TUESDAY MORNING
FEBRUARY 22, 2005

California Bar Examination

Answer all three questions.
Time allotted: three hours

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

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

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

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

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

Question 1

A State X statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as "gasohol." The statute is based on the following legislative findings: (1) the use of gasohol will conserve domestic supplies of petroleum; (2) gasohol burns more cleanly than pure gasoline, thereby reducing atmospheric pollution; and (3) the use of gasohol will expand the market for grains from which ethanol is produced.

State X is the nation's largest producer of grain used for making ethanol. There are no oil wells or refineries in the state.

Oilco is an international petroleum company doing business in State X as a major retailer of gasoline. Oilco does not dispute the legislative findings underlying the statute or the facts concerning State X's grain production and lack of oil wells and refineries. Oilco, however, has produced reliable evidence showing that, since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol.

Can Oilco successfully assert that the statute violates any of the following provisions of the United States Constitution: (1) the Commerce Clause, (2) the Equal Protection Clause, (3) the Due Process Clause, and (4) the Privileges and Immunities Clause? Discuss.

Question 2

PC manufactures computers. Mart operates electronics stores.

On August 1, after some preliminary discussions, PC sent a fax on PC letterhead to Mart stating:

> We agree to fill any orders during the next six months for our Model X computer (maximum of 4,000 units) at $1,500 each.

On August 10, Mart responded with a fax stating:

> We're pleased to accept your proposal. Our stores will conduct an advertising campaign to introduce the Model X computer to our customers.

On September 10, Mart mailed an order to PC for 1,000 Model X computers. PC subsequently delivered them. Mart arranged with local newspapers for advertisements touting the Model X. The advertising was effective, and the 1,000 units were sold by the end of October.

On November 2, Mart mailed a letter to PC stating:

> Business is excellent. Pursuant to our agreement, we order 2,000 more units.

On November 3, before receiving Mart's November 2 letter, PC sent the following fax to Mart:

> We have named Wholesaler as our exclusive distributor. All orders must now be negotiated through Wholesaler.

After Mart received the fax from PC, it contacted Wholesaler to determine the status of its order. Wholesaler responded that it would supply Mart with all the Model X computers that Mart wanted, but at a price of $1,700 each.

On November 15, Mart sent a fax to PC stating:

> We insist on delivery of our November 2 order for 2,000 units of Model X at the contract price of $1,500 each. We also hereby exercise our right to purchase the remaining 1,000 units of Model X at that contract price.

PC continues to insist that all orders must be negotiated through Wholesaler, which still refuses to sell the Model X computers for less than $1,700 each.

1. If Mart buys the 2,000 Model X computers ordered on November 2 from Wholesaler for $1,700 each, can it recover the $200 per unit price differential from PC? Discuss.

2. Is Mart entitled to buy the 1,000 Model X computers ordered on November 15 for $1,500 each? Discuss.

Question 3

Molly and Ruth were partners in the operation of a dry cleaning store. Recent government environmental regulations relating to dangers posed by dry cleaning fluids increased their exposure to liability and caused a decline in their business. Molly and Ruth decided to convert their partnership into Dryco, Inc. ("Dryco"), a corporation, to limit their potential personal liability.

Molly and Ruth each contributed $20,000 in cash to Dryco. In return, each received a $15,000 promissory note from Dryco and 5,000 shares of stock with a value of $1 per share.

Prior to incorporation, Molly entered into a contract on behalf of Dryco with Equipment Company ("EC") for the unsecured credit purchase of an environmentally safe dryer for $100,000. EC was aware that Dryco had not yet been formed. EC delivered the dryer one week after the incorporation, and Dryco used it thereafter and made monthly installment payments.

Dryco had been incorporated in compliance with all statutory requirements, and Molly and Ruth observed all corporate formalities during the period of Dryco's existence. One year after incorporation, however, Dryco became insolvent and dissolved. At the time of the dissolution, Dryco's assets were valued at $50,000. Its debts totaled $120,000, consisting of the two $15,000 notes held by Molly and Ruth and a $90,000 balance due EC for the dryer.

1. As among EC, Molly, and Ruth, how should Dryco's $50,000 in assets be distributed? Discuss.

2. On what theory or theories, if any, can Molly and/or Ruth be held liable for the balance owed to EC? Discuss.

THURSDAY MORNING
FEBRUARY 24, 2005

California Bar Examination

Answer all three questions.
Time allotted: three hours

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

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

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

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

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

Question 4

Ann represents Officer Patty in an employment discrimination case against City Police Department ("Department") in which Patty alleges that Department refused to promote her and other female police officers to positions that supervise male police officers. Bob represents Department.

At Patty's request, Ann privately interviewed a male police captain, Carl, who had heard the Chief of Police (Chief) make disparaging comments about women in Department. Carl told Ann that Chief has repeatedly said that he disapproves of women becoming police officers, routinely assigns them clerical work, and would personally see to it that no female officer would ever supervise any male officer. Carl met with Ann voluntarily during his non-work hours at home. Ann did not seek Bob's consent to meet with Carl or invite Bob to be present at Carl's interview.

When Bob saw Carl's name as a trial witness on the pretrial statement, he asked Chief to prepare a memo to him summarizing Carl's personnel history and any information that could be used to discredit him. Chief produced a lengthy memo containing details of Carl's youthful indiscretions. In the memo, however, were several damaging statements by Chief reflecting his negative views about female police officers.

In the course of discovery, Bob's paralegal inadvertently delivered a copy of Chief's memo to Ann. Immediately upon opening the envelope in which the memo was delivered, Ann realized that it had been sent by mistake. At the same time, Bob's paralegal discovered and advised Bob what had happened. Bob promptly demanded the memo's return, but Ann refused, intending to use it at trial.

1. Did Ann commit any ethical violation by interviewing Carl? Discuss.

2. What are Ann's ethical obligations with respect to Chief's memo? Discuss.

3. At trial, how should the court rule on objections by Bob to the admission of Chief's memo on the grounds of attorney-client privilege and hearsay? Discuss.

Question 5

Alice and Bill were cousins, and they bought a house. Their deed of title provided that they were "joint tenants with rights of survivorship." Ten years ago, when Alice moved to a distant state, she and Bill agreed that he would occupy the house. In the intervening years, Bill paid nothing to Alice for doing so, but paid all house-related bills, including costs of repairs and taxes.

Two years ago, without Alice's knowledge or permission, Bill borrowed $10,000 from Lender and gave Lender a mortgage on the house as security for the loan.

There is a small apartment in the basement of the house. Last year, Bill rented the apartment for $500 per month to Tenant for one year under a valid written lease. Tenant paid Bill rent over the next seven months. During that time, Tenant repeatedly complained to Bill about the malfunctioning of the toilet and drain, but Bill did nothing. Tenant finally withheld $500 to cover the cost of plumbers he hired; the plumbers were not able to make the repair. Tenant then moved out.

Bill ceased making payments to Lender. Last month, Alice died and her estate is represented by Executor.

1. What interests do Bill, Executor, and Lender have in the house? Discuss.

2. What claims do Executor and Bill have against each other? Discuss.

3. Is Tenant obligated to pay any or all of the rent for the remaining term of his lease, including the $500 he withheld? Discuss.

Question 6

In 2003, Sam executed a valid testamentary trust, naming Tom as trustee. The terms of the trust state:

(a) All net income is to be paid to Bill, Sam's nephew, for life;
(b) Tom may invade principal for Bill in such amounts as Tom, in his sole and absolute discretion, determines;
(c) The trust terminates on Bill's death and any remaining principal is to be distributed to Alma Mater University;
(d) The interests of the beneficiaries are inalienable and not subject to the claims of creditors.

In 2004, Sam died.

In 2005, Lender obtained a judgment against Bill for an unpaid credit card bill that includes charges for tuition, groceries, and stereo equipment. Lender now requests a court order directing Tom to pay all future installments of trust income to it rather than Bill until the judgment is satisfied.

Bill is delinquent in making child support payments to Kate, his former spouse, for their child. Kate now requests a court order directing Tom to pay all future installments of trust income to her rather than Bill until the arrearages are eliminated.

Bill wants Tom to invade the trust principal so Bill can promote a newly-formed rock band, but Tom has refused. Bill now requests a court order directing Tom to invade the trust principal.

Because of Tom's refusal to invade the trust principal, and because Alma Mater is concerned over Bill's debt difficulties, Bill and Alma Mater wish to terminate the trust in order to divide the trust principal, but Tom has refused. Both Bill and Alma Mater now request a court order terminating the trust.

How should the court rule on the requests made by Lender, Kate, Bill, and Alma Mater? Discuss.

TUESDAY AFTERNOON
FEBRUARY 22, 2005

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

SANDRA CASTRO v. TOM MILLER

SANDRA CASTRO v. TOM MILLER

INSTRUCTIONS

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

Law Offices of Mariah Malone

98 Prentiss Street, Suite A

Palo Verde, Columbia 83013

TO: Applicant
FROM: Mariah Malone
DATE: February 22, 2005
RE: **Castro v. Miller**

At the request of Columbia Insurance Company ("CIC"), we have undertaken the defense of this personal injury action. Our client, Tom Miller ("Miller"), is the owner, but not the driver, of the vehicle that struck plaintiff Sandra Castro's ("plaintiff" or "Castro") bicycle. The driver, Bryon Russell ("Russell"), an acquaintance of Miller, probably will not be served with the lawsuit since he has moved from the area, his whereabouts are unknown, and he's uninsured.

I have not included the form complaint and answer filed on behalf of Miller in this file. There are two causes of action in the complaint against Miller and Russell: one for permissive use of an automobile and another for negligent entrustment of the vehicle. The answer denies that Russell and Miller were negligent. It also asserts affirmatively that the plaintiff was comparatively negligent and that Russell's use was beyond the scope and the permission granted. Plaintiff's complaint asks for damages in the amount of $15,000.

I have attached the documents collected by the CIC claims adjustor who investigated the case. There are no lost wages, since plaintiff is a student, nor are there any permanent or disabling injuries. This case should settle without the expense of discovery, let alone trial, if only plaintiff Castro can be persuaded to take a more reasonable view of the worth of her case. In my opinion, a jury would likely apportion

fault between the driver and plaintiff. Since plaintiff has a copy of the Columbia Department of Motor Vehicles Driver License Search Report, it's probable that she thinks a jury may be enraged because of Russell's drunk driving conviction. The plaintiff does not have the CIC confidential Memorandum from the claim adjuster, Mark Hoffman.

We want to determine if we can settle this case before any additional expenses are incurred. We have been authorized to settle the case at this stage for $5,000 for all of plaintiff Castro's damages, including pain and suffering. Please draft a letter to plaintiff's counsel for my signature offering to settle the matter for $5,000. Remember that this letter is being written to an attorney who needs to understand the strength of our position and be persuaded to settle. Using the materials and authorities I've attached, you must draft the letter to state the facts in a light that supports our position, articulates the legal and factual arguments in our favor, and emphasizes the weaknesses of the other side's position on both liability and damages.

Palo Verde Police Report

CASE NO.: 2004-97531

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(1) REPORT TYPE:

Hate Crime_____ Gang-related_____ Accident xxxx

Cited & Released_____ In Custody_____

(2) LOCATION OF EVENT/CROSS STREET:

Intersection of Willow & Oak

(3) SUSPECT:

Name Russell, Bryon Address_____

M/F M Race W Birth Date____ Height____ Weight____

Phone # 733-3497 Col. Drivers License # 267-75-983

Hair Color____ Facial Hair____ Complexion____ Appearance____

(4) VICTIM:

Name_____ Address_____

M/F____ Race____ Birth Date____ Height____ Weight____

Sexual Assault____ Domestic Violence____

Phone #_____ Col. Drivers License #_____

Hair Color____ Facial Hair____ Complexion____ Appearance____

(5) REPORTING PARTY:

Name Sandra Castro Address 285 College Ave., Apt. E., Palo Verde, 83014

M/F F Race H Birth Date 3/2/85 Height 5-4 Weight 110

Phone # 734-2685 Col. Drivers License # N/A

Hair Color____ Facial Hair____ Complexion____ Appearance____

Palo Verde Police Report CASE NO. 2004-97531 Supplemental xx

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

February 3, 2004, 1500 hours. Reporting Party (RP) called, identifying herself as Sandra Castro, to ask if a bicycle belonging to her had been turned in. When I asked what happened, RP said that while bicycling the previous night she had been struck by a car on Willow Road and that her bicycle had been left at the accident scene while she was taken to the emergency room of PV Medical Center. Since this was a possible hit-and-run or theft, the writer asked RP to come in for report.

February 3, 2004, 1600 hours. RP informed writer that yesterday, February 2, 2004, at between 1715 and 1720 hours RP was struck by a vehicle at the intersection of Willow Road and Oak Avenue as RP bicycled along crosswalk to cross Willow Road. RP stated that impact caused her to fall to pavement, causing injuries to left leg and right arm. RP stated that a white male identified himself as the driver and assisted her to a car and transported her a few blocks to PV Medical Center emergency room, where she was treated for lacerations and released. When RP left the emergency room, a nurse said the driver had left. RP gave writer a note identifying Suspect as a Bryon Russell, telephone number 733-3497, Columbia Driver's License number 267-75-983, Columbia Vehicle License number 4 638 754. On interrogation, RP explained that she was en route to Bud's Ice Cream, heading north along the bike path on Oak Avenue. Near the intersection with Willow Road, the bike path splits off from the right side of the road and goes onto the sidewalk. It is then separated from the road by a guardrail that is 18 inches in height. At Willow Road, she was going to cross Willow to the north side in the crosswalk. As she entered the crosswalk, RP looked left and immediately saw the vehicle that hit her. RP said that she was in the crosswalk and the vehicle did not stop before impact. RP did not observe slurred speech or other indications of alcohol/drug impaired behavior. Suspect was calm, polite, well groomed, and had no distinguishing features. RP said that on her way home from the hospital she went by the accident scene but was unable to locate her bike.

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

Oak Avenue and Willow Road are both 2 lane roads. Oak runs North/South. Willow runs East/West. The accident occurred at the Southeast corner of the intersection. That corner is rounded and set back from the actual intersection of Oak and Willow. Where the 2 roads meet there is a triangular pedestrian island approximately 12' from the Southeast corner. The accident occurred in the crosswalk that connects the Southeast corner to the pedestrian island. RP said that she was completely in the crosswalk when the car struck her. RP said that there is a large yield sign at the spot where the crosswalk enters the roadway.

Writer is familiar with the intersection. Because of the configuration, vehicles can turn right from Oak to Willow without coming to a full stop. There are no buildings at the intersection. The sidewalk is directly adjacent to the Oak Avenue roadway. Between the roadway and sidewalk there is a low guardrail.

Writer informed RP that he would contact her if her bike was turned in or charges pressed against Suspect. Writer sent requests for search to Columbia Department of Motor Vehicles.

February 3, 2004, 1700 hours. Writer received call from a Fran Lally, 2011 Bowdoin St., PV, 739-7191 (Witness), who reported that she had witnessed a car-bicycle accident on February 2, 2004 at the intersection of Willow Avenue and Oak Road. Writer determined that it was the same accident reported by Sandra Castro. Witness reported that at the time of the accident she was jogging along the west side of Oak Avenue, approaching intersection with Willow Road. Witness was heading south and the accident happened ahead and across the street from

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

her direction of travel. Witness stated that the vehicle struck the cyclist as the cyclist was riding her bike in the crosswalk in the turnoff area from Oak Avenue to Willow Road. Witness was unable to identify vehicle because of poor visibility. Witness thinks she could identify victim. Witness stopped, running in place, to see what would happen. Witness observed driver exit and run back to victim. Driver was a white male, medium height and weight. Driver assisted victim into his vehicle and proceeded west on Willow. Witness stated that she then crossed street, retrieved the bike (which appeared badly damaged) and placed it next to the sidewalk adjacent to Willow. Witness stated that vehicle did not stop at crosswalk but continued to approach it at about 20 mph prior to striking cyclist. Witness stated that she thought driver braked but was unable to stop in time to avoid accident. Witness estimated time of accident to be almost 1800 hours. Witness stated that she had not seen cyclist before accident, because she was paying more attention to where she was running and not necessarily looking across the street. Witness also said that bicyclist would have been behind guardrail until she entered the crosswalk. She was fairly certain that the cyclist did not stop before she entered the crosswalk. Witness may have seen the vehicle brake lights illuminate, and she thinks its other lights were on. Writer informed Witness that she would be contacted if further information was needed.

February 3, 2004, 1730 hours. Writer attempted to contact suspect Bryon Russell at number provided by RP. No answer.

February 4, 2004, 0900 hours. Attempted to contact Suspect by phone. No answer.

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

February 6, 2004, 1400 hours. Made phone contact with Suspect. Confirmed that he was the driver in Castro accident. Suspect agreed to come into station.

February 8, 2004, 1600. White male in late 20s identifying himself as Bryon Russell, 1145 Lincoln Drive, PV, arrived at Palo Verde Police Station for interview. Russell possessed a valid Columbia driver's license. Russell did not have vehicle registration because vehicle belonged to Tom Miller. Russell could not provide an address or phone number for Miller. Russell admitted that he struck RP as he proceeded to make a right turn from Oak Avenue to Willow Road. Russell stated that he approached the intersection at the speed limit, 25 mph, and he saw no one in crosswalk as he proceeded to make a right turn from Oak Avenue onto Willow Road, so he continued to proceed around the corner. Russell stated that as he approached the crosswalk a cyclist suddenly darted in front of his car and that he was unable to stop in time to avoid the collision. He advised that he helped the cyclist to his car and transported her to PV Medical Center emergency room. Russell stated that RP, whom he confirmed was Sandra Castro, seemed OK. Russell stated that he did not recall if the vehicle lights were on because it was still daylight and lights were not needed. Russell stated that the cyclist was dressed in dark clothing and did not have lights or any reflectors on her bicycle or person. Writer questioned Russell about whether there were any vehicles approaching on Willow Road from his left as he approached the intersection. Russell stated no, that he had looked to his left and there was no traffic from that direction. Russell was then asked if that meant that he had been looking left as he proceeded to cross the crosswalk, and he said no, that he was looking forward just as he approached crosswalk.

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

Russell stated that he applied the brakes when he saw the cyclist, but was unable to stop in time. Russell stated that he never saw the cyclist before she entered the crosswalk. The cyclist was struck with the front of the vehicle and the force of the impact pushed her away from the front of the car.

February 8, 2004, 1400 hours. No outstanding warrants on Russell. Drivers License Search Report from Columbia Department of Motor Vehicles attached. Writer concluded evidence was insufficient to issue a citation. Writer sent report to Columbia Department of Motor Vehicles. Investigation closed.

COLUMBIA DEPARTMENT OF MOTOR VEHICLES
CAPITOL CITY, COLUMBIA

DRIVER LICENSE SEARCH REPORT

DATE: February 5, 2004 TIME: 10:35

REQUESTING AGENCY: Palo Verde Police Department

INFORMATION PROVIDED:

NAME: Russell, Bryon DRIVER LICENSE NUMBER: 267-75-983
DOB: 09-22-70

ADDRESS: P.O. BOX 414, Wilson, Columbia 86602

IDENTIFYING INFO:

SEX: Male HT: 6-00 WT: 175 EYES: Blue HAIR: Red

LICENSE STATUS: Valid

RESTRICTIONS: None

CONVICTIONS:

VIOL/DATE	CONV/DT	SEC/VIOL	DKT/NO	FINE	DISP	COURT
09-17-2002	09-30-2002	22350VC (Speeding)	C11321	165	PG	650
12-14-2002	12-31-2002	22350VC (Speeding)	J3567	135	PG	703
01-06-2003	01-15-2003	22350VC (Speeding)	K1001	198	PG	650
01-20-2003	01-29-2003	23152(A)VC (Driving Under the Influence Of Alcohol)	K2003	30 SERVED/ 6 MO/SUS		650

FAILURES TO APPEAR: None

ACCIDENTS: None

Columbia Insurance Company

Peninsula Office

Claims and Adjustment Department

MEMORANDUM

This Report Contains Information That Is Confidential and May Be Protected By the Attorney-Client or Other Applicable Privileges. It Is Intended to Be Conveyed to the Designated Recipient(s).

Insured: MILLER, TOM
Policy No. **A-874 743 88**
Accident/Incident Date: February 2, 2004
From: Mark Hoffman
(304) 339-6034

February 6, 2004. Returned call from insured reporting accident on **February 2, 2004**. Miller reported driver was one Bryon Russell ("Russell"), and all that Miller knew about the accident was from Russell. Miller briefly told me what he understood had happened.

I asked if Russell was driving with his permission, and Miller said that he was. Miller said that Russell was an acquaintance whom he'd known from the 24-7 Gym over the last 2 months. They occasionally worked out and practiced rock climbing together at the gym. On the day of the accident, Miller had gone to the gym and talked to Russell. They wanted to talk over a possible back packing trip together, so they went to the Brew Pub. Miller put this at about 3:00 pm.

Miller said that they split a pitcher of beer, about 2 glasses each. Then they drove back to the gym, where Miller was to meet his girlfriend at 4:30 pm and Russell had his car. He dropped Russell off, and was waiting to park in Russell's spot. Russell's car wouldn't start, and Russell seemed angry because, he said, he had an important meeting with someone who was helping him in his attempt to get a job. Miller said Russell seemed really disappointed. So, Miller offered to let Russell use his car. Russell said he'd be back by 7:00 pm. The gym closed at 8:00 pm, and Miller said that

his girlfriend would have her car. Miller said that there were no other discussions of where Russell might or could go.

Russell showed up about 7:00 pm, but he was highly agitated and stated that he'd been in an accident over on Willow Road next to Leland University. He told Miller that he hit a bicyclist "who darted out of nowhere" as Russell made a right turn. Russell said he'd taken the cyclist, a young woman, in the car to the nearby Palo Verde Medical Center where he waited for 30 minutes. While waiting, Russell thought that he'd call Miller at the gym and went to find a phone. He couldn't get through and, when he returned to the emergency room, she was gone. Russell didn't think that she'd been seriously injured. He hadn't gotten her name, but he'd given her his name, phone and license numbers.

Russell and Miller went to check out the damage to his car. There was none. Miller then took Russell home. On the way, they drove by Willow Road and Oak Avenue to see if the bicycle was there. It wasn't. They decided against contacting police since it was apparent the cyclist had not been seriously injured.

Yesterday, Miller saw Russell, and Russell said he had gotten calls from the police, so Miller thought he had better notify us.

Prepared report. Waited to hear from possibly injured party.

February 10, 2004. Call from Sandra Castro referred to me. Told her I'd get the police report, and asked her to get copies of doctor, hospital, or repair bills and get back to me. Picked up copy of police report.

Noting Russell's 3 speeding tickets and recent drunk driving conviction, I called and went to meet with Russell. He confirmed Miller's account of how he borrowed the car. He said that they only had a few beers. Russell then went to his meeting. After a few questions, Russell told me his meeting had been at another bar, Sidewinders. Russell said he had another few beers and left a little after 5:00 pm, intending to run another errand over at Leland University and then return to the gym. I asked Russell whether

he had felt intoxicated after 4 or more beers in about 2-3 hours, and he said, no, that he felt “OK” to drive.

Russell said that the accident happened after 5 pm, and that he didn’t have his lights on. There was no need, since it was still daylight. (I checked archives on weather.com, and on February 2, sunset was at 5:45 pm.)

As he approached the corner, he saw no cars ahead or approaching on Willow Road. He slowed down, and saw a yield sign immediately before the crosswalk. He thinks he was traveling less than 10 mph at the time of impact.

Castro told him that her arm and leg hurt. Driving to the hospital, he told her that she “seemed to come out of nowhere.” She didn’t respond, but Castro did say that he (Russell) should have been more careful when driving next to the campus, as students are often on bicycles and on foot.

He pled guilty to the recent drunk driving charge, and spent nights and weekends in jail for about a month. He never told Miller about it. He tried to keep it quiet, even from friends, as it embarrassed him. He may have told Miller that he was concerned about getting cited for the accident because he was close to losing his license.

February 11, 2004. Visited scene. Took photos, but camera malfunctioned.

Oak and Willow is a tricky intersection. Approaching the intersection with Willow on Oak, as Russell would have been, there is a bike lane painted on the right side of the road. About 100' before the intersection, the bike lane turns onto the sidewalk and runs along right next to the road.

To turn right from Oak to Willow does not require a full stop. Just before Oak meets Willow, there is a right turn lane which rounds the corner. The crosswalk where the accident happened crosses this rounded right turn lane. There is a yield sign right at the edge of the crosswalk. Next to the yield sign there is a large utility pole.

It's easy to see how the accident may have happened. As Russell got near the intersection, Castro on her bike would have already gone from the bike lane onto the sidewalk and would be approaching the crosswalk. Russell and Castro reached the crosswalk at the same moment. Russell may have been looking to the left as he rounded the corner. He may not have looked back along the sidewalk for a bicycle about to enter the crosswalk without stopping. He may not have seen her because he did not look, or he may not have been paying attention, or he may have been obstructed by poor light or the utility pole.

February 22, 2004. Called Miller to follow up on what he thought about Russell's condition when he loaned him the car. Asked what he knew of Russell's driving record prior to accident: "I really didn't know much about Russell at all. Just another guy at the gym." Asked what Russell had told him about his driving record: "I think he told me, when talking about a possible trip together, that he'd had a couple of speeding tickets." Asked if that was when he was talking about his concern about losing his license. "Yes, I think that's when it was." But when I put it to him specifically, did you know about Russell's speeding tickets before the accident, Miller said: "I think that he mentioned the tickets prior to the accident." He was emphatic that he didn't know about a drunk driving conviction before I asked him about it. I asked if he had, would he have loaned Russell the car? He wasn't sure: "I don't know, since it never came up."

February 25, 2004. Received medical report and hospital bill ($250) from Castro. She didn't have receipt for bike, which she said cost her $150 a year ago. I offered her $700. She said that she was thinking of talking to a lawyer first.

Castro argued that Russell was going too fast and she thought that he'd been drinking. I asked her, if she believed that, then why did she let him give her a ride to the hospital? She said that it was only a 2 minute ride and that she didn't note the smell of alcohol on him until she was seated next to him in the car, and then it was obvious. She admitted that she didn't notice anything erratic in his driving or behavior, although she thinks that the reason Russell dropped her at the hospital and then disappeared was because he had been drinking.

PALO VERDE MEDICAL CENTER ADMITTING FORM:

Name of Patient:	Sandra Castro
Address & Telephone Number:	285 College Avenue, Apt. E
	Palo Verde, COL (111) 734 - 2685
Insurer: none	Date & Time Admitted: February 2, 2004 @ 1720
Sex: F	Race: Hispanic
Occupation:	Student
Business Address:	N/A
DOB:	March 2, 1985
Emergency Contact:	Gaspar Castro
Address & Telephone Number:	9832 Walmer Creek
	Overland Park, COL (924) 316-3814

Diagnosis: Patient admitted to ER at 1720. Complained of pain in left leg and right arm. Stated she sustained injuries when a car traveling without lights collided with her bicycle, knocking her to pavement. Visual examination disclosed numerous superficial lacerations of the leg and arm, some of which were bleeding actively though not profusely. As the examination failed to disclose any indication of possible fractures, no x-rays were ordered. The lacerations were cleaned and antiseptic gel was applied. Tetanus injection was also administered as patient could not recall when she last had booster. Patient was given tube of Lanocane to guard against possible infection and to soothe itching and burning. Patient released 1830. - Jorge Montoy, M.D.

Patient returned on February 4, 2004 (1730) complaining of pain in left leg and right arm. Examination revealed that she had normal movement in both extremities though the degree was limited markedly by the pain. Further examination did not disclose possible fractures in either extremity. The lacerations had healed well, though bruises which were quite sensitive to the touch were evident along the lower part of the right arm and below the knee of the left leg. Patient was advised that she would continue to experience pain but that it would diminish and eventually disappear within 2 weeks to a month. Patient was told to avoid all strenuous activity until pain disappeared. - Jorge Montoy, M.D.

Dictated but not read

Palo Verde Medical Center
2000 University Avenue
Palo Verde, Columbia 83014
(111) 733-3000

Direct Billing Statement of Account

Date: February 15, 2004

Account No.: 83187

Patient: Sandra Castro
285 College Avenue, Apt. E
Palo Verde, COL 83014

Date:	Description of Services	Charges	Payments
February 2, 2004	Emergency Room Services	$180	00
February 4, 2004	Emergency Room Services	$ 70	00

Balance Due: $250

TUESDAY AFTERNOON
FEBRUARY 22, 2005

California
Bar
Examination

Performance Test A
LIBRARY

SANDRA CASTRO v. TOM MILLER

LIBRARY

Table of Contents

SELECTED COLUMBIA VEHICLE CODE PROVISIONS

§ 17150. Liability of Owner

Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.

§ 17151. Limitation of Liability

The liability of an owner, imposed by section 17150 and not arising through the relationship of principal and agent or master and servant is limited to the amount of fifteen thousand dollars ($15,000) for damage to property and for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of thirty thousand dollars ($30,000) for damage to property and for the death of or injury to more than one person in any one accident.

§ 21200. Rights and Duties of Bicycle Riders

Every person riding a bicycle upon a highway has all the rights and is subject to all the provisions applicable to the driver of a vehicle.

§ 21950. Right-of-Way at Crosswalks

(a) The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided.

(b) The provisions of this section shall not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard. No pedestrian shall unnecessarily stop or delay traffic while in a marked or unmarked crosswalk.

(c) The provisions of subdivision (b) shall not relieve a driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or

within any unmarked crosswalk at an intersection.

§ 23152. Driving Under Influence

It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

SELECTED COLUMBIA BOOK OF APPROVED JURY INSTRUCTIONS (BAJI)

Columbia's form jury instructions, BAJI, were formulated by the Committee on Standard Jury Instructions, Civil, Superior Court, to be as close as possible to generally applicable statements of the law.

3.50 Comparative Negligence Defined

Comparative negligence is negligence on the part of the plaintiff which, combined with the negligence of a defendant, contributes as a cause in bringing about the injury. Comparative negligence, if any, on the part of the plaintiff does not bar a recovery by the plaintiff against the defendant, but the total amount of damages to which the plaintiff would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the plaintiff.

5.13 Yield Right-of-Way--Intersection

An immediate hazard exists whenever a reasonably prudent person in the position of the driver, upon approaching a yield right-of-way sign at an intersection, would realize that another vehicle in or approaching the intersection would probably collide with [his][her] vehicle if [he][she] then proceeded to enter or cross the intersection.

5.40 Influence of Alcoholic Beverage--Driver

Columbia Vehicle Code Section 23152 provides: It is unlawful for any person who is under the influence of any alcoholic beverage to drive a vehicle. A person is under the influence of any alcoholic beverage when as a result of drinking such beverage [his][her] physical or mental abilities are impaired to the extent that such person is not able to drive a vehicle in the manner that a person of ordinary prudence would drive under the same or similar circumstances.

5.41 Influence of Alcoholic Beverage--Circumstances to Consider

One is not necessarily under the influence of an alcoholic beverage as a result of consuming one or more drinks. The circumstances and effect must be considered. Whether a person was under the influence of an alcoholic beverage at a certain time is an issue for you to decide.

13.51 Liability of Owner--No Issue as to Permission

It has been established in this case that, at the time of the accident, the vehicle then being used by the defendant/driver was owned by the defendant/owner, and that it was being used with the permission of the owner. It follows, therefore, under the law, that if defendant/driver is liable, both are liable.

13.52 Liability of Owner--Contested Issue as to Permission

If you find that at the time of the accident, defendant/driver did not have the permission, express or implied, of the defendant/owner to use the vehicle, then defendant/owner is entitled to a verdict in [his][her] favor, regardless of what your decision may be as to the other defendant. But if you find that the vehicle used by defendant/driver was being used with the permission, express or implied, of the defendant/owner, then if the defendant/driver is liable, so is the defendant/owner.

13.53 Limited Permissive Use--Effect of Use Beyond Scope of Permission

When the owner of a motor vehicle gives another permission to use that vehicle, the owner may restrict the permitted use to a given locality or to a specified period of time or to a particular purpose. Disobedience of the owner's orders will not relieve the owner from the legal consequences of permission, unless the disobedience amounts to a use substantially beyond the scope of the permission as to either time, place, or purpose.

Armenta v. Churchill

Supreme Court of Columbia, 1954

Plaintiffs, the widow and children of Amador Armenta, Sr., brought this action to recover damages for his wrongful death. The deceased, while working on a road-paving job, was killed when a dump truck backed over him. The truck was operated by defendant Dale Churchill, whose wife and codefendant, Alece Churchill, was the registered owner.

Plantiffs' amended complaint contained two counts. The first count charged negligence on the part of Dale Churchill as driver of the truck, acting as agent and employee of his wife, Alece Churchill, and within the scope of his agency and employment. The second count contained the added allegations that Alece Churchill was herself negligent in entrusting the truck to her husband, she having actual knowledge that he was a careless, negligent and reckless driver. As to the first count, defendants admitted in their answer the agency and scope of employment of Dale Churchill, but, as to the second count, they denied the added allegations. In support of the added allegations of the second count, plaintiffs offered evidence at trial to show that Dale had been found guilty of 37 traffic violations, including a conviction of manslaughter, and that Alece had knowledge of these facts. Defendants objected to the offered evidence because it was directed to an issue which had been removed from the case by the pleadings. After the objection was sustained, defendant Alece Churchill again admitted her liability for all damages sustained by plaintiffs in the event that her husband was found to be liable. The jury found for defendants. Plaintiffs contend that the trial court committed prejudicial error in instructing the jury and in excluding certain evidence.

The question presented here is whether there was any material issue remaining in this case to which the offered evidence of 37 traffic violations, including a manslaughter conviction, would be relevant. Defendant Alece Churchill admitted vicarious liability as

the principal for the tort liability, if any, of her husband.

Plaintiffs' allegations in the two counts with respect to Alece Churchill merely represented alternative theories under which plaintiffs sought to impose upon her the same liability as might be imposed upon her husband. Alece Churchill's unqualified admission that Dale Churchill was her agent and employee and that he was acting in the course of his employment at the time of the accident effectively removed from the case the issue of her liability for the tort, if any, of her husband: in effect, Alece Churchill was liable if her husband was liable for negligence. Accordingly, there was no material issue remaining to which the offered evidence could be legitimately directed. We therefore conclude that the trial court properly sustained defendants' objection to the relevance of the 37 traffic violations of defendant Dale Churchill.

The judgment is affirmed.

Osborn v. Hertz Corporation

Columbia Court of Appeal, 1988

In this appeal, we consider whether a car rental company is liable under the theory of negligent entrustment for injuries caused by a drunk driver who had rented a car while sober and presented a valid driver's license.

In the early morning hours of July 18, 1981, plaintiff Joan Osborn was on a date with Dennis Ege. Mr. Ege was driving while intoxicated and he drove the car in which they were riding into a tree. Plaintiff suffered serious injuries. Defendant Hertz Corporation had earlier rented the car to Ege.

Plaintiff contends defendant Hertz negligently entrusted the car to Ege even though Ege was sober and presented a valid Columbia driver's license when he rented the car from defendant. Plaintiff asserts defendant was negligent for failing to investigate further Ege's qualification to drive. Plaintiff argues that, had defendant conducted such an investigation, it would have discovered that Ege had been twice convicted of drunk driving, the most recent conviction having occurred some seven years earlier, and that Ege's driver's license had in the past been suspended for six months as a consequence. The trial court ruled for defendant on the negligent entrustment claim.

It is generally recognized that one who places or entrusts his or her motor vehicle in the hands of a driver whom he or she knows or, from the circumstances, is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by that driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness. Liability for the negligence of the driver to whom an automobile is entrusted does not arise out of the relationship of the parties. Rather, it arises from the act of entrustment of the motor vehicle with permission to operate the same to one whose incompetency, inexperience, or recklessness is known or should have been known to the owner.

Under the theory of negligent entrustment, liability is imposed on the vehicle owner because of his or her own independent negligence and not the negligence of the driver.

Columbia Vehicle Code section 14608 prohibits a rental car agency from renting to unlicensed drivers. A rental car agency may therefore be liable for negligently entrusting a car to an unlicensed driver. Excerpts from Ege's deposition established without contradiction that he showed defendant a valid driver's license and had not been drinking before renting the car. It is undisputed that Ege gave defendant no clue that he was then unfit to drive. There is therefore no triable issue whether defendant knew of Ege's unfitness.

Plaintiff claims defendant should have asked Ege: (1) whether he had a record of driving under the influence; (2) whether he had ever had his license suspended or revoked for drunk driving; (3) whether he had ever been refused automobile insurance; and (4) whether he intended to drive under the influence. Plaintiff claims defendant's entrusting the car to Ege without asking these questions was negligent.

An ordinarily prudent car rental agency is not obligated to ask its customers for information that has no useful purpose. The practical effect of plaintiff's contentions would be to make it impossible for anyone previously convicted of drunk driving or whose license was once suspended from renting a car. Because rental cars play an indispensable role in contemporary American business, adopting plaintiff’s position would impose a severe hardship on countless responsible citizens who were once convicted of vehicle offenses and who depend on rental cars to perform their jobs. Accordingly, we hold that a car rental company is not liable for injuries caused by a drunk driver who, while sober, rented a car and presented a valid driver’s license.

The judgment is affirmed.

Allen v. Toledo

Columbia Court of Appeal, 1980

Decedent was killed when Stephen Toledo, a 19-year-old driver, smashed his father's pickup truck into decedent's car as she was pulling out of a driveway. Decedent's four minor children sued the driver and his father, Robert Toledo, for her wrongful death. The cause of action against the father was for negligently entrusting Stephen with his truck when he knew, or should have known, his son was a reckless driver. The jury found the father permitted the son to use his vehicle when he knew or should have known the son was a reckless driver, the son's recklessness proximately caused the accident, and decedent was not negligent. The jury returned a general verdict of $200,000 against defendants, and they appealed.

Over objection, the trial court had admitted the following evidence: Robert knew Stephen had been in an accident on November 18, 1973, while driving Robert's vehicle. Robert also knew that Stephen was in an accident on March 29, 1975, in which the vehicle that Robert owned and Stephen was driving was damaged. Finally, Robert knew that Stephen was injured on October 25, 1975, as the vehicle Stephen was driving was damaged when it struck another vehicle and then hit a house. Less than three weeks after Stephen’s third accident, he killed the decedent.

Defendants contend the evidence of the earlier accidents and Robert’s knowledge of them should have been excluded under Columbia Evidence Code section 352, because its probative value was far outweighed by the likelihood the jury would improperly infer Stephen had been negligent or reckless in the present instance. Evidence of involvement in other accidents is inadmissible when its purpose is solely to prove negligence in the accident in question. Here, however, the evidence of Stephen's involvement in other accidents is relevant to Robert's liability for negligent entrustment. Robert's knowledge of Stephen's unfitness or incompetence to drive is an essential element of liability for negligent entrustment.

The doctrine of negligent entrustment is a common law liability doctrine wherein an owner of an automobile may be independently negligent in entrusting it to an incompetent driver. On the other hand, the vicarious liability of an owner who permits another to use his automobile is statutorily imposed. Columbia is one of several states that recognizes the liability of an automobile owner who has entrusted a car to an incompetent, reckless, or inexperienced driver, and has supplemented the common law doctrine of negligent entrustment by enactment of a specific consent statute. (See Columbia Vehicle Code, § 17150 et seq.)

Defendants argue the evidence of other accidents does not support the jury's finding Robert liable for negligently entrusting the pickup truck to Stephen. The tort of negligent entrustment requires demonstration of actual knowledge that the driver is incompetent or knowledge of circumstances which should indicate to the vehicle owner that the driver is incompetent.

Liability for negligent entrustment is determined by applying general principles of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care. Review of the evidence on this issue is limited to determining whether the jury's finding is supported by substantial evidence. The record contains uncontroverted evidence of Stephen having been in three earlier vehicle accidents, including two within the eight months before the collision involved here, and one of them nineteen days before. Moreover, in the most recent accident, the vehicle Stephen was driving collided with both another vehicle and a house. Robert was aware of Stephen's involvement. There was substantial evidence from which the jury could conclude a reasonable and prudent vehicle owner with knowledge of Stephen's previous accidents would not have permitted Stephen to drive. Thus, the jury's finding Robert liable for negligently entrusting the pickup truck to Stephen is supported by substantial evidence.

The judgment is affirmed.

Green v. Otis

Columbia Court of Appeal, 1979

The trial court found that the defendant used car dealer had not been negligent in entrusting a used car to a driver who had taken it on a testdrive, and thus was not liable for the death and injuries caused by the driver while he was operating the car.

On April 4, 1974, there occurred a three-car collision which generated this wrongful death action. Ross Dietrich ("Dietrich"), driving at high speed and without a driver's license in his possession, collided head-on with a vehicle driven by Valerie Green. Ruth Green was a passenger in Valerie's car. Valerie Green was pronounced dead at the scene. Dietrich was driving a 1972 Cadillac owned by Defendant John Otis ("Otis"), a used car dealer.

One Friday, an Otis salesman had allowed Dietrich to take a 1972 Cadillac off the lot for an extended testdrive. There was testimony at trial that the Otis dealership had a very loose policy about allowing its vehicles to be taken off the lot and driven by prospective customers. Otis's rules about who would be allowed to testdrive Otis cars were determined *ad hoc*. It was not uncommon for prospective customers to desire to have the car in which they were interested checked by an outside mechanic or examined by a spouse. Cars were sometimes kept overnight for such a purpose. There was no testimony as to the terms and conditions the Otis salesman communicated to Dietrich concerning the return of the Cadillac, but Dietrich had not returned the car by Sunday. The police arrested Dietrich for outstanding traffic warrants while he was driving the Cadillac and impounded the car some 30 miles from the Otis dealership. Otis's manager recovered the car by paying impounds and storage charges in the amount of $400.

On the following Tuesday, Dietrich returned to the Otis car lot driving a 1962 Chevrolet. He requested to testdrive the Cadillac again, but the manager refused to allow it and

asked Dietrich to pay the recovery costs of the Cadillac. Dietrich refused, insisting that he be allowed to testdrive an automobile and stayed on the premises complaining for several hours. He told John Otis, the owner of the car lot, that he merely wished to have the car checked by a mechanic at a location some eight blocks away.

Dietrich did not exhibit signs of intoxication. He was neatly dressed. Otis testified that he doubted at the time whether Dietrich was actually able to purchase the Cadillac but that he had not ruled out the possibility "100 percent." At the time, because of the recent energy crisis, sales of large luxury cars were moving slowly. Otis was interested in selling cars and was also anxious to end the confrontation with Dietrich.

Finally, at approximately 4:30 p.m., Otis gave Dietrich permission to testdrive an automobile. No paperwork was involved. Otis obtained Dietrich's address but did not ask him if he possessed a valid driver's license. Otis and Dietrich agreed orally that Dietrich would return the car by closing time, 6 p.m., and that he was to take the car for the sole purpose of having it checked by a mechanic. Dietrich failed to return. Otis's repossessor searched, but was not successful in locating Dietrich or the car. Two days after Dietrich took the car, the fatal collision occurred some eight to ten miles from the Otis lot.

By statute, Columbia has long provided for liability of a vehicle owner to third persons for damages sustained as the result of negligent operation of the owner's vehicle by a driver who has the owner's permission to drive. Columbia Vehicle Code Section 17150.

The courts have adopted various views of the meaning of "permission." There is (1) the "initial permission" rule that if a person has permission to use an automobile in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties, is a permissive use; (2) the "minor deviation" rule that use is permissive so long as the deviation is minor in nature; and (3) the "conversion" rule that any deviation from the time, place or purpose specified by the person granting

permission is sufficient to take the owner outside of the statutory liability. The only limitation on the "initial permission" rule is that the subsequent use must not be equivalent to "theft or the like."

Irrespective of which definition of "permission" we apply here, Dietrich's continued possession of the Otis Cadillac for two days after he had promised to return it more nearly resembles the situation of "theft or the like." This was no minor deviation from the scope of permission; rather, it was a deviation of major proportions. The scope of permission had in fact been limited as to time, area, and purpose, and had been completely violated by Dietrich. Since there was substantial evidence supporting the trial court's determination that Dietrich was operating the vehicle without the permission of Otis at the time of the accident, we must uphold the conclusion.

Plaintiffs also claim that Otis is liable under the nonstatutory common law theory of negligent entrustment of a motor vehicle. Under the doctrine of "negligent entrustment," an owner of an automobile may be independently negligent in entrusting it to an incompetent, reckless, or inexperienced driver.

The owner owes a duty of "ordinary care or skill" for the breach of which the owner who routinely entrusts automobiles may be liable for injuries to third parties. We think it clear that ordinary care and skill on the part of a used car dealer requires that the dealer make inquiry of persons wishing to testdrive the dealer's cars whether such persons are duly licensed drivers. Those persons who cannot produce a valid license to operate such automobiles testdrive at the dealer's peril. Otis made no such inquiry of Dietrich, even though he knew that Dietrich had been arrested several days before for outstanding traffic warrants. We hold, therefore, that the undisputed facts support a finding of breach of the duty of care owed by Otis to third persons, and the imposition of liability for negligence on the Otis Company.

The judgment is reversed.

THURSDAY AFTERNOON
FEBRUARY 24, 2005

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

MARRIAGE OF EIFFEL

MARRIAGE OF EIFFEL

INSTRUCTIONS

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

Task A	----	30%
Task B	----	70%

LAW OFFICES OF
ALEJANDRO RUZ AND RENA TISHMAN
THE CANYONS, COLUMBIA

MEMORANDUM

To: Applicant

From: Rena Tishman

Re: **Marriage of Eiffel**

Date: February 24, 2005

I want you to help me prepare Appellant's Opening Brief for our client, Angela Eiffel, nee Killian. The appeal is from an order following a trial on the sole issue of the enforceability of the Marital Settlement Agreement ("MSA"). Her husband wrote an agreement they both agreed to and signed. Then they had the agreement formalized into a complete MSA, which they also signed. The lawyer who prepared the MSA for them had previously represented each of them in other, unrelated matters. The trial court, despite finding that both the wife and husband had knowingly and voluntarily entered into the MSA, invalidated the agreement on the ground that the attorney drafting it did not make an adequate conflict of interest disclosure.

I have attached the trial court decision and trial transcript. The complete record (including the petition for dissolution of marriage, response, complete MSA, and judgment) is not necessary for your task.

Please draft for my approval *only* the following two sections of an Appellant's Opening Brief:

A. A statement of facts.
B. An argument demonstrating that the trial court erred.

For each section, please follow the guidelines set out in the Office Memorandum on the Drafting of Appellant's Opening Briefs. I shall draft the remaining sections of the brief.

LAW OFFICES OF
ALEJANDRO RUZ AND RENA TISHMAN
THE CANYONS, COLUMBIA

OFFICE MEMORANDUM

To: Associates

From: Rena Tishman

Re: **Drafting of Appellant's Opening Briefs**

All Appellant's Opening Briefs ("AOB") must conform to the following guidelines:

- All AOBs must include the following sections: a table of contents; a table of cases; a summary of argument; a statement of the jurisdictional basis of the appeal; a procedural history; a statement of facts; an argument comprising one or more claims of error; and a conclusion.
- The *statement of facts* must contain the facts that support our client's claims of error and must also take account of the facts that may be used to support the opposition. It must deal with all such facts in a persuasive manner, reasonably and fairly attempting to show the greater importance of the ones that weigh in our client's favor and the lesser importance of the ones that weigh in the opponent's favor. Above all, it must tell a compelling story in narrative form and not merely recapitulate each witness's testimony.
- The *argument* must analyze the applicable law and bring it to bear on the facts in each claim of error, urging that the law and facts support our client's position. It need not attempt to foreclose each and every response that the opponent may put forth in their brief, but it must anticipate their strongest attacks on our client's

weakest points, both legal and factual. It must display a subject heading summarizing each claim of error and the outcome that it requires. The subject heading must express the application of the law to the facts, and not a statement of an abstract principle or a bare conclusion. For example, do *not* write: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. *Do* write: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA, HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

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

In re the Marriage of Eiffel
ANGELA EIFFEL,
Petitioner
v. Case No. 140733
PAUL ALEXANDRE EIFFEL, **Memorandum of Decision**
Respondent
_____/

On July 13, 2002, petitioner Angela Eiffel (Wife) and respondent Paul Alexandre Eiffel (Husband) filed a joint petition for summary dissolution of marriage. The matter proceeded to trial in May, 2003.

This Memorandum of Decision shall constitute the Court's findings of fact and conclusions of law:

1. Wife (now known as Angela Casey Killian) and Husband were married on September 24, 1994. During the marriage Husband became unemployed, and Wife, who was still working, put Husband through paralegal school.

2. In February 2001, Husband was arrested in Aventura County on a no-bail warrant issued by San Joaquin County for Husband's failing to appear in a criminal paternity case. Wife then sought the services of attorney Robert Gant to defend Husband. The very next day, Wife was arrested in Aventura County on a no-bail warrant issued by San Joaquin County for allegedly making criminal threats concerning the San Joaquin County District Attorney handling Husband's case. Wife too was thereafter represented by Mr. Gant. The criminal case against Husband was dismissed following a separate acknowledgement and settlement of the paternity claim. Wife was acquitted in a trial on the criminal threats charge.

3. In May and June 2002, Husband and Wife discussed their marital problems and community debts, and Husband agreed to refinance and borrow money against real property in his name in Texas to pay community debts and to fund the separation of the

parties. Whether the Texas property is characterized as community or separate property, Husband agreed to donate the loan proceeds from refinancing to liquidate community debts.

4. By July, 2002, Husband and Wife had agreed to separate. As part of the separation they agreed on a division of property and payments of debts.

5. Husband and Wife contacted attorney Robert Gant about drafting a Marital Settlement Agreement ("MSA") for them. Mr. Gant reluctantly agreed.

6. Husband and Wife each agreed to and signed an agreement on July 19, 2002. The agreement is attached as Exhibit A. Husband drafted and freely executed the July 19, 2002 agreement. Husband faxed Exhibit A to Mr. Gant after it was signed by Husband and Wife.

7. Based upon this fax and his conversations with Husband and Wife, Mr. Gant prepared an eleven-page MSA. The majority of the MSA contained the standard provisions of a marital settlement agreement, and these provisions are not in dispute.

8. The MSA contained the agreements set forth in Exhibit A, and an additional provision that Husband would repay the entire loan on the Texas property. Husband agreed with all of the provisions.

9. Prior to execution of the MSA, Mr. Gant had Husband and Wife execute a written waiver of conflict. That written conflict waiver statement read:

> "This will confirm that Angela Eiffel and Paul Alexandre Eiffel have been advised that Robert Gant's mere typing of an agreement made between the parties may be a potential conflict of interest, despite the fact that he was not in an advisory capacity, nor involved in the negotiation of the agreement. Each party knowingly waives any potential conflict of interest in the preparation of the parties' agreement. In addition, each party has been advised to seek independent counsel and advice with respect to this statement and the agreement."

10. Pursuant to the terms of the MSA, Wife assumed and paid a substantial amount of community debt, including the attorney fees she owed to Mr. Gant. Husband made one spousal support payment, but failed to make further payments. Wife then petitioned this Court for enforcement of the Marital Settlement Agreement.

11. The Court finds the MSA was in fact the free and voluntary agreement of the parties as of the date it was made, and specifically rejects the claim that Husband was forced to consent to its terms as a result of fraud, duress, or undue influence.

12. The Court also concludes that Mr. Gant's testimony on the admonitions, warnings, and conflicts disclosures he made to the parties was clear, credible and convincing, and specifically concurs in Mr. Gant's observation that there was nothing to suggest that the MSA was anything other than what the parties freely and genuinely "wanted" and consented to at the time it was signed. The Court concludes that Mr. Gant was not motivated to obtain payment of the attorney fees that were due him. He was not trying to "protect himself" nor guilty of "overreaching," as Husband now contends.

13. Notwithstanding the above findings, the Court also finds that the MSA is subject to attack and is not enforceable because the conflict disclosures made by Mr. Gant were inadequate to permit his dual representation of the parties under the circumstances. Under *Klemm v. Superior Court* (Columbia Court of Appeal, 1977), he could proceed with dual representation only after making full disclosure of all facts and circumstances necessary to enable both parties to make a fully informed decision regarding such representation. The evidence in this case regarding disclosure was inadequate to meet this standard. As a result, under the Court's equitable powers, the agreement is not enforceable.

14. The Court is persuaded that the weight of authority in Columbia is that a lawyer may represent both parties only in exceptional circumstances. [*Marriage of Vandenburgh* (Columbia Court of Appeal, 1993); *Klemm v. Superior Court*, supra.] Even when a party waives separate representation, confusion can arise and the party may think that he or she is getting legal representation. The theory that a lawyer can serve both parties and be a mere "scrivener" does not absolve the lawyer should a dispute arise. At the very least such agreements are subject to heightened scrutiny. (*Marriage of Vandenburgh*, supra.) As experts on ethics and family law have concluded, "most lawyers *refuse* dual representation in all cases. Despite the spouses' assurances they are in agreement on all issues, all marital cases involve a potential conflict of interests." [*Klemm v. Superior Court*, supra, quoting from Elrond and Elrond, "Common Ethical Problems In Family Law Practice," 82 *Col. State L. J.* (1975) (emphasis original).]

15. The Court emphasizes that the only issue before this Court is the enforceability of the September, 2002, MSA.

Dated: July 21, 2003. *Kevin J. Burke*

Kevin J. Burke
Judge of the Superior Court

EXHIBIT A

Angela and I agree to the following terms:

1) Until a new lease is signed Angie will receive from me by the 3rd of each month $750.
2) After the new lease is signed Angie will receive 50% of the new lease income after the money for the loan is taken into account. This money will be paid directly by Northland Corporation to Angie.
3) Should the new lease account for less than $2,000 a month for Angie, I agree to make up the difference.
4) Angie will receive 50% of the yearly percentage income given by Northland for the lease.
5) This agreement will be in effect for a maximum of five years or until Angie has regained her feet to include a stable job.
6) Angie will be responsible for $15,000 in legal fees for her defense and I will be responsible for those fees remaining that were incurred in my paternity case.
7) Angie will receive a copy of the new lease after it is signed.

I hereby agree to the above:

Angela Eiffel
Angela Eiffel

I hereby agree to the above:

Paul Alexandre Eiffel
Paul Alexandre Eiffel

July 19, 2002 July 19, 2002

Date Date

IN THE MATTER OF THE MARRIAGE OF EIFFEL, MAY 15, 2003

BY THE COURT: Let's begin. First, let me review the state of the record. In the Marriage of Eiffel, the essential facts of the marriage, separation, and jurisdiction have been admitted. This trial is solely on the issue of the validity and enforceability of a Marital Settlement Agreement executed by the parties. Its authenticity is also admitted, and it is already in the record. You may proceed, Ms. Tishman. The witness, Mrs. Eiffel, has been sworn.

BY THE WITNESS: Excuse me, your honor, I don't use that name anymore. My name is Angela Casey Killian.

BY PETITIONER'S COUNSEL, RENA TISHMAN:

Q: Thank you for the correction, Ms. Killian. You are married to Paul Alexandre Eiffel?

A: Yes. We were married on September 24, 1994.

Q: Where do you live?

A: Here in The Aspens. At the Creek Side Apartments, number C 16.

Q: Ms. Killian, please look at the document that the clerk has marked as Exhibit A. Do you recognize the document?

A: Yes. It is the settlement agreement that Paul wrote. My husband, Paul Eiffel.

Q: Is that your signature on the document?

A: Yes, and that of Paul, too.

Q: I assume that you are familiar with his signature. Is that Paul Eiffel's signature under the statement "I hereby agree to the above?"

A: I saw him sign it. The signature is Paul's.

PETITIONER'S COUNSEL, MS. TISHMAN: Move to admit as Exhibit A.

THE COURT: Admitted as Petitioner's Exhibit A.

Q: Would you please describe the document?

A: It is the agreement Paul and I made when we split up. Each of us was to take care of our bills. Paul got to keep his property in Texas but I was to get at least $2000 a month for five years, but Paul only made the first payment, and he's still getting the profits.

Q: To put this in context, Ms. Killian, this one-page agreement that you and Paul signed is the one that then was used by the lawyer that represented you and Mr. Eiffel to write the much longer marital settlement agreement, correct?

BY RESPONDENT'S COUNSEL, RICHARD HENKE: Objection. The question assumes that the lawyer who drafted it was representing Mr. Eiffel.

THE COURT: I'll allow it. It's preliminary, and we know that whether and by whom Mr. Eiffel was represented is the matter now at issue.

A: Yes, it was the basis of the legal settlement agreement.

Q: Let's look at each paragraph. Now, number 1 says "Until a new lease is signed Angie will receive from me by the 3rd of each month $750." What is the lease?

A: Before we got married, Paul inherited a dry cleaning business in Houston. When we married, he moved here, and since then he's rented the space out, when he could. Mostly it has been vacant, but a convenience store was going to rent it, and that's why we put in that my share was 50%.

Q: How much was the new rental income to be?

A: They were negotiating the exact amount, but it was supposed to be between $4,000 or $5,000 a month, plus another payment at the end of the year, a percentage of the profits on the sales. I was to get one-half, and that was to be at least $2,000 a month and one-half of the annual profits.

Q: Had both you and Paul been making the mortgage payments on the building?

A: At first Paul did since it was in his name. But since Paul wasn't working most of the time, I made the payments. For the last 8 years at least.

Q: How much was the mortgage on the Texas building?

A: It was $460.90 each month. When we agreed to separate and needed money to pay off our bills, Paul refinanced, and so the monthly loan payment was more. I never made those payments, since we were separated.

Q: Before separation did you handle most of the money?

A: Yes, although we each had our own checking accounts and credit cards. Paul's account was used mostly for the Texas property, paying taxes and repairs, and depositing rent checks, but as I said, since for many years there was no income, I

paid the mortgage from my account. I paid both credit cards also. Paul and I had serious problems, but we did not fight about money.

Q: Was the division at the time of your separation amicable?

A: Well, we both saw divorce was coming, and spent time the last couple of months together working out how we'd split things, and mainly get out of debt. We owed our lawyer Mr. Gant $21,000. And together we owed over $20,000 on our credit cards. So we decided that, since renting the Texas building looked very likely and the mortgage was paid down, that Paul would refinance the mortgage and we'd try to pull out about $50,000, so that each of us could start off fresh.

Q: Is that roughly what you did?

A: Yes. We paid off Mr. Gant and the credit cards. Paul got $5000 for first and last months' rent on a new place and to buy some new furniture. And we split the stuff we'd accumulated in 10 years.

Q: You were able to agree on personal possessions as well?

A: It wasn't that much. Each of us had our own car, Paul's was almost new. Our furniture was old, and none of it expensive or valuable any more. Paul collected avant garde art, and he insisted on keeping all of it, even the paintings that he bought and had given me as gifts. I didn't like that, and objected at first, but in the end all I wanted was to be free. I never liked them anyway. I took them down the day Paul moved out, even before he picked them up.

Q: The cars and art. How were they bought or paid for?

A: With our -- my account. Since Paul wasn't working and the Texas building wasn't rented, my salary was all our income. I guess we did sometimes argue whenever Paul found a painting he just had to have.

Q: So, everything in the agreement was done, except what Paul was to pay you?

A: Exactly. I got $750 once. I know that the building is rented, but I haven't gotten any of my share, or even seen the lease, as Paul promised. He's kept it all.

Q: How did this typed agreement, Exhibit A, come about?

A: In about May or June of last year, when we were splitting up, dividing the property and all that, Paul said we needed a legal agreement. He had studied to be a

paralegal, but never really did it. We said we'd go see our lawyer Mr. Gant and have it drawn up for us. So, we made an appointment. When he heard that we were there to get divorced and for him to help us, he said no, actually he said, "No way."

Q: What was the reason?

A: He said a lawyer couldn't represent both of us, that it would be a conflict, a conflict of interests. In fact, he stated each of us had to get our own lawyer. Two new lawyers, because Mr. Gant would not even help one of us. We hadn't counted on hiring any more lawyers. Paul really argued with Mr. Gant. Telling him that we had agreed on everything. That we had no disputes. That it was all done.

Q: Did you agree, or say that to Mr. Gant?

A: Yes. We had agreed on everything, and divided things up. Paul had rented a place, and the bank in Texas was about to send us the money to pay everything off. Paul finally persuaded Mr. Gant that he could write up our agreement and that Mr. Gant was just to make it a legal agreement. We were doing the divorce ourselves and Paul had already typed out the forms and filed them.

Q: Mr. Gant did agree to draft the settlement agreement?

A: Finally. But you could tell he did not want to. He insisted that we write out and sign a document of all our agreements, and send him only that. No other communications, he said. He said that he'd only be a draftsman for us. That was the word he used.

Q: Did you and Paul do as Mr. Gant said?

A: Yes, we met at Paul's new place, and sat at his computer, and Paul typed out the agreement, the one you call Exhibit A. He printed it. We each signed it, and faxed it to Mr. Gant.

Q: You agreed with and signed the agreement?

A: Yes, although Mr. Gant called me a day or two later to ask about who was going to pay off the mortgage. He said that it should be in there as well. Of course, I agreed that it belonged there. A couple of weeks later his office called and said that we should come in to sign the legal agreement. I guess they called Paul too, and we

met there to go over the legal documents. We signed them, and I thought that it was done until Paul didn't pay.

Q: Did you read the documents at Mr. Gant's office?

A: Yes. He made us read every word, and explained it all. I realized that it was much more complicated than I'd thought. I had had my doubts that we needed a legal document, perhaps that Paul was just saying that because he liked playing lawyer, but Mr. Gant had included provisions that belonged there.

Q Did Mr. Gant actually say that for him to represent you both was a conflict of interests?

A: Yes, he was extremely clear about that, telling us again and again that he was not advising us on how to divide our assets or how much support I should get. He even had us read and sign another document saying that he had told us that and that it was okay with us.

Q: I was coming to that. Mr. Gant also had you sign a written waiver of conflict?

A: We had to read that too. Read each paragraph. Mr. Gant would ask if we had questions. And even though we didn't, he would explain what it meant.

Q: Did Mr. Gant go through the same steps on the marital settlement agreement?

A: Yes. It took a long time. Mr. Gant kept asking us if he had written down what we had agreed to. Was it everything? Was there anything else we wanted in it?

Q: When you signed the waiver and the marital settlement agreement did you believe that you fully understood what you were doing?

A: Yes. Although I thought I understood before, Mr. Gant then made sure.

Q: In sum, Ms. Killian, did you think that the agreement was fair?

A: Yes. It would have allowed each of us a fresh start. Paul had gotten training and education, even though it was his choice not to take advantage of it. Now it was my turn to improve my situation. Paul knew that it was fair.

Q: You stated that you understood that Mr. Gant was not giving you legal advice, but now you have a lawyer, and have been given legal advice about the agreement. Do you believe that the agreement was fair?

A: Yes I do.

Q: No further questions.

RESPONDENT'S COUNSEL, MR. HENKE:

Q: Ms. Killian, Mr. Gant was your lawyer? He had defended you in a serious criminal case just last year?

A: Yes, he did, and I was acquitted.

Q: You were charged with threatening the life of a public official here in Columbia?

PETITIONER'S COUNSEL, MS. TISHMAN: That's irrelevant. Mr. Gant represented both Mr. and Mrs. Eiffel regarding the disputes arising from Mr. Eiffel's adultery and his paternity case. Both of these people were in debt because of his irresponsibility.

THE COURT: This is unnecessary. You have stipulated in chambers that Mr. Gant had represented both parties. Mr. Eiffel first, when he was charged in a criminal paternity case, and perhaps in an overly aggressive defense of her husband, Mrs. Eiffel -- Ms. Killian -- was charged, tried and acquitted of threats against the District Attorney of San Joaquin County. Let's have nothing further on either of these matters.

Q: Thank you, Your Honor. Ms. Killian, as I understand your present situation, you still work, that is, you have the same job as before, you aren't making payments on huge credit card debt, and you aren't making mortgage payments. Your rent is the same. Aren't you better off, financially, than you were before?

A: I am supporting myself, as I was before, but I haven't been able to get more training or education, as Paul did.

TESTIMONY OF ROBERT GANT

PETITIONER'S COUNSEL, MS. TISHMAN: Mr. Gant, you are here pursuant to a subpoena, correct?

A: Yes. I am not here voluntarily to testify for or against Angela or Paul. They are both my clients.

Q: Would it be fair to say that based on your past representation, you had a very good understanding of their situation, their financial situation?

A: Yes. At least up until their separation. I had to defend Paul in the paternity case, and negotiate a settlement based on what he could afford. I represented Angela in a several day trial, so I think I knew her pretty well too.

Q: What was your reaction when they came to see you to draft a marital settlement agreement?

A: I refused to do it, and advised them in the strongest manner I could that they each needed to have another lawyer. I tried my best to persuade them that property divisions could be complicated, and that each of them should have a lawyer to advise them on their rights. They were insistent, however.

Q: Would you say that either one of them was more interested in having one lawyer, or conversely was one more reluctant to follow your advice?

A: No, not at all. They were both alternately arguing with me. One would say they couldn't afford it. The other would say that both of them trusted me. Finally, Paul said he'd write their agreement, and all they wanted was for me to add the so-called "boilerplate" of a MSA, a marital settlement agreement.

Q: Did that finally persuade you?

A: I concluded that they had talked extensively, even negotiated, and had worked out a settlement that each of them thought was fair and workable. These are two intelligent people. Paul has completed a paralegal program. No one takes advantage of him. Paul says it is because his heritage makes him wary. Angela is a competent public administrator in the city planning office. The San Joaquin County DA learned when he tried to browbeat her into turning against Paul that no one walks over Angela. I was persuaded that they really understood that I was not going to give them advice and would do no more than translate their agreements into a marital settlement agreement. When I said that I would not help one of them against the other, they got it. I have no doubt of that, and subsequent events showed that they understood it.

Q: How so?

A: Well, after I told them that if they would write up and agree upon their complete agreement, I'd have it typed into a MSA, Paul faxed the agreement over. When I

went to dictate the terms into a standard MSA form, I noted that they had put in language about deducting the mortgage from the rent, but they hadn't said who would pay the mortgage. I knew from talking to them that it was to be Paul, but rather than adding it, I called each and asked whether they wanted it in the agreement. Angela said yes. Paul did likewise, but then he asked me, "Is this something I have to do?" I told him that I would not say, and if he had any question about it, he must see a lawyer. He laughed and said that he knew I'd say that and he was just testing me.

Q: Angela and Paul thereafter returned to review and sign the agreement?

A: In September, 2002, the MSA was done, and I called them to come in.

Q: You also had prepared a waiver, a written statement that there was a waiver of any potential conflict of interests?

A: Yes, I dictated it myself. I didn't want legalese. Simple, direct, plain English. Then, I had them read it. I read each of the two paragraphs aloud, and explained what they meant, such as, my just being a drafter, and that I wasn't acting in an advisory capacity, and that my only advice was to get another lawyer. I recall saying, if I were in their shoes, I would not do it.

Q: But they did?

A: Yes, they both signed, and then we moved on to the MSA, and, once again, they read each paragraph, and I'd explain what it meant. When I thought they understood, we'd move on to the next provision. We were there for two hours.

Q: At any time, in either of your meetings or conversations, did you think that either Angela or Paul was under duress or pressure to go along with the agreement?

A: Never. This agreement was voluntary, something each genuinely wanted.

Q: At any time, did you think that either had been misled or tricked?

A: No, never. They knew each other, knew what they were doing.

Q: Thank you. Nothing further.

RESPONDENT'S COUNSEL, MR. HENKE:

Q: Mr. Gant, you never gave Mr. Eiffel a written disclosure of each type of conflict that could arise?

A: Do you mean in addition to the one that both Paul and Angela signed?

Q: Well, I'd say that document is a waiver of your conflict of interests, not a disclosure of adverse consequences. For example, did you provide Mr. Eiffel a written statement of each area of potential conflict involved in dividing all of their community property and paying community obligations?

A: No. That would be quite a job, and I can't imagine how you would do it without seeming to be arguing against what they had agreed to.

Q: Ethical obligations can be like that. Specifically did you provide a written statement stating that an area of potential conflict was whether Ms. Killian was entitled to spousal support, or for how long and in what amount?

A: No.

Q: For all she knew, she might have been entitled to more, without knowing it?

A: Yes. With her own lawyer, as I urged, she could have found out.

Q: Did you notify Mr. Eiffel, orally or in writing, that his separate property in Texas was an area of potential conflict?

A: No.

Q: Thus, Mr. Eiffel agreed to put his separate property into the agreement without any disclosure that he might have a right to retain the proceeds of this property?

A: He knew that the property was in his name, and that I explicitly refused to give him advice on it. I neither urged nor opposed any provision. I stayed completely away from the pros and cons of their agreements.

Q: Would you agree that telling either of them the pros and cons might have persuaded one of them to withdraw?

A: That is possible.

Q: And you didn't want to talk either of them into withdrawing?

A: That was not my job. The only thing I tried to talk them into was obtaining separate independent advice. Then, they could decide for themselves.

Q: If one of them withdrew, your fee of over $20,000 might not be paid, correct?

A: No, my payment was in no way dependent on the agreement. I had complete confidence that both Angela and Paul were going to pay the amount due me for past services.

Q: But, it is true that you were reluctant to undertake this dual representation, that you conditioned your representation on their signing a document absolving you of responsibility, that you devoted considerable time to the task, and I understand charged neither party a fee. You did all this without any thought that it might be the only way to collect the $20,000 that they owed you?

A: That's what I did.

Q: Let me ask another specific question. Did you disclose to either party that by choosing to have one lawyer, they had given up the attorney-client privilege, and in any future dispute, such as this one, nothing they said was privileged and confidential?

A: No.

Q: Mr. Gant, it appears that the only disclosure you made was to protect yourself with a waiver, with nothing to protect Mr. Eiffel or Ms. Killian.

A: I do not agree with that. I would not have helped them if I had not thought that basically what they had agreed to was fair to each of them.

Q: Thank you, Mr. Gant. Will there be redirect or anything further, Ms. Tishman? No? Then, Respondent calls Mr. Paul Alexandre Eiffel.

TESTIMONY OF RESPONDENT PAUL ALEXANDRE EIFFEL

RESPONDENT'S COUNSEL, MR. HENKE:

Q: Mr. Eiffel, before you and your wife drew up the one-page document identified as Exhibit A had either of you consulted a lawyer other than Mr. Gant?

A: No, we did that strictly on our own.

Q: Before signing the MSA in Mr. Gant's office did you consult with any other lawyer?

A: Just Mr. Gant.

Q: You had agreed with Ms. Killian to refinance, borrowing about another $50,000, secured by the property in Texas, that the loan proceeds would be used to pay off family debts, including the $15,000 she owed Mr. Gant for her own criminal defense, and then that you alone would be responsible to pay back the entire loan. Is that correct?

A: Yes. When you put it that way, it sounds foolish, but that is what I did.

Q: You further agreed that even though Ms. Killian was not going to help pay the mortgage on the building, she would get one-half of the income and profits?

A: Yes. That too.

Q: Before making these agreements with respect to the loan proceeds, repayment or income, did you obtain any advice from a lawyer?

A: No, none.

Q: What were you thinking?

A: As I said, I thought that we had to do something. We owed Mr. Gant $21,000 and another $20,000 on two credit cards. I thought that there was no other way. I was under immense pressure to come up with a solution. I thought I had no choice. It never occurred to me that the property might be just mine.

Q: If someone had told you that you might have the right to retain the proceeds of the Texas property, that is, the loan proceeds and income, would you have made the same agreement?

A: I doubt it. Certainly, I would first have wanted to know if that was correct before making a legally binding agreement.

Q: Did you try to get help from Mr. Gant on your rights with regard to the Texas property?

A: Yes. After that first time we saw him, he called to ask whether he should put into the MSA that I was going to pay off the entire mortgage myself, and I asked him whether I had to do it. He got upset, and told me there was a huge potential conflict of interests and that he wanted to remain as neutral as possible.

Q: So, knowing that you were unsure about whether you were obligated to share the loan proceeds but be saddled with all the debt, Mr. Gant went ahead and wrote the MSA to say exactly that?

A: Yes. He went ahead and wrote it that way.

Q: I think that should be enough. Nothing further.

PETITIONER'S COUNSEL, MS. TISHMAN:

Q: Good afternoon, Mr. Eiffel. As I understand it, you refinanced the mortgage on the Texas property through a bank in Texas, and thereby obtained cash?

A: Yes, after fees, we received around $46,000.

Q: What did you do with the money?

A: I turned it over to Angela. She paid our bills.

Q: So, you agreed that the money would be used to pay the family debts?

A: Yes, and, well, the money couldn't go into my checking account because there was a court order garnishing the funds in my account for child support arrears.

Q: Hadn't you and Angela agreed many years ago that all family income would go into Angela's bank account?

A: Yes, we thought that would be the best way to manage our affairs.

Q: You and Angela agreed that she would receive at least $2,000 a month for five years once the building was leased?

A: Yes, that is what the agreement said.

Q: And she was to get that amount even if the 50% of the net on the lease did not add up to $2,000, correct?

A: Yes, that too was in the agreement.

Q: The building is leased.

A: Yes.

Q: How much are you receiving a month from Northland?

A: I don't receive direct payment. The rent goes to the Texas bank for the mortgage, and the balance goes into an account I set up in Texas. My net has been $4,400 a month.

Q: And you have paid none of that to Angela, right?

A: No. I've been advised that those proceeds are my property.

Q: Mr. Eiffel, when you wrote and signed the one-page agreement, Exhibit A, you agreed with everything in it, correct?

A: Yes, at that time.

Q: And when you signed the MSA, you agreed with everything in it?

A: Yes, as I said, based on what I knew, I went along with it.

Q: No more questions.

THURSDAY AFTERNOON
FEBRUARY 24, 2005

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MARRIAGE OF EIFFEL

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COLUMBIA RULES OF PROFESSIONAL CONDUCT

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure.

* * * * *

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

* * * * *

Discussion:

Rule 3-310 is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either client would be adversely affected.

Some tasks commonly performed by lawyers require no distinctly legal skill. Some courts in an earlier era determined that the lawyer was then a mere "scrivener" and that communications relating to such tasks were not privileged. The older decisions reflected a culture in which many clients were illiterate and lawyers were employed because they could read and write, rather than employed because of their legal skills or knowledge. (See *Blevin v. Mayfield*) [Columbia Court of Appeal, 1961], where the court upheld the deed an attorney had drafted, because "the agreement had already been reached between the two parties and therefore the only service performed [by the attorney] was that of a scrivener.")

However, in contemporary practice it will be unusual for a lawyer to prepare a document without communication with the client to determine, at a minimum, the client's objectives. Except in unusual circumstances clearly indicating otherwise, no distinction under this Section should be drawn between situations where the lawyer performs perfunctory services and those involving greater complexity or moment.

Subsection (C)(1) has its origins in the case law beginning with *Lessing v. Gibbons*, (Columbia Court of Appeal, 1935). That court held that it was proper for one lawyer to negotiate a contract for two parties, despite potential conflicts, since the parties retained one lawyer with the goal of working out a mutually satisfactory agreement. In *Lessing*, the court found that the attorney developed an attorney-client relationship with both parties. Since that time, many courts have upheld the principle of one lawyer representing multiple parties in transactional settings.

Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an antenuptial agreement, or joint or reciprocal wills for a husband and wife, or the resolution of an "uncontested" marital dissolution. In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2). Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters. There are some matters in which the conflicts are such that written consent may not suffice for nondisciplinary purposes. (See *Marriage of Vandenburgh*) [Columbia Court of Appeal, 1993.]

Klemm v. Superior Court

Columbia Court of Appeal (1977)

The ultimate issue herein is to what extent one attorney may represent both husband and wife in a noncontested dissolution proceeding where the written consent of each to such representation has been filed with the court.

Dale Klemm (hereinafter "husband") and Gail Klemm (hereinafter "wife") were married and are the parents of two minor children. They separated after six years of marriage, and the wife filed a petition for dissolution of the marriage *in propria persona*. There was no community property, and neither party owned any substantial separate property. Both parties waived spousal support. The husband was a carpenter with part-time employment.

At the dissolution hearing attorney Catherine Bailey appeared for the wife. Bailey is a friend of the husband and wife and because they could not afford an attorney she was acting without compensation. The attorney had consulted with both the husband and wife and had worked out an oral agreement whereby the custody of the minor children would be joint, that is, each would have the children for a period of two weeks out of each month, and the wife waived child support.

The trial judge granted an interlocutory decree and awarded joint custody in accord with the agreement. However, because the wife was receiving Aid for Families with Dependent Children (AFDC) payments from the county, he referred the matter of child support to the Family Support Division of the County District Attorney's office for investigation and report.

The subsequent report from the Family Support Division recommended that the husband be ordered to pay $25 per month per child (total $50) child support and that this amount be paid to the county as reimbursement for past and present AFDC payments made and being made to the wife. Attorney Bailey, on behalf of the wife, filed a written objection to the recommendation that the husband be required to pay child support.

At the hearing on the report and issue of child support on April 25, 1977, Bailey announced she was appearing on behalf of the husband. She said the parties were "in agreement on this matter, so there is in reality no conflict between them." No written consents to joint representation were filed. On questioning by the court the wife expressed uncertainty as to her position in the litigation. The wife said, "She (Bailey) asked me to come here just as a witness, so I don't feel like I'm taking any action against Dale." The judge pointed out that she (the wife) was still a party. When first asked if she wanted Bailey to continue as her attorney she answered "No." Later she said she would consent to Bailey's being relieved as her counsel. She then said she didn't believe she could act as her own attorney but that she consented to Bailey's representing the husband. After this confusing and conflicting testimony and a request for permission to talk to Bailey about it, the judge ordered, over Bailey's objection, that he would not permit Bailey to appear for either the husband or the wife because of a present conflict of interest and ordered the matter continued for one week.

At the continued hearing on May 2, 1977, Bailey appeared by counsel, who filed written consents to joint representation signed by the husband and wife and requested that Bailey be allowed to appear for the husband and wife (who were present in court). The consents, which were identical in form, stated:

> "I have been advised by my attorney that a potential conflict of interest exists by reason of her advising and representing my ex-spouse as well as myself. I feel this conflict is purely technical and I request Catherine Bailey to represent me."

The court denied the motion, stating,

> "Under our canons of ethics and rules of conduct it would be improper for Ms. Bailey to appear in this proceeding on behalf of the respondent where there is not in the court's opinion a theoretical conflict, but an actual conflict of interest. There is obviously a potential if not actual point in time when the petitioner may not be receiving public assistance, in which case whatever order, if any, is made to her benefit on account of child support in this proceeding would be the amount subject to modification that she would receive on account of child support at least for some

period of time."

The husband and wife have petitioned this court for a writ of mandate to direct the trial court to permit such representation.

Rule 3-310 of the Columbia Rules of Professional Conduct prohibits an attorney from representing conflicting interests, except with the written consent of all parties concerned. The Columbia cases are generally consistent with Rule 3-310 permitting dual representation where there is a full disclosure and informed consent by all the parties, at least insofar as a representation pertains to agreements and negotiations prior to a trial or hearing. For example, in *Lessing v. Gibbons* (Columbia Court of Appeal, 1935), the court approved an attorney acting for both a studio and an actress in concluding negotiations and drawing agreements. The court refers to the common practice of attorneys acting for both parties in drawing and dissolving partnership agreements, for grantors and grantees, sellers and buyers, lessors and lessees, and lenders and borrowers.

Where, however, a fully informed consent is not obtained, the duty of loyalty to different clients renders it impossible for an attorney, consistent with ethics and the fidelity owed to clients, to advise one client as to a disputed claim against the other.

Though an informed consent be obtained, no case we have been able to find sanctions dual representation of conflicting interests if that representation is in conjunction with a trial or hearing where there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another. As a matter of law a purported consent to dual representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed. Such representation would be *per se* inconsistent with the adversary position of an attorney in litigation, and common sense dictates that it would be unthinkable to permit an attorney to assume a position at a trial or hearing where he could not advocate the interests of one client without adversely injuring those of the other.

However, if the conflict is merely potential, there being no existing dispute or contest

between the parties represented as to any point in litigation, then with full disclosure to and informed consent of both clients there may be dual representation at a hearing or trial.

In our view, the case at bench clearly falls within the latter category. The conflict of interest was strictly potential and not present. The parties had settled their differences by agreement. There was no point of difference to be litigated. The position of each *inter se* was totally consistent throughout the proceedings. The wife did not want child support from the husband, and the husband did not want to pay support for the children. The actual conflict that existed on the issue of support was between the county on the one hand, which argued that support should be ordered, and the husband and wife on the other who consistently maintained the husband should not be ordered to pay support.

While on the face of the matter it may appear foolhardy for the wife to waive child support, other values could very well have been more important to her than such support, such as maintaining a good relationship between the husband and the children and between the husband and herself despite the marital problems thus avoiding the backbiting, acrimony, and ill will. Thus, it could well have been if the wife was forced to choose between AFDC payments to be reimbursed to the county by the husband and no AFDC payments she would have made the latter choice.

Of course, if the wife at some future date should change her mind and seek child support, and if the husband should desire to avoid the payment of such support, Bailey would be disqualified from representing either in a contested hearing on the issue. There would then exist an actual conflict between them, and an attorney's duty to maintain the confidence of each would preclude such representation.

We hold on the facts of this case, wherein the conflict was only potential, that if the written consents were knowing and informed and given after full disclosure by the attorney, the attorney can appear for both of the parties on issues concerning which they fully agree. It follows that if we were reviewing the order of the trial court after the first hearing held on April 25, 1977, the petition for mandate would have to be denied on the ground that no

written consents to joint representation had been procured at that time. Moreover, as a result of the judge's questioning of the wife, he could have reasonably concluded that the wife's consent was not given after a full disclosure and was neither intelligent nor informed.

The order before us, however, is the order entered after the second hearing held on May 2, 1977, at which time the written consents of both the husband and wife, dated that date, were received by the judge without further inquiry of the clients or of the attorney. It could well have been that between April 25 and May 2 and before signing the written consents the parties became apprised of sufficient information to make the written consents intelligent and informed. The situation on May 2 was not necessarily the same as it was on April 25. The record of the May 2 hearing reflects no inquiry whatsoever as to whether the written consents were knowing, informed and given after full disclosure.

Thus it appears the trial judge failed to exercise his discretion in accordance with proper legal principles. Accordingly, the cause must be returned to the trial court to make the determination of whether the consents were knowing, informed, and given after a full disclosure.

Finally, as a caveat, we hasten to sound a note of warning. Attorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice. Failing such disclosure, the attorney is civilly liable to the client who suffers loss caused by lack of disclosure. In addition, the lawyer lays himself/herself open to charges, whether well founded or not, of unethical and unprofessional conduct. Moreover, the validity of any agreement negotiated without independent representation of each of the parties is vulnerable to easy attack as having been procured by misrepresentation, fraud, and overreaching. It thus behooves counsel to cogitate carefully and proceed cautiously before placing himself/herself in such a position. As some commentators have stated,

"For these reasons, it has been our observation that most lawyers *refuse* dual

representation in all cases. Despite the spouses' assurances they are in agreement on all issues, all marital cases involve a potential conflict of interests. In our opinion, dual representation is ill-advised, even if arguably permissible under Rule 3-310." Elrond and Elrond, "Common Ethical Problems In Family Law Practice," 82 *Columbia State Law Journal*, 1150, 1163, (1975).

It is an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not only to prevent the dishonest practitioner from fraudulent conduct, but also to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.

It is ordered that a peremptory writ of mandate issue directing the trial court to reconsider Bailey's motion to be allowed to represent both husband and wife, that the court determine if the consent given by each was knowing and informed after a full disclosure by the attorney, and to decide the motion in accordance with the principles set forth in this opinion.

Marriage of Vandenburgh

Columbia Court of Appeal (1993)

This is an appeal from a judgment granting the plaintiff-husband a divorce and, *inter alia,* setting aside the parties' separation agreement. The marriage of these parties was both short and stormy. After a bitter all-night quarrel extending through to the morning, wife demanded that husband leave the marital home. He refused to leave without a written separation agreement, in response to which wife contacted an attorney who agreed to meet with them at 8:00 A.M. that very morning. They reconciled that afternoon and returned to the attorney's office to delay any further action. A separation agreement had already been prepared which the parties executed together with several supporting documents to be utilized in the event their reconciliation failed. The agreement provided that wife could purchase husband's interest in the marital home for $2,500, but no mention of the parties' significant marital savings was made. Subsequently, another violent argument erupted resulting in husband's peaceful departure from the residence.

Husband and wife reaffirmed the separation agreement in writing, which included the statement that each agreed the attorney could represent them both in the preparation of the agreement. Husband received $2,500 in exchange for the previously executed deed. On the very next day, husband learned that wife had become a secretary to the attorney who prepared the separation agreement and immediately sought to rescind it and regain title to the marital home. Following a trial, the court set aside that portion of the separation agreement with respect to the marital residence and directed that the property be sold and the net proceeds divided equally between the parties. On this appeal wife challenges that part of the judgment which modified the separation agreement.

The Columbia Supreme Court has established that "property settlement agreements occupy a favored position in the law of this state." (*Adams v. Adams*, 1947). The Columbia Legislature embraced this principle. The policy favoring property settlement agreements has been codified in Columbia Family Code section 3850:

"A husband and wife may agree, in writing, to the immediate separation, and may provide in the agreement for the support of either of them and of their children during the separation or upon dissolution of their marriage. The mutual consent of the parties is sufficient consideration for the agreement."

In *Adams*, the Supreme Court stated,

> "When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court."

Property settlement agreements are contracts subject to the general rules of contract interpretation and enforcement. A trial court may set aside a property settlement agreement on traditional contract law. The agreements are governed by the legal principles applicable to contracts generally. These grounds include mistake, unlawfulness of the contract, and prejudice to the public interest.

The trial court also had the power to invalidate the property settlement agreement if it was inequitable. Family law cases are equitable proceedings in which the court must have the ability to exercise discretion to achieve fairness and equity. Equity will assert itself in those situations where right and justice would be defeated but for its intervention. Thus, property settlement agreements may be set aside where the court finds them inequitable even though not induced through fraud or compulsion.

While it frequently occurs in negotiations between a husband and wife for settlement of property matters that one attorney serves both parties, in fairness to both parties concerned, when negotiations for settlement of property matters between a husband and wife are on hand, both parties should at all times be represented by counsel.

It is, of course, much better for all concerned if both sides have independent counsel, but

there is no way by which a litigant can be compelled to secure an attorney. Where the attorney for one of the parties is compelled to deal directly with the other litigant he is under a most strict duty to deal with such litigant fairly and objectively, and the agreement will be scrutinized most carefully to be sure that there has been no overreaching. At least the attorney should make sure that each party is fully advised as to his or her legal rights and to the right to independent counsel.

Separation agreements are held to a higher standard of equity than other contracts and may be set aside if manifestly unfair to one spouse because of overreaching by the other, circumstances that the trial court determined existed here. Agreements drafted with only one attorney ostensibly representing both parties are subject to heightened scrutiny.

We find ample basis in this record to sustain the judgment, particularly because the trial court had the advantage of viewing the witnesses and weighing their credibility. Here, the agreement was made under circumstances which at best are described as hurried, stressful and questionable. A major family asset in the possession of wife was ignored. Wife was given the right to buy husband's interest in the marital home containing an income apartment, which husband had purchased prior to the marriage, for a minimal sum. Wife commenced employment with the attorney who ostensibly represented both parties the day following the separation, the reaffirmation of the agreement and the transfer of the property. In sum, there is sufficient evidence to sustain the trial court’s findings and conclusions.

The judgment is affirmed.