California
Bar
Examination

# Performance Tests
# and
# Selected Answers

## February 2008

# PERFORMANCE TESTS AND SELECTED ANSWERS

# FEBRUARY 2008 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2008 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Contents

# TUESDAY AFTERNOON
# FEBRUARY 26, 2008

# California
# Bar
# Examination

# Performance Test A
# INSTRUCTIONS AND FILE

**ONE-STOP EQUIPMENT LEASING v. FRANK REEVES**

**FILE**

## ONE-STOP EQUIPMENT LEASING v. FRANK REEVES

## 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. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Engles, Clay & Medrano, LLP
10 Anderson Center
Plainview, Columbia

MEMORANDUM

**TO:** Applicant

**FROM:** Joan Clay

**DATE:** February 26, 2008

**RE:** **One-Stop Equipment Leasing v. Frank Reeves**

About three weeks ago we filed a malpractice action against a local attorney, Frank Reeves, on behalf of our client One-Stop Equipment Leasing, Inc. ("One-Stop"). David Matchie, the CEO and sole shareholder of One-Stop, came into our office last October with a box of files and materials he had obtained from Reeves when they parted company in November, 2006. Reeves had been One-Stop's attorney for about six years at that point, and he had managed to create quite a mess. Matchie asked us to go through the files and see if there were grounds for a malpractice action, and sure enough, there were. The problem was that Reeves had told Matchie not to bother with the "formalities" of filing the required annual statements and tax returns for the corporation, so at the time Matchie first contacted us, the corporation had been suspended and had no power to institute litigation. By the time we got those problems cleared up, about a month ago, the statute of limitations on some of the claims appeared to have run. We filed the claims anyway, after my preliminary research indicated the statute of limitations might not be a bar. As we expected, Reeves demurred to the complaint.

I need your help in drafting certain sections of our memorandum of points and authorities in opposition to the demurrer. I have attached for your reference our office guidelines for drafting Persuasive Briefs and Memoranda. Please draft those portions of the memorandum that persuasively argue that:

1. The Third Cause of Action was timely filed under the applicable statute of limitations;

2. The Fourth Cause of Action was timely filed under the applicable statute of limitations; and

3. The defendant should be equitably estopped from asserting the statute of limitations against all causes of action.

As you probably remember from law school, demurrers and responses to them can only rely on facts that are alleged in the complaint. I have included a couple of brief memos from the file to give you some background, but you should not refer in your draft to anything covered in those memos that is not also mentioned in the complaint.

Engles, Clay & Medrano, LLP
10 Anderson Center
Plainview, Columbia

MEMORANDUM

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

To clarify the expectations of the firm and to provide guidance to attorneys, all persuasive briefs, including briefs in support of motions (also called memoranda of points and authorities), whether directed to an appellate court, trial court, arbitration panel or administrative officer shall conform to the following guidelines.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER:** COLUMBIA HAS PERSONAL JURISDICTION. **PROPER:** DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

In writing a first draft, the attorney should not prepare a table of contents, a table of cases, a summary of argument, an index, or, unless specifically requested to do so, a statement of facts. These will be prepared, where required, after the draft is approved.

**MEMORANDUM TO FILE**

**TO:** File, One-Stop Equipment Leasing Matter

**FROM:** Joan Clay

**DATE:** October 8, 2007

**RE:** **Summary of Client Interview**

David Matchie, sole shareholder and officer of this Columbia corporation, came in to discuss filing a malpractice action against the corporation's former attorney, Frank Reeves. Matchie is a self-made businessman who worked his way up from operating heavy equipment to owning and leasing it, forming a corporation in the early 1990's. Reeves represented One-Stop in a variety of matters from sometime in 2000 until Matchie fired him on November 20, 2006, after he found out Reeves had been concealing the fact that he had allowed a default judgment to be entered against the corporation some two years earlier. Matchie demanded and obtained the files in all the matters Reeves had handled for One-Stop on that same day, November 20, 2006.

Matchie brought all these files to the interview in a large box, and also gave me a thick folder of delinquency notices and other communications from the Columbia authorities regarding the corporation's failure to pay taxes and file its required annual statements for the last few years. Matchie said Reeves had told him these corporate obligations were "mere formalities" that he could safely ignore, and that he could continue to carry on the corporation's business, including engaging in any necessary litigation, in his own name. I told him I didn't think that was the case, but would get back to him after doing some research. I also told him it would take a few days to go through the files and see if there was a viable malpractice action. We scheduled a follow-up appointment for next week.

**MEMORANDUM TO FILE**

**TO:** File, One-Stop Equipment Leasing Matter

**FROM:** Joan Clay

**DATE:** October 14, 2007

**RE:** **Corporate Matters and Possible Malpractice Actions**

1. Re: Corporate matters. A review of the documents brought in by David Matchie on behalf of the corporate client revealed that it has been suspended under *both* § 2205 of the Corporations Code and § 23301 of the Revenue and Taxation Code for failing to file its annual statements and pay its taxes from 2003 to the present. Until it applies for a certificate of revivor, files the statements, pays taxes, penalties and interest it can transact no business of any kind, including filing lawsuits or even *defending* any lawsuits that might be filed. I called the two offices that handle these matters in Columbia – the Secretary of State's office and the Tax Board – and learned that it will take at least three to six months to complete all the paperwork, and there is no way the process can be accelerated. They are sending a complete accounting of all the amounts due, and in our meeting yesterday Mr. Matchie retained us to straighten all this out for him and assured me he could pay our fees as well as the back taxes, penalties and interest. He gave me a $10,000 retainer as a beginning.

2. Re: Possible malpractice actions. It is absolutely clear from my research that Matchie cannot prosecute the corporation's claims as an individual, so we will have to wait until the corporation is reinstated before filing a malpractice action against Frank Reeves. It looks like Reeves egregiously fouled up One-Stop's claim against Goodfellows Development Corporation and also the lawsuit by A.B. Construction against One-Stop. Reeves turned over all the files on both of these matters to Matchie on November 20, 2006. Thus, these claims were fully accrued and with reasonable diligence Matchie or any lawyer for One-Stop could have discovered that the statute began to run on that date. The one-year statute of limitations expires next month, and it

may be as much as six months before we can file. I think we should still file these actions when it becomes possible, arguing the statute should not be a bar, and there may be claims based on the grossly erroneous advice that put the client in this predicament.

Joan Allen Clay, State Bar #10239
Engles, Clay and Medrano, LLP
10 Anderson Center
Plainview, Columbia
Attorney for Plaintiff

FILED

Clerk, Fulton County Superior Court
February 5, 2008

IN THE SUPERIOR COURT FOR THE STATE OF COLUMBIA

COUNTY OF FULTON

ONE-STOP EQUIPMENT LEASING, INC. Case No. 320016

Plaintiff,

v. **COMPLAINT FOR DAMAGES FOR PROFESSIONAL NEGLIGENCE AND FRAUD**

FRANK REEVES, Attorney-at-Law,

Defendant.

_____)

Plaintiff alleges as follows:

**FIRST CAUSE OF ACTION**

**(Negligent Failure to Commence Action on Timely Basis)**

1. Plaintiff One-Stop Equipment Leasing, Inc., is a Columbia corporation engaged in the business of equipment leasing and finance.

2. Defendant Frank Reeves resides in Fulton County, Columbia, and at all times herein mentioned was licensed to practice law in the State of Columbia and maintained a law office at 710 Main Street, Plainview, Columbia.

3. On or about March 12, 2000, plaintiff and defendant entered into a written retainer agreement under which defendant was retained by plaintiff to advise it on non-litigation matters and also to represent it in litigation matters on an ongoing basis. Defendant accepted such employment and commenced to handle all legal matters on which plaintiff needed assistance. This arrangement continued until November 20, 2006, when plaintiff terminated the agreement and obtained from defendant all files pertaining to matters in which defendant had advised and represented plaintiff.

4. In accordance with their retainer agreement, on or about June 25, 2003, plaintiff employed defendant to represent plaintiff in commencing and prosecuting a contract claim against Goodfellows Development Corporation. Defendant assured plaintiff that he was diligently prosecuting said claim.

5. In fact, defendant failed to exercise reasonable skill, care and diligence in representing plaintiff in said matter and negligently failed to commence such action within the three-year statute of limitations.

6. Plaintiff is informed and believes and on that basis alleges that such claim was at all times mentioned meritorious; that plaintiff would have recovered on such claim; and that at all times mentioned Goodfellows Development Corporation was solvent with sufficient assets and property to satisfy a judgment in the amount claimed.

7. As a proximate result of the negligence herein alleged, plaintiff's cause of action in this matter is now barred and its claim rendered worthless, all to plaintiff's damage.

**SECOND CAUSE OF ACTION**

**(Negligent Failure to Defend Action)**

8. Plaintiff refers to and herein incorporates Paragraphs I through 3 of the First Cause of Action.

9. In accordance with his retainer agreement with plaintiff, defendant was employed to defend plaintiff in an action filed in the Superior Court of Columbia, County of Fulton, entitled A.B. Construction vs. One-Stop Equipment Leasing. Plaintiff was identified as a defendant in said action, and defendant Reeves accepted service on plaintiff's behalf on January 17, 2005. Defendant accepted such service without notifying plaintiff and knew he was obligated to represent plaintiff in defending said action under the retainer agreement.

10. Defendant was very familiar with the subject matter of the above action and knew plaintiff had a meritorious and sufficient defense to the complaint. Had plaintiff been advised of the action, it was also available, willing and able to provide the facts comprising its defense from the time the complaint was filed until expiration of the time to file an answer or other responsive pleading.

11. Instead, defendant failed to exercise reasonable care and skill in representing plaintiff and in defending such action, and neglected to file an answer or any responsive pleading within the time required by law and negligently permitted a default judgment to be entered against plaintiff.

12. Plaintiff is informed and believes and on that basis alleges that if defendant had exercised due care and skill in representing plaintiff, judgment would have been entered in plaintiff's favor in such action.

13. As a proximate result of such negligence, a default judgment was entered against plaintiff on April 5, 2005 in the sum of $37,698.00, as prayed for in such action.

14. Defendant concealed the entry of this default judgment against plaintiff, and as a result plaintiff was unable to obtain other counsel and seek to set aside the default or obtain other relief, and also incurred further expense in the form of accrued interest amounting to $4,435.00.

15. As a proximate result of defendant's negligence and subsequent concealment plaintiff has been damaged.

**THIRD CAUSE OF ACTION**

**(Negligence in the Giving of Advice)**

16. Plaintiff refers to and herein incorporates Paragraphs 1 through 3 of the First Cause of Action.

17. Beginning in February, 2004 and continuing until the termination of their attorney-client relationship on November 20, 2006, following a period in which lapses in record keeping and incomplete financial information caused plaintiff to be unable to file an accurate corporate tax return for the 2003 calendar year, defendant advised plaintiff not to file a return at all, because to do so would subject plaintiff to fines, and plaintiff's sole shareholder, officer and director, David Matchie, to both fines and imprisonment for filing false tax returns. Defendant further advised plaintiff that it need not observe any normal corporate formalities, including, among other things, maintaining corporate minutes or filing the statement of information required by Corporations Code section 1502. Defendant advised that the failure to observe these "mere formalities" would result in suspension of plaintiff's corporate status, but that its corporate status could be renewed by merely paying the back taxes at any time, without affecting any of plaintiff's business or legal claims. Defendant also advised that David Matchie could prosecute in his own name any legal claim plaintiff One-Stop might have. This advice was rendered periodically from February, 2004, when it was first given, until the parties terminated their relationship.

18. The advice specified above was erroneous, and in giving such advice defendant was negligent in that he failed to research the law or investigate the factual basis of his assertions, thus failing to exercise the degree of care, skill and diligence he owed to plaintiff.

19. Plaintiff relied on this advice and failed to file corporate tax returns, keep corporate minutes, file required information statements or comply with other legal requirements for the period 2003 to 2006. Plaintiff so acted only on the advice of defendant and would not have so acted without such advice. Plaintiff continued to rely on defendant's advice until October 13, 2007, when, in the course of consulting counsel in the present action about the claims set forth in the First and Second Causes of Action, above, plaintiff began to learn the true facts concerning the erroneous legal advice defendant had given.

20. As a proximate result of defendant's negligent advice, plaintiff was damaged as follows: First, plaintiff was suspended from doing business in Columbia and incurred fines and penalties as well as charges for accrued interest. Second, plaintiff also had to employ legal counsel to assist in undoing the harm caused by defendant's negligent and erroneous advice, and thereby incurred substantial legal fees. Third, as a result of its suspended corporate status, plaintiff was prevented from filing claims against defendant Reeves and other possible defendants within the time period specified by the applicable statutes of limitations, thereby jeopardizing and in some cases foreclosing plaintiff's ability to prosecute valid legal claims. Plaintiff continues to incur damages as a proximate result of defendant's negligence as alleged herein.

**FOURTH CAUSE OF ACTION**

**(Fraud)**

21. Plaintiff refers to and herein incorporates Paragraphs I through 3 of the First Cause of Action, and Paragraph 17 and 20 of the Third Cause of Action, above.

22. By virtue of the attorney-client relationship that existed between defendant and plaintiff, defendant owed to plaintiff a fiduciary duty, and by virtue of plaintiff's having placed confidence in the fidelity and integrity of defendant and entrusting

defendant to provide accurate, reliable advice on the conduct of plaintiff's corporate affairs, a confidential relationship existed at all times herein mentioned between plaintiff and defendant.

23. Despite having voluntarily accepted the trust and confidence of plaintiff with regard to giving accurate and reliable advice on the conduct of plaintiff's corporate affairs, and in violation of this relationship of trust and confidence, defendant abused the trust and confidence by giving the patently erroneous advice summarized above.

24. Plaintiff in fact placed confidence and reliance in defendant's advice until October 13, 2007, when, in the course of consulting counsel in the present action about the claims set forth in the First and Second Causes of Action, above, plaintiff began to learn the true facts concerning the erroneous legal advice defendant had given. Plaintiff reasonably relied on the defendant because of their attorney-client relationship.

25. As a result of defendant's aforementioned breach of fiduciary duties to plaintiff, defendant gained a financial advantage in that from February, 2004 to November 20, 2006, plaintiff continued to employ defendant and pay his fees, and even after that continued to rely on his advice concerning the consequences of the course of action he had recommended. Furthermore, by giving advice that resulted in the suspension of plaintiff's corporate status, defendant prevented plaintiff from being able to prosecute its claims against defendant himself within the period specified by the applicable statute of limitations, which, unless remedied by this court, would also result in a substantial financial benefit to defendant.

26. Defendant knew that the advice summarized above was erroneous but repeated it on numerous occasions and also concealed from plaintiff the legal consequences of some of the actions it had taken in reliance on this advice as these consequences began to occur. Defendant did these acts with the intent to deceive and

defraud plaintiff, and with the intent to induce reliance by plaintiff in the continuing fidelity of its attorney.

27. Plaintiff relied on this advice and failed to file corporate tax returns, keep corporate minutes, file required information statements or comply with other legal requirements for the period 2003 to 2006. Plaintiff so acted only on the advice of defendant and would not have so acted without such advice.

28. As a proximate result of defendant's breach of his fiduciary duty to plaintiff by intentionally giving erroneous advice, plaintiff was damaged as set out in paragraph 20, referred to and incorporated above. Plaintiff continues to incur damages as a proximate result of defendant's fraudulent conduct as alleged herein.

29. In doing the acts alleged herein, defendant intentionally concealed the true and material facts known to defendant with the intention of thereby depriving plaintiff of property and legal rights, and plaintiff is entitled to punitive damages against defendant.

WHEREFORE, Plaintiff prays judgment as follows:

ON THE FIRST CAUSE OF ACTION:

1. For compensatory damages in the amount of $450,000;

ON THE SECOND CAUSE OF ACTION:

2. For compensatory damages in the amount of $42,133;

ON THE THIRD CAUSE OF ACTION:

3. For compensatory damages in the amount of $157,000 comprising penalties, interest, and attorneys' fees incurred to this date;

ON THE FOURTH CAUSE OF ACTION:

4. For the compensatory damages identified in the Third Cause of Action, above;

5. For punitive damages of $1,000,000.

ON ALL CAUSES OF ACTION:

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.

Dated: February 5, 2008

Engles, Clay and Medrano, LLP

By: Joan Allen Clay

JOAN ALLEN CLAY
Attorney for Plaintiff

Lewis Farrington, State Bar #13465
Robey, Smith and Brown, LLP
712 Main Street
Plainview, Columbia
Attorney for Defendant

IN THE SUPERIOR COURT FOR THE STATE OF COLUMBIA

COUNTY OF FULTON

ONE-STOP EQUIPMENT LEASING, INC. Case No. 320016

Plaintiff,

v.

FRANK REEVES, Attorney-at-Law,

Defendant.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER OF DEFENDANT FRANK REEVES TO COMPLAINT OF PLAINTIFF ONE-STOP EQUIPMENT LEASING**

Defendant demurs to plaintiff's complaint on the ground that it fails to state a cause of action in that it appears on the face of the complaint that each cause of action is barred by the applicable statute of limitations, in that the alleged wrongful acts and omissions of which plaintiff complains were all discovered by plaintiff on or before

November 20, 2006, and this action against defendant was not brought until February 5, 2008.

**A. Objection by Demurrer.** The party against whom a complaint has been filed may object by demurrer, as provided in Section 430.30 of the Columbia Code of Civil Procedure, to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). When any ground for objection to a complaint appears on the face thereof, that ground may be taken by a demurrer to the complaint or any of the separate claims therein. Code Civ. Proc. § 430.30(a).

**B. Raising Statute of Limitations by Demurrer.** The objection that an action is barred by a statute of limitations may be set up by demurrer. *Krusesky v. Baugh* (Columbia Court of Appeals, 1982). This objection is deemed to be included in the general ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action. *Id.*

**C. Limitation on Commencement of Action.** Civil actions, without exception, can be commenced only within the periods prescribed in Title 2 of Part 2 (Section 312 et seq.) of the Columbia Code of Civil Procedure, after the cause of action shall have accrued.

**D. Commencement of Action.** An action is commenced, within the meaning of Title 2, Part 2, Section 312 et seq. of the Code of Civil Procedure when the complaint is filed. Code Civ. Proc. § 350.

**E. Accrual of Cause of Action.** A cause of action invariably accrues when there is a remedy available. *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (Columbia Supreme Court, 1998).

**F. Period of Limitation.** An action against an attorney for wrongful acts or omissions arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence

should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. Code Civ. Proc. § 340.6.

**G. Running of Period of Limitation.** In this case, it is apparent on the face of the complaint that plaintiff discovered the facts constituting the alleged wrongful acts and omissions complained of on November 20, 2006. The applicable one-year period of limitation began to run on that date and expired one year later, on November 20, 2007. Since plaintiff failed to file its complaint within that time period, its claims are barred and the complaint must be dismissed.

WHEREFORE, defendant prays that his demurrer be sustained without leave to amend, and that the complaint be dismissed.

Dated: February 21, 2008

Respectfully submitted,

Robey, Smith and Brown

By Lewis Farrington

LEWIS FARRINGTON
Attorney for Defendant

# TUESDAY AFTERNOON
# FEBRUARY 26, 2008


# California
# Bar
# Examination

# Performance Test A

# LIBRARY

**ONE-STOP EQUIPMENT LEASING v. FRANK REEVES**

LIBRARY

## COLUMBIA CODE OF CIVIL PROCEDURE

**§ 335. Periods of limitation prescribed**.

The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

* * * * * * * *

**§ 338. Statutory liability; injury to property; fraud or mistake; three years.**

Within three years:

(a) An action upon a liability created by statute, other than a penalty or forfeiture.

(b) An action for trespass upon or injury to real property.

(c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

* * * * * * * *

**§ 340.6. Action against attorney for wrongful act or omission, other than fraud.**

(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

(2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitation; or

(4) The plaintiff is under a mental or physical disability which restricts the plaintiff's ability to commence legal action.

**Krusesky v. Baugh**
Columbia Court of Appeals (1982)

Plaintiff, Donna Krusesky, filed this action against her divorce lawyer, defendant Clyde A. Baugh, alleging that he negligently failed to tell her the military retirement benefits paid to her husband Alex at the time of their 1977 divorce were community property. The divorce ended a 23-year marriage during which Alex served continuously in the United States Navy. Donna alleges she remained unaware of her rights to the pension until February 25, 1980, when a lawyer she consulted on another matter pertaining to the divorce judgment advised her of her community property interest in the pension. Donna filed this suit for malpractice on November 3, 1980. Baugh successfully demurred on the ground Krusesky's action was barred by the statute of limitations, Code of Civil Procedure section 340.6.

On appeal from a judgment of dismissal following the sustaining of a demurrer without leave to amend, the reviewing court must accept as true not only those facts alleged in the complaint, but also facts that may be inferred from those expressly alleged. A demurrer based on a statute of limitations will not lie where the action may be, but is not necessarily, barred. In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint: it is not enough that the complaint shows that the action may be barred. We proceed on the premise that Donna states a valid cause of action for legal malpractice where the pension involved consists of federal retirement benefits which were both vested and matured at the time of the divorce.

The statute of limitations applicable to this action, Code of Civil Procedure section 340.6, provides that a legal malpractice case, other than one for actual fraud, "shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first...." Since Donna filed her action less than four years after her divorce became final,

on September 23, 1977, she is not barred by the four-year occurrence rule of section 340.6.

There remains the question of whether Donna's action is barred by the one-year discovery rule of section 340.6. Donna alleges she did not discover she was entitled to share in her husband's military retirement pension benefits until February 25, 1980, less than one year before she filed her malpractice action against Baugh. Assuming this allegation to be true, Donna actually discovered the facts constituting Baugh's negligent act within the one-year period.

Whether Donna "through the use of reasonable diligence should have discovered" those facts more than one year before she filed her malpractice action depends on whether she had notice of circumstances sufficient to put a reasonable person on inquiry. What constitutes such notice turns on the facts of each case. In some cases, sustaining known physical or monetary damages may be a fact sufficient to alert a plaintiff to the necessity for investigation and pursuit of her remedies. In other cases, however, because of the nature of legal advice, a financial loss will pass unnoticed.

An attorney stands in a fiduciary relationship to his clients. A client damaged in the context of such a relationship is under no duty to investigate her attorney's actions unless she has actual notice of facts sufficient to arouse the suspicions of a reasonable person. In light of Baugh's advice, Donna's lack of suspicion about not receiving part of her husband's pension benefits is understandable and her delay until February 25, 1980, to investigate Baugh's competence was reasonable. To conclude otherwise and hold that Donna acted unreasonably would in effect require a client to consult a second lawyer in every case for another opinion on every subject. Because Donna filed her malpractice action within one year after her reasonable discovery of the facts constituting Baugh's negligent act, she is not barred by the one-year limitations period of section 340.6.

The judgment is reversed.

**Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison**

Columbia Supreme Court (1998)

This case involves the question of when a plaintiff suffers "actual injury" within the meaning of Code of Civil Procedure section 340.6 (a)(1) so as to start the statute of limitations running in an action for attorney malpractice.

Jordache Enterprises, Inc. retained the law firm of Brobeck, Phleger & Harrison (Brobeck) in 1984 to defend it in a lawsuit filed in Los Angeles (the Marciano action). This action involved several claims, including that Jordache was marketing "knockoffs" of Guess?, Inc. apparel. Jordache did not request from Brobeck, and Brobeck did not offer, any advice concerning insurance coverage for the Marciano action. Brobeck did not ask about Jordache's insurance or otherwise investigate whether any potential for coverage might trigger an insurer's duty to defend the Marciano action.

In April, 1987, Reavis & Pogue replaced Brobeck as Jordache's counsel of record in the Marciano action. Its new counsel advised Jordache there was potential insurance coverage for that action. In August, 1987, Jordache instructed its counsel to demand that its insurers defend the Marciano action and the two related actions then pending in Delaware and Hong Kong. Counsel contacted Jordache's insurance broker, Advocate Brokerage Corp., and asked it to submit the claims to Jordache's insurers. In December, 1987, Jordache gave Reavis & Pogue "exclusive authority" to make and prosecute claims concerning the Marciano action against Jordache's liability insurers. From the outset, Jordache and its new counsel discussed the predicament in which Jordache found itself. A "big issue" in these early discussions was the probability that the insurers would raise a "late notice" defense to Jordache's coverage claim. Thus, by December, 1987, Jordache had discovered Brobeck's alleged negligence in not notifying or advising Jordache to notify its insurers of the Marciano action.

More than three years after the Marciano action began, Reavis & Pogue formally tendered defense of the action directly to Jordache's liability insurance carriers. Soon after, in February, 1988, Jordache sued its insurers, alleging they failed to provide a defense and wrongfully refused to acknowledge coverage. Jordache sought reimbursement for $30 million it had allegedly paid for attorney fees and costs in the Marciano action. Jordache also asserted that it lost millions of dollars in profits because the funds spent on legal fees would otherwise have been used for profitable investments.

In May, 1990, the Marciano action settled. Jordache and one of its insurers then filed cross-motions for summary adjudication of issues in their insurance coverage litigation. After an adverse ruling on some of these issues, Jordache settled its insurance coverage suits for $12.5 million on July 31, 1990.

Jordache's legal malpractice claim against Brobeck was filed on August 15, 1990, alleging only omissions: (1) failure to recognize that Jordache's insurance might cover the Marciano action; (2) failure to investigate or advise Jordache to investigate whether it did, and (3) failure to notify or to advise Jordache to notify its liability insurers whose policies potentially covered the action.

Brobeck moved for summary judgment, asserting that section 340.6 barred Jordache's claims because, no later than 1987, Jordache discovered the alleged omissions and sustained actual injury in the form of (1) lost profits from business investment monies diverted to defense costs in the Marciano action, and (2) forgone insurance benefits for defense costs incurred before Jordache tendered defense of the Marciano action. Jordache agreed that it discovered Brobeck's alleged omissions by December, 1987. Jordache opposed the motion on the ground that it did not sustain actual injury until it settled with its insurers for less than the full amount of its claim.

The trial court granted summary judgment, finding that more than one year before its suit was filed, Jordache sustained actual injury within the meaning of section 340.6

because it claimed it lost millions of dollars of business profits before it tendered the Marciano action's defense to its insurers. The Court of Appeals reversed, holding that Jordache suffered no actual injury within the meaning of section 340.6 until it settled its actions against the insurers in July, 1990. We granted Brobeck's petition for review on this single issue.

This court most recently considered the actual injury provision in *Adams v. Paul* (1995). *Adams* reconfirmed the following: (1) determining actual injury is predominantly a factual inquiry; (2) actual injury may occur without any prior adjudication, judgment, or settlement; (3) nominal damages, speculative harm, and the mere threat of future harm are not actual injury; and (4) the relevant consideration is the fact of damage, not the amount.

Ordinarily, the client already has suffered damage when it discovers the attorney's error. In this case, the client alleged its attorneys failed to advise it about, or to assert a timely claim to, liability insurance benefits covering a third party's suit against the client. The client acknowledged it discovered its attorneys' alleged malpractice more than one year before it commenced this action. However, the client also contends it did not sustain actual injury until it later settled its action against its insurer for less than the full benefits it claimed.

We conclude that actual injury occurred before the court's settlement with the insurer. In reaching this conclusion, we reaffirm the basic principles reiterated in *Adams.* Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions. Under section 340.6, subdivision (a)(1) will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.

Here, the attorneys' alleged neglect allowed the insurers to raise an objectively viable defense to coverage under the policies. The insurer's assertion of this defense

necessarily increased the client's cost to litigate its coverage claims and reduced those claims' settlement value. Moreover, because of the attorneys' alleged neglect, the client provided its own defense in the third party action for several years. Consequently, this client not only lost a primary benefit of liability insurance, it also lost profitable alternative uses for the substantial sums it paid in defense costs. These detrimental effects of the attorneys' alleged neglect were not contingent on the outcome of the coverage action. Further, that action could not establish either a breach of duty to provide timely insurance advice or a causal relationship between the alleged neglect and the claimed damages. Instead, the coverage action settlement simply reflected the client's preexisting predicament – the attorneys' alleged omissions had diminished the client's rights to its liability insurance benefits.

The loss or diminution of a right or remedy constitutes injury or damage. Neither uncertainty of amount nor difficulty of proof renders that injury speculative or inchoate. The coverage action settlement was not the first realization of injury from the alleged malpractice; the settlement simply resolved one alternative means to mitigate that injury. Accordingly, we agree with the trial court that the undisputed facts establish that the client sustained actual injury more than one year before it commenced this suit.

Reversed.

**Battuello v. Battuello**

Columbia Court of Appeals (1998)

Appellant Craig Batuello has, for many years, worked on the family vineyard located in the Grappa Valley. Ever since appellant was a young boy, his father, Dominic, and his mother, Ellen, told appellant repeatedly that they would give him the vineyard when Dominic died. In reliance on those promises, appellant went to college to learn the formal aspects of running a business; and from 1970 through 1995, appellant farmed and managed the vineyard.

In 1988, Dominic and Ellen executed a trust which specified that appellant would receive the vineyard upon the death of the survivor of Dominic and Ellen. Dominic died on December 10, 1995. Shortly thereafter, appellant learned that in 1994, Dominic and Ellen had executed another trust and related documents (the 1994 trust) which stated that appellant would not receive the vineyard as he had been promised.

Appellant objected when he learned the terms of the 1994 trust, and he entered into settlement negotiations with his mother and her legal advisors. As a result of these negotiations, Ellen promised appellant he would receive the vineyard no later than the end of 1996. In reliance on those promises, appellant refrained from making any objection when Ellen filed a petition in the Superior Court to confirm that the 1994 trust had title to the vineyard. In December, 1996 the court did, in fact, rule that the trust had title to the vineyard pursuant to the 1994 trust document.

Shortly thereafter, Ellen repudiated the settlement agreement, taking the position that appellant did not have any right to the vineyard other than that to which he might be entitled under the 1994 trust. Faced with this breach of the settlement agreement and the potential loss of the vineyard, appellant filed the present action against Ellen, both individually and in her capacity as trustee of the trust, and against Dominic's estate, seeking to enforce his father's promise to give him the vineyard when he died.

Ellen, acting individually, as trustee of the trust, and apparently on behalf of Dominic's estate, demurred to the complaint on the grounds that the action was barred by the one-year statute of limitations set forth in Code of Civil Procedure section 366.2. The trial court agreed and sustained the demurrer without leave to amend. This appeal followed.

In the trial court, appellant argued that even if the statute of limitations set forth in section 366.2 applied, respondents should be equitably estopped from asserting that statute as a defense. The trial court rejected this argument based on section 366.2, subdivision (a)(2) that states, "The limitations period provided in this section for the commencement of an action is not tolled or extended for any reason." Appellant now claims the court incorrectly concluded the quoted language prevented it from applying the principles of equitable estoppel. We agree.

Before an estoppel to assert an applicable statute of limitations may be said to exist, certain conditions must be present: the party to be estopped must be apprised of the true state of facts; the other party must be ignorant of the true state of facts; the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and the other party must rely on the conduct to its prejudice. All those factors appear to be present here.

While section 366.2 clearly states that the one-year statute of limitations may not be "tolled" or "extended," it says nothing about equitable estoppel. The doctrines are distinct. Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. These are matters in large measure governed by the statute of limitations itself. Equitable estoppel, however, is a different matter. It is not concerned with the running and suspension of the limitations period, but rather comes into play only after the limitations period has run and addresses itself to the circumstances in which a party will be stopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. Its application is wholly

independent of the limitations period itself and takes its life, not from the language of the statute, but from the equitable principle that no man will be permitted to profit from his own wrongdoing in a court of justice. Thus, because equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it may apply no matter how unequivocally the applicable limitations period is expressed.

While section 366.2 subdivision (a)(2) clearly shows the Legislature intended that the statute of limitations set forth therein not be "tolled" or "extended," the statute says nothing about equitable estoppel. The Legislature could have easily stated it intended to abrogate long-established equitable principles. It did not do so. In the absence of such language, or legislative history suggesting that was what the Legislature intended, we conclude the doctrine still applies.

Having reached that conclusion, we agree appellant has alleged sufficient facts to come within the doctrine. Appellant claims that during the settlement negotiations which followed his father's death, Ellen convinced him not to file a timely suit by telling him that he would receive the vineyard. By the time appellant learned Ellen's promise was false, the statute of limitations had passed. We conclude these allegations were sufficient to support a claim of equitable estoppel.

The judgment is reversed.

## Answer 1 to Performance Test A

1. PLAINTIFF'S THIRD CAUSE OF ACTION WAS TIMELY FILED BECAUSE THE APPLICABLE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN UNTIL PLAINTIFF COULD HAVE REASONABLY DISCOVERED THE FACTS UNDERLYING THE CAUSE OF ACTION; ALTERNATIVELY, THE CLAIM WAS TIMELY FILED BECAUSE THE STATUTE OF LIMITATIONS WAS TOLLED BECAUSE THE PLAINTIFF HAD NOT YET SUSTAINED AN ACTUAL INJURY.

There are two alternative reasons why the Third Cause of Action was timely filed. The first is that the statute of limitations had not begun running until Plaintiff could have reasonably discovered the facts constituting the cause of action; the second, alternative argument is that the running of the statute of limitations was tolled because the Plaintiff had not sustained an actual injury until it had a legally cognizable claim against Defendant.

Code Civ. Proc. Section 340.6 gives two alternative statutes of limitations for actions against an attorney. 340.6. The statute of limitations is either one year from the time that the plaintiff "discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission," or "four years from the date of the wrongful act or omission," whichever occurs first. The first wrongful act alleged in the complaint occurred in February 2004 (and that act was subsequently repeated several times throughout the course of Defendant's representation of Plaintiff), and therefore the four-year statute of limitations has not yet run. In reference to Plaintiff's actual discovery of the facts constituting the Third Cause of Action, this discovery occurred on October 13, when counsel in the present action advised Plaintiff of such.

A crucial issue, therefore, is at what time Plaintiff should have discovered, through reasonable diligence, the facts constituting the Third Cause of Action. The Columbia Supreme Court held in Krusesky v. Baugh that this determination depended upon whether a plaintiff "had notice of circumstances sufficient to put a reasonable person on

inquiry." Krusesky. Defendant will argue, ironically, that due to his negligent advice and representation in other matters (see the First and Second Causes of Action), that Plaintiff should have been on notice from the time of that discovery that all of Defendant's advice—including the advice at issue in the Third Cause of Action—was suspect.

Plaintiff did not have notice of circumstances sufficient to put a reasonable person on inquiry. Plaintiff was aware that Defendant had negligently represented him in one suit, and had failed to prosecute another suit effectively; this is insufficient, however, to put a reasonable person on notice that every act of their attorney is suspect. Plaintiff still believed, due to Defendant's advice about Plaintiff's legal rights as a suspended corporation, that Plaintiff would be able to bring an action against Defendant. Plaintiff had no notice that it was barred from bringing an action against Defendant on other claims due to its following Defendant's advice. Plaintiff therefore did not have notice of circumstances sufficient to put a reasonable person on inquiry. Following Krusesky, this court should hold that the statute of limitations did not run until Plaintiff actually discovered the facts constituting the Third Cause of Action, and that the statute of limitations did not commence running until October 13, 2007, and that thus the Third Cause of Action was timely filed.

If the court holds that Plaintiff should have discovered the facts underlying the cause of action on November 20, 2006, then the court should alternately find that the statute of limitations was tolled until Plaintiff sustained actual injury. Section 340.6(a)(1) states that the statute of limitations will be tolled if the plaintiff "has not sustained actual injury." 340.6. The Columbia Supreme Court addressed the issue of actual injury—and when it occurs—at length in Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison ("Jordache"). The court initially noted that actual injury is ordinarily sustained when the client discovers the error. Thus, in this case, actual injury occurred when Plaintiff discovered that Defendant's advice had caused it to be unable to file the claim. The

Jordache Court, however, gave a more thorough analysis as to when the actual injury is sustained.

The Jordache Court held that the plaintiff in that case had sustained actual injury prior to the result of the claim underlying the malpractice claim—before, that is, the plaintiff was aware of the extent of the actual injury—and that therefore the "actual injury" tolling provision was inapplicable. The Court stated: "Actual injury occurs when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based upon the asserted errors or omissions." Jordache. In this case, the injury was not legally cognizable, because Plaintiff was unable to bring the claim asserted in the Fourth Cause of Action because of its suspended status—and was unaware of this injury.

The Jordache Court gave several reasons supporting its decision to find the actual injury tolling provision inapplicable—none of those reasons is found in the present case. First, the Court noted that there was no causal relationship between the outcome of the underlying action and the alleged neglect of the attorneys. In this case, the negligence alleged in the Third Cause of Action—that Defendant negligently advised Plaintiff to act in a way that prevented Plaintiff from timely filing his claim against Defendant—is directly related to the detrimental effect of the negligence, i.e., that plaintiff was unable to file a claim based upon the negligent behavior.

Next, the Jordache Court noted that there had been no affirmative duty breached by the defendant attorneys. Here, however, Defendant clearly breached his duty of competence by negligently giving advice, which is the focus of the Third Cause of Action. Further, the Court noted that the plaintiffs in Jordache were fully aware of the cause of action that they had against the defendant attorneys. That is not the case here; Plaintiff was completely unaware of the facts constituting the Third Cause of Action until October 13, 2007. Finally, the Jordache Court noted that 340.6(a)(1) "will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice." Jordache. In this case, Plaintiff was unable to

plead damages that could establish a cause of action for legal malpractice, because following Defendant's negligently given advice had rendered it unable to do so. The several distinguishing factors between the present case and Jordache weigh in favor of finding that Plaintiff's injury in this case was not sustained until it was actually discovered.

This court should hold that according to the ordinary method of determining actual injury, Plaintiff did not sustain actual injury until he was made aware of the injury on October 13, 2007. Because actual injury was not sustained until October, the statute of limitations was tolled by 340.6(1), and the Third Cause of Action was timely filed. Plaintiff did not have a legally cognizable injury it was able to file claims [for]. As a suspended corporation, Plaintiff was unable to file claims until recently. This argument is further evidenced by the distinguishing factors between the present case and Jordache, including the relatedness of the injury (the inability to bring the claim) to the alleged negligence (the negligent advice which produced the inability to bring the claim), and the breach of the duty owed by Defendant to Plaintiff. This court should hold that the statute of limitations was tolled until Plaintiff had a legally cognizable injury, which was actually discovered on Oc[tober 13, 2007].

In either of the two cases, the court should hold that the actual injury tolled provision in 340.6(1) applies to the Third Cause of Action, and that the Third Cause of Action was therefore timely filed.

2. PLAINTIFF'S FOURTH CAUSE OF ACTION IS BASED UPON ACTUAL FRAUD BY THE DEFENDANT, AND IS THEREFORE SUBJECT TO THE THREE-YEAR STATUTE OF LIMITATIONS IN COLUMBIA CODE OF CIVIL PROCEDURE SECTION 338.

Defendant asserts in his demurrer that Plaintiff's Fourth Cause of Action is barred by the one-year statute of limitations in Code Civ. Proc. section 340.6, which states that actions against attorneys must be commenced within one year after the plaintiff "discovers, or should have discovered through reasonable diligence, the facts constituting the wrongful act or omission." Code Civ. Proc. section 340.6. This section does not apply to actions against an attorney concerning fraud, however. As 340.6(a) states, the one-year statute of limitations applies to "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud." 340.6(a)(emphasis added).

Plaintiff's Fourth Cause of Action is an action against Defendant, an attorney, for actual fraud. The complaint states directly after the title of the Fourth Cause of Action that it is for fraud. The Fourth Cause of Action additionally states all of the required elements for fraud, including that Defendant intended to defraud Plaintiff, made false statements of law intending to induce reliance thereupon, that Plaintiff did in fact rely upon Defendant's misrepresentations, and that Plaintiff was damaged thereby. Because the Fourth Cause of Action is clearly an action against Defendant for actual fraud, the one-year statute of limitations in 340.6 does not apply to the Fourth Cause of Action.

Instead, the applicable statute of limitations is found in section 338. Section 338 gives a three-year statute of limitations for certain types of actions. Section 338(d) states that the three-year statute of limitations applies to "[a]n action for relief on the ground of fraud or mistake." As noted above, the Fourth Cause of Action is based upon fraud, and therefore the three-year statute of limitations in Section 338(d) applies to the Fourth Cause of Action.

Additionally, 338(d) states: "The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Unlike the one-year statute of limitations in 340.6, which commences the running of the statute of limitations upon discovery or when a party reasonably should have discovered the facts surrounding the wrongful act, 338 only commences running

the statute of limitations upon actual discovery of the facts constituting the cause of action.

Plaintiff did not actually discover the facts constituting the Fourth Cause of Action until October 13, 2007, in the course of consulting counsel in the present action. Upon this actual discovery, therefore, the three-year statute of limitations in 338 began running. The statute of limitations on the Fourth Cause of Action will thus finish on October 13, 2010. The Fourth Cause of Action was filed with this court on February 5, 2008; this filing was timely, therefore, because it was filed well before the applicable statute of limitations had run.

3. BECAUSE THE DEFENDANT'S KNOWING CONDUCT IN MISREPRESENTING THE LAW TO PLAINTIFF PREVENTED PLAINTIFF FROM BEING ABLE TO BRING THE CAUSES OF ACTION IN THE COMPLAINT AGAINST THE PLAINTIFF, THE DEFENDANT SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING THE STATUTE OF LIMITATIONS AGAINST ALL CAUSES OF ACTION.

The doctrine of equitable estoppel is based upon the equitable principle that "no man will be permitted to profit from his own wrongdoing in a court of justice." Battuello. Equitable estoppel is a legal doctrine that stops a party from asserting that a statute of limitations has run. Battuello. Thus, the doctrine of equitable estoppel is only available after the statute of limitations has run. In this case, if the court determines that the statute of limitations has run on any of the four causes of actions listed in the complaint, then the court should hold that Defendant is equitably estopped from asserting the statute of limitations.

Equitable estoppel applies to the statutes of limitations at issue in this case. The Columbia Court of Appeals, in addressing this principle on an unrelated statute of limitations, stated that, in the absence of language which specifically abrogated equitable estoppel, equitable estoppel should apply to statutes of limitations. Battuello.

The Court of Appeals held that this was true even though the statute of limitations at issue in that case stated that "[t]he limitations period provided in this section for the commencement of an action is not tolled or extended for any reason." Even such strong language, if it didn't address equitable estoppel specifically, will not affect the application of equitable estoppel.

The statutes of limitation at issue in this case implicitly allow the application of equitable estoppel. First, there [is] no language in either 340.6 (the one-year statute of limitations on actions against an attorney) or 338 (the three-year statute of limitations on fraud) specifically denying the applicability of equitable estoppel. Second, the statutes of limitations at issue in this case have no language like that in the previous case, denying the extension of the statute. Section 338 doesn't address tolling or equitable estoppel at all, and section 340.6 specifically allows for tolling in a number of circumstances. Because the statutes of limitations do not specifically abrogate equitable estoppel, and because they are even less stringent as the statute in the Battuello case, this court should hold that equitable estoppel is applicable in the present case.

The Battuello Court noted four elements that were necessary to establish equitable estoppel: (1) the party to be estopped must be apprised of the true state of facts; (2) the other party must be ignorant of the true state of acts; (3) the party to be estopped must have intended that this conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and (4) the other party must rely on the conduct to its prejudice. Battuello. Each of these four elements has been met in the present case.

First, the party to be estopped, in this case Defendant, was apprised of the true state of facts. An ordinary attorney would be aware that a corporate client who is suspended will not be able to file claims. Therefore, Defendant was no doubt aware of the true state of the facts. Second, the other party must be ignorant of the true state of facts. The other party in this case, Plaintiff, was unaware of the true state of facts as to its rights as a corporation if it was suspended. Plaintiff did not have Defendant's legal knowledge, training and resources. Additionally, Plaintiff relied upon Defendant's

assertions to the contrary. Thus, Plaintiff did not have awareness of the true state of the facts.

Third, Defendant acted in a manner that Plaintiff had a right to believe meant that Defendant intended his conduct to be acted upon. Defendant repeatedly advised Plaintiff that he did not need to file tax returns or follow corporate formalities. As Plaintiff's attorney, Defendant's advice to Plaintiff was no doubt intended to be followed; even if Defendant did not intend his advice [to] be followed. Defendant should have been aware that by giving the advice, plaintiff would be likely to act on the advice. Therefore, the third element of equitable estoppel applies because Defendant intended, or acted in a way that Plaintiff took to mean that defendant intended, Plaintiff to follow Defendant's negligently given advice.

Finally, Plaintiff was prejudiced by Defendant's advice. If any of Plaintiff's causes of action are prevented from being brought by the relevant statute of limitations, then Plaintiff will be unable to receive deserved legal relief. Any delay on Plaintiff's ability to file timely was caused by Defendant's negligent advice that corporate formalities and tax returns need not be complied with or filed, respectively. Defendant's conduct caused Plaintiff's inability to file timely causes of action; because of this delay caused by Defendant, Plaintiff will be harmed if the statute of limitations bars the causes of actions. Therefore, Plaintiff has shown that the fourth element of equitable estoppel has been met.

Because all four elements of equitable estoppel have been met, and because equitable estoppel is applicable to the statutes of limitations at issue in this case, the court should hold that Plaintiff is equitably estopped from asserting that the statute of limitations has run.

## Answer 2 to Performance Test A

**I. PLAINTIFF'S COMPLAINT STATES A CAUSE OF ACTION WITH RESPECT TO ITS THIRD CAUSE OF ACTION FOR NEGLIGENCE IN THE GIVING OF ADVICE BECAUSE THE THIRD CAUSE OF ACTION WAS FILED WITHIN ONE YEAR OF DISCOVERY OF THE FACTS GIVING RISE TO THE CAUSE OF ACTION IN COMPLIANCE WITH COLUMBIA CODE SECTION 340.6.**

Plaintiff One-Stop Equipment Leasing ("One-Stop") discovered the negligent and fraudulent behavior of its former attorney, Frank Reeves ("defendant") on October 17, 2007. One-Stop filed suit on February 5, 2008, less than one year from the discovery of the defendant's tortious conduct. As a result, One-Stop fully complied with the statute of limitations as set forth in Columbia Code Section 340.6, subdivision (a). The Court should therefore deny the defendant's demurrer as to this cause of action.

A. <u>One-Stop complied with the one-year statute of limitations because it did not discover defendant's tortious conduct until meeting with another attorney on October 17, 2007</u>.

The Columbia Code Section 340.6 outlines the applicable statute of limitations in an attorney malpractice action. Specifically, "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful omission, or four years from the date of the wrongful omission, whichever occurs first."

Here, since One-Stop filed its complaint on February 5, 2008, less than four years from defendant's termination on November [20, 2006], One-Stop is not barred by the four-year rule in the statute. However, defendant asserts that the November 20, 2006 date is actually the date when One-Stop discovered or should have discovered

through reasonable diligence the omissions giving rise to the negligence in giving advice cause of action, thereby creating a one-year statute of limitations from that point under the statute. Defendant is wrong, because as of that date, One-Stop had not yet discovered the facts giving rise to the negligence in giving advice cause of action.

While it is true that One-Stop terminated the defendant on November 20, 2006, One-Stop did not have any knowledge on that date of defendant's negligently given advice not to file tax returns or corporate information statements as required by Corporations Code 1502. The cause for defendant's termination on that date was not the discovery of the negligent advice, but the discovery that defendant had failed to commence an action against Goodfellows Development Corporation, and also had allowed a default judgment to be entered against One-Stop by A.B. Construction. It was not until One-Stop consulted its present counsel on October 13, 2007, that One-Stop had any idea that the advice defendant had provided was negligently given, wholly erroneous, and had produced injurious consequences. Therefore, because October 13, 2007, was the date that One-Stop discovered the defendant's tortious conduct, a February 5, 2008 filing was timely because it falls within the one-year time frame allowed by Section 340.6, subdivision (a).

Defendant may argue that November 20, 2006, was the day of discovery because pursuant to Section 340.6, subdivision (a), One-Stop could have discovered, through reasonable diligence, defendant's negligent advice giving rise to the cause of action. This contention is simply unsupported by the law.

In Krusesky v. Baugh, the plaintiff sued her attorney after the attorney negligently failed to inform her that her husband's military retirement benefits were community property at the time of their divorce in 1977. She didn't discover the truth until February 25, 1980, when she consulted with another who advised her of the community property interest. The court there held that because of the nature of the relationship between a client and her attorney, "a client damaged in the context of such a relationship is under

no duty to investigate her attorney's actions unless she has actual notice of facts sufficient to arouse the suspicion of a reasonable person." (Krusesky.) The court went on to state that in light of the attorney's advice, the plaintiff's lack of suspicion was understandable, and to hold differently "would in effect require a client to consult a second lawyer in every case for another opinion on every subject." (Ibid.)

Similarly, beginning in February, 2004, defendant failed to inform One-Stop that failure to observe corporate formalities such as maintaining corporate minutes or filing an information statement would result in suspension of the ability to do business, which could also affect One-Stop's ability to prosecute legal claims. In addition, defendant instructed plaintiff not to file a tax return in 2003 because it would subject One-Stop and its sole shareholder, officer, and director, David Matchie, to fines and possible imprisonment for Mr. Matchie. Relying on the relationship between attorney and client, and the fiduciary nature of defendant's position, One-Stop followed defendant's erroneous and negligently given advice to its detriment. There was no actual notice of facts to arouse the suspicion of a reasonable person, and One-Stop was entitled to rely on its attorney in these matters. As the Krusesky court noted, to hold otherwise would require One-Stop and any corporation to consult a second lawyer in every case for another opinion on every subject. Krusesky rejected that outcome, and this Court should do the same.

B. Even if the November 20, 2006 date started the statute running, the statute of limitations was tolled until October 13, 2007, because One-Stop had not yet suffered actual injury until that date.

Section 340.6, subdivision (a)(1), provides that the statute of limitations is tolled if the plaintiff has not sustained actual injury. Here, One-Stop had not sustained actual injury until October 13, 2007, when it became aware of the negligent advice and the detrimental repercussions resulting from it.

In Jordache v. Brobeck, Phleger & Harrison, the Supreme Court of Columbia set forth four factors to consider when determining when actual injury has occurred. The inquiry is predominantly factual, and may occur without any prior adjudication or settlement. In addition, nominal damages, speculative harm or threat of future harm are not actual injury, and the relevant consideration is the fact of damage, not the amount. In that case, the plaintiff had become aware of the omissions by its attorneys and suffered actual injury before it accepted a settlement for less than its losses. The Court reasoned that the settlement was not the actual injury; the plaintiff suffered injury well before the settlement, in the form of increased legal costs and loss of alternative profitable uses for the money it expended in litigation.

Here, and as discussed above, October 13, 2007, was the day One-Stop became aware of defendant's wrongdoing. It was then, and only then, that One-Stop discovered the injuries that defendant tortiously caused: suspension of ability to do business, fines and penalties for accrued interest, employment of counsel to undo the harm caused, and prevention of filing of claims. These injuries, like defendant's conduct, were not discovered nor could have been discovered through reasonable diligence at any time prior to the October 13 date.

Therefore, because actual injury was not discovered until October 13, 2007, the statute would have been tolled until that date, making One-Stop's February 5, 2008 filing timely.

Because One-Stop did not have knowledge of the facts giving rise to the cause of action, in that it did not discover defendant's negligent advice, until October 13, 2007, and had no reason to know of those facts prior to that date, One-Stop complied with the one-year statute of limitations by filing its complaint on February 5, 2008. In addition, even if the November 20, 2006 termination had started the running of the statute, One-Stop did not suffer actual injury until the meeting with its new counsel on October 13, 2007, and its complaint filed on February 5, 2008 was timely. One-Stop's complaint

does state a cause of action with regard to its cause of action for negligence in giving advice, and the Court should deny defendant's demurrer accordingly.

**II. PLAINTIFF'S COMPLAINT ALSO STATES A CAUSE OF ACTION WITH REGARD TO ITS FOURTH CAUSE OF ACTION FOR FRAUD BECAUSE THE STATUTE OF LIMITATIONS FOR FRAUD IS THREE YEARS AND GOVERNED BY SECION 338, NOT 340.6.**

Section 340.6 explicitly states that the provisions therein apply to attorney malpractice cases "other than actual fraud." Thus, the one-year discovery statute of limitations does not apply.

Instead, the statute of limitations for fraud is governed by Section 338, subdivision (d), of the Columbia Code, which states that an action for fraud is brought within three years. The action itself "is not deemed to have accrued until the discovery… of the facts constituting fraud…"

One-Stop's fourth cause of action explicitly pleads an action for fraud. Thus, the three year provision of Section 338 governs. As discussed above, because One-Stop discovered the true facts giving rise to the fraud on October 13, 2007 and filed its complaint on February 5, 2008, the complaint was well within the statute of limitations and was thus timely. Therefore, the Court should deny defendant's demurrer as the fourth case of action as the complaint states a valid cause of action for fraud.

**III. EVEN IF ONE-STOP'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS, DEFENDANT IS EQUITABLY ESTOPPED FROM ASSERTING A STATUTE OF LIMITATIONS DEFENSE BECAUSE DEFENDANT MISLED ONE-STOP WITH FULL KNOWLEDGE OF THE FACTS, ONE-STOP WAS IGNORANT OF THESE FACTS, AND RELIED UPON DEFENDANT'S REPRESENTATIONS TO ITS DETRIMENT.**

Defendant acted negligently failing to prosecute a lawsuit on behalf of One-Stop, in allowing a default to be entered against One-Stop, and in failing to provide competent legal advice regarding One-Stop's corporate formalities and tax situation. In addition, defendant acted intentionally and fraudulently in keeping from One-Stop facts and information that would have allowed One-Stop to assert malpractice claims against defendant. One-Stop relied in good faith on defendant's representations to its detriment. Thus, defendant is equitably estopped from raising the statute of limitations as a bar to all causes of action.

The court in Battuello v. Battuello provided the conditions that must be present before an estoppel to assert an applicable statute of limitations may be said to exist. They are that (1) the party to be estopped must be apprised of the true facts; (2) the other party must be ignorant of the true state of facts; (3) the party to be estopped must have intended that its conduct be acted upon; and (4) the other party must rely on the conduct to its prejudice.

In Battuello, the court held that the defendant was equitably estopped from raising a statute of limitations defense when she made false promises to convey a vineyard to the plaintiff. In reliance on defendant's representations, plaintiff did not file a lawsuit to compel the delivery of the vineyard. By the time the plaintiff discovered the promise was false, the statute had already passed. Nevertheless, because the four conditions were present, the court held that the defendant was estopped from asserting the defense.

Similarly to Battuello, all factors are present here:

A. <u>Defendant was apprised of the true facts.</u>

As discussed above, defendant was the attorney of One-Stop. Although defendant told One-Stop that he would prosecute the Goodfellows suit and defend the

A.B. suit, defendant did not do either. Defendant knew the true state [of] affairs when he did nothing on those cases, all to One-Stop's detriment.

In addition, defendant knew that the advice he gave to One-Stop was erroneous: his advice to refrain from filing a tax return, that it was permissible not to observe normal corporate formalities, that failure to observe would result in a suspension which could be easily renewed by payment of back taxes, without [a doubt] affected One-Stop's legal claims. Yet, he continued to advise One-Stop in this way, knowing all the while that the statements were false, would cause injury to One-Stop, and most importantly, foreclose One-Stop's ability to prosecute lawsuits on its behalf.

Defendant was apprised of the true facts at all times, and as such, this condition is met.

B. <u>One-Stop was ignorant as to the true state of the facts.</u>

One-Stop had no knowledge that its claims were not being prosecuted against Goodfellows, nor that it was not being defended in the A.B. action. One-Stop only learned of these consequences when it was too late: the Goodfellows statute had expired, and A.B. had obtained a default judgment.

Moreover, One-Stop had no knowledge that defendant's advice was negligently and fraudulently given, and patently erroneous. One-Stop only discovered the true state of the facts upon consulting present counsel on October 13, 2007.

One-Stop was ignorant as to the true state of the facts, and this condition is also met.

C. <u>Defendant intended that his conduct be acted upon.</u>

Especially with regard to his negligent and fraudulent advice, defendant intended that his conduct be acted upon. Defendant's advice was consistent, beginning in February, 2004, until his termination in November of 2006, and garnered him financial gain: One-Stop continued to pay fees and employ defendant during this period.

In addition, by giving One-Stop advice that suspended One-Stop's corporate status, defendant rendered One-Stop unable to prosecute its claims within the statutory period. What defendant obtained through his negligent and fraudulent conduct shows that he intended his conduct to be acted upon because by acting upon it, One-Stop provided defendant with financial gain and immunity from suit.

Defendant intended that his conduct be acted upon, and this condition is also met.

D. One-Stop relied to its detriment

Trusting defendant in his fiduciary capacity as the corporation's lawyer, One-Stop relied to its detriment on defendant's negligent and fraudulent representations.

Believing defendant to be prosecuting on behalf of and defending One-Stop, it did not inquire further into defendant's handling of the cases, thus relying on defendant. The consequence of this reliance was detriment: the statute of limitations expired on the Goodfellows case, rending the claim worthless, and A.B. obtained a default judgment against One-Stop.

Believing and relying on defendant's expertise and experience, One-Stop followed defendant's advice and did not file a 2003 tax return, nor observe statutorily require corporate formalities.

Again, the consequence of this reliance was detriment: the suspension of One-Stop, making it unable to prosecute claims on its behalf, and necessitating the hiring of legal counsel to fix the problems.

One-Stop clearly relied to its detriment on defendant's negligent and fraudulent representations, and this final condition is met. Because all four conditions are met, the Court should adhere to the equitable principle that "no man will be permitted to profit from his own wrongdoing in a court of justice." (Battuello.) The court should hold that because of defendant's fraudulent behavior, he is now equitably estopped from raising a statute of limitations defense.

# THURSDAY AFTERNOON
# FEBRUARY 28, 2008

# California
# Bar
# Examination

# Performance Test B
# INSTRUCTIONS AND FILE

**SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA**

**FILE**

## SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

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

**POLACEK & SCHEIER**
**5700 North Prospect, Suite 2600**
**Springville, Columbia**

MEMORANDUM

**To:** Applicant

**From:** R. J. Morrison

**Re:** Snyder v. Regents of the University of Columbia

**Date:** February 28, 2008

We have been retained by Dr. Norm Snyder to represent him in claims arising from his removal as Chairperson of the Department of Medicine at the University of Columbia. The Regents of the University terminated him as head of the Department following his very vocal and public opposition to the relocation of the Medical School from its current location here in Springville to Palatine, some 20 miles away. The termination is to become effective almost a month from today. He will retain his professorship after his termination as Chair.

Dr. Snyder wishes to pursue injunctive relief to stop his termination, if possible. Please write me an objective memorandum in which you analyze the likelihood of obtaining a preliminary injunction based on retaliatory employer action in violation of Dr. Snyder's First Amendment right to free speech under the State of Columbia Constitution. For tactical reasons, we are going to rely on the Columbia State Constitution rather than the United States Constitution. We will do so because the Columbia State Constitution is more protective of public employee First Amendment rights. Since the facts will be woven throughout your memorandum, limit your statement of facts to a brief one-paragraph summary.

*SPRINGVILLE STAR BULLETIN*
February 12, 2008

**PROFESSOR'S LETTER SPARKS**
**OUTCRY: REGENTS SCHEDULE HEARING**

A "letter to the editor" to the *Star Bulletin* on December 28, 2007 by a University of Columbia department chair complaining about plans to relocate the School of Medicine has erupted into a public protest and the scheduling of a special hearing by the Board of Regents. The letter of Dr. Norm Snyder, longtime chair of the Department of Medicine of UC's Medical School, called the Regents' expected approval of the move to Palatine, 20 miles from its present Springville location, "ill-conceived, fiscally reckless, and detrimental to the needs of our indigent citizens." Snyder also urged *Star Bulletin* readers to refer to the report he submitted to the medical school dean and the Regents and posted on his UC website (http://www.ucolum.hsc.medschool.edu/snyder).

Community activists have used Dr. Snyder's letter to rally people, particularly those in the Homewood area, to attend the Regents' hearing on February 26, 2008 and to speak against moving the school. Mary Rankin, president of the Homewood Citizens' Association, said, "Many of Springville's most vulnerable residents are totally dependent on the Med School for virtually all of their health care needs." Ms. Rankin pointed specifically to emergency room services available through the School of Medicine. Rankin also added, "The School's specialized clinics and research studies provide a broad range of medical services that will disappear." Rankin went on to note that there is "no public transportation between Springville and Palatine."

The Regents are expected to make a decision after the close of public testimony.

## EXCERPT FROM DR. NORM SNYDER'S WEBSITE

**Background information**:

The University of Columbia is a public university comprising four campuses, one of which is the Health Sciences Center. In turn, the Health Sciences Center embraces five schools, one of which is the School of Medicine. The School of Medicine consists of eight Basic Science Departments and sixteen Clinical Departments, including the Department of Medicine.

Dr. Snyder, a nephrologist and medical academician, was appointed Professor of Medicine in the School of Medicine on or about July 1, 1982. He received continuous tenure and was subsequently appointed Head of the Renal Division of the Department of Medicine. In 1986, the doctor was appointed Chair of the Department of Medicine, the largest department within the School of Medicine. Department Chairs are responsible for the organization of their department and for implementing policies initiated by the Chancellor and Dean of their respective units. Dr. Jack Blake became Chancellor of the Health Sciences Center in 1995 and Dr. Paul Simmons has served as Dean of the School of Medicine since 1999.

In early 2004, the University began considering the possibility of moving the School of Medicine, located at Ninth Avenue and Prince Boulevard in Springville, Columbia, to a campus to be established at the former Palatine Army Medical Center in Palatine, Columbia, some 20 miles away. The University engaged in a three-plus year planning process to consider the pros and cons of the relocation plan. The possibility of the transition of the School of Medicine from its Ninth Avenue location to Palatine has been the subject of extensive debate within the University community.

## EXCERPTS OF TRANSCRIPT OF INTERVIEW WITH DR. NORM SNYDER

**R. J. Morrison**: Dr. Snyder, I've just turned on the tape recorder. As I explained earlier, this will mean that others and I can easily review this interview.

**Dr. Norm Snyder**: Makes sense. That's fine with me.

**Q**: Dr. Snyder, you showed me the letter dated yesterday terminating you from your position as Chair of the Department of Medicine at the University of Columbia. You wanted to meet today to explore the possibility of seeking injunctive relief -- a preliminary injunction -- stopping that action from taking effect.

**A**: You know, I was and still am extremely angry about this letter. I have spent the last 20 plus years of my career building up this department into one of the best in the country. I have always prided myself in taking principled positions and speaking my mind on controversial issues. Here's a recent article on the controversy.

**Q**: Thanks. Doctor, can you tell me more about concerns you have about the proposed relocation of the School of Medicine to Palatine?

**A**: Of course. First, the University is the primary public research facility in basic science and medicine in Columbia. I feel that separating the School of Medicine from the Basic Sciences Research facilities at Springville would unnecessarily isolate the Med School from its Basic Science colleagues. Second, from a fiscal standpoint, the citizens of Columbia would not be getting their money's worth. The bonds floated to pay for the construction will take 40 years to pay off without a certain benefit to the community. This is particularly true because the new school would be located some 20 miles from the urban center of Springville. That would mean that most people who use the medical facilities would have to travel longer distances to areas not supported by public transportation. This would have a detrimental effect on the lower income members of our community. Finally, I thought I had a good compromise proposal — essentially splitting the medical school into two — with some faculty and facilities being located in Springville and some in Palatine.

**Q**: And I assume you made these views known?

**A**: You bet. I wrote a pretty comprehensive report that I circulated widely among the faculty at the Medical School soon after the proposal was first floated in 2004. There were a number of faculty and university-wide forums held in 2004 and 2005. I attended them, and presented my position at each of those forums. In early 2006, Blake and Simmons asked me to meet with them.

**Q**: Who are they again?

**A**: Jack Blake is the Chancellor of the Health Sciences Center. Paul Simmons is the Dean of the Medical School. They asked me to tone down my criticism of the relocation proposal, stating that it was divisive. I told them that I thought this issue needed to be fully debated so that a decision in the Medical School's and greater community's best interests would be made. I also told them that if their position eventually prevailed, I would accede, but that I wouldn't go down without a fight.

**Q**: How did they respond?

**A**: They seemed to be pretty upset. They said that it was important that the administration present a united front, and that my actions indicated my unwillingness to be a team player.

**Q**: Dr. Snyder, how would you respond to that statement?

**A**: I question both the premise and the conclusion they drew about me. I certainly understand that it's important that once a policy is adopted or a decision is made that it is critical that members of the administration implement that policy or decision whether they agree with it or not. Then it's important to present a united front. But the Regents hadn't made a decision yet. We were debating the issue as a community. I have been on the losing side of many such battles over the years, and I defy anyone to point to an instance when I wasn't a good team player. This reminds me of a similar battle over the reorganization of the Health Sciences Center a number of years ago. I opposed the current division of the various schools and made my views known. When the decision went against me, I implemented the decision wholeheartedly.

**Q**: How closely do you, Blake and Simmons work?

**A**: The departments are pretty autonomous. Simmons has bimonthly meetings with Department Chairs. Chancellor Blake and I see each other very infrequently. So, we don't work very closely together at all.

**Q**: Did they direct you not to make any further statements about the relocation?

**A**: No, they knew better than that. Not that I would have listened anyway.

**Q**: Can you say more about what you mean?

**A**: I'm a stubborn cuss, I guess you could say. I felt very strongly — still do — that the relocation plan was misguided, and I felt that I owed it to the Med School, to all my colleagues, and to Springville, to do my best to convince the Regents that I was right. I wanted to make sure the right thing was done.

**Q**: Did anything happen after the meeting with Blake and Simmons?

**A**: The next thing that happened was the Regents' meeting where the proposal was considered. That happened about two months ago. I presented my report and oral testimony, as well as a petition signed by some 45 out of 50 of my faculty colleagues at the Medical School opposing the relocation. The Regents tabled their decision for a couple of months. I then wrote a letter to the *Star Bulletin*. That ran in the paper about 7 weeks ago, about a week after the Regents' meeting where I testified. That's the straw that broke the camel's back, I guess.

**Q**: How so?

**A**: Earlier this week at the Regents' most recent meeting, lots of community members showed up to testify against the proposal. I'm pretty sure that my letter was the impetus for all the community opposition. The meeting was supposed to last for 4 hours, and ended up going an extra 3 hours.

**Q**: Did the Regents vote?

**A**: Yes, they did. Even after all that, they decided to go ahead with the proposal to relocate the Med School to Palatine. I was very disappointed to say the least.

**Q**: I'm sure you were. And that wasn't the last of it, was it?

**A**: No, the next thing I know I get this letter dated the day after the Regents' vote. They canned me! I still can't believe it. I just hope there's something you can do about this.

**Q**: I certainly hope so. We'll start doing research and will draft preliminary injunction papers if we think we have a shot. You've given me a copy of the newspaper article and the termination letter. Did you bring anything else?

**A**: Yes, here's the letter to the newspaper and a print-out of background information from my website, too. I can't think of anything else that's relevant.

**Q**: I want to get back to an earlier point you made. You said that you are pretty angry about the proposed termination. Would you say more about the effect of this on you?

**A**: It's quite a slap in the face. This feels like a blatant attempt to send a stern message to the rest of the faculty: dissent at your peril; don't buck the administration if it's already made up its mind. It feels unfair too, since I told everyone all along that I'd abide by the Regents' decision — whether my position prevailed or not.

**Q**: Can you say anything about the effect the termination might have on your career?

**A**: It's absolutely devastating on a professional level, too. I am in the midst of very delicate licensing negotiations with a pharmaceutical company. Everyone will know about my change in position here at the University — and that will likely cause the company to back away from the negotiations. A huge part of my leverage in these negotiations comes from my authority as Department Chair to assign research funds, graduate assistants and lab space to particular research and development teams. This authority will be stripped from me as soon as I'm removed as Chair. We're talking millions of dollars here. Not to mention years of work will go down the tubes. It will be virtually impossible to continue the research, conduct the clinical trials, and do the marketing without the licensing deal. And it's unlikely that another company will step forward at this point.

**Q**: What kind of research is this?

**A**: My team is developing a new method of dialysis that is much faster and can be done at home.

**Q**: That sounds exciting. I would think that it would be in the University's interest to preserve the team as you've set it up, wouldn't it?

**A**: These pharmaceutical companies are pretty sensitive about these issues. I'm afraid that my removal will be sufficient to cause them to back away regardless of any assurances anyone might give them.

**Q**: How do you think that will affect you personally?

**A**: Well, first it will certainly affect my professional prestige and over time that will affect future opportunities for research, research grants, publication opportunities, and future royalties from licenses. It will even limit speaking engagements and conferences.

**Q**: Can you put a dollar value on that?

**A**: That would really be problematic, perhaps impossible.

**Q**: Dr. Snyder, I glanced at the termination letter. What would you say in response to their allegations about disharmony among faculty and staff?

**A**: When you've been around as long as I have, you make enemies, I'm afraid. Yes, there were some who disagreed with me — mostly because they wanted to be on the opposite side of the issue from me. I think I know which faculty members said they felt intimidated. I don't intimidate people. That's not my style. You will find that I am widely respected by my faculty colleagues and the staff. Those few are just out to get me.

**Q**: What about that statement about your effectiveness as Chair?

**A**: It's a bunch of hooey. You can ask the 45 faculty who signed my petition. All of them are in my department, and I' be willing to bet that all of them would say that things continue to run well.

**Q**: Well, Dr. Snyder, I know that the termination is set to become effective almost a month from yesterday. I will get back to you by the end of the day and let you know where things stand. Thanks for coming in today.

END OF TRANSCRIPT

**LETTER TO THE EDITOR**

***Springville Star Bulletin***

December 28, 2007

Dear Editor:

I write to you as a private citizen who is concerned about the recent direction taken by the Regents of the University of Columbia. I have been a good soldier. I have limited the expression of my concerns to the University community up until this point. I was hopeful that I would be able to persuade the powers that be that the proposal to relocate the Medical School to Palatine is ill-conceived, fiscally reckless, and detrimental to the needs of our indigent citizens. Unfortunately, this has not been the case. I urge members of the general public to take a look at my report. It can be found at http://www.ucolum.hsc.medschool.edu/snyder. The Regents will be holding a public hearing on February 26, 2008. If you agree with me, come to the hearing and make your views known.

Norm Snyder, M.D.
Chairperson, Department of Medicine
School of Medicine
Health Sciences Center
University of Columbia

REGENTS OF THE UNIVERSITY OF COLUMBIA

OFFICE OF THE PRESIDENT
WALLACE PLAZA
SPRINGVILLE, COLUMBIA

February 27, 2008

Dr. Norm Snyder
Chair, Department of Medicine
School of Medicine
Health Sciences Center
University of Columbia
FG-705
Springville, Columbia

Dear Dr. Snyder:

After the public portion of last night's Regents' meeting was adjourned, we went into Executive session. At the joint recommendation of Chancellor Blake and Dean Simmons, we unanimously voted to terminate your Chairpersonship of the Department of Medicine, effective one month from today. As a tenured member of the faculty, you will retain all rights and perquisites of your position as a Professor of Medicine, and we sincerely hope that you will remain with the Department.

We greatly regret that the situation has deteriorated to such a degree that this decision is necessary, but it is. Given your more than 20 years of service as Chair of the Department, we believe that you are entitled to understand some of the reasons for this unfortunate decision.

More than three years ago the Regents embarked on the planning process culminating in yesterday's decision to relocate the Medical School to Palatine. Since day one, you have made it your singular mission to sabotage this effort. You are certainly entitled to your opinion. Let me assure you that the Regents' decision has nothing to do with that

opinion or your wide and vehement expression of that opinion. Rather, it has become apparent that your prominent role as an outspoken opponent of the relocation has caused widespread disharmony among the faculty and administration of the University. Several faculty members have expressed to Chancellor Blake and Dean Simmons that they feel intimidated by your insistence that the relocation not occur. This indicates that your performance as department chair has been impaired, as these faculty members clearly did not feel comfortable going to you directly to express their concerns. Most importantly, Chancellor Blake and Dean Simmons feel that you cannot be trusted to work as part of the team to implement the relocation plan, now that it has been approved.

Norm, you have been an invaluable member of the University community. This action is not a reflection of any animus toward you. Rather, as your employer, we need to operate efficiently. Your recent activities have adversely affected your effectiveness as Chair, undermined the University's confidence in your ability to be a team player, and caused disharmony among employees. This we cannot tolerate.

All the best,

Regents of the University of Columbia

Lauren D. Ryan

Lauren D. Ryan, President

# THURSDAY AFTERNOON
# FEBRUARY 28, 2008

# California
# Bar
# Examination

# Performance Test B

# LIBRARY

## SNYDER v. REGENTS OF THE UNIVERSITY OF COLUMBIA

**LIBRARY**

**Elkins v. Hamel**

Columbia Supreme Court (2007)

This is an action brought pursuant to Columbia Civil Rights Code ' 1983 by two City of Tunbridge police officers against Steve Hamel, the City of Tunbridge police chief, alleging a violation of their First Amendment rights under the Columbia Constitution. In their complaint, plaintiffs Kenneth Elkins and George Chanel assert they have been illegally disciplined by Chief Hamel for exercising their rights to free speech. Plaintiff Elkins asserts he has been disciplined by a fifteen day suspension, and plaintiff Chanel asserts he has been disciplined by a one day suspension. They sought a preliminary injunction. Plaintiffs requested rescission of their suspensions. They further sought injunctive relief restraining and enjoining the defendant from further discipline or threat of discipline for the exercise of their rights to free speech. The request for injunctive relief was denied, and this appeal followed.

The verified complaint sets forth the following facts: On February 16, 2006, Glenda Oliver wrote a column in the *Tunbridge Journal* addressing several issues "concerning her perception of racism in the state court criminal system." The complaint notes: "Ms. Oliver's comments included her questioning the justice involved in the sentencing of a young African-American male on drug charges since no other African-Americans were involved in the young man's sentencing, including the jury, judge and attorneys involved." The column concluded with Ms. Oliver's e-mail address, which was provided for the public to contact her with comments.

On the next day, plaintiff Elkins sent an e-mail from his personal account at his home to several officers of the Tunbridge Police Department (TPD) and the editorial departments of the *Tunbridge Journal* and the *Tunbridge Metro News*. On February 19, 2006, plaintiff Chanel sent an e-mail from his personal account at his residence to Ms. Oliver in

response to her column. The complaint states: "Chanel commented that Ms. Oliver's article was racist in tone, and stated his belief that the young man referred to in her article was not sentenced because of his race." Ms. Oliver responded by e-mail to Chanel's e-mail. Chanel sent this e-mail to Elkins and TPD officer David Ernst. On February 22, 2006 Elkins sent an e-mail from his TPD account at his home to the e-mail accounts of Chanel, Ernst and Ms. Oliver. The complaint states: "The e-mail contained comments in response to Ms. Oliver's article regarding her allegations of racism in the state court system." On February 24, 2006, Elkins' comments that had been sent to the newspapers' editorial boards were published in both papers. On March 13, 2006, Chief Hamel instituted discipline in the form of a one day suspension without pay for Chanel and a fifteen day suspension without pay for Elkins.

We review the decision to deny a motion for a preliminary injunction for abuse of discretion. In order to obtain a preliminary injunction, a party must demonstrate the following: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) the injunction, if issued, will not be adverse to the public interest.

Substantial Likelihood of Success on the Merits

Plaintiffs are correct that public employees retain their First Amendment rights under the Columbia Constitution. However, in the public employment context, a public employer may impose some restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large. This is particularly true of police officers. Because police departments function as paramilitary organizations charged with maintaining public safety and order, police departments are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer.

To determine whether a public employer's actions impermissibly infringe on free speech rights, this court has followed the *Boyer* test enunciated by this Court.[a] The test is as follows: (1) Does the speech in question involve a matter of public concern? If so, (2) we must weigh the employee's interest in the expression against the government employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace. If the employee prevails on both these questions, we proceed to the remaining two steps. In step (3), the employee must show the speech was a substantial factor driving the challenged governmental action. If the employee succeeds, in step (4) the employer, in order to prevail, must in turn show that it would have taken the same action against the employee even in the absence of the protected speech.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. In evaluating the nature of an employee's speech in a retaliatory discipline or discharge case, we have articulated that when an employee speaks as an employee upon matters only of personal interest the speech is not protected. To judge whether particular speech relates merely to internal workplace issues, courts must conduct a case by case inquiry, looking to the content, form, and context of the speech, which includes scrutinizing whether the speaker's purpose was to bring an issue to the public's attention or to air a personal grievance. An employee's speech must not merely relate generally to a subject matter that is of public interest, but must sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government. That is, we look beyond the general topic of the speech to evaluate more specifically what was said on the topic.

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[a] The language of the Columbia Constitution's First Amendment is identical to that of the U.S. Constitution. Historically, this Court has interpreted these words more expansively than the U.S. Supreme Court. As such, we choose not to follow the recent U.S. Supreme Court opinion in *Garcetti v. Ceballos* (2006).

Because Plaintiffs' letters concerned the integrity of the police department's operations, though arguably touching upon internal workplace issues, the speech addressed matters of public concern. Therefore, Plaintiffs satisfied the first prong of the *Boyer* analysis.

Once a court determines that the Plaintiffs' speech involves a matter of public concern, the *Boyer* balancing test requires a court to weigh the interest of a public employee in commenting on such matters against the interest of the employer in promoting the efficiency of its services. We balance these interests by weighing the following factors: (1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one on which debate was vital to informed decision-making.

While possible disruption of the employer's operations does not satisfy the *Boyer* test, the government need not wait for speech actually to disrupt core operations before taking action. The matters noted by the defendant at the hearing, i.e., the disruption of the prosecution of criminal cases and the disruption of personnel matters, were deemed by the trial court to tip the balance in favor of the employer. Thus, Plaintiffs were unable to show a likelihood of success on the merits.

Irreparable Harm

We have held that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm. Nevertheless, we also must note that to show irreparable harm, the party seeking injunctive relief must at least demonstrate that there exists some cognizable danger of recurrent violation of its legal rights. Here, the legal foundation for "irreparable harm" is an underlying violation of the Plaintiffs' constitutional rights. But, it is evident that the trial court was unable to

conclude that such violations occurred or were occurring, and found that Plaintiffs did not demonstrate that they would have suffered irreparable harm if injunctive relief was not granted. We agree.

Furthermore, in the employment context, courts are loathe to grant preliminary injunctions because injuries often associated with employment discharge or discipline, such as damage to reputation, financial distress, and difficulty finding other employment, do not constitute irreparable harm. Plaintiffs wrongfully discharged from employment generally may be made whole by monetary damages after a full trial on the merits, such as in this case.

Balancing of harms

The moving party has the burden of showing that the threatened injury to the moving party outweighs the injury to the other party. The standard is easy to understand in common sense terms even if the expression is imperfect: the judge should grant or deny preliminary relief with the possibility in mind that an error might cause irreparable loss to either party. Consequently the judge should attempt to estimate the magnitude of that loss on each side and also the risk of error. That is, in deciding whether to grant or deny a preliminary injunction the court must choose the course of action that will minimize the costs of being mistaken. If the judge grants the preliminary injunction to a plaintiff who it later turns out is not entitled to any judicial relief - whose legal rights have not been violated - the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the injunction causes to the defendant while it is in effect. If the judge denies the preliminary injunction to a plaintiff who it later turns out is entitled to judicial relief, the judge commits a mistake whose gravity is measured by the irreparable harm, if any, that the denial of the preliminary injunction does to the plaintiff. The court below found the potential harm to the efficient and smooth operation of the police department to outweigh the prospective minimal First Amendment deprivation to be suffered by the plaintiffs. We do not disagree.

Not Adverse to the Public Interest

The moving party must demonstrate that the injunction, if issued, is not adverse to the public interest. This court has recognized that the public has a strong interest in the vindication of an individual's constitutional rights, particularly in encouraging the free flow of information and ideas under the First Amendment. On the other hand, in cases such as this, the public has an interest in the efficient and dependable operation of law enforcement agencies. The court below did not reach this issue. We need not either. In the absence of a showing of substantial likelihood of success on the merits, the court below did not err in denying Plaintiffs' motion for preliminary injunction.

Affirmed.

**Harlan v. Yarnell**

Columbia Supreme Court (2002)

Defendants, two state university officials, appeal from the superior court's finding of a violation of Plaintiff's First Amendment rights under the Columbia Constitution and awarding him damages. We affirm.

Background

Plaintiff Myron Harlan is a tenured faculty member at Columbia State University ("CSU"). He was appointed as an assistant professor in the Department of Accounting in 1989. His field is taxation. Beginning in 1995, Dr. Harlan sought to revoke the tenure of a colleague (Dr. William Mosser) on grounds of plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and other charges. Administrators at CSU allegedly threatened Dr. Harlan with adverse employment-related actions unless his charges against Dr. Mosser were dropped. These threatened actions included termination of the Masters of Accounting (M.S.) degree program in which Dr. Harlan taught, assignment to teach courses outside his area of expertise, transfer to another department, and eventual termination due to overstaffing if the graduate program were eliminated.

Ultimately, a special university committee recommended that Dr. Mosser's tenure be retained, but it did so without considering evidence beyond the initial charges and without interviewing Dr. Harlan. In July 1996, Dr. Carlson became the Dean of the College of Business, and, after learning of the more than six years of divisiveness and dysfunction within the Department of Accounting, he proposed transferring Dr. Harlan out of the Department. In the summer of 1997, Dr. Harlan was transferred involuntarily from the Department of Accounting into the Department of Management, in which he claims he is not qualified to teach any courses, thereby resulting in a diminished ability

to attract research funds, publish scholarship, receive salary increases, teach summer tax classes, and obtain reimbursement for professional dues and journal subscriptions. As we discuss in depth later, Dr. Harlan aired his professional concerns about being removed from the Department of Accounting to Dean Carlson several times before he was transferred. Dr. Harlan contends that he was notified in May 1998 that he could only teach two classes, both in tax, in the Department of Accounting in any given year. He further contends that adjunct staff and temporary faculty have been hired to teach the courses he normally teaches.

In response to the transfer, Dr. Harlan filed a grievance. Eventually, the Provost denied the grievance.

Dr. Harlan filed suit alleging that his transfer to the Department of Management was in retaliation for his public allegations against Dr. Mosser. He was awarded damages and injunctive relief following a jury trial. This appeal followed.

Discussion

Dr. Harlan's Columbia Constitution First Amendment claim rested on the assertion that state actors may not condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression and cannot retaliate against an employee for exercising his constitutionally protected right of free speech. In considering this type of claim, it is essential to identify the speech which resulted in the alleged retaliation. Here, Dr. Harlan's Aspeech@ consisted of his statements in support of administrative revocation of tenure of Dr. Mosser and his statements refusing to withdraw his support for an investigation despite the university's opposition.

The four-part test for evaluating a Columbia constitutional claim for First Amendment retaliation is stated in *Boyer*. The test is as follows: (1) whether the speech is protected, i.e., on a matter of public concern; (2) whether the employee's interest in commenting

on matters of public concern outweighs the government employer's interest in promoting efficient government services. If the employee prevails on both these questions, step (3) requires the employee to demonstrate that his speech was a substantial or motivating factor in the adverse employment action. If the employee so demonstrates, step (4) considers whether the government employer has proven that it would have taken the same adverse employment action, even in the absence of the protected speech.

The trial court properly found that speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of state officials, in terms of content, clearly concerns matters of public importance. In deciding whether an employee's speech touches on a matter of public concern, or constitutes a personal grievance, courts look at the "content, form and context of a given statement, as revealed by the whole record." *Boyer.* They also consider the motive of the speaker B was the speech calculated to redress personal grievances or did it have a broader public purpose? Here, Dr. Harlan attempted to bring his concerns about Dr. Mosser to the CSU Administration, and stated in response to threats that if the charges were withdrawn, he would personally refile them. He wrote memos to the Provost about the lack of investigation that generated the recommendation that Dr. Mosser's tenure not be revoked and requested an investigation of the alleged threats made against him. The speech in this case fairly relates to charges at a public university that plainly would be of interest to the public, e.g., plagiarism and copyright violations, emotional abuse of students, abuse and harassment of staff, misuse of state funds, receipt of kickbacks from a publisher in return for adopting textbooks, and a claimed inadequate investigation of the allegations and alleged retaliation against the person who made the allegations.

Dean Carlson contended that Dr. Harlan merely sought to establish internal order in the Department of Accounting, not bring to light governmental wrongdoing. Of course, speech relating to an internal department dispute will normally be classified as a

personal grievance outside of public concern. Dr. Harlan testified that while he knew that filing tenure revocation charges against Dr. Mosser would be divisive in the short run, in the long run it would lead to greater harmony in the Department because most of the problems were attributable to that issue. The fact that Dr. Harlan might receive an incidental benefit of what he perceived as improved working conditions does not transform his speech into purely personal grievances. Moreover, speech which touches on matters of public concern does not lose protection merely because some personal concerns are included. The trial court properly concluded that Dr. Harlan's speech related to matters of public concern.

As to the second step, the trial court balanced Dr. Harlan's right to speak out about this matter with the interests of his employer. In engaging in this balancing, courts consider the following factors: (1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one on which debate was vital to informed decision-making.

In weighing factor one, the trial court found that Dr. Harlan’s speech contributed to disharmony among coworkers. Its inquiry properly did not stop there. In a democratic society, healthy levels of dissent and debate are essential to the vitality of institutions. In particular, an academic institution strives to foster critical thinking skills in its students and does so in part by modeling the give and take of debate within the institution itself. Thus, the court must consider the ability of the employer to do its essential work without undue disruption in its operations despite the exercise of free speech rights of its employees. Defendants were unable to convince the court that the disharmony caused disruption in teaching, research or administration at the school, nor were Defendants able to demonstrate long-term morale or discipline problems caused by the speech.

The second factor goes to the essence of the specific employer-employee relationship in question. For example, an executive depends upon the loyalty and confidence of her administrative assistant. Similarly, a political appointee must rely upon the loyalty of her aides. The trial court found here that the nature of the relationship between a professor in a department and his superiors did not necessitate loyalty and confidence.

The third factor speaks for itself. Here, the court found that Dr. Harlan's speech had no effect on his ability to perform his duties as a professor. He continued to teach classes, hold office hours, serve on faculty committees, and participate in outside activities such as conferences and symposia.

The court also considered the time, place and manner of Dr. Harlan's speech. It is noteworthy that Dr. Harlan's speech occurred through proper channels. He filed charges according to university protocols. He spoke with colleagues privately and in faculty or committee meetings. He aired his concerns directly with the Dean of the College. He then filed a grievance. This is not to say that more public forums for expression of opinions are never appropriate, but Dr. Harlan followed authorized procedures and appealed to appropriate authorities.

The next factor considers whether the matter was one on which debate was vital to informed decision-making. The allegations addressed a matter of public concern, not mere public interest, because they involve charges of wrongdoing and malfeasance. Thus, debate was essential to potentially avoid the alleged ongoing wrongdoing.

The third step of the *Boyer* test requires the employee to demonstrate that his speech was a substantial or motivating factor in the adverse employment action. There is no question here that the employer's motivation for transferring Dr. Harlan was his speech.

The fourth step considers whether the government employer has proven that it would have taken the same adverse employment action, even in the absence of the protected

speech. Dean Carlson testified that "every expression of the reason for Dean Carlson's transfer of Dr. Harlan in August 1997 involved an attempt to resolve once and for all six years of divisiveness and dysfunction within the Department." We recognize that Dean Carlson testified that there were a variety of reasons (other than the content of Dr. Harlan's protected speech) for the transfer: (1) getting the Department of Accounting back on track after 8 to 9 years of divisiveness between the Accounting faculty and the Tax and Law faculty, (2) getting the Department to focus on the upcoming 150-hour requirement for accounting professionals, (3) increasing the productivity of the non-tenured faculty, and (4) finding a suitable fit between Dr. Harlan's non-accounting and interdisciplinary Ph.D. and the Department of Management. In examining the record before us, however, we are not persuaded that the court erred in finding that CSU would not have transferred Dr. Harlan in the absence of his speech.

Affirmed.

**Answer 1 to Performance Test B**

To: R.J. Morrison

From: Applicant

Re: Snyder v. Regents of University of Columbia Retaliatory Employer Action

Date: February 28, 2008

Statement of Facts

Dr. Norm Snyder is a tenured Professor and Chair of the Department of Medicine at the University of Columbia located in Springville, Columbia. The Department of Medicine is one of eight Basic Science departments and sixteen clinical departments that make up the School of Medicine at the University. In 2004, the University began consideration of a plan to move the School of Medicine to Palatine, Columbia, 20 miles from its current location. Dr. Snyder was opposed to this plan because it would be fiscally irresponsible and detrimental to the lower income members of the community. After using the appropriate channels at the University to voice his dissent, Dr. Snyder wrote a "Letter to the Editor" in the Springville Star Bulletin on February 12, 2208, urging members of the public to attend a public hearing regarding the proposed move. In response to Dr. Snyder's dissent and letter, the Regents of the University of Columbia voted unanimously to terminate his position as Chair of the Department of Medicine. As a tenured professor, Dr. Snyder retains his position at the University within the Department, but stands to incur substantial damage to his reputation and professional interests. The decision to terminate his position will become effective on March 27, 2008. Dr. Snyder has retained our firm to determine whether he has a cause of action for a preliminary injunction against the University for its retaliatory actions taken after he voiced his dissent to the plan to move the School of Medicine.

Analysis

In order to succeed in obtaining a preliminary injunction, Dr. Snyder will have to demonstrate that this case meets the standard for obtaining a preliminary injunction.

Dr. Snyder must demonstrate: 1) he has a substantial likelihood of prevailing on the merits, 2) he will suffer an irreparable harm in the absence of the injunction, 3) the threatened harm to him outweighs any damage the injunction may cause to the University, and 4) if the court issues the injunction, it will not be adverse to the public interest.

1. Substantial Likelihood of Prevailing on the Merits

Dr. Snyder must be able to demonstrate that his claim has a substantial likelihood of prevailing on the merits. To prove this, we must establish that Dr. Snyder has a proper claim for infringement of his First Amendment rights under the Columbia State Constitution. In the public employment context, courts in Columbia have adopted the four-part Boyer test to evaluate a constitutional claim for First Amendment retaliation by a public employer in the State of Columbia. See Elkins v. Hamel (2007); Harlan v. Yarnell (2002). Columbia courts recognize that public employees retain their First Amendment rights under the Columbia Constitution, subject to the employer's right to maintain a safe and orderly workplace. This allows a public employer to impose restraints on job-related speech in a way that would be unconstitutional if applied to a member of the general public. Elkins.

Under the Boyer test, the court must determine 1) whether the speech is on a matter of public concern; 2) if so, the court must balance the employee's interest in the expression against the government employer's interest in regulating the speech of employees to maintain an efficient and effective workplace; 3) if the employee's interest prevails, the employee must show the speech was a substantial factor driving the challenged governmental action; 4) if it was, the employer must show that it would have taken the action even in the absence of the protected speech. See Elkins; Harlan.

A. Matter of Public Concern

The court will look at the whole record and review the content, form, and context of the speech to determine if it was a matter of public concern. Elkins. In doing so, the court will consider the motive of the speaker: was Dr. Snyder speaking with the intent to

redress a personal grievance that he had or was he commenting for a broader public purpose? Harlan. If Dr. Snyder was speaking merely on matter of personal interest, the speech is not protected. The speech must be something that not only relates to a matter of public interest, but informs the issue in a way that is helpful to the public in evaluating the government conduct.

Dr. Snyder may assert that his letter was a matter of public concern because he was commenting on an issue that has an impact on the whole community in Springville. First, separating the Med School from the rest of the Basic Science departments would isolate members of the faculty. A university is founded on collaboration and the exchange of ideas. Interdepartmental cooperation is often necessary to advance the field of study, especially in the sciences, where members of the faculty can collaborate together to discover new treatment methods. This would be a matter of public concern because separating the medical school may inhibit the University's ability to promote medicine and the development of new treatments beneficial to the community.

We can also argue that his speech was a matter of public concern because there are negative financial consequences to the community. The bonds that were passed to support the construction of the new School will take 40 years to pay off and the community will not receive a benefit. The community has an interest in how public funds are being appropriated, especially if that appropriation will not benefit the community. The community has a fiscal interest of how the move is being paid for. The Harlan court noted that speech regarding the misuse of state funds by a professor at a public university constituted a matter within the public concern.

Most importantly, however, the new school would be located 20 miles from the urban center of Springville. Currently, the school of medicine treats many of the town's indigent citizens. Moving the school would have a detrimental impact on low income members of the community because there is not adequate public transportation between Springville and Palatine, the proposed site. This would prevent the low income citizens from receiving necessary medical treatment that they can afford. As a public institution, the medical school likely offers low cost treatment, especially to those who cannot afford to pay. Without the medical school in town, these citizens may be forced

to go without health care. We can argue that this situation is similar to Harlan, where a professor filed a grievance against another professor for various charges, including misappropriation of funds and abuse of students. The court found that because the professor was addressing subjects that had a broader public purpose, it was a matter of public concern.

The University will assert that Dr. Snyder is working on a personal motive to redress a personal grievance. The Regents will argue that Dr. Snyder was angry that the University rejected his proposal to split the medical school in two, leaving some faculty in Springville and some in Palatine. They will also argue that he is angry because his position was not adopted by the University and he sent a letter to the editor with a personal grudge against the administrators. It is true that Dr. Snyder was not satisfied with the Regents' rejection of his proposal. He admits that he is stubborn and feels very strongly that the relocation plan was misguided. But we can overcome this argument by citing previous decisions by the Regents that Dr. Snyder has disagreed with. Several years ago, the Regents made a decision to reorganize the Health Sciences Center. Dr. Snyder was adamantly opposed to this reorganization and went through a similar campaign to try [to] prevent that decision from taking place. But after he was outvoted and the Regents proceeded with their plan, Dr. Snyder, as Head of the Department of Medicine, implemented their decision wholeheartedly. Dr. Snyder agrees that the administration should implement policy whether they agree with it or not. The important fact in this situation is that the plan has not yet been decided because the debate within the community continues.

The University may also argue that Dr. Snyder was motivated by a personal interest he would receive if the school stayed. This argument is similar to the one that was made in Harlan. But this case is distinguishable from Harlan, because it involves a matter that affects the whole community. In Harlan, the university alleged that it was merely a matter relating to an internal department dispute because Harlan wanted to achieve a benefit of establishing the "internal order" of the department. But the court rejected this argument because the fact that the plaintiff might receive an incidental benefit from his speech does not transform it into a purely personal grievance. Dr. Snyder was already head of the Department, and by keeping the School of Medicine in

Springville, he would not receive a promotion or a better position within the school. The University cannot allege that he is working for a personal benefit.

Due to the harsh impact that this proposal will have on the indigent members of the community and their ability to obtain medical care, the court would likely find that this was a matter of public concern. The fact that Dr. Snyder previously implemented policy decisions that he disagreed with shows that he is capable for working within the system and that he had no personal bias or motive when sending the letter.

B. Balance of Dr. Snyder's Interest to Comment against the University's Interest in Promoting an Efficient Workplace

Under the second prong of the Boyer test, the court will look at several factors to weigh each side's interest, including: 1) whether the speech did or would create problems of discipline or harmony in the workplace, 2) whether the employment relationship requires personal loyalty and confidence, 3) whether the speech impeded Dr. Snyder's ability to perform his responsibilities, 4) the time, place, and manner of his speech, and 5) whether the matter was one on which debate was vital to informed decision making.

1. Discipline and Harmony in Workplace

The University will contend that Dr. Snyder's position has created tension among members of the faculty and has created disharmony in the University. Several faculty members have expressed to the Chancellor and Dean that they are intimidated by Dr. Snyder because of his insistence that the relocation decision should not happen. They will argue that this creates discipline problems because his ability to perform as a department chair has been impaired. The University will cite Elkins in support of their position, where the court found that the discipline and harmony within the police station was vital to community interests and outweighed the officers' right to speech.

But Dr. Snyder can rely on Harlan, where the court found that debate and dissent was essential to a democratic society. The court noted that academic institutions in particular are meant to "foster critical thinking skills in its students," and one way to

accomplish this is for members of the university to engage in healthy debate within the institution itself. The court must consider whether the speech of the employees would cause undue disruption of the ability of the university to function. The University contends that Dr. Snyder's authority has been undermined by his vocal dissent. This argument is weakened by the fact that Dr. Snyder has previously opposed plans submitted by the Regents yet has been able to effectively lead the department for over 20 years. The letter from the Regents terminating Dr. Snyder notes his years of service, which proves that his speech would not undermine the discipline and harmony because it has not done so in the past. Dr. Snyder's argument is bolstered by the fact that 45 of 50 members of the Med School faculty signed a petition in support of Dr. Snyder's position. This severely undercuts the University's argument that there is disharmony in the University.

2. Necessity of Personal Loyalty and Confidence

The necessity of having personal loyalty from an employee to his superiors depends on the nature of the employee-employer relationship in question. Harlan. The Harlan court found that in an academic institution, the relationship between professor and his superiors did not require loyalty and confidence.

We can argue that this situation is akin to Harlan because the eight departments in the School of Medicine act autonomously. Dr. Snyder is the chair of one department, the Department of Medicine. Although there are bimonthly meetings with Mr. Simmons and the department chairs, the departments basically run themselves. And there is even less contact between the chairs and Chancellor Blake. Dr. Snyder indicated that he sees him very infrequently. The need for there to be personal loyalty and confidence between Dr. Snyder and his superiors is not as necessary as in the police department. In Elkins, the court emphasized that it was necessary for the officers to follow the command of the captain and ranking officers because the public safety was at stake. But in an academic institution, the need for loyalty and confidence is lessened.

The University will counter that the medical school is distinguishable from a regular university because public health is at stake. The University will contend that the situation does resemble Elkins because, as doctors, it is necessary for them to follow

their superiors in order to protect patients and members of the community. This argument is weakened by the fact that the doctors do not rely on the university administration for orders on how to do their job. The situation is distinguishable from Elkins, where the police captain gives orders to an officer, who must then follow those orders to protect public safety. At the University, even though public safety and health are at stake, the administration does not give orders to the doctors on how to treat patients. The fact that health is involved does not take it out of the holding of Harlan. This situation is distinguishable from Elkins, where it was necessary for there to be loyalty and confidence among members of the police force, because they were charged with protecting the public, and having a clear chain of authority was important, because a fellow officer or a member of the public could be injured or killed if the rank and file was not properly followed. There is not a similar need within the Department because they work autonomously.

3. Whether the Speech Impeded Dr. Snyder's Ability to Perform

The Harlan court found that speech of a professor does not affect his ability to perform if he can carry on office hours, teaching classes, serving on committees and participating in outside activities related to his profession. Dr. Snyder's ability to perform as chair of the department has not been impeded by his speech. He has been able to attend faculty and university-wide forums and speak to members in the community. But, at the same time, he has headed a huge project within the Department aimed at developing a new method of dialysis that is faster and can be performed at home. This project involves coordinating graduate assistants and lab space. He has been in negotiations with several major pharmaceutical companies in order to secure funding for this research. We can argue that his ability to act as chair has not been disturbed by his speech regarding the proposal.

The University will contend that his ability to lead the department has been undermined and affected by his speech because members of the faculty are intimidated by him and do not feel comfortable going to him directly to express concerns. This is an important argument, because if Dr. Snyder cannot effectively manage the department,

the University will show that his speech impeded his ability to perform his job. Dr. Snyder can rebut with the same petition signed by the 45 faculty members. If some are intimidated by him, it is a small minority within the department. Additionally, Dr. Snyder may have enemies who are disagreeing with him just to disagree. They are people who said they feel intimidated because they want to be on the opposite side of the issue and may be acting for personal reasons and not out of true feelings of intimidation by Dr. Snyder. Calling members of the faculty to testify on his behalf would show that he is widely respected among colleagues and staff.

4. Time, Place, and Manner

Public forums are an appropriate place for expression of opinions, but if the speech occurs through proper channels, the court is more likely to uphold the speech as being the proper time, place, and manner for the expression. Dr. Snyder can argue that he followed the proper channels for his opinion because he first began his opposition to the proposed project by submitting a comprehensive report that he circulated widely among the medical school faculty in 2004. He also attended and presented his position at faculty and university-wide forums held in 2004 and 2005. In addition to these actions, Dr. Snyder also met with Jack Blake, Chancellor of the Health Sciences Center, and Paul Simmons, Dean of the School of Medicine. After his meeting, he also circulated a petition among the faculty, which 45 out of 50 signed onto in support of his position. He did not send the letter until all of these actions had been taken, when he felt that the community needed to be involved in this decision because it has such a heavy impact on them.

The situation is similar to Harlan, where Professor Harlan followed proper university protocols for voicing his opinion, including attending faculty meetings and airing concerns to the Dean of the College. The Harlan court found that the fact that Professor Harlan followed the proper channels before filing a public grievance demonstrated that the time, place, and manner of the speech was appropriate.

This prong of the balancing of interest weighs in Dr. Snyder's favor because he did not go to the public and air his complaint without first addressing it through channels

at the University. He had raised his position for years before submitting his letter to the editor for the Star Bulletin on December 8, 2007.

5. Vital to Decision-Making

Under this factor, the court must decide whether the matter is essential to the decision-making process. Here we can argue it is vital to the process because members of the community were unaware of the proposal. The Regents were holding a public hearing on the proposal but it is not clear if they invited members of the public or advertised the meeting. The Springville Star Bulletin article notes that the Regents are expected to make a decision at the close of public testimony. But how can the Regents make an informed decision if there are no members of the public there to support or argue against the proposal? Dr. Snyder's letter merely informed the public about an issue that affected them and invited them to come and speak out in favor [of] or against the proposal.

Weighing these factors, the court will likely find that Dr. Snyder's interest in the speech outweighs the University's interest in an efficient workplace because it does not have a substantial impact on his ability to perform and the workplace is not disrupted.

C. The Speech as a Motivating Factor for Employer's Action

Under the third Boyer factor, the court will look at whether the speech was a motivating factor for the adverse or retaliatory employment action taken by the employer. The Regents in their letter contend that the decision was not based on his speech, but on disharmony in the faculty. But the alleged disharmony was created by the speech. There appears to be no other reason to remove Dr. Snyder as chair of the department. The fact that he was negotiating a multi-million dollar deal with pharmaceutical companies indicates that he was performing his job adequately and bringing in revenue and new research opportunities to the University. Like Harlan, there is no question that the decision to remove Dr. Snyder from his position was motivated by his speech against the proposal.

D. Employer Must Show Action Would Have Been Taken Despite Speech

If the employee satisfies the other elements of the Boyer test, the burden shifts to the employer to show that the employment action would have been taken regardless of whether the employee was engaged in the protected speech. There must be some other reason that the employer had for taking the action. The University cannot show that the action would have been taken despite the speech.

2. Irreparable Harm in the Absence of Injunction

Elkins opined that the loss of any First Amendment freedoms, even for a minimal period, was an irreparable harm. But in the context of a preliminary injunction, Dr. Snyder must show that there is a danger of recurrent violation of his legal rights. The court, in dicta, suggested that in the employment context, a court will hesitate to grant a preliminary injunction where the employee can be made whole by monetary damages after a full trial.

Unlike other damages cited in Elkins, such as damage to reputation, financial distress or difficulty, Dr. Snyder stands to lose his contacts for his research, which would cause the loss of millions of dollars. It would also affect his professional standing and his ability to get research grants, publication opportunities, and future royalties from licenses. Unlike lost wages, all of these things would be problematic to put a dollar amount on. The ability to get a research grant or opportunity for research cannot be quantified in a dollar amount.

The fact that his speech has been impaired, combined with the fact that the pharmaceutical companies will back out of their deals for the research, demonstrates that Dr. Snyder stands to suffer irreparable injury if the preliminary injunction is not granted.

3. Balancing of the Harms

Dr. Snyder will have the burden of showing that his irreparable injury outweighs any injury the University might suffer if the court grants the injunction. The court will look at the course of action that will minimize the loss to each side and the risk of error. Under the balance of harms, if the university is forced to take him back, they will not

suffer injury because Dr. Snyder has previously accepted and implemented decisions with which he disagreed. He agrees that it is important for the faculty to put up a united front when it comes to policymaking. But the decision in this case has not been made. There is sill debate going on. Any dissension in the faculty may be based on personal bias and not true intimidation. Dr. Snyder stands to lose a great deal because he will lose licenses from pharmaceutical companies to do his research. These are opportunities that he may never be able to get back. The Elkins court said to look at the risk of making a wrong decision. If it makes a wrong decision in favor of the University, Dr. Snyder will be irreparably harmed. But if the court rules in favor of Dr. Snyder and is incorrect, the University will not suffer harm because Dr. Snyder has agreed that he will implement the policy regardless of whether he agrees with it.

4. The Injunction Will Not be Adverse to the Public Interest

Finally, the court will analyze whether the injunction is adverse to the public interest. The public has a strong interest in the "vindication of an individual's constitutional rights," so granting an injunction in this case may not be adverse to the public interest.

The Elkins court suggested that an injunction granted against the police department would have been against the public interest because there is a strong interest in having an efficient and dependable law enforcement system.

The injunction will not be adverse to the public because it will allow a prominent member of the faculty to continue research on dialysis, which would be affordable and easier. This would have a significant benefit to the community. Not granting the injunction would have a negative and adverse effect on the community because Dr. Snyder is researching treatment for dialysis, which many members of the community would likely benefit from. If he is terminated this research will cease and may not be able to continue, causing the public to lose out on a possible medical breakthrough.

**Answer 2 to Performance Test B**

To: R.J. Morrison
From: Applicant
Re: Snyder v. Regents of the University of Columbia
Date: February 28, 2008

Mr. Morrison:

In accordance with your direction, I have drafted an objective memorandum analyzing the likelihood of Dr. Snyder obtaining a preliminary injunction based on the University's alleged infringements of his free speech rights under the Columbia Constitution.

Statement of Facts

Dr. Snyder, a tenured professor at the University of Columbia, is currently the Chairperson of the Department of Medicine. He was recently terminated from his position, apparently because of his stand on the controversial issue of whether or not the Department of Medicine should be relocated. Dr. Snyder's first attempts to persuade the Board not to move were made entirely within the University system. Upon his failure to convince the Board, Dr. Snyder wrote a letter to the editor, attacking the move and urging the public to come to a public hearing which the Board was going to have regarding the relocation. Following this public meeting, the Board decided to relocate the Department and to terminate Dr. Snyder's position as Chairperson. He will remain a professor. The termination will take effect in about one month. Dr. Snyder desires a preliminary injunction to stop the termination.

Analysis

Requirements for a Preliminary Injunction

Dr. Snyder desires to seek a preliminary injunction based on a violation of his rights under the First Amendment of the Columbia Constitution. In order for a party to obtain a preliminary injunction, he must demonstrate "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) the threatened harm outweighs any damage the injunction may cause the party opposing it; and (4) the injunction, if issued, will not be adverse to the public interest." Elkins v. Hamel, Columbia Supreme Court, 2007.

In analyzing Dr. Snyder's claim, it will first be necessary to determine whether or not he is likely to prevail on the merits. Following this determination, the other requirements for a preliminary injunction will be analyzed.

Issue 1: Will Dr. Snyder Prevail On the Merits?

In order for Dr. Snyder to prevail in his request for a preliminary injunction, he will have to demonstrate that there is a "substantial likelihood" that he will prevail on the merits. Therefore, it is necessary to examine the merits of Dr. Snyder's underlying claim.

Dr. Snyder desires to bring a claim under the First Amendment to the Columbia Constitution, for violation of his right to free speech. Somewhat complicating this situation is the fact that Dr. Snyder is a public employee; therefore, it is possible that some restraints may be imposed on him "that would be plainly unconstitutional if applied to the public at large." Elkins. However, public employees still have substantial constitutional rights to free speech. In determining whether a public employee's right to free speech has been violated, the Columbia Supreme Court developed a four-part test

in Boyer. This test first looks to see whether the speech in question involves a matter of public concern. If it does, the court then weighs the "employee's interest in the expression against the government employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace." If the employee prevails on this step as well, the employee must next demonstrate that "the speech was a substantial factor driving the challenged government action." If the employee succeeds on this part, the employer is then permitted to raise the defense that "it would have taken the same action against the employee even in the absence of the protected speech." Elkins.

In analyzing Dr. Syder's claim, each of these elements will be examined separately.

Does the Speech Involve a Matter of Public Concern?

According to the Elkins court, the determination as to whether or not the employee's speech addressed a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." Moreover, "when an employee speaks as an employee upon matters only of personal interest the speech is not protected." Thus, courts essentially are required to "conduct a case by case inquiry, looking to the content, form, and context of the speech, which includes scrutinizing whether the speaker's purpose was to bring an issue to the public's attention or to air a personal grievance." The Elkins court furthermore stated that the speech must not merely be related to a public interest, but it must sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government."

In Dr. Snyder's case, it seems relatively likely that a court will conclude that his speech involved a matter of public concern. D. Snyder has indicated that the Medical School provides substantial medical services to the public. Moreover, the area in which the medical school is planning to relocate is a substantial distance away from the current users of these services, and there is no public transportation system between the current area in which the medical school is located and the proposed new area. Dr.

Snyder also noted that the medical school currently provides medical services to many indigent individuals, and these individuals apparently would be left without good health care if the medical school moved. Thus, it seems likely that the issue of the medical school's location was a matter of public concern.

Dr. Snyder has also indicated that the moving of the medical school will cause substantial inefficiencies. The medical school's current location, in Dr. Snyder's opinion, substantially increases its ability to communicate with colleagues on matters that are being researched. The public has a substantial interest in furthering medical research, and enhancing the efficiency of the University system as a whole.

Moreover, Dr. Snyder has indicated that it will cost a tremendous amount of money to move the medical school. Because the University is a taxpayer-funded institution, the taxpayers (i.e., the public) definitely have an interest in having their money spent wisely.

Dr. Snyder's speech was of such a nature that it sufficiently informed the public. He raised the issue to the public's attention, and then directed the public to his website, where they could obtain more information on the matter.

The Elkins court did note that speech only relating to an employee's personal interest is not protected. However, the Supreme Court in Harlan stated that even if the speaker receives an incidental benefit personally, his speech is not transformed into a "purely personal grievance." In this case, even though Dr. Snyder would receive some personal benefit in not having to commute to the new location, and in being able to research more effectively due to the current location's proximity to the division of the University, it seems likely that these benefits are not of such a nature that they transform his speech into a statement of purely personal grievances. The public concerns involved in this matter (medical services to the public, including indigents, fiscal responsibility issues, and government efficiency issues) appear to substantially outweigh any purely personal benefit that Dr. Snyder would receive in the matter.

Therefore, it seems quite likely that a court will conclude that Dr. Snyder's speech involved the mater of public concern.

Does Dr. Snyder's Interest in Commenting on these Matters Outweigh the University's Interest in Promoting Efficient Services?

In applying this second element of the four-part Boyer test, the courts will consider the following five factors: "(1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform his responsibilities; (4) the time, place, and manner of the speech; and (5) whether the matter was one of which debate was vital to informed decision making." Harlan v. Yarnell.

Problems Created by the Speech

The University has asserted that Dr. Snyder's actions created disharmony. It is probably true that vigorous dissent to a proposed plan will create disharmony – that is the very nature of dissent. However, the analysis of this element does not stop at this point. According to the Harlan court, "healthy levels of dissent and debate are essential to the vitality of institutions." This is especially true of academic institutions – an academic institution such as a university strives to foster "critical thinking skills in its students." Part of this is "modeling the give and take of debate within the institution itself." Therefore, the University has to demonstrate that substantially more problems were created by the speech than some other government organization (such as police stations) would need to do. The Harlan court essentially distilled this element, as applied to a University, into a consideration of whether or not the government's ability to do its "essential work without undue disruption" is unnecessarily impaired.

The University will cite the division created by Dr. Snyder's actions, and the fact that it is necessary for the upper level members of the University system to present a unified

front. However, Dr. Snyder indicated all along that even if the University declined to follow his recommendation, he would implement the university's decision whether he agreed with the decision or not. Dr. Snyder indicated that he has taken stands while employed by the University before, and when his recommendations were not followed, he would implement the University's decision wholeheartedly.

The University has also stated that Dr. Snyder's conduct caused several faculty members to feel intimidated. Dr. Snyder denies that he intimidates people; however, this is probably an open question at this point.

Dr. Snyder has also indicated that of the 50 faculty in the Medical School, 45 signed his petition to the Board regarding the moving of the school. It certainly doesn't appear that Dr. Snyder's speech caused significant disharmony – 90% of the faculty in the relevant department agreed with him.

Altogether, it does not appear that the University will be able to demonstrate that Dr. Snyder's speech significantly impaired its ability to do its "essential work without disruption." Part of the very essence of a University is the give and take of debate; thus, a certain amount of disruption should be taken for granted. Moreover, it does not appear that Dr. Snyder's speech will impair the University's ability to continue with its essential work – that of educating students and researching things. Dr. Snyder has testified, and his past conduct indicates, that he is fully willing and able to implement decisions with which he does not agree. Thus, Dr. Snyder's past assertions probably will not have much effect at all upon the University's current course.

Therefore, it seems that this factor weighs substantially in Dr. Snyder's favor.

The Employment Relationship is not One in Which Personal Loyalty and Confidence are Necessary

According to the Harlan court, significantly more latitude is granted to the government employer, where personal loyalty and confidence are necessary; such as an executive depending on his administrative assistant, or cases involving political appointees.

A professor's position in a university is not one which requires personal loyalty and confidence. Harlan. Moreover, even though Dr. Snyder was a chairperson of a department, and thus was a higher level employee, it seems quite unlikely that this position required personal loyalty and confidence. As discussed supra, the very nature of a university necessitates that the parties be involved in the give and take process of debate – a university is, after all, an academic institution. This is certainly not a case involving a political appointee or an administrative assistant to an executive.

Did Dr. Snyder's Speech Adversely Affect his Ability to Perform his Duties as a Professor?

The University has indicated that Dr. Snyder's speech did impair his ability to perform as a department chair. It asserted that certain faculty members were not comfortable working with him anymore, due to intimidation which they had suffered. Moreover, the University stated that it felt that he could not be trusted to "work as part of the team to implement the relocation plan."

Dr. Snyder, on the other hand, can assert that of the 50 faculty in the medical school, 90% of them agreed with him on this issue, as evidenced by their signing of the petition to the Board. He has also asserted that, in the past, he has fully implemented decisions with which he did not agree, and which he had protested before the decision was made.

There is evidence on both sides of the issue here. It seems that Dr. Snyder has a fairly good argument that his ability to perform will not be substantially impaired, especially based on his previous actions in supporting University decisions once they had been made. However, it can't be denied that vigorous opposition of a plan definitely can result in an adverse impact on the opponent's ability to perform, once the plan is

adopted. Everyone will remember his vigorous opposition, and there is necessarily a serious question of trust, especially when the opposition has been as broad and vigorous as Dr. Snyder's was in this case.

Therefore, it seems that Dr. Snyder's speech probably did adversely affect his ability to perform to some degree. The exact extent to which his ability to perform was affected is not entirely clear, although it appears that his ability to perform was not affected in a major way, due to the fact that he has opposed things in the past and then supported them after the University overruled his objections, and the University knows that.

The Time, Place, and Manner of Dr. Snyder's Speech

For a considerable period of time, Dr. Snyder confined his speech to the typical channels for objection within the University system. This was definitely the most appropriate way to raise objections, considering the nature of the problem. See also Harlan.

However, Dr. Snyder then sent a letter to the editor, stating that his attempts had failed; and that he had been unable to persuade the "powers that be" that the proposed relocation was "ill-conceived, financially reckless, and detrimental to the needs of our indigent citizens." He urged the public to look further into the matter at his website, and then attend the public hearing which the Board of Regents would be having regarding this issue.

This speech was definitely outside the normal process of objections within the University system, and Dr. Snyder's language is admittedly rather strong. However, it should be kept in mind that the letter was regarding a public hearing. Being that this was a public issue, the University Board had determined that it would hold a public hearing, apparently to listen to the views of the public on this issue. In order for the public to attend the hearing, they would have to understand the issue, and attend it.

Thus, Dr. Snyder will point out that his letter was merely attempting to get the public to address the issue in a way which the University desired them to – at the public hearing.

The Harlan court reviewed a situation in which a professor had raised unpopular opinions, but had stayed within University channels the whole time. The court noted that this was undoubtedly appropriate, but also stated that it was possible that expression of opinions in more public forums could be appropriate at times. It appears that Dr. Snyder can present an excellent argument that this was one of those times.

The University will point out that the nature of Dr. Snyder's language was unnecessarily strong – he referred to the board in a somewhat derogatory manner ("the powers that be"), and very strongly stated his opinion on the matter (it was "ill conceived, financially reckless, and detrimental to the needs of our indigent citizens.") This is admittedly strong language – probably somewhat stronger than was appropriate. On the other hand, this was a letter regarding a public meeting, and calls to public meetings must necessarily be couched in relatively strong terms if anybody is going to take notice of them.

Thus, it is not really clear who this factor favors. Dr. Snyder undoubtedly would have been better had he toned down his speech a bit; but on the other hand, it should be kept in mind that this was a call to a public meeting.

The Speech Involved a Matter in which Debate was Vital to Informed Decision Making

It is highly likely that this factor will weigh heavily in Dr. Snyder's favor. As discussed supra, the location of the medical school was a matter of public concern. The Board essentially admitted to this by holding a public hearing on the decision, where the public could weigh in with its opinions. Moreover, by holding the public hearing, the Board essentially admitted that debate was essential to making an informed decision.

It should also be noted that debate is vital to the principle of self-government. Under the American political system, the people have the right to engage in debate regarding the political system; and the people can also take action (through the polls) to change the actions of government. Because this was an issue involving a governmental decision, and the people have an interest in the actions of government, it seems likely that active, informed debate was vital to the making of an informed decision.

Conclusion

It appears that these factors, overall, are in Dr. Snyder's favor. It seems unlikely that his speech will create significant problems within the University; he does not hold a position of loyalty and confidence; and debate on this issue was vital to informed decision making. The University will point out that his speech probably does impede his ability to perform as a chairperson to some degree; and that Dr. Snyder's speech was unnecessarily strong. However, viewing the nature of this problem, and the fact that the University was going to hold a public hearing on the matter, it seems likely that Dr. Snyder's speech was not strong enough to cause this factor to weigh heavily in the University's favor. Moreover, his prior history demonstrates that his ability to perform will not be adversely affected in any substantial manner.

Therefore, it seems somewhat likely that Dr. Snyder will prevail on the balancing test. It should be kept in mind that a court could rule against Dr. Snyder at this point, especially due to his strong language; however, such a ruling does seem somewhat unlikely.

<u>Was the Speech a Substantial Factor Driving the Government Action?</u>

It seems undoubted that Dr. Snyder's speech was a substantial factor driving the action of the University. In fact, in the letter which Dr. Snyder received from the University, the Board essentially stated that his termination was due to his opposition to the relocation of the medical school.

Therefore, it seems unlikely that there will be any question as to this element.

Would the University Have Taken the Same Action Even in the Absence of the Protected Speech?

Again, this is not likely to be an issue in this case. The termination was solely because of Dr. Snyder's speech – if Dr. Snyder had not opposed this action, it seems unquestioned that he would not have been terminated.

Conclusion

It seems unquestioned that Dr. Snyder's speech involved a matter of public concern; that the speech was a substantial factor driving the government action; and that the University would not have terminated him if he had not engaged in the speech at issue. Therefore, the major issue involving Dr. Snyder's underlying claim will be the balancing test – did his interest in commenting on this matter outweigh the University's interest in promoting efficient government services? As discussed supra, it appears that the majority of the factors considered by courts in making this termination end to favor Dr. Snyder, and the ones that disfavor him do not appear to disfavor him in a substantial way. Therefore, it seems that there is a reasonable probability, but by no means a certainty, that Dr. Snyder will prevail on the merits.

It should be noted that in determining whether to grant a preliminary injunction, courts look for a substantial likelihood that the proponent will prevail on the merits. The lower the likelihood that the proponent will prevail on the merits, the more reluctant the court will be to grant the motion for a preliminary injunction. A proponent with a lower likelihood of prevailing on the merits can still obtain a preliminary injunction, however, if the irreparable damages element weighs strongly in his favor.

Issue 2: Will Dr. Snyder Suffer Irreparable Harm if the Preliminary Injunction is Not Issued?

The Columbia Supreme Court stated that the loss of First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable harm." However, in order to demonstrate irreparable harm for the purpose of obtaining a preliminary injunction, the moving party must also "demonstrate that there exits some cognizable danger of recurrent violations of its rights."

Dr. Snyder will argue that he is in danger of losing his position or being demoted again, if he speaks out on more issues which the University doesn't approve of. However, it doesn't really appear that Dr. Snyder has a really good argument here. There are no pending issues on which he is speaking, and the case involving the relocation is over.

Dr. Snyder may cite damage to his reputation; his ability to research; his ability to get research grants; and publication opportunities. However, the Columbia Supreme Court has held that things such as damage to reputation do not constitute irreparable harm, as they can be made whole by monetary damages after a full trial on the merits.

Dr. Snyder's strongest argument on the irreparable harm issue is that his termination will probably cause his ongoing negotiations with a pharmaceutical company regarding the development of a new method of dialysis to cease. He states that his termination will most likely cause the pharmaceutical company to back away, and that years of work and millions of dollars will be wasted. Dr. Snyder will point out that the new method of dialysis which is being developed will significantly improve the lives of the thousands of people who rely on dialysis to live, and that, if he is terminated now, these people will suffer irreparable harm due to the fact that all the research and negotiations which have been completed at this point will be wasted.

Assuming that Dr. Snyder's statements regarding the probability of the pharmaceutical companies' backing down and the research terminating are correct, it appears that irreparable harm would be present. However, the University will probably attempt to prove that the termination of Dr. Snyder will not cause all this harm. Evidence on this factor will probably be critical to this case. If Dr. Snyder is correct, it appears that there will be irreparable harm of a fairly significant magnitude.

The University might point out that the irreparable harm will not be suffered by Dr. Snyder, as he is not a dialysis patient, but by the public at large. This might raise a problem. More research is probably needed on whether Dr. Snyder can assert irreparable harm going to the public at large. However, Dr. Snyder can also assert injury to himself in losing this research, and a court might be more willing to consider the injury in this manner.

Therefore, if Dr. Snyder's statements regarding the probability of the pharmaceutical companies' backing away if he is terminated are correct, it will probably be possible to prove that there is irreparable harm. However, more evidence will be needed on this issue.

Issue 3: Does the Threatened Injury to Dr. Snyder Outweigh the Injury to the University which will Occur if the Injunction is Granted?

A preliminary injunction necessarily involves an analysis of probabilities and an evaluation of potential injuries. Because the preliminary injunction is issued before there has been a trial on the merits, the party against whom the injunction is given may suffer injury which he should not suffer at all (assuming that he will prevail on merits.) Therefore, in applying this element, the judge "should attempt to estimate the magnitude" of the loss for both sides and "also the risk of error."

As discussed supra, it seems probable, but not certain, that Dr. Snyder will prevail on merits. Moreover, it is possible that he will suffer substantial irreparable harm if the injunction is not granted, as discussed supra.

The University, on the other hand, will point out that it will suffer irreparable harm if it is required to keep Dr. Snyder in a position to which he is not entitled. The University may argue that it will not have his cooperation in the move, and that his effectiveness will be substantially reduced due to his prior arguments in opposition to the move. However, it is not abundantly clear that the university will suffer much harm down this line at all. If Dr. Snyder does support the move (as his past conduct seems to indicate that he will do) the University probably will not suffer much harm at all. Although some parties may be apprehensive about him, due to his prior opposition, it seems likely that his present support, especially considering the fact that 90% of the faculty in the medical school supported him in his opposition, will do more to aid the University than to harm it. On the other hand, it is not at all certain what Dr. Snyder will do in this point; thus, it is possible that he will still attempt to stop the move.

However, it seems likely that the move itself will probably take some time. Money must be raised; plans must be made; etc. Dr. Snyder might be able to hamper these plans and money-raising projects somewhat; but it should be kept in mind that the move itself is not actually occurring.

Dr. Snyder might also assert that the University's harm is not irreparable – it can be compensated for in money damages. However, a court is not likely to buy this argument. A government organization's ability to control what it does is highly important to the ability of the organization to function properly, and money damages are not really sufficient to remedy a loss of this ability.

Overall, it seems likely that the threatened irreparable injury to Dr. Snyder (the loss of years of research which will substantially benefit the public) substantially outweighs the

irreparable injury to the University (potential delay of the move; lack of cooperation within the University.) Combined with the fact that it appears somewhat likely that Dr. Snyder will prevail on the merits, it seems likely that this factor supports Dr. Snyder.

Issue 4: Is the Injunction Adverse to the Public Interest?

A court will not issue a preliminary injunction if the injunction is adverse to the public interest. This again involves somewhat of a balancing test – is the public interest stronger in favor of the injunction or in opposition to it?

The Supreme Court in Elkins stated that the public "has a strong interest in the vindication of an individual's constitutional rights, particularly in encouraging the free flow of information and ideas under the First Amendment." On the other hand, the public probably has an interest in the efficient operation of the University.

However, it seems likely that the public has a strong interest in the continuation of the research which Dr. Snyder has been working on.

Therefore, it seems unlikely that a court will conclude that this injunction is adverse to the public interest. In fact, it appears that the public has a strong interest [in] supporting the granting of this injunction.

Conclusion

In conclusion, it appears that Dr. Snyder has a good chance of prevailing on his motion for a preliminary injunction. As discussed supra, it seems somewhat likely that he will prevail on the merits.

A major issue in this case is going to be whether Dr. Snyder will suffer irreparable harm. As discussed supra, the mere injury to his reputation will not be sufficient, as the Supreme Court has concluded that this can be remedied through monetary damages.

A court might find Dr. Snyder's claims that all the research on the dialysis system will simply be lost if he is terminated to be somewhat preposterous. Any evidence which can be brought in to support Dr. Snyder's claim will definitely be to his advantage.

As far as the balancing test and the public interest elements, it seems likely that if Dr. Snyder is able to prove that he will suffer the type of irreparable injury which he alleges (the loss of years of research on the dialysis system), a court will rule that the risk of irreparable injury to him exceeds the potential injury to the University if the injunction is granted, and that the injunction is not adverse to the public interest.

Therefore, the primary issue in this case will be the irreparable injury element. It seems relatively likely that Dr. Snyder will prevail in his request for a preliminary injunction, if the irreparable damages which will [be] suffered are as dramatic as he asserts.