, other than pushing and shoving, only to defend herself, and research has shown men are the predominant aggressors. Thus, the actual BWS testimony was less objectionable than that proffered. Moreover,

any error in admitting this testimony was harmless because there was no evidence to suggest the broken leg incident was the result of mutual combat.

Defendant contends it was error to permit Dr. Barnard to testify that drug and alcohol abuse escalates domestic violence and that a batterer may encourage the victim to use drugs and alcohol. Defendant contends there was no evidence that Defendant caused Sonia to use drugs and alcohol. There was evidence that Sonia had used drugs with Defendant, but there was ample evidence that she drank heavily in his absence. The most pertinent portion of Dr. Barnard's testimony on this point was that battered women often self-medicate with drugs or alcohol.

Finally, Defendant contends the BWS testimony served as a testimonial to Sonia's credibility. Although the trial court excluded any testimony about post-traumatic stress disorder, Dr. Barnard used the terms "flat affect" and "piecemeal memory" to explain why Sonia did not tell anyone at the hospital about Defendant "stomping" or "kicking" her leg.

We find no error in the admission of the BWS testimony. There was evidence Sonia was a battered woman and the testimony was relevant to explain some of her behavior, such as her failure to leave Defendant sooner and to minimize some early violence.

The judgment is affirmed.