

# FEBRUARY 2026

## ESSAY QUESTIONS 1, 2, AND 3



# California Bar Examination

**Answer all 3 questions; each question is designed to be answered in one (1) hour.**

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 situation 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 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 to the facts.

If your answer contains only a statement of your conclusions, you will receive little or no 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 resolution of the issues raised by the call of the question.

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

## QUESTION 1

Olivia owned a house in Havenwood, a subdivision with 15 homes on large wooded lots. The developer of Havenwood had conveyed each lot, including Olivia's, by a recorded deed stating that the conveyance was for "residential purposes."

When Olivia died last year, she bequeathed a life estate in her house to Linda, leaving the remainder to Reed. Linda already owned a house and wanted to use Olivia's previous house as a florist shop instead. Shortly after taking title, Linda cut down valuable mature trees and privacy hedges on the lot to make room for parking. Linda then obtained a construction permit to renovate the house and a license to operate her business. Linda's renovation reduced the square footage of the house from approximately 5,000 square feet to 2,000 square feet, which significantly reduced the value of the structure.

Nancy, one of Linda's neighbors in the subdivision, threatened to sue Linda for violating the residential covenant in Olivia's original deed. However, Linda pointed out to Nancy that (i) five other businesses have been operating out of five homes in the subdivision for over 10 years, including two coffee shops, two clothing stores, and a dry cleaner, and (ii) neither Nancy nor other lot owners had complained previously.

1. What claims and remedies, if any, may Reed reasonably pursue against Linda? Discuss.
2. Were the developer's residential deed restrictions valid? Discuss.
3. Will Nancy succeed in her claim against Linda? Discuss.

## QUESTION 2

Sam is a well-known dealer in valuable musical instruments, including antique violins. Betty owns a high-end music store and has occasionally purchased stringed instruments from Sam.

Sam telephoned Betty and told her that he had a violin for sale that was made by Enrico Rocca in the early nineteenth century. Betty agreed to buy it for \$200,000. Sam signed and then emailed his standard form sales contract to Betty. The contract stated in part, "Seller agrees to sell and Buyer agrees to buy the following product: violin for the purchase price of: \$200,000 ." Sam filled in the words "violin" and "\$200,000" in his own handwriting; the remaining pages of the contract were preprinted. Betty signed, dated, and returned the contract to Sam along with payment. Sam then shipped Betty the violin.

When Betty received the violin, she sent it to an expert appraiser. A week later, the appraiser told Betty that laboratory tests confirmed that the violin was not a genuine Rocca but, rather, a skillfully made recent replica worth around \$5,000. Betty immediately telephoned Sam and told him that she would return the violin and expected her money back.

Sam was flabbergasted. He sincerely believed the violin to be a genuine Rocca. Sam told Betty that she could not return the violin. Sam pointed out that their written contract specified that the violin was "sold as is, without warranty of any kind, express or implied." Betty protested that Sam had told her over the telephone that the violin was a genuine Rocca. Sam pointed out that their written contract also included a clause stating, "This written contract contains the entire agreement between the parties and supersedes any and all prior written and/or oral agreements." Furious, Betty sued Sam for breach of contract, seeking rescission or damages.

What arguments will Betty likely make to support her claim, what arguments will Sam likely make in response, and who is likely to prevail? Discuss.

### **QUESTION 3**

While attending law school, Rex worked as a real estate broker and was co-owner of Realty-Co, a real estate brokerage firm. Rex sold his interest in Realty-Co when he passed the California Bar Exam. Rex is now a solo law practitioner who represents buyers of real estate. During the last year and a half, Rex was sued for legal malpractice four times. Rex has not told anyone about being sued for malpractice because there have been no judgments against him, and he believes the suits to be frivolous.

To help Rex get clients, his former partner at Realty-Co allowed Rex to place a sign in the lobby of Realty-Co, free of charge. The sign advertises as follows:

LOOKING FOR A STATE BAR-CERTIFIED REAL ESTATE ATTORNEY?  
LOOK NO FURTHER! CALL REX JONES AND ASSOCIATES  
1-800-BIG-FIRM

Rex recently represented a buyer at a real estate closing in California and noticed that the seller, an Arizona resident who owned only that one property in California, was represented by Nancy, an attorney Rex knew to be living in, and licensed only in, Arizona. In casual conversation, Nancy told Rex that she is temporarily representing her client in California in the real estate transaction. Rex researched Nancy and discovered that Nancy was previously disbarred in Arizona, but now she is in good standing with the bar.

1. What ethical violations, if any, has Rex committed? Discuss.
2. What ethical violations, if any, has Nancy committed? Discuss.

Answer according to both California and ABA authorities.

# FEBRUARY 2026

## ESSAY QUESTIONS 4 AND 5



# California Bar Examination

**Answer both questions; each question is designed to be answered in one (1) hour. Also included in this session is a Performance Test question, comprised of two separate booklets, which is designed to be answered in 90 minutes.**

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 situation 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 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 to the facts.

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## QUESTION 4

Dan, a citizen of Nevada, was employed as a bus driver by Nevada Bus Lines, Inc. (NBL). While working for NBL, Dan was transporting master bingo players from Thousand Oaks, California, to a bingo tournament when Dan dozed off, failed to stop at a red light, and hit a car in Los Angeles, California.

The car struck by Dan was owned by Owen, and at the time of the accident, Owen's car was being driven by Peggy, the sole occupant. Peggy was rushed to the hospital and was treated for a broken wrist. The car was damaged beyond repair. Owen and Peggy are both lifelong residents of California.

Peggy and Owen (Plaintiffs) hired a lawyer, Larry, with a valid retainer agreement, to file a civil action in federal court in Los Angeles. Plaintiffs' complaint named NBL and Dan as defendants. Plaintiffs alleged that Dan acted negligently and that NBL is liable as Dan's employer. Peggy demanded \$100,000 in damages for medical expenses and pain and suffering. Owen demanded \$50,000 for damage to his car.

Larry went to Nevada and properly served NBL with the complaint. Larry then drove to Dan's residence in Nevada, where no one was home. Larry slid a copy of the complaint under the front door of Dan's house. Dan received the complaint when he returned home. NBL and Dan promptly answered Plaintiffs' complaint.

In a request for production of documents, Plaintiffs sought all documents from the past 10 years related to claims for injuries and property damage caused by NBL's drivers. After meeting and conferring, NBL refused to produce any documents in response to this request. Plaintiffs filed a motion to compel, and NBL opposed the motion.

1. Does the federal court have subject matter jurisdiction? Discuss.
2. Does the federal court have personal jurisdiction? Discuss.
3. Was Dan properly served? Discuss.
4. How should the court rule on Plaintiffs' motion to compel? Discuss.

## QUESTION 5

Harvey opened a restaurant in 2010. In 2015, Wanda inherited \$100,000 from her father that she put in her bank account. In 2016, Harvey and Wanda married in California. Wanda, who was unemployed at the time of the wedding, used \$20,000 of the inheritance money to buy Harvey a framed and signed football jersey from his favorite player. Wanda gave it to Harvey when they returned from their honeymoon. After the wedding, Wanda and Harvey bought a house for \$500,000. Wanda used \$50,000 of the inheritance as a down payment for their house. The title to the house and the mortgage were in Harvey's name, and Harvey paid the mortgage payments with his earnings from his restaurant business.

A few years later, Wanda used \$30,000 of the inheritance to buy herself a car. Harvey loved the car and drove it often.

During the marriage, Wanda worked at the restaurant and helped Harvey to manage it. During those years, the value of the restaurant increased from \$100,000 to \$500,000. Soon after Wanda stopped working at the restaurant, a celebrity posted on social media that it was his favorite restaurant. Overnight, the restaurant's value doubled to \$1 million.

Soon afterwards, Harvey filed for dissolution, moved out of the house, and stopped paying the mortgage on the house. At the time of the dissolution, the remaining mortgage on the house was \$300,000.

What are Wanda and Harvey's rights and liabilities, if any, with respect to:

1. The car? Discuss.
2. The framed and signed football jersey? Discuss.
3. The house? Discuss.
4. The restaurant? Discuss.

Answer according to California law.



**February 2026**

**California  
Bar  
Examination**

**Performance Test  
INSTRUCTIONS AND FILE**

**STATE OF COLUMBIA v. DAVIS**

Instructions.....

FILE

Memorandum to Applicant from Armando Gomez .....

Internal Memorandum to File from Armando Gomez .....

Excerpts from Transcript of Testimony of Officer Robert Powers.....

Transcript of Text Messages on Sally Cameron's Cellular Phone.....

## **PERFORMANCE TEST 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.
2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.
5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them 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 references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.
6. In answering this performance test, you should concentrate on the materials in the File and Library. 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. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.
9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

**BRIGGS COUNTY OFFICE OF THE PUBLIC DEFENDER**  
**502 Alleghany Street**  
**Martinsville, Columbia 12345**

**MEMORANDUM**

**To: Applicant**  
**From: Assistant Public Defender Armando Gomez**  
**Date: February 24, 2026**  
**Re: State of Columbia v. John Davis, et al.**

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In two weeks, we begin the trial of our client John Davis, who has been charged with conspiracy to distribute cocaine. At the trial, the State plans to introduce a handwritten transcript of text messages between Mr. Davis and his former girlfriend, Sally Cameron, to show that they were arranging sales of the drug.

We will file a motion *in limine* seeking to exclude the transcript on the grounds that Columbia's "original documents rule" (i.e., Columbia Rule of Evidence 1002) requires the original text messages to be submitted into evidence. Please prepare a brief in support of Mr. Davis's motion *in limine* in which you address the applicability of the original documents rule and present legal arguments supporting our request to exclude the handwritten transcript of text messages between Mr. Davis and Ms. Cameron. Do not prepare a statement of the facts, but please do use the facts in your argument as necessary.

**BRIGGS COUNTY OFFICE OF THE PUBLIC DEFENDER**  
**502 Alleghany Street**  
**Martinsville, Columbia 12345**

**INTERNAL MEMORANDUM**

**To: File**  
**From: Assistant Public Defender Armando Gomez**  
**Date: August 24, 2025**  
**Re: State of Columbia v. John Davis, et al.**

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Defendant John Davis has been charged with conspiracy to distribute cocaine. One of Mr. Davis's alleged co-conspirators is Sally Cameron, his former girlfriend. Mr. Davis was arrested based on a tip from a police informant named Betty, who claims she arranged to buy cocaine through Ms. Cameron.

In order to obtain a conviction for conspiracy, the State must show that a conspiracy existed and that Mr. Davis agreed to participate in it, intending to commit the underlying substantive offense of distributing cocaine. The elements of a conspiracy are an agreement between two or more persons to commit a crime and an overt act by one of them in furtherance of the agreement.

The State plans to rely on a series of text messages between Mr. Davis and Ms. Cameron to prove that they conspired together to distribute cocaine. The State believes that the text messages will show that Ms. Cameron routinely connected Mr. Davis with individuals wishing to purchase cocaine, and that Mr. Davis then met with the buyers at a predetermined location to carry out the sale.

The State contends that the original text messages between Mr. Davis and Ms. Cameron no longer exist. I have attached a portion of an earlier motion to suppress in which Officer Robert Powers gave testimony relevant to the original documents issue. Officer Powers executed a search warrant and reviewed the contents of Ms. Cameron's cell phone shortly after Mr. Davis was arrested. Officer Powers claims that he prepared a handwritten verbatim transcript of the content of Ms. Cameron's text messages with Mr. Davis, including the date of each message. Officer Powers is prepared to testify at trial as to the accuracy of the transcript, as well as the disappearance of the text messages from Ms. Cameron's cell phone. I have placed a copy of the transcript of the text messages in the file.

The State subpoenaed text message records from Ms. Cameron's cell phone service provider, but the service provider no longer had the messages stored in its servers. Mr. Davis destroyed his own cell phone shortly before he was arrested. There is no indication that the State has subpoenaed Mr. Davis's text messages from any other source.

**EXCERPTS FROM THE TRANSCRIPT OF  
TESTIMONY OF OFFICER ROBERT POWERS  
January 24, 2026**

**Assistant Public Defender Armando Gomez:** Good morning, Officer Powers. I'm Assistant Public Defender Armando Gomez.

**Officer Robert Powers:** Nice to meet you.

**Gomez:** I wanted to ask you a few questions about the John Davis case.

**Powers:** Sure.

**Gomez:** I understand that you're the officer who examined the cell phone of Sally Cameron. Is that correct?

**Powers:** Yes, that's right. After Davis was arrested, we got a warrant to search and seize Ms. Cameron's phone. I executed the warrant myself.

**Gomez:** And what did you find?

**Powers:** I found a series of text messages between Davis and Cameron that appeared to be talking about drug deals they were setting up. They were arranging to sell cocaine to a couple of different buyers.

**Gomez:** Can I see the text messages?

**Powers:** We don't have them anymore.

**Gomez:** What do you mean, you don't have them anymore?

**Powers:** A couple of weeks after I examined Cameron's phone, I went back to have another look at it, and I discovered that all the text messages had been deleted.

**Gomez:** Where was the phone during that time?

**Powers:** It was in our evidence locker at the police station.

**Gomez:** How were the texts deleted if the phone was in police custody?

**Powers:** It looks like Cameron had her phone set up so that it would automatically delete all her text messages two weeks after she sent or received them. Pretty smart.

**Gomez:** Do you have any notes or records about what the text messages said?

**Powers:** Yes. When I examined the phone the first time, I made a transcript of all the messages between Cameron and Davis. I wrote down each of the messages word for word, and I noted the date of each message.

**Gomez:** Do you have a copy of the transcript with you?

**Powers:** Yes, here it is. (Hands transcript to Gomez.)

**Gomez:** Can you testify to the accuracy of this transcript?

**Powers:** Well, I think it's pretty accurate, yeah. I worked on it over the course of two days, in between a couple of witness interviews and some other things that were happening.

**Gomez:** What sorts of other things?

**Powers:** Oh, you know – phone calls, meetings, people coming by my desk to ask me about something or other. But I tried to keep track and make sure I didn't miss anything that seemed like it might be important.

**Gomez:** Did you print out the messages or make an electronic copy of them?

**Powers:** No, we never do that when we are looking at text messages.

**Gomez:** Why not? Isn't that part of your standard procedures?

**Powers:** We don't have any way of printing out texts from a cell phone or making copies of them. It's not like looking at someone's laptop, where you can copy things onto a flash drive. I wouldn't even know how to do that with a phone.

**Gomez:** Have you had any training on how to handle electronic evidence like computer files and text messages?

**Powers:** No, not really. Everyone in my department pretty much has to figure these things out for themselves. These new technologies change so often, you know.

**Gomez:** Thank you, Officer Powers. No further questions, Your Honor.

**TRANSCRIPT OF TEXT MESSAGES ON  
SALLY CAMERON'S CELLULAR PHONE  
Prepared by Officer Robert Powers**

**May 24, 2025**

**Sally Cameron:** Hey John, do you have any C on you?

**John Davis:** Why do you want to know?

**Cameron:** I just heard from Harry and he's looking to buy some. He wants \$100 worth.

**Davis:** Let me see what I can do.

**May 27, 2025**

**Davis:** I got that blow your friend is looking for.

**Cameron:** Great. Can you meet him this afternoon?

**Davis:** Where?

**Cameron:** In the grocery store parking lot on Oak Street. He said around 4.

**Davis:** Will do.

**June 3, 2025**

**Davis:** Hey, I just got a big shipment of stuff from down south. You know anyone who might be interested?

**Cameron:** Let me talk to some of my friends.

**June 4, 2025**

**Cameron:** I got a couple people who want to talk to you. Jay and Frieda both said they were in.

**Davis:** Cool. Set it up for me.

**Cameron:** Will do. Jay said he can meet you tomorrow and he'll bring cash.

**Davis:** Tell Jay I'll see him at the usual place tomorrow afternoon.

**Cameron:** Frieda wants to know if she can have a loan till she gets paid next Friday? She says she's desperate.

**Davis:** Forget Frieda – no loans. I'm not a bank.

**June 9, 2025**

**Cameron:** This girl Betty just called me. Do you know her? She's looking for some snow real fast.

**Davis:** She's in luck. Just had a big snow storm here. How much does she want? \$\$\$

**June 11, 2025**

**Cameron:** Just heard from Jay. Can you meet him today?

**Davis:** Where and when?

**Cameron:** Same place. He said around 2:30.

**Davis:** Got it.

**June 12, 2025**

**Davis:** I like your friend Jay. He shows up on time, pays his money, and no argument about the goods. We need some more customers like him.

**Cameron:** (Smiley face emoji)

**June 14, 2025**

**Davis:** What happened to Betty? I thought she was in a hurry.

**Cameron:** Don't know. She sort of disappeared after that phone call.

**June 16, 2025**

**Cameron:** Finally heard from Betty. Can you do tonight at 11:30, across the street from the movie theater?

**Davis:** Sure, I'll be there.



**February 2026**

**California  
Bar  
Examination**

**Performance Test  
LIBRARY**

**STATE OF COLUMBIA v. DAVIS**

LIBRARY

State of Columbia Rules of Evidence (Selected).....

*State of Columbia v. Susan Jones*

Columbia Supreme Court (2016) .....

*State of Columbia v. Brian Grimes*

Columbia Court of Appeal (2018) .....

**STATE OF COLUMBIA  
RULES OF EVIDENCE (SELECTED)**

**Rule 1001:**

In this article, the following definitions will apply:

- (a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form.
- (b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.
- (c) A “photograph” means a photographic image or its equivalent stored in any form.
- (d) An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout—or other output readable by sight—if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.
- (e) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

**Advisory Committee Note**

*Paragraph (1).* Traditionally, the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present-day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

*Paragraph (2).* In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances a particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage

require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout.

**Rule 1002:**

An original writing, recording, or photograph is required in order to prove its content, unless these rules provide otherwise.

**Rule 1004:**

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) All the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) An original cannot be obtained by any available judicial process;
- (c) . . . ; or
- (d) The writing, recording, or photograph is not closely related to a controlling issue.

**STATE OF COLUMBIA v. SUSAN JONES**  
**Columbia Supreme Court (2016)**

This case comes to us on appeal from the trial court in the County of Gaston. Defendant Susan Jones was convicted of conspiracy to traffic in counterfeit watches. Jones appealed her conviction on the grounds that the lower court erred in admitting Detective Peter Barrett's handwritten notes and testimony about a series of emails Jones exchanged with her alleged co-conspirator (not a party to this action) during the relevant time period, because the emails themselves were not introduced into evidence by the prosecution. The Columbia Court of Appeal agreed with the disposition of the trial court and affirmed. Because Detective Barrett's notes and testimony were admitted solely to establish the fact that Jones was in communication with the co-conspirator, and not to prove the content of the emails, we agree with the Court of Appeal and affirm.

*Columbia Rule of Evidence 1002* provides, "An original writing, recording or photograph is required in order to prove its content, unless these rules provide otherwise." Here, Jones objects that the trial court erred by admitting a police detective's notes and testimony about her emails with her co-conspirator because the original emails themselves were not in evidence.

Application of the "original document rule" requires a resolution of the question whether the contents of the documents are sought to be proved. Thus, an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved by oral testimony, without producing the written receipt that was given. If, however, reference to the written receipt is relied upon by a witness, the receipt must be produced or properly excused under *Columbia Rule of Evidence 1004*. Similarly, earnings may be proved without producing books of account in which they are entered. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The purpose of the rule is to prevent inaccuracy and fraud when attempting to prove the contents of a writing. The exact wording of a document is often of great importance, and a slight variation in wording can sometimes result in a substantial change in meaning. Oral testimony about the contents of a writing may also be subject to greater risk of error than testimony about the writing, such as its existence, creation, and delivery. As a result, if testimony attempts to prove the contents of the document, such testimony is not admissible unless the original document is provided or an acceptable explanation for its absence is given. Conversely, where the testimony merely states a fact about the writing, then the challenged testimony is admissible.

In this case, the prosecution relied upon the detective's notes and his testimony about the emails between Jones and her co-conspirator solely to prove that the two women were in communication with one another during the relevant period of time. The notes and testimony of the detective were not used for purposes of showing that Jones and her co-conspirator discussed the sale of counterfeit watches, or any other topic for that matter. That is, the notes and testimony at issue were not admitted to prove the content of the emails exchanged between Jones and her co-conspirator.

Affirmed.

**STATE OF COLUMBIA v. BRIAN GRIMES**  
**Columbia Court of Appeal (2018)**

This matter is before the court on Defendant Brian Grimes' emergency appeal from the trial court's denial of his motion *in limine* seeking to exclude photographs of certain documents taken by the police. For the following reasons, the court concludes that the trial court erred in denying Grimes' motion *in limine*.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

Defendant Grimes is charged with robbery and wire fraud relating to the theft of certain negotiable instruments, including travelers checks that can be converted to cash. Grimes was stopped late at night by the Columbia State Police while he was driving south through Briggs County, Columbia. The police found 72 travelers checks in a briefcase in the back seat of his car. They took five photographs of the travelers checks in the briefcase while it was still sitting in the car at the scene, but copies of the individual travelers checks were not made. Further, because it was late at night, the photographs are dark and somewhat blurry. The travelers checks were placed in a secure vault at the central police station, but they subsequently disappeared and no explanation has been offered for their loss.

The State wishes to introduce the five photographs as part of its case against Grimes. Grimes moved to exclude the photographs because the travelers checks themselves were no longer available.

**DISCUSSION**

Columbia's original documents rule, codified in *Columbia Rule of Evidence 1002*, requires production of the original to prove the content of a writing, recording, or photograph, except as otherwise provided in the Rules. In this case, the best evidence to prove the existence and content of the travelers checks is the documents themselves. However, the travelers checks are unavailable. As a result, the State relied on *Columbia Rule of Evidence 1004(a)*, which provides that the original is not required, and other evidence of the contents of a writing is admissible, if "[a]ll the originals are lost or destroyed, and not by the proponent acting in bad faith." Grimes objected to the use of the photographs as secondary evidence because he claims the travelers checks were lost or destroyed due to bad faith.

This case presents the opportunity to state certain controlling rules where evidence has been lost or destroyed in a criminal case. Loss or destruction of evidence probative in a

criminal case occurs in circumstances so variant that applicable rules cannot be set forth for every situation, but certain principles of broad application may be stated.

When criminal evidence is lost or destroyed, the court must protect a number of interests. The main concern is to provide the accused an opportunity to produce and examine all relevant evidence, to ensure a fair trial. The degree of prejudice to the defendant from loss or destruction of the evidence must be weighed, along with any intentional or culpable government action that has caused the loss or destruction. The degree of government fault is relevant. In many cases the government's responsibility for loss or destruction of evidence is caused by actions that are negligent or inadvertent, or done intentionally but with an element of good faith, in which case a greater degree of prejudice may be tolerated. In cases of severe prejudice, suppression is appropriate without regard to the good faith or culpability of the government.

The court must balance the quality of the government's conduct against the degree of prejudice to the accused. The government bears the burden of justifying its conduct, and the defendant bears the burden of demonstrating prejudice. In reviewing the conduct of the government, the court should consider whether the evidence was lost or destroyed while in its custody, whether the government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. In analyzing the degree of prejudice to the defendant, the court must consider a wide number of factors, including (1) the centrality of the evidence to the case and its importance in establishing the elements of the crime, including motive or intent; (2) the reliability of secondary or substitute evidence; and (3) the probable effect on the jury from absence of the evidence.

Here, the State sought to prove the existence and content of negotiable instruments allegedly found in Grimes' car through the use of photographs of those documents, because the original documents inexplicably disappeared while in police custody. The State was unable to meet its burden of justifying its conduct, since it offered no explanation for when or how the travelers checks disappeared.

Grimes, on the other hand, amply meets his burden of demonstrating prejudice based on the unavailability of the original documents. The travelers checks are central to the theft charges against Grimes. The five photographs on which the State relies are neither probative nor reliable. The photographs show groups of documents sitting in an open briefcase. The low lighting conditions at the scene resulted in poor resolution of several of the images. The State does not have a clear, readable image of each document allegedly found in Grimes' possession. Grimes will be severely prejudiced if the State is

permitted to use the five photographs to prove the existence and the content of the 72 travelers checks allegedly found in Grimes' car.

The order appealed from is reversed and the case is remanded for further proceedings not inconsistent with this opinion.