TUESDAY AFTERNOON
JULY 24, 2007

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

PERFORMANCE TESTS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the July 2007 California Bar Examination and two selected answers to each test.

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

Contents

CARTER v. RESTON HEALTH

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.

CARTER v. RESTON HEALTH

FILE

COLUMBIA SUPERIOR COURT
DARBY COUNTY

MEMORANDUM

TO: Applicant

FROM: Judge Melissa Grant

DATE: July 24, 2007

RE: **Carter v. Reston Health**

The litigation in Carter v. Reston Health involves claims by Roseanne Carter, an indigent health care patient, that Reston Health engaged in discriminatory and predatory billing practices adversely affecting her and others similarly situated.

I have just concluded a hearing on a motion by counsel for Reston Health to disqualify the attorneys for Roseanne Carter because of a conflict of interest.

I conducted the hearing by receiving written declarations in support and opposition and by examining Mallory Jergens *in camera*. Ms. Jergens is the attorney whose status is alleged to have created the conflict. I believe Ms. Jergens was truthful in her statements to me and that she has not made any disclosure to National Center for Health Care (NCHC) of confidential information relating to Reston Health.

I haven't yet decided how to rule on the motion. Please prepare an objective memorandum that analyzes the legal and factual issues raised by the motion to disqualify plaintiff's law firm, NCHC. After objectively analyzing each issue, your memorandum should conclude with a recommendation as to how I should rule.

Malcolm Richardson
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Attorneys for Plaintiff Roseanne Carter

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,
Defendant.
_____/

Case No. C06-030355MG

COMPLAINT - CLASS ACTION

Causes of Action:

Count One: Third Party Breach of Contract
Count Two: Breach of Contract
Count Three: Breach of Duty of Good Faith and Fair Dealing
Count Four: Breach of Charitable Trust
Count Five: Violation of the Columbia Unfair Competition Act
Count Six: Violation of the Consumers Legal Remedies Act
Count Seven: Unjust Enrichment

* * *

10. Defendant Reston Health is a private, not-for-profit corporation incorporated in Columbia. Reston owns and operates more than 20 hospitals in Columbia, including Perkins Memorial Hospital.

11. Plaintiff Roseanne Carter received services at Defendant's Perkins Memorial

Hospital in 2002. She sought emergency room services and indicated at the time the services were rendered that she did not have medical insurance to pay for the services. She received two stitches in her finger for a cut. Since receiving the services, Ms. Carter has received bills for over $2400, despite the fact that similar services for an insured patient would have been billed at one-half this amount. She has been subject to numerous collection calls at home and at work, despite requests that these calls desist. She has not been informed of any rights that she might have to negotiate the terms of repayment, or to reduce the amount allegedly owed.

* * *

16. Defendant Reston currently receives a federal income tax exemption as a purported "charitable" institution. Defendant Reston is required to operate "exclusively" in furtherance of a charitable purpose, with no part of its operations attributable directly or indirectly to any noncharitable commercial purpose. By accepting this favorable tax exemption, Defendant Reston has explicitly and/or implicitly agreed to provide uninsured patients with medical care at reasonable rates, and to not engage in aggressive and unreasonable collection practices. Reston has failed to comply with these obligations.

17. Reston also engages in discriminatory pricing practices which have a significant detrimental impact on the very population Reston has obligated itself to assist.

* * *

25. Reston gives private insurance companies and governmental third party payers like Medicare and Medicaid significant discounts. It charges its uninsured patients 100% of the "full sticker price."

* * *

NATIONAL CENTER FOR HEALTH CARE

By: *Malcolm Richardson*

Malcolm Richardson
Attorneys for Plaintiff

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Attorneys for Defendant Reston Health

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,

Defendant.
_____/

Case No. C06-030355MG

DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS

Defendant Reston Health ("Reston") hereby moves the court for disqualification of the National Center for Health Care ("NCHC") from this legal proceeding. This motion is based upon the following facts, more fully set forth in the Declaration of Hugo Brenner, which is attached and by this reference incorporated herein:

1. Mallory Jergens, an attorney now employed by NCHC, was formerly

employed by Coburn, Bronson & McQueen, a law firm that formerly represented defendant Reston.

2. During the period of her employment at Coburn, Bronson & McQueen, Ms. Jergens engaged in legal work on behalf of Reston that is identical to the matters at issue in this litigation.

3. Ms. Jergens acquired confidential information relating to defendant Reston, creating a direct conflict of interest. The confidential information relating to defendant Reston is, as a matter of law, imputed to all members of the NCHC law firm, which must therefore be disqualified.

Dated: May 14, 2007

Respectfully submitted,

AUSTEN, JAMES & ELIOT, LLP

By: *Hugo Brenner*

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Attorneys for Defendant Reston Health

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,

Defendant.
_____/

Case No. C06-030355MG

DECLARATION OF HUGO BRENNER IN SUPPORT OF DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS

I, Hugo Brenner, declare as follows:

1. I am the managing partner of the law firm of Austen, James and Eliot, LLP.

2. Our firm has been retained by Reston Health (Reston) to represent it in this action.

3. We learned from Reston that it had previously received representation from the law firm of Coburn, Bronson & McQueen (Coburn). One of the associates attended

law school with attorney Mallory Jergens, and knew that she had worked at Coburn and now works at Plaintiff counsel's firm, National Center for Health Care (NCHC).

4. The essence of the complaint filed by Plaintiff Roseanne Carter ("Carter") is that Reston failed to fulfill its legal and contractual obligations to provide indigent medical services to her and a class of persons similarly situated.

5. The essence of a research memorandum written and presented to Reston by Ms. Jergens during her tenure at Coburn is Reston's legal and contractual obligations as a charitable institution to provide medical services to indigents. The memorandum advises Reston on how to meet and limit its obligations. The allegations of the complaint filed in this action relate directly to many of the issues that Ms. Jergens opined on in her research memorandum.

6. NCHC asserts that there is no other counsel available to represent Carter in this litigation. This is not true. I have personally contacted the managing partners of five prominent firms in the County of Darby who have reputations for providing significant amounts of pro bono services. Each of these firms indicated that it would have seriously considered helping Carter with regard to her collection dispute with Reston. Since the firms we contacted are willing to represent Carter on a pro bono basis, there is no cost concern present.

7. A review of the complaint in this case shows that NCHC is not particularly expert in the causes of action presented. The claims are based in contract, constructive trust, and tax law. None of these are areas in which NCHC has particular expertise which couldn't be available from any private firm.

8. Reston will suffer prejudice if NCHC is permitted to continue representing Carter inasmuch as Reston can never by assured that client confidential material has not been and will not be passed on from Ms. Jergens to other staff at NCHC.

9. NCHC is a small firm consisting of no more than 10 lawyers, of whom Ms. Jergens is a supervising attorney. In such a small office, it is impossible to create an effective ethical screen.

10. We are bringing this motion as soon as reasonably possible after learning of the facts. Reston was served with the complaint in this matter on approximately February 23, 2007. We learned of Ms. Jergens' conflict approximately March 23, 2007. We conducted an investigation of the facts, and brought this motion promptly upon completing our investigation.

11. Neither Reston nor my firm are motivated by anything except the interests of Reston in ensuring the continued confidentiality of attorney-client privileged information.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on June 22, 2007, in Fort Meade, Columbia.

Hugo Brenner

Hugo Brenner

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Attorneys for Plaintiff Roseanne Carter

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF DARBY

ROSEANNE CARTER, and all those similarly situated, Plaintiff, vs. RESTON HEALTH, a Columbia corporation, Defendant. _____/	Case No. C06-030355MG **DECLARATION OF MALCOLM RICHARDSON IN OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS**

I, Malcolm Richardson, declare as follows:

1. I have personal knowledge of the statements contained in this declaration. If called to testify, I would attest to the truth of these statements.

2. I am the current Executive Director of the National Center for Health Care (NCHC). I have served in this capacity for the past 15 years.

3. NCHC is a nationally recognized, not-for-profit public interest law firm specializing in policy and advocacy on behalf of low income clients in the health care area. NCHC derives 50% of its funding from foundation grants, 25% from private donations, and 25% from attorneys' fees awards. Our current $2 million annual budget supports the work of 15 advocacy staff, including 10 attorneys with over 100 years of health care-related legal experience among them. We have filed over 30 state and nationwide class actions in the past 15 years. Defendants have included the federal government, various state and local governmental agencies, and several private health care providers.

4. Mallory Jergens was hired by NCHC about three years ago. As required by our hiring policy, Ms. Jergens furnished a list of the clients for whom she provided legal services while an associate at Coburn, Bronson & McQueen. This client list was added to our office's conflict database which contains a searchable listing of all NCHC's past and current clients, opposing parties, law firms, and former client lists.

5. Roseanne Carter, the plaintiff in this action, contacted NCHC approximately six months ago. We ran a conflict check after determining who the potential opposing party or parties might be. This conflict check revealed that Reston Health, the defendant in this case, was a former client of Mallory Jergens. When this was brought to my attention, I issued the memorandum attached hereto as Exhibit 1, which by this reference is incorporated herein. I have confirmed that all of the steps in the memorandum have been carried out, and have been maintained to date.

6. This case is a class action involving a defendant with $4.4 billion in assets

that earned more than half a billion dollars in the past two years alone. Reston is a Columbia-based health care provider that operates more than 20 hospitals throughout Columbia.

7. Taking on a class action such as this litigation is a major undertaking for any firm. This dispute is not just about a collection action for $2,400 against Ms. Carter.

8. Our firm has made numerous inquiries with prominent private law firms throughout the state. We have been unable to find co-counsel, much less any firm to represent Ms. Carter. In addition, while Hugo Brenner, Counsel for Reston, is correct that the causes of action sound in areas of the law in which NCHC has no extraordinary expertise, the overarching area of the law that is at the heart of this litigation is health care for the indigent. We are the unquestioned preeminent national law firm in this area of the law. Ms. Carter evidently sought us out to represent her because of our reputation.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on July 10, 2007, in Rincon, Columbia.

Malcolm Richardson

Malcolm Richardson

National Center for Health Care

MEMORANDUM

To: All Staff
From: Malcolm Richardson
Date: January 24, 2007
Re: Roseanne Carter Ethical Screen

It is essential that the following be instituted immediately and that all legal and clerical staff abide by these provisions for the foreseeable future. Our office has been retained by Roseanne Carter to explore potential courses of action against Reston Health related to health care Ms. Carter received as a patient of a Reston Health hospital. Ms. Carter will probably be the named plaintiff in a class action we are considering filing against Reston Health. Mallory Jergens used to work for a firm, Coburn, Bronson & McQueen, which formerly represented Reston Health. In order to avoid any potential claim of a conflict of interest, Ms. Jergens must be screened from <u>any</u> access to or participation in this case. Therefore:

4. When reception staff receives a call related to this case, the call should be transferred to the appropriate staff member. The staff member who receives the call should ensure that Ms. Jergens is not in his/her office when taking the call.
5. All files related to this case shall be stored in a separate, locked file cabinet, and only staff directly working on the case, including assigned support staff, shall have keys to this cabinet. A sign-in and sign-out log shall be maintained, and all persons removing or replacing files in the locked cabinet

shall sign and date the log. No staff shall give access to this cabinet to Ms. Jergens, and Ms. Jergens shall not seek access to the cabinet.

6. Staff must ensure that any files and internal work product related to this case shall be kept in the dedicated locked file cabinet except when in use. When in use, care should be taken to not leave the files or other materials in public areas of the office such as the library. When materials are temporarily being kept in an office, they should be in closed files, with any written materials not in plain view. Ms. Jergens will not seek access to any files or materials related to this case.

7. A password-protected computer filing system will be maintained for the computer files related to this case. Only staff directly involved in the case will have access to the password. Ms. Jergens shall refrain from seeking access to the computer files related to this case.

8. Staff shall not engage in conversations or discussions regarding this case in public areas of the office, such as the library, unless the doors are closed and Ms. Jergens is not present. Ms. Jergens will not engage in conversations with other staff regarding Reston Health matters. Ms. Jergens will not supervise any staff regarding this case.

HEARING TRANSCRIPT OF *IN CAMERA* TESTIMONY OF MALLORY JERGENS

Judge Melissa Grant: In the matter of Roseanne Carter versus Reston Health, we are now on the record. This is an *in camera* proceeding with attorney Mallory Jergens present. Let the record reflect that other than court personnel and Ms. Jergens, no other parties are present. Ms. Jergens, you understand that you are under oath, don't you?

Mallory Jergens: Yes, I understand, your honor.

Q: Ms. Jergens, please describe your legal career.

A: After graduating from law school eight years ago, I went to work as an associate for Coburn, Bronson and McQueen. I worked there for five years. I did exclusively transactional work while I was there, and specialized in health care law. In 2004, I went to work for the National Center for Health Care. It is a private, not-for-profit law firm doing both litigation and policy work on behalf of low income people in health-care related issues, including Medicare and Medicaid.

Q: While you were at Coburn, did you do any work for Reston Health?

A: Yes, Reston had been a client of the firm for several years before I worked at Coburn, and I was assigned to work for the partner who oversaw the firm's work on behalf of Reston.

Q: Please describe the specific work you did on behalf of Reston.

A: For the first couple of years, I just reviewed various contracts between the various Reston hospitals and various vendors, as well as between the hospitals and various entities, such as counties, the feds, and HMOs on the provision of health care.

Q: Did you meet with the client at all during these first couple of years?

A: No, I analyzed the contracts, made various suggestions, and then passed on these comments to the partner who would meet or speak with the various hospital administrators.

Q: I gather that the nature of your work on behalf of Reston changed at some point?

A: Yes, your honor. I was gradually given more responsibility. One specific project

that I recall involved an extensive memorandum advising Reston on its obligations as a charitable not-for-profit in terms of its obligation to provide indigent medical services in order to preserve its not-for-profit status under federal and state tax laws. I remember that this project took me at least a month to complete.

Q: Do you know what happened to your memo?

A: Yes, I gave it to the CEO of Reston. I also made a presentation to Reston's Board of Trustees highlighting the conclusions of my research.

Q: Did you advise the Reston Board to take specific actions as a result of your research?

A: Yes, I did, your honor. Would you like for me to go into detail?

Q: I'm trying to avoid the disclosure of confidential attorney-client communications, so please don't. Can you recall any other specific assignments you had regarding Reston?

A: No, I don't, your honor. I continued to review contracts. I also re-drafted a number of contracts. I also conducted research as requested, but I honestly don't recall any other specific assignments.

Q: Throughout your five years at Coburn, what percentage of your time was devoted to work for Reston?

A: I would say that it averaged about 10%, your honor, but that's really a guess.

Q: Okay, please tell me about your work at the National Center for Health Care.

A: I started working for NCHC about three years ago. I was hired to head the Indigent Health Care Project.

Q: What does that project do?

A: We are concerned with litigation and legislative proposals to improve the medical care for the poor and working poor.

Q: Could that include hospitals' services to the uninsured, such as are at issue in this case?

A: Yes. This case is being handled by one of the Project's attorneys.

Q: How many attorneys are in the Project?

A: Two of us.

Q: Are you both in the same office?

A: Our offices are adjacent.

Q: Do you supervise any of the work on this case?

A: No. None. But on all other matters I supervise the other Project attorney.

Q: When you were hired, were you asked about your work at Coburn?

A: Of course. I think that my experiences made me particularly valuable. The Executive Director, Malcolm Richardson, also had me obtain a client list – a list of all the clients on whose behalf I'd performed work while I was at Coburn. Mr. Richardson made it clear that this list would be incorporated into NCHC's database for conflicts checks.

Q: What's your understanding of how the conflict system at NCHC works?

A: I don't know the specifics, but I know that before we undertake representation of a client, a conflict check is run. If a potential conflict comes up, it is brought to the attention of Mr. Richardson, who takes appropriate action.

Q: Do you know what happened when this case against Reston first arose?

A: Yes. Mr. Richardson sat down with me and said that we were considering filing a case against Reston. He then went over the provisions of the memo he was going to circulate that explained how I was to be screened from the case. He also told me that I must observe the terms of that memo scrupulously. I think the memo is attached to his declaration filed in this proceeding.

Q: So what do you know about this litigation?

A: I don't know, except from what I've read in the newspapers. It concerns the billing practices of Reston as it relates to uninsured patients. That's all I know.

Q: As far as you know, have all of the procedures in the memo been carried out?

A: I don't know for sure. All I know is that I have not had any conversations with anyone at NCHC about this case since that initial conversation with Malcolm Richardson. No one in the office has approached me about the case. I have not heard any conversations about the case, even inadvertently.

Q: Ms. Jergens, did you take any research files or other work product with you from

Coburn to NCHC?

A: No, but I did take general research files with me. That is permitted under Coburn's policies. However, I retained no work product, meaning any work specifically related to a particular client. This work could not be removed from Coburn.

Q: At NCHC have you had any conversations about the law involved in hospitals' obligations to uninsured patients?

A: Yes, I have. But I have only discussed the law generally. I was never asked about and never disclosed any specific information about Reston.

Q: Thank you, Ms. Jergens. That's all I have. The hearing is closed.

END OF TRANSCRIPT

TUESDAY AFTERNOON
JULY 24, 2007

California
Bar
Examination

Performance Test A

LIBRARY

CARTER v. RESTON HEALTH

LIBRARY

HOGLUND v. FORSYTH

United States Court of Appeals (15th Circuit, 2001)

James Forsyth, the plaintiff in the underlying case, *Forsyth v. County of Putnam*, is represented by attorney Stephen Younger and the law firm of Younger, Younger & Reichmann. Joseph Reichmann is a retired United States Magistrate Judge who, five years ago, presided over settlement negotiations in *Thomas v. County of Putnam*.

Forsyth and *Thomas* are police brutality cases, arising out of different incidents separated in time by several years. They are related only in the sense that the County of Putnam and one of its deputy sheriffs, Scott Hoglund, are defendants in both cases.

Defendants moved to disqualify the Younger firm on the ground that, during the settlement negotiations in *Thomas*, Reichmann met with defense counsel ex parte and therefore had access to confidential information pertaining to the County of Putnam and Deputy Sheriff Hoglund. Younger did not contest the disqualification of Reichmann but proffered the following evidence: Reichmann joined the Younger firm as a partner on November 1, 1999, and has had no involvement in the *Forsyth* case. Moreover, a week before Reichmann joined the firm, Stephen Younger removed all of the files pertaining to the case to his home and instructed the firm's only other lawyer, partner Marion Younger, not to discuss the case with Reichmann. Reichmann himself submitted a declaration stating that he had no recollection of the settlement discussions in *Thomas*, and that he does not recall having received any confidential information from defendants' lawyer in that case. Reichmann, moreover, explained that "as a magistrate judge from 1980 to 1996, it was my long-standing, regular, and continuing practice in conducting settlement conferences (1) not to go into the merits of actions, (2) not to request or receive either confidential or strategic information from counsel, and (3) to discuss only monetary matters." Reichmann Declaration at page 2.

For their part, defendants submitted the declaration of Richard Kemalyan, defense counsel in *Thomas*, who stated as follows: "I do not have a specific recollection of the details of what communications were made between declarant and Magistrate Judge Reichmann outside the presence of plaintiff's counsel. I am sure that in the normal course of the Settlement Conference, I did have private and confidential communications with Magistrate Judge Reichmann. I cannot recall the details of those communications." Kemalyan Declaration at page 1.

The district court denied the motion to disqualify the Younger firm, finding no evidence that Reichmann received confidential information during the settlement negotiations in *Thomas*. The court also found that the wall of confidentiality erected to shield Reichmann from the Youngers was adequate to protect the interests of the defendants. Defendants brought this petition for a writ of mandamus seeking reversal of the district court's order and disqualification of the Younger firm.

Until recently, the practice of judicial officers returning to law firms was rare, and the relevant authorities are sparse. The case law draws a distinction between situations where a judicial officer acted merely as an adjudicator and those where he acted as a mediator or settlement judge.

A judge who has participated in mediation or settlement efforts becomes a confidant of the parties, on a par with the parties' own lawyers. Under those circumstances, the judge will be conclusively presumed to have received client confidences in the course of the mediation, and his later participation in the case will be governed by the same rule that governs lawyers: He may not participate in the case and neither may his law firm.

The district court erred by inquiring whether confidential information actually passed from the parties to the mediator. As this case demonstrates, memories as to what transpired during these off-the-record proceedings are likely to be dim, making the fact-

finding process highly perilous. More importantly, allowing an inquiry into what transpired during settlement negotiations will surely chill the candor of the parties in speaking to the mediator. Suffice it to say that the mediation process inherently leads to the disclosure of confidential information, as Reichmann's declaration confirms. While Reichmann claims not to have requested or accepted confidential information during settlement negotiations, he admits that he did discuss "monetary matters." Information as to a party's bottom-line settlement position, or the degree of flexibility in settling a particular case, is itself a significant piece of information that the opposing party would love to have. In litigation, as in life, monetary matters *are* confidential matters.

Reichmann presided as settlement judge over a case other than the present one. Presuming that Reichmann learned confidential information as settlement judge in *Thomas*, it doesn't follow that any of that information pertains to *Forsyth*. When the two cases involve different parties and/or different incidents, disqualification of the former judge and his law firm is appropriate only if the two cases are "substantially factually related." The “substantially factually related” standard entails significant overlap of facts between the two cases. This standard also applies when an attorney is disqualified from representing a client because the attorney previously represented a party adverse to the client in a related case.

The "substantially factually related" standard provides that if there is a *reasonable probability* that confidences were disclosed in an earlier representation which could be used against the client in a later, adverse representation, a substantial relation between the two cases is presumed. To determine whether *Thomas* and *Forsyth* are sufficiently related, we must decide whether "there is a reasonable probability" that the confidences we presume were disclosed during the settlement discussions in *Thomas* would be useful to the plaintiff in *Forsyth*. This inquiry calls for a careful comparison between the factual circumstances and legal theories of the two cases. We cannot, on the record before us, determine whether *Forsyth* and *Thomas* are substantially related.

Yet we need not leave this matter unresolved and open for future dispute, which would further delay resolution of the underlying litigation. We will *assume* the two cases are substantially related, so Reichmann is presumed to have learned confidential information in *Thomas* that is relevant to *Forsyth*. This, in turn, will give rise to the further presumption that he shared those confidences with the Younger firm. If this latter presumption is irrebuttable, "the firm as a whole is disqualified whether or not its other members were actually exposed to the information" Reichmann learned from the earlier case.

Because we apply state law in determining matters of disqualification, we must follow the reasoned view of the state supreme court when it has spoken on the issue. For a long time, the Columbia Supreme Court was silent as to whether the presumption of shared confidences is rebuttable, leaving the question to the state's intermediate appellate courts. The Columbia courts of appeal developed a general rule that the presumption is not rebuttable.

But the Columbia Supreme Court has recently cast doubt on this approach. In *Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.* (2001), an attorney represented one party while the firm where he was former counsel represented an adverse party to the *same* litigation. *SpeeDee Oil* presented a situation on all fours with appellate case law holding that the presumption of shared confidences is irrebuttable. The Supreme Court, nevertheless, held that it "need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures," because the firm had failed to set up an effective screen. Observing that federal decisions have taken "a more lenient approach to conflicts disqualification than prevails in Columbia," the Court left open the possibility that screening can rebut the presumption of shared confidences within the firm. We read *SpeeDee Oil* as sending a signal that the Columbia Supreme Court may well adopt a more flexible approach to vicarious disqualification.

SpeeDee Oil was the kind of case most likely to give rise to automatic disqualification because the same firm represented adverse parties in the same litigation. The Columbia Supreme Court recognized that "discrete, successive conflicting representations in substantially related matters" - as are presented in our case - may pose less of a threat to the attorney-client relationship. Magistrate Judge Reichmann joined the Younger firm years after presiding over the *Thomas* settlement negotiations, and the Younger firm does not seek to represent a party to the *Thomas* litigation. The current case, though we assume it to be related, involves largely different facts. These circumstances create an even more compelling case than *SpeeDee Oil*, where the court nonetheless refused to hold that the presumption is irrebuttable.

The vicarious disqualification of an entire firm can work harsh and unjust results, particularly in today's legal world where lawyers change associations more freely than in the past. A rule that automatically disqualifies a firm in all cases substantially related to the tainted lawyer's former representation could work a serious hardship for the lawyer, the firm and the firm's clients. An automatic disqualification rule understandably would make firms more reluctant to hire mid-career lawyers, who would find themselves cast adrift, and clients would find their choice of counsel substantially diminished, particularly in specialized areas of law. Such a rule also raises the specter of abuse: A motion to disqualify a law firm can be a powerful litigation tactic to deny an opposing party's counsel of choice. This is a case in point: Forsyth's counsel, Stephen Younger, has a formidable reputation as a plaintiffs' advocate in police misconduct cases; defendants in such cases may find it advantageous to remove him as an opponent.

Several of our sister circuits have held that a firm can rebut the presumption of shared confidences when it seeks to represent a party in a case substantially related to one in which a new member of the firm has participated. Although not adopted in Columbia, the ABA Model Rules of Professional Conduct also recognize that the increased

mobility of lawyers between firms calls for a less rigorous application of the disqualification rules.

We would nevertheless accept the costs of automatic disqualification, if it were the only way to ensure that lawyers honor their duties of confidentiality and loyalty. But it is not. A client's confidences can also be kept inviolate by adopting measures to quarantine the tainted lawyer. An ethical wall, when implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm. The ABA Model Rules explicitly approve the use of screening procedures to avoid vicarious disqualification where a former judicial officer or government lawyer has joined the firm. Here, Stephen Younger removed all files concerning the *Forsyth* case from the law office before Reichmann joined the firm; all attorneys were instructed not to discuss the case with Reichmann. The district court found "ample evidence of appropriate screening measures: all members of the firm have declared that they have not discussed the pending case and that Reichmann does not have access to the case file." We agree that the measures taken by the Younger firm adequately protect any legitimate interests of the defendants.

The changing realities of law practice call for a more functional approach to disqualification than in the past. In resolving this case, we take our cue from the Columbia Supreme Court's recent indication that it may be inclined to follow the path taken by other federal courts. We hold that the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge, where the settlement negotiations are substantially related (but not identical) to the current representation. Screening mechanisms that are both timely and effective, as the Younger firm erected here, will rebut the presumption that the former judge disclosed confidences to other members of the firm. Because the district court here found that the ethical wall adopted by the Younger firm was being scrupulously enforced and there is no reasonable possibility that confidential information will leak to Younger from

Reichmann, or vice versa, we find no basis on which to disqualify the Younger firm from serving as counsel for plaintiff *Forsyth*.

Petition for writ of mandamus DENIED.

CITY AND COUNTY OF AMES v. MAMBO SOLUTIONS, INC.

United States Court of Appeals (15th Circuit, 2004)

Dennis Hammond (Hammond), now the City Attorney of Ames, represented Mambo Solutions, Inc. (Mambo), while in private practice, in a matter that was substantially related to this case. Thus, there is a conclusive presumption that Hammond had access to confidential information in the course of the earlier representation that is relevant to the current litigation and his disqualification is mandatory. We must decide whether his disqualification automatically extends to the entire City of Ames City Attorney's Office (Office) or simply requires that the Office effectively screen Hammond from any participation in this case. We hold that the presumption that Hammond will share the confidences of his former client with others in the Office is rebuttable by establishing the existence of an effective ethical screen. We remand to the trial court for a determination on the effectiveness of the ethical screen.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2000, Hammond was still in private practice. Mambo retained Hammond and his firm to represent it in a range of business matters, including dealings with the City of Ames (City) and an ongoing dispute with the City's Department of Building Inspections.

In November 2001, Hammond was elected Ames City Attorney and shortly thereafter left private practice.

In September 2001, under Hammond's predecessor, the Ames City Attorney's Office (Office) began an investigation that turned up evidence that Marcus Armstrong, the head of the City's Department of Building Inspections, had authorized prepayments on a city contract with Government Computer Sales, Inc. (GCSI) in violation of City law, and that GCSI had failed to fulfill the contract.

In February 2003, the City sued GCSI, Armstrong, and others, alleging that GCSI paid Armstrong kickbacks through various fictitious business entities in order to have him select GCSI for the contract and authorize illegal prepayments.

In March 2003, further investigation uncovered evidence of payments by Mambo, another City contractor, to Armstrong's fictitious business entities, and in April 2003 the City added Mambo as a defendant in the GCSI lawsuit.

One month later, Mambo moved to disqualify Hammond and the entire City Attorney's Office due to Hammond's previous representation of Mambo in matters substantially related to the current lawsuit. The City Attorney's Office responded that it had instituted an ethical screen immediately upon discovering Mambo's alleged involvement in the kickback scheme. All responsibilities for decisions concerning the matter were passed from Hammond to his chief deputy, Jesse Smith, and Hammond had no further involvement in the case. It also argued that Hammond's prior representation of Mambo was not substantially related to the current litigation, and that disqualification was therefore unnecessary.

The trial court granted the motion to disqualify Hammond and the City Attorney's Office. Critically important to our analysis are the trial court findings that Hammond had personally represented Mambo, that he had obtained confidential information from Mambo, and that the subject of the prior representation was substantially related to the current lawsuit. The trial court held that as a matter of law disqualification of both Hammond and the City Attorney's Office was required.

A conflict of interest may arise from an attorney's successive representation of clients with adverse interests. With successive representation of adversaries, the chief fiduciary value jeopardized is that of client *confidentiality*. The former client's expectation of confidentiality must be preserved to ensure the right of every person to freely and fully

confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. The attorney must maintain those confidences inviolate and preserve them at every peril to himself or herself. Because of this duty, an attorney in actual possession of material containing confidential information from a former client may not represent an adverse party without the former client's consent.

A trial court may disqualify a party's counsel to enforce these ethical standards. A trial court's authority to disqualify an attorney derives from the power inherent in every court to control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

In deciding a motion to disqualify, however, the court must balance the interests of a client in preserving its confidences with the interests of disqualified counsel’s client. These interests included a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.

In successive representation cases, the "substantially factually related" standard mediates between these competing interests. Absent a substantial factual relationship between the subjects of the two representations, the current client's choice of counsel will be honored and the motion to disqualify must be denied. However, if a substantial factual relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is

mandatory. This mandatory rule applies unless the court finds that other countervailing factors exist, such as tactical abuse underlying the disqualification motion.

VICARIOUS DISQUALIFICATION

In addition, the general rule is that disqualification extends from the affected attorney to her entire firm. The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. (*SpeeDee Oil*). Vicarious disqualification is required "to assure the preservation of [the client's] confidences and the integrity of the judicial process." (*Id*.).

The Rules of Professional Conduct of the State Bar of Columbia do not address the vicarious disqualification of an entire law firm when a member of that firm has a former client conflict. For this reason, the vicarious disqualification rules have essentially been shaped by judicial decisions.

The appellate courts' current rule that rigidly applies vicarious disqualification in certain contexts was developed decades ago. The realities of a modern law practice compel a more flexible approach. Lawyers are increasingly mobile, and mid-career shifts are common. Gone are the days when attorneys typically stay with one organization throughout their entire careers. Law firm mergers, dissolutions and acquisitions of other firms' practice groups occur with regularity. International mega-firms have been formed, with offices in numerous countries, containing lawyers who are unlikely to meet, let alone discuss confidential matters, even if they share a common language. In this context, the automatic disqualification of the law firm may result in harsh consequences for the lawyer and the firm, without any compelling reason. Further, the firm's clients are likely to find their counsel of choice limited, particularly in specialized areas of the law. The rule that the presumption of shared confidences is conclusive also creates a substantial potential for abuse. A motion to disqualify is an effective litigation tactic

depriving an opposing party of its counsel of choice, and, possibly, driving up its legal fees significantly. This is particularly true in a situation where a client and the challenged law firm have a long-term relationship.

None of these problems detracts from the primacy of preserving "public trust in the scrupulous administration of justice and the integrity of the bar." (*SpeeDee Oil).* But, the disqualification of the conflicted lawyer's current firm is not the sole means to preserve these important values. (*Hoglund*). A client's confidences can be maintained by isolating the lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate *under the circumstances* to protect information that the isolated lawyer is obligated to protect. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Vesting the trial court with the discretion to approve a screen when the head of a public law office is disqualified will permit an evaluation of all relevant circumstances. It is, of course, significant that the conflicted attorney has office-wide supervisory responsibilities, or helps in the formulation of office policy or plays a major role in the hiring, firing and promotion of subordinates. But, in evaluating the effectiveness of any screen imposed, other factors should come into play. For example, the size of the office should be considered, at least to the extent it affects the number of levels of supervision, and, therefore, the ease with which another supervisor can replace the conflicted office head in the current case. Further, the trial court should consider whether the attorneys actually handling the case, and the office files they utilize, are in the same physical location as the disqualified head of the office.

In a motion to disqualify the current law firm because of an attorney's former client conflict, the presumption that the law firm is disqualified should be rebuttable by evidence that the conflicted attorney has been effectively screened.

Remanded.

DISSENTING OPINION BY JUSTICE JONES

I respectfully dissent. The majority's decision reaches far beyond the narrow issues presented. In one fell swoop, this Court precipitously overturns a host of decisions made by careful deliberations by appellate courts over many years and presumes to predict how the Columbia Supreme Court will decide its own rules.

The Court ignores the holding of *SpeeDee Oil*: "The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. . . . Vicarious disqualification is required to assure the preservation of the client's confidences and the integrity of the judicial process." It is not for this court to depart

from this holding. We are not called upon to decide whether an ethical screen or some other lesser prophylactic measure might suffice.

I would affirm.

Answer 1 to Performance Test A

To: Judge Melissa Grant
From: Applicant
Date: July 24, 2007
RE: Carter v. Reston Health, Motion to Disqualify Counsel

Overview

The following memo provides an objective analysis of the legal and factual issues relevant to the motion to disqualify the Plaintiff's Attorney and law firm in the above referenced action. By way of brief overview, the plaintiff is represented by National Center for Health care (NCHC), a nonprofit legal aid organization which provides representation to low income clients in matters related to health care. The NCHC employs Jergens, a staff attorney who was formerly employed by the Coburn firm, which formerly represented the defendant, Reston Health Care. Pursuant to her employment at Coburn, Jergens had access to confidential information regarding Reston as a result of working directly on matters involving Reston. NCHC became aware of this conflict, and has taken certain steps to screen off Jergens from disclosing confidential information she may have learned during her representation of Reston. Reston is now represented by Austen firm, which has filed a motion to disqualify both Jergens and the NCHC from representing the plaintiff.

Legal Analysis

I. Duty of Confidentiality and Imputed Disqualification

When a conflict of interest arises from an attorney's "successive representation of adversaries" in litigation, the fiduciary duty of confidentiality to the clients is "jeopardized." Mambo. As the court noted in Mambo, this duty is essential to ensuring that each client feels free to confide confidential information with their attorney. Therefore, as a basic matter, "an attorney in actual possession of material containing confidential information from a former client may not represent an adverse party without the former client's consent." Mambo. The trial court, therefore, has the authority to disqualify a party's counsel to enforce the ethical standards. Mambo. However, the court must also balance the interests of the duty of confidentiality with the interests of the client whose counsel is disqualified, and may suffer a financial burden, or be the victim of improper tactical abuses of the motion to disqualify simply to harass or delay the client's rights.

In balancing these two competing concerns, the court has used the "substantially factually related" standard. Mambo; Speedee; Hoglund. Where there is no substantial factual relationship between the "subject of the two representations", the court will uphold the client's choice of counsel. Id. Where such a conflict exists, the attorney is mandatorily disqualified, unless some other countervailing factor is demonstrated, as an abusive tactical procedure to frustrate the plaintiff's rights. Id. Further, the court will impute this disqualification to the other attorneys in the firm, absent screening measures taken by the firm, which are discussed below. Id.

A. Substantially Factually Related Matter

A threshold question to determine whether a conflict of interest will be assigned to an attorney who represents two adverse clients in successive representation is whether there is a "substantial factual relationship between the subjects of the two representations." Mambo. This standard is applicable where there is "significant overlap of facts between the two cases." Hoglund. (applying the standard to a judge who had participated in an earlier case, but holding that the standard applies equally to a lawyer). The focus of the standard is to identify those cases where there is a reasonable probability that information was disclosed in the first representation which might be useful to the plaintiff in the second action. Where the moving party is able to demonstrate that a substantial factual relationship between the prior and current representation exists, access to that information by the attorney is presumed, and the disqualification of that attorney is mandatory. Mambo.

In Hoglund, the court considered a case of a judge who had overseen an ex parte examination of the defendant while presiding over a case involving police brutality, and subsequently represented a plaintiff in an unrelated case against the same defendant on an unrelated allegation of police brutality. The court, without deciding the issue, focused on the question of whether the two matters were discreet, were close in time, involved largely different facts. The court presumed in Hoglund that the conflicted attorney had gained confidential information, and presumed that it was substantially factually related, though it did not decide the issue.

In the current case, NCHC and the plaintiff are alleging that Reston Health Care has engaged in discriminatory pricing practices, and has violated their obligations pursuant to their tax status as a charitable organization. While employed at Coburn, Jergens worked directly on matters involving Reston Health Care, and in fact prepared a memo and presentation to the Reston Board of Trustees regarding Reston's obligations as a tax free charitable organization in providing indigent medical services to preserve its nonprofit status. This memorandum would have covered issues and facts directly related to the part of the claim involving the charitable status. Further, given that only three years have passed since Jergens left Coburn, the information she obtained is likely still true and relevant.

Jergens also reviewed contract matters involving Reston during her time at Coburn, which may have involved reviewing billing agreements with insurance companies, bill collectors, and various levels of government. This would give her access to information regarding the pricing practices of Reston, which is also directly an issue in this case. The scope of Jergen's practice regarding Reston while working at Coburn involves issues that are substantially factually related to the current litigation. Therefore, Reston has argued that this entitles them to have Jergens disqualified.

However, Jergens has testified under oath, in camera, that she has not worked for Reston or Coburn in several years. Further, she only spent approximately 10% of her time working on matters involving Reston, and does not specifically remember any specific assignments with Reston other than the memorandum discussed above. Therefore, there is an argument that Jergens is not in fact in possession of any confidential information. This argument is without merit, however, under Mambo and Hoglund, which have both held that possession of confidential information will be presumed if the attorney had worked on substantially factually related matters in the prior representation.

Therefore, the court should rule that because the two matters involving Jergens are substantially factually related, Jergens is disqualified from representing the plaintiff in this action.

B. Abuse of Tactical Motion

The courts have also indicated that even where the information in the matters is substantially factually related, the court should balance the interests of the plaintiff in seeking counsel of their choice, and, as such, should not allow the defendant to use the motion to impede the plaintiff's claim. The court in Mambo noted that the mandatory rule of disqualification applies unless the court finds that "other countervailing factors exist, such as tactical abuse underlying the disqualification memo." As the court held in Hoglund, "a motion to disqualify a law firm can be a powerful litigation technique." (noting that the lawyer for the disputed firm has a formidable reputation in the area of litigation, and "defendants in such cases may find it advantageous to remove him as an opponent").

In this case, the defendant's counsel has stated in their declaration that they are not pursuing this motion for any improper purpose, but solely to preserve their fiduciary rights to confidentiality. They have further asserted in their declaration that they have made attempts to locate alternative counsel for the plaintiff, indicating a desire to have the litigation proceed under different representation. Finally, they have declared that they have raised this issue as soon as was practicable given their knowledge of the situation. If NCHC is disqualified, it will no doubt set the plaintiff's case back, as this is a complex matter of a class action lawsuit.

On the other hand, NCHC has asserted in their declaration that they have also attempted to find co-counsel or alternative representation, but have been unsuccessful in finding anyone to take the case, calling into question the assertions of the defense. And, similar to the facts of Hoglund, NCHC is a formidable opponent in the area of health care litigation, and therefore Reston would gain substantial benefit by removing them from the action, regardless of whether they have access to confidential information. NCHC is a "preeminent national law firm" in the area of healthcare litigation.

However, in the absence of any direct allegations of improper purpose by the defendant, the court should not deny the motion on this basis. Though the matter involves providing indigent health care, it also involves specific issues of contract law and tax law, for which NCHC may not in fact be the most formidable opponent. Therefore, the motion should not be denied on this motion.

C. Vicarious Disqualification

As discussed above, given the substantial factual related nature of this action and Jergens' representation of Reston, the court should rule that Jergens is disqualified from participating in the litigation. However, NCHC has not argued that Jergens should be permitted to participate, but is instead seeking to prevent its own disqualification in the matter on the basis of its efforts to screen off Jergens from any participation in the matter. The state of the law in Columbia courts is somewhat unclear in this regard. Both the State Supreme Court and the federal courts interpreting Columbia law have indicated some willingness to permit this type of ethical wall in the circumstances of successive representation conflicts being imputed to the firm.

The California Rules of Professional Conduct do not address whether an entire firm is disqualified on the basis of a conflict arising from a member of the firm's former client. Mambo. Therefore, the rules of imputed disqualification have been primarily judge made. Id. Traditionally, the Columbia state courts have held that where an attorney has gained confidential information from a former client, there is an irrebuttable presumption that the entire firm is also disqualified. Hoglund. However, this harsh rule has been somewhat eroded in Columbia state courts by the decision in Speedee, where the court noted in dicta that "it need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures." Though the court did not directly indicate that the presumption could now be rebutted with this type of ethical wall subsequent opinions have interpreted the case that way. Mambo; Hoglund. Though the Columbia Supreme Court has not adopted the view of a rebuttable presumption, the federal courts have adopted this view, which is described below.

i. Rebuttable Presumption

In both cases interpreting Speedee, the courts cited policy reasons to justify moving away from the irrebuttable presumption of the old state court decisions. Specifically, the court noted that vicarious disqualification can lead to "harsh and unjust" results. Hoglund. The court noted that such disqualification can work a hardship on both the lawyer and the client. Id. First, in the modern world of lawyers who are more mobile between firms, and law firms which contain hundreds of partners who may never meet each other, an automatic disqualification may result in firms becoming "more reluctant to hire mid-career lawyers." Hoglund; Mambo. Where the lawyers are not even in the same geographic location, the risk of information being disclosed is slight, and the disqualification may "result in harsh consequences. . .without any compelling reason." Mambo. Second, such disqualification is likely to have adverse effects on the client in two ways. Primarily, it will deprive the client of their choice of counsel without justification. Additionally, it will have the effect of preventing lawyers from moving between firms, and may ultimately limit the plaintiff's choice of counsel, "particularly in specialized areas of the law." Mambo. Finally, as noted above, disqualifying the counsel may have the effect of driving up the client's fees in finding alternative counsel, and thus is ripe for abuse as a litigation tactic. Additionally, the ABA model rules are in accord with the position advocated by the 15th circuit, in allowing an ethical wall to prevent total disqualification of the attorney's firm.

Though the federal courts have clearly decided that the presumption is no longer irrebuttable, the precedent is not binding on this court, and as the dissent in Mambo noted, the court in Speedee actually held that the presumption of access to confidential information extends to the entire firm. Mambo. The dissent noted that "vicarious disqualifications required to assure the preservation of the client's confidences and the integrity of the judicial process." Id.

Though the Columbia Supreme Court has not specifically adopted the rebuttable presumption, the federal courts are likely correct in noting that the decision in Speedee casts doubt on the viability of the irrebuttable presumption. Many of the concerns voiced above are implicated in this case, particularly the hardship to the plaintiff in in finding alternative counsel in this specialized area of healthcare litigation. Though Reston has argued that even NCHC is not directly qualified to litigate this case, given their lack of experience in this area of contract and tax law, they are a nationally recognized law firm in the area of health litigation concerning indigent clients, which is primarily within their area of expertise. Disqualifying NCHC from working on a case involving a healthcare provider operating 20 hospitals in the state will significantly limit indigent plaintiffs' ability to seek representation. Further, there is a legitimate issue of whether the plaintiff can find alternative counsel in this matter, as even the defendant's declaration does not assert that any law firm has in fact agreed to take the matter on, only that it would be seriously considered.

ii. Effective Ethical Wall

Recent decisions have indicated that the vicarious disqualification of a lawyer's firm arising from representation of a former client who is now adverse to the moving party is rebuttable if the party can show that they have effectively screened off the disqualifying attorney. In Mambo, the court laid out a number of factors to consider when determining whether an attorney has been effectively screened off. The court stated that the test of whether the steps taken are adequate are to be considered in the context of whether they are timely taken, and are "reasonably adequate under the circumstances." Id.

The court indicated that reasonably adequate steps include having the screened attorney make written assurance that they will avoid communications with other firm personnel or files related to the screened-off matter. Additionally, the firm should issue written notice to all other personnel not to communicate with the screened lawyer regarding the screened matter, and should offer periodic reminders of the screening policy. Such measures should be implemented as soon as possible after the firm knows or should reasonably know of the conflict.

Additionally, the court noted that it is a significant factor whether the screened lawyer has office wide supervisory power, and thus the role in formulation of office policy or hiring and firing subordinates might raise a temptation for revealing confidential information. Finally, the court noted additional factors that might come into play, including the "size of the office, at least to the extent that it affects the number of levels of supervision, and therefore, the ease with which another supervisor can replace the conflicted office head in the current case," and whether the attorneys occupy the same physical space as the disqualified party.

In the current case, there are facts cutting both for and against the disqualification of NCHC despite the attempts to form an ethical wall. First, in support of finding sufficient screening, NCHC put the screening policy into effect as soon as reasonably possible. They have a proper screening mechanism in place to identify conflicts as they arise. Jergens properly disclosed her prior representation when she was hired, and the conflict was identified. When the conflict was brought to the attention of the Executive Director, he immediately issued a written memorandum to the office. This memorandum took extensive measures to protect the case from being affected by Jergens, including taking care to prevent phone calls relating to the case being taken while Jergens was in the office, a locked file cabinet with a strict practice of signing files in and out. All staff were ordered not to discuss the case with Jergens or to provide her with access to the files either purposefully or inadvertently. Finally a password protected electronic filing system was instituted. Additionally, the executive director initially sat Jergens down and discussed with her the policy addressed in the memo, and that she was to observe the terms "scrupulously." The procedures arguably have been effective, as Jergens stated under oath that she has not disclosed any confidential information regarding Reston to

any of her colleagues. She stated that she has only discussed issues involving hospitals' duties to provide indigent care in a general way, careful not to disclose any specific information regarding Reston.

Cutting against finding the wall to have been sufficient, Jergens was never asked to sign an agreement not to disclose information, as was suggested in Mambo. Further, the court noted that the fact that the screened lawyer works in the same geographic location may be a factor. In this case, Jergens works adjacent to the attorney who is supervising the litigation with Reston. Further, Jergens supervises the Project attorney on all other matters, which was also noted as a factor in Mambo. Additionally, the size of the NCHC makes it difficult to replace the screened attorney as a supervisor, because Jergens is the head of the Indigent Health Care Project, which only has two attorneys total in the group. Therefore, despite NCHC having 10 attorneys on staff, Jergens and the attorney handling the Reston litigation work closely together on many matters, and therefore there is an increased risk of inadvertent or intentional disclosure.

This is an extremely close case, given the commendable efforts of NCHC to screen off Jergens and the potential hardship to the plaintiff in this case, balanced against the important goals of client confidentiality and risk of inadvertent disclosure. However, given that Jergens is supervising the work of the Project Attorney, and that their offices are adjacent to each other, the court should rule that NCHC is disqualified from handling this matter. The rule allowing rebuttal of the presumption of disqualification provides sufficient flexibility to accommodate the modern realities of legal employment, but the fact that Jergens has such related confidential information, and the size of operations, the risk of disclosure is too great, and NCHC has not effectively screened off Jergens from the matter, and given the constraints of their operation, it does not seem likely that they can.

D. Conclusion

As discussed above, the motion should be denied on the basis of the presumption that Jergens has access to confidential information based on her having worked on matter substantially similar to those in litigation now, and that disqualification should be imputed to NCHC, despite their efforts to screen Jergens. Finally, there is insufficient evidence that the motion has been submitted for any improper purpose, and therefore should be granted.

Answer 2 to Performance Test A

MEMORANDUM

To: Judge Melissa Grant

From: Applicant

Date: July 24, 2007

Re: Carter v. Reston Health disqualification motion

I. Introduction

You have requested that I write a memorandum analyzing the legal and factual issues raised by the motion by defendant's counsel to disqualify plaintiff's law firm, NCHC. Below is my analysis of these issues, along with my recommendation for how you should rule.

II. Issue presented

National Center for Health Care (NCHC) employs Mallory Jergens, an attorney who has previously been adverse to Reston Health during her employment with another firm. The issue here is whether NCHC should be disqualified as an entire firm from representing Roseanne Carter, an indigent health care patient, in an action against Reston Health for discriminatory and predatory billing practices adversely affecting her and others similarly situated.

III. Analysis

A. Is this substantially related to a matter that Jergens previously worked on with Reston Health?

In order to determine whether the entire firm of NCHC should be disqualified, the threshold issue must be established of whether Jergens herself, and therefore possibly her firm, should be disqualified from working on Carter v. Reston Health because of her previous affiliation with Coburn, Bronson & McQueen ("Coburn").

As the court in Hoglund v. Forsyth (15th Cir. 2001) stated, disqualification of an attorney, and possibly her law firm, is appropriate only if the case on which an attorney previously represented the client is "substantially factually related" to the case where the attorney is now adverse to the client. This standard requires a significant overlap of facts between the two cases. If there is a "reasonable probability that confidences were

disclosed in an earlier representation which could be used against the client in a later, adverse representation," then the court will assume that there is a substantial relation between the two cases.

The current case involves claims of breach of contract, breach of duty of good faith and fair dealing, breach of charitable trust, violation of the Columbia Unfair Competition Act, violation of the Consumers Legal Remedies Act, and unjust enrichment. These charges stem from Reston's care of plaintiff Roseanne Carter at Perkins Memorial Hospital in 2002. She did not have medical insurance but required two stitches in her finger for a cut. She has received bills for over $2400, despite the fact that similar services for an insured patient would be less. In addition, because Reston receives a federal income tax exemption as a "charitable" institution, it is required to operate in furtherance of a charitable purpose.

Some of Jergens' prior work is substantially factually related to the claims in this case. Jergens first represented Reston Health in 1999 in her capacity as an associate at Coburn and did work for Reston until she left the firm in 2004 to work for the NCHC. For the first couple of years, her work on behalf of Reston consisted of reviewing various contracts between the numerous Reston hospitals and its vendors. She would analyze the contracts, make suggestions and then pass those comments on to the partner who would meet or speak with the various hospital administrators. She devoted about 10% of her time working on Reston activities.

The most relevant matter on which she worked was an extensive memorandum that she researched and wrote advising Reston on its obligations as a charitable not-for-profit in terms of its obligation to provide indigent medical services in order to preserve its not-for-profit status under federal and state tax laws. In that memo, which took over a month to complete, she advised the Reston Board to take specific actions relating to its obligations under the tax laws.

That memo is substantially factually related to this case. In that memo Jergens outlined what Reston must do as part of its obligations as a charitable not-for-profit as far as its obligation to provide indigent medical services. Here, Carter is alleging that Reston has not done enough to provide indigent medical services and is not doing what it is required to do as a result of its charitable tax status. As a result, it is appropriate to presume that confidences were disclosed to Jergens in her earlier assignment with her previous law firm, and that she should therefore not be able to work on a case adverse to Reston Health, her former client.

B. Should NCHC be disqualified as an entire firm?

Although Jergens should certainly be disqualified, the law is less clear about whether her entire firm should also be disqualified. The Rules of Professional Conduct of the State Bar of Columbia do not address the vicarious disqualification of an entire law firm

when a member of that firm has a former client conflict. Instead, various court decisions have shaped the rules for vicarious disqualifications.

1. Historical rule and modern trend

Historically, there has been an irrebuttable presumption that when an attorney is disqualified, her entire firm must also be disqualified. This rule was established by Columbia's intermediate appellate courts, as the state Supreme Court was silent about this issue for many years. Recently, however, in Dep't. of Corps. v. SpeeDee Oil Change Sys., Inc. (2001), the Columbia Supreme Court specifically reserved ruling on that issue, indicating that perhaps there is not an irrebuttable presumption after all. Instead, the Court stated that it "need not consider" if a firm could avoid disqualification by setting up effective screening procedures, because the firm in that case had clearly not done so. Hoglund. Therefore, it is possible that the State Supreme Court would allow this presumption of disqualification to be rebutted by an effective screening wall. In addition, the case in which the Court left the rebuttable presumption option open was one where an attorney and his firm were adverse on the same case. The Court recognized that "discrete, successive conflicting representations in substantially related matters" might be less of a threat to the attorney-client relationship. Here, Jergens' involvement with Reston Health was not in the same case; instead, it was several years prior on a related matter. Therefore, it is even more likely that the Court would support a rebuttable presumption in this type of situation.

Two recent Court of Appeals cases have also adopted the rebuttable presumption standard – Hoglund and City and County of Ames v. Mambo Solutions, Inc. (15th Cir. 2004). In addition, other circuits have also held that a firm can rebut the presumption of shared confidences. The ABA Model Rules of Professional Conduct also recognizes that there should be a more lenient application of disqualification rules. Hoglund. While the ABA Model Rules have not been adopted in Columbia and decisions by other circuits are not binding, these decisions may be informative as to the policy reasons behind such a decision.

2. Policy reasons to relax disqualification rules

The court in Mambo outlines the various policy reasons that should be considered in deciding to allow a firm to rebut the presumption that it should be disqualified as a result of the disqualification of a newly hired attorney from work she did at a previous firm. The most emphasis is placed on the fact that lawyers are "increasingly mobile," and tend to move from job to job frequently. The consequence of this is that lawyers are constantly exposed to new clients, and imputing their previous knowledge of confidential information of one client to their entire new firm would be debilitating to firms' ability to take cases.

In addition, there are now many "mega-firms" which have offices in numerous countries,

meaning that many attorneys never interact with other attorneys in their firms, let alone share confidential communications with them. Disqualifying an entire firm would result in "harsh" consequences, both for the firm and for potential clients seeking a firm to represent them. Mambo.

Some firms may also use the irrebuttable presumption as a litigation tactic in order to disqualify formidable opponents. Even if the parties involved do not truly believe that there is a conflict, a firm can move to disqualify another firm on the basis of the irrebuttable presumption of vicarious disqualification in order to eliminate them from the case.

3. Policy reasons to maintain disqualification rules

Although there appears to be a trend toward relaxing disqualification rules for the reasons stated above, it is not certain that this standard will ultimately be adopted. For example, in the SpeeDee decision the Columbia Supreme Court specifically avoided answering the question. While this may indicate that a rebuttable presumption might be acceptable, it could also indicate that the Court was satisfied with the development of the case as of 2001, which required an irrebuttable presumption of vicarious disqualification.

As the dissent said in Mambo, a court overturning many years of precedent by attempting to predict that the Columbia Supreme Court would rule in their favor is speculating and may be incorrect. As a result, it is far from clear whether the Supreme Court would accept the reasoning in Hoglund and Mambo.

4. Balancing the interests of both clients

In deciding whether or not a firm should be vicariously disqualified because of the disqualification of one of its lawyers, it is necessary to balance the interests of the former client whose confidences may be revealed with the interests of the current client who is seeking to vindicate her rights. Mambo. In order to do so, the court must look at the client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Id.

a. Current client's right to chosen counsel

Here, Carter's interest in being able to choose which counsel represents her is in jeopardy. According to Malcolm Richardson, the current Executive Director of the NCHC, NCHC is a nationally recognized, not-for-profit public interest law firm that specializes in policy and advocacy on behalf of low income clients in the health care area. NCHC has filed over 30 state and nationwide class actions in the past 15 years.

Carter's case falls exactly within NCHC's specialty and it is reasonable for her to want them to represent her; she apparently sought out NCHC to represent her because of its reputation.

Reston Health, however, contends that NCHC is not special in its representation of Carter. According to Hugo Brenner, managing partner of the law firm of Austen, James and Eliot, LLP, which is representing Reston Health in this matter, NCHC is not particularly expert in the causes of action presented. Brenner claims that any private firm would have similar expertise in the areas of contract, constructive trust and tax law, and that therefore Carter would not be harmed by being represented by one of those firms instead.

b. An attorney's interest in representing a client

NCHC has an interest in representing Carter, as her case falls into the category of cases that they feel it is their mission to litigate. Jergens is an attorney of the Indigent Health Care Project, which is a part of NCHC. Receiving publicity from this case would help in its effort to receive foundation grants, from which it receives 50% of its funding, and private donations, from which its receives 25% of its funding. In addition, any contingency fees received from this class action would help to supplement the 25% of its funding that it receives from attorneys' fees.

Reston Health, however, would likely claim that there is no particular reason why NCHC must litigate this case. There are probably other health care related issues that are affecting indigents that NCHC may litigate, rather than this case.

c. Financial burden on the client

There could be a financial burden on Carter to be required to replace her disqualified counsel. NCHC is a not-for-profit organization, and it may not be possible to find other representation that would zealously litigate the case for no charge. Carter is an indigent client and would therefore not be able to pay an attorney; the $2400 charge for her medical emergency is already a fee well beyond her means. According to Richardson, NCHC has made "numerous inquiries" with prominent private law firms throughout the state and has not been able to locate a firm to serve as co-counsel. Therefore, it may be very difficult for Carter to find another firm to represent her.

According to Brenner, however, there are other firms that could represent Carter free of charge. Brenner states that he has contacted the managing partners of five prominent firms in the County of Darby who would have "seriously considered" helping Carter with regard to her dispute. If they would indeed take her case, then there would not be a significant financial burden on Carter. Delaying the case further, however, will likely increase her current financial problems with regard to the medical charges.

d. Possibility of tactical abuse

There is no direct evidence of tactical abuse on the part of the defendant. There is no direct evidence in the record that Reston is attempting to disqualify NCHC in order to remove a formidable opponent from the case; it appears that the motion is in good faith and is a result of Reston's concern that its confidential information may be revealed.

However, it is possible that there are tactical reasons for seeking this vicarious disqualification. Although Coburn learned of Jergens' conflict on approximately March 23, 2007, the defendant waited until May 14, 2007 to move to disqualify the firm. As a result, it is possible that the almost two month delay in filing such a motion was not a result of researching the issue, but was instead in response or retaliation to some other aspect of the litigation.

Overall the balance of these factors seems to indicate that Carter has a strong interest in being able to maintain her current counsel and that she would be harmed if the entire firm were to be disqualified from this matter.

C. Was there an effective ethical screen?

If this court determines that it is possible for a firm to rebut the presumption that it should be vicariously disqualified because of the disqualification of one of its attorneys for work she did at a prior firm, the Court must determine whether there has been the timely and effective implementation of an ethical screen to prevent the client's confidences from being revealed to other members of the firm. Hoglund, Mambo. It is possible for a "client's confidences [to] be kept inviolate by adopting measures to quarantine the tainted lawyer." Hoglund.

In Mambo, the Court outlined several procedures that should be implemented in order to have an effective ethical screen. First, there should be something in writing which tells the screened lawyer to avoid any communication with other firm personnel and not to have any contact with firm files or other materials which relate to the matter from which she is screened; firm personnel should also be notified of these policies. In addition, the Court should consider the supervisory responsibilities of the screened lawyer, her responsibilities in the office, the size of the office, where the attorneys and files relating to the screened matter are located, and other factors which relate to the efficacy of the ethical screen. Mambo.

In this case, NCHC followed a very rigorous screening process and did so in a timely manner. According to Richardson, as soon as Jergens was hired by NCHC, she furnished a list of clients for whom she had provided legal services at her former firm. As a result, that information was in NCHC's searchable office conflict database. When Carter contacted NCHC approximately six months ago about the possibility of it representing her against Reston Health, NCHC immediately did a conflict check and

determined that Jergens would have to be screened from the case. Richardson's memo to all staff on January 24, 2007 verifies that this occurred.

Richardson's memo outlines various guidelines that all staff were required to follow in screening Jergens from the Reston case. All staff was required not to talk about the case anywhere in Jergens' presence; all files were stored in a separate, locked file cabinet which Jergens would not have access to; a computer filing system had a password that Jergens did not know. In addition to these instructions to the staff, Jergens testified that Richardson spoke with her personally about the memo and told her specifically how she was to be screened from the case. He told her that she must "observe the terms of that memo scrupulously."

Jergens also testified that she has not had any conversations with anyone at NCHC about the case, and she has not even inadvertently heard any conversations about the case. While she has had general conversations about the law involved in hospitals' obligations to uninsured patients, she has never disclosed any specific information about Reston.

Although the memo and NCHC's adherence to it appear to have been faithful, there are other arguments that indicate that an effective screen may not be possible. First, Jergens is the head of the Indigent Health Care Project and typically supervises the one other attorney that is in that group. Therefore, it may not be possible for her to stay completely removed from the case. In addition, there are only 10 attorneys in the office, which makes it more difficult for Jergens to not see or hear something that is related to the case. Further, all of the files and the attorneys working on the case are in the same office as Jergens and she works in very close proximity with them. Although she has had no inadvertent contact with the files or attorneys working on the case as of yet, it is still possible that such contact will occur in the future.

IV. Conclusion/Recommendation

Although it is not certain how the Columbia Supreme Court will rule on the issue of vicarious disqualification, its recent decision as well as current judicial and societal trends indicate that it is likely that the Court would find that a rebuttable presumption that a firm should be disqualified because of an attorney's disqualification is preferable to an irrebuttable one. Reston's confidentiality interests are strong here, but Carter's interests in effective representation are also compelling. Therefore, a rebuttable presumption is the appropriate standard. NCHC has gone to great lengths to implement a timely and effective ethical screen and there is no indication that Reston's confidences are likely to be revealed. As a result, you should rule that NCHC has overcome the rebuttable presumption that it should be disqualified and allow it to continue to represent Carter in this action.

THURSDAY AFTERNOON
JULY 26, 2007

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

TANYA AND MARK GROSS v. BAKER

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.

TANYA AND MARK GROSS v. BAKER

FILE

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

MEMORANDUM

TO: Applicant

FROM: Robert Popper

DATE: July 26, 2007

RE: **Tanya and Mark Gross v. Baker**

Our clients are Tanya and Mark Gross, children of Claude Gross, a prominent local businessman who recently died. Shortly before his death, while hospitalized and mentally deteriorated, he married his companion, Maxine Baker, and amended his will to leave her most of his property. Tanya and Mark believe that both actions are invalid and do not want Ms. Baker to benefit from taking advantage of Claude's debilitated condition.

Maxine Baker was represented by Rudolph Philmore in an action that Tanya and Mark brought to enjoin their father's marriage to Ms. Baker. I will contact him shortly to see if we can settle these matters prior to filing a lawsuit. Please prepare a letter to Mr. Philmore that persuasively explains that our clients should get their father's entire estate because:

A. The bequest to Claude's first wife Irene is no longer effective; and
B. The bequest to Maxine is invalid; and
C. The marriage to Maxine should be annulled because of Claude's incapacity.

Do not discuss fraud or undue influence. Also, in connection with your discussion of the validity of the bequest to Maxine (Part B above) do not discuss Claude's mental capacity to execute the codicil. Another associate is looking into those issues.

This case will be won or lost on our ability to marshal facts to support our legal position. The ability to weave the facts of our clients' case into our argument and to anticipate the factual arguments that will be raised against our position, therefore, are critical.

Popper & Sayles, LLP
245 Vaughn Drive
Rosslyn, Columbia 22222

TO: File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 19, 2007

RE: Interview with Tanya Gross

Tanya and her brother Mark lost their father 2 weeks ago. Father was Claude Gross, a well-known successful businessman. Relationship between father and children was strained since divorce from mother 10 years ago, but Tanya said it had been improving and would have been restored had their father not been involved with Maxine Baker, who was a continuing obstacle to full reconciliation.

Tanya discovered that right before her father went into the hospital he signed a codicil to his will that left most of his money to Maxine, $10 million of what is likely to be a $12 million estate. In addition, while her father was in the hospital and on his deathbed, Maxine arranged for a marriage license to be issued and staged a marriage ceremony. Tanya believes he was barely conscious. Tanya tried to stop the wedding by going to court, but the "wedding" happened and her father died before the court acted.

Tanya and Mark want to challenge both the marriage to Maxine and the amendment to the will. They believe that their father was "extremely generous with Maxine and she doesn't deserve to have any more than she already got."

Tanya expresses anger over her father's behavior toward her mother during 50 years of marriage. He had numerous affairs, but his affair with Maxine was notorious, made it into the newspaper and was very embarrassing. The breakup with the mother was

tumultuous. Her mother was a quiet but essential partner in her father's business successes and was involved in his best decisions. During the divorce, there was a lot of litigation over who owned what, who would be left with what, and who would get control of which businesses. After two years of litigation, Tanya and Mark persuaded them to settle. As part of the settlement, her mother got the house and its contents, including some expensive paintings, and cash, stock and other assets worth $3 million. Claude also agreed to continue to fund the Gross Family Foundation to increase its assets to at least $7 million and to let her mother decide which charities it would fund. The bitterness from the divorce never faded.

Her father believed that she and Mark should not have taken sides, that they didn't appreciate "the unhappiness their mother inflicted upon me." He told Tanya that she had "ruined me for marriage. I will never marry again. Even though I love Maxine, I will never marry her or any other woman." Maxine was a wedge between the father and his children and grandchildren. Maxine told lies about the family, did not relay phone messages, and sowed discord. Although her father seemed to love his four grandchildren (she and her brother each have two kids), he saw them only once or twice a year.

Before his illness, Tanya last saw her father four months ago. His manner was jaunty, but his health had clearly deteriorated. He did not get up to greet her and his breathing seemed labored. He said that he didn't go out much anymore but that he was lucky that Maxine was there to take care of him. He expressed regret that they didn't spend more time together and said, "Maxine can't stand it when I see you and I would rather not fight with her." He was going to work on it and promised to call more often.

Tanya didn't know about his hospitalization -- he had not notified his children, and Maxine hadn't bothered to call. She found out when a friend who saw him in the Intensive Care Unit (ICU) called. When she entered his hospital cubicle on June 15,

2007, she was stunned. Intravenous lines were in his arms, a tube was in his nose, and he was hooked up to all kinds of machines. His skin was grayish-yellow. A sign nearby read "Fall Risk." A private nurse was with him.

His situation seemed dire. He had a blank look and seemed confused. Tanya spent about 90 minutes with her father, holding his hand. He talked distractedly about his service in World War II, something he never talked about, interspersed with questions about his businesses. He didn't seem to know where he was, what date it was or what was going on. He came around after a while and asked her about her family but he was "in and out, mostly out." The whole time Tanya was there Maxine wasn't, so she had no trouble. Tanya departed, alarmed at his condition. Afterward, she telephoned her brother, Mark, who was out of town, and urged him to come home and see their father.

The next day, when Mark went to visit, his way was blocked by Maxine and her son Edward, who claimed to be Claude's lawyer. They told him that his father didn't want to see him. Mark argued with them and they finally let him go into the room, but his father was asleep. After that, Tanya and her brother timed their visits to avoid Maxine and her son. Tanya often waited in the parking lot outside, where she could see her father's room, and went in only after she saw the others leave.

On June 17, 2007, Tanya brought along one of her daughters. He was happy to see his granddaughter and asked to see her sister. The next day Tanya took both granddaughters and Mark took both of his children as well. Maxine and her son were there, briefly barring them from seeing Claude. Maxine relented after Tanya begged her. The grandchildren were allowed a quick visit after Maxine cautioned them, "No hugs in the ICU." He did not seem to recognize any of them and seemed largely out of it. Tanya asked one of the nurses to call her when her father was in better shape. Later that day the nurse called and told her about the wedding scheduled for a few days later.

The nurse said that she hoped the wedding would take place on “one of his good days” since she didn’t see how he could take part otherwise.

Tanya said the wedding confirmed her worst fears that Maxine would take advantage of her father’s incapacity. She and her brother were determined to prevent it.

Tanya and Mark immediately called Larry Fox, a lawyer they knew, and he agreed to petition the court to name them as conservators for Claude and to block the wedding. He filed papers the next day and the judge appointed a psychologist to report on whether enjoining the marriage was warranted. It wasn’t until two days later that the expert showed up at the hospital and by then the marriage had already occurred. When her father died on July 5, 2007, the court dismissed the petition. Tanya brought the report from the court- appointed expert, Dr. Quint, and it contains excerpts from medical records that he consulted when he went to the hospital.

Tanya and her brother are determined not to let Maxine benefit from what they see as a phony marriage or a sham amendment to the will, especially since their father was so generous to Maxine.

Popper & Sayles, LLP
245 Vaughn Drive
Rosslyn, Columbia 22222

TO: File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 23, 2007

RE: Meeting with Mark Gross

Mark Gross came to the office to confirm that he wants us to represent him along with his sister to challenge both the codicil and the marriage. (We discussed possible conflicts issues with both siblings. Since we do not envision any scenario in which the two siblings would have conflicting interests and they have agreed to the representation, we have agreed to represent both of them.)

Mark's story about the relationships among mother, father, siblings and Maxine Baker is essentially the same as Tanya's. He said that he had reached out to his father numerous times in the past three years and that his father seemed to welcome the communication. They met for lunch three or four times in 2006 and that each time they met he sensed that his father "was getting older, walking slower, speaking slower." The resentment Mark felt toward Maxine and her jealousy in return was a constant barrier to having the kind of relationship he wanted with his father.

He learned about his father's kidney and liver problems about 4 months ago when his father was hospitalized for the first time. He visited him in the hospital when Maxine wasn't there. He said that once his father left the hospital "it was as if Maxine built a fence around him. She wouldn't let us in to see him, claiming that he needed his rest and that he didn't want company. I really regret giving deference to her but after all of these years I didn't want an argument. I thought I was doing what was right for him."

He reiterated Tanya's story about his father's final hospitalization. He feels guilty that he couldn't do more but Maxine and her lawyer son, Edward, actively tried to keep him away. He fully supported his sister's attempt to stop the marriage. "They were preying on an old dying man when he couldn't think clearly."

He said that he met his father's housekeeper at his father's funeral. She told him that for much of the past two months at home his father had been very sick and noncommunicative. She said that Maxine kept friends and family away and did an excellent job taking care of Claude Gross.

Popper & Sayles, LLP

245 Vaughn Drive
Rosslyn, Columbia 22222

TO: Memo to File of Tanya and Mark Gross v. Baker

FROM: Robert Popper

DATE: July 24, 2007

RE: Phone Conversation with Marvin Stevens

I had a phone conversation with Marvin Stevens on July 24, 2007. He is the named executor under Claude's first will and is a lifelong friend of Claude. He had the original in his office and received the codicil hand-delivered by messenger from the law office of Edward Baker one week before Claude died. He told me that Edward is the son of Maxine.

Stevens called Edward right after receiving the codicil. Edward told Stevens that the night before Claude went into the hospital for the second time, Claude told Maxine that he wanted to rewrite his will to be sure that she got the bulk of his estate. According to Edward, Claude was quite sick by then and wasn't sure he had much more time to live. Edward got a call from his mother at 8:00 pm on the evening before the hospitalization asking him if he could write a new will. He agreed, if there was time. Edward got on the phone with Claude and asked him if he was sure he wanted to change his will. Claude said yes. Edward asked if Claude had a copy of his current will and Claude said Maxine would fax it to him immediately. Claude then said that he wanted to give Maxine $10 million, which would leave a few million for his children. He wanted to do right by Maxine and also to be sure that his first wife didn't get any of the money. Claude also said that he had made his children rich through trusts and gifts over the course of their young lives and didn't feel the necessity of rewarding their ingratitude. Edward drafted the codicil

and took it over first thing the next morning, showed Claude where to sign and had Claude's housekeeper and gardener sign as witnesses.

Stevens said he told Edward that all of this surprised him. Stevens said that he had spoken to Claude regularly and that Claude frequently expressed his sorrow over the state of his relationships with his children. Claude was pleased at recent moves toward reconciliation and talked of doing more to regain their affection and companionship. He wanted to be closer with them and particularly with his grandchildren.

Stevens told me that the marriage to Maxine surprised him almost as much as the change of the will. He said that Claude said often and in public that he didn't want to marry again and that he said it in the presence of Maxine. Also, Claude said that he had provided for Maxine by giving her the house and "a nice nest egg on top of it."

The Columbia Times

July 7, 2007

Family Feud Reaches Beyond Grave;
As Gross Lay Dying, Questions About Companion, Competency Swirled

Early evening on June 21, 2007 they gathered at the bedside of legendary Columbia tycoon Claude Gross, who lay in a glass-enclosed cubicle in the intensive care unit of Rosslyn Memorial Hospital.

Wearied by age and illness, Gross, 83, was jaundiced from liver failure; his weakened heart maintained a feeble beat and his kidneys no longer functioned.

Short and pugnacious, the white-haired millionaire and former feisty businessman now seemed shrunken and frail against the expanse of his hospital bed.

He had just two weeks to live, but those who had assembled amid monitors, tubes and other hospital machinery that muggy night hadn't come to say farewell.

They were there to see Gross marry.

His fiancée, Maxine Baker, 69, wearing an elegant pink suit, looked nervous as a judge intoned, "Repeat after me." The wedding ceremony lasted about 5 minutes. There was no cake. The groom stayed behind as his bride headed out for dinner with friends.

With the fate of a fortune estimated at more than $12 million at stake, the issue is whether the wedding was the most wonderful thing to befall him in a decade or the deathbed manipulation of a befuddled man.

His bride and the new friends he had developed say the marriage was his heartfelt desire. The children of his first marriage worry that it was not.

A second act would take on legal consequences after Gross's death. His will was amended to leave the bulk of his estate to Baker with only the leftovers for his children.

It was signed in the shaky and barely legible handwriting of a sick, old man. Skeptical family members question whether he was making his own decisions. They suspect that he was half-delirious and being duped.

The wealth that paid for Gross's lifestyle was of his own making. He built his fortune marketing the unusual inventions of others. His first success, the “Flapjack Shoe,” involved a mechanism that replaced shoe laces with a flap that closed the shoe. The Flapjack Shoe became a fad in the 1950's and, through his partnership with the inventor, he made millions cleverly marketing it.

His estrangement from his wife Irene Hines was particularly bitter and involved allegations of infidelity and public verbal insult. It ended, about 10 years ago, with a divorce, the children estranged from him, the family name tarnished and millions spent on attorneys. Hines ended up with their mansion and many of their mutual friends sided with her.

In the aftermath, Gross found new happiness with a fresh circle of acquaintances, a sort of surrogate family. They said he grew devoted to Baker.

Baker has one adult child, Edward Baker, a well-known corporate lawyer in Rosslyn. Her first husband died in 1997.

After Gross's divorce, he vowed to friends that he would never wed again. But, according to their friends, he and Baker got on well. They traveled abroad and entertained. They lived in a house styled after the Taj Mahal, that he bought in 1999 as a gift for her. The house, which is currently appraised at $2,500,000, according to Rosslyn tax records, was featured in one of his lawsuits when he sued the swimming pool contractor for improperly installing several marble slabs.

But Gross's days of wheeling and dealing were nearing their end. He was admitted to Rosslyn Hospital, on April 7, 2007, where he was sent to intensive care and remained for five days.

"He was pure yellow," said Marvin Stevens, a friend who had known him for years. "It was clear he was not well." His liver was failing, and his kidneys were spent. He began dialysis three times a week, cleansing his blood of impurities. He was stabilized and sent home but returned for his treatments.

He was exhausted much of the time and he was unable to carry on his formerly active social life. Baker told friends and family to stay away to “let him recover his strength.” After several months of this regimen he was back in the hospital.

The wedding was set for the next day.

Tanya Gross filed a petition in the probate division of Columbia Superior Court to stop the wedding.

The court petition asked for an evaluation of his mental status and requested that the judge stop the marriage. The circumstances surrounding the marriage, she said, clearly suggested "that he was clearly incapable of making a reasoned decision."

The court appointed a psychologist to evaluate Gross, but took no immediate action.

The magistrate read a simple civil wedding service. The couple exchanged “I do’s,” slipped rings on each other's fingers, and Gross added: "I love Maxine very, very, very, very much.”

"We all laughed," Maxine said. "It was so cute."
Then the two kissed.

According to one member of the wedding party, they went to Guernsey’s Restaurant, where they showered Baker with flowers.

Baker and Gross were husband and wife for exactly two weeks. Baker said the couple planned a honeymoon for when he got out.

On July 5, 2007, Baker was summoned to the hospital. Gross needed a ventilator to breathe. He was semiconscious and failing. About 10:30 p.m., with Baker and three friends at his side, he died.

Stephen Quint, Ph.D.
Licensed Clinical Psychologist
277 Carly Way
Rosslyn, Columbia

June 25, 2007

The Honorable Jan Cole
Superior Court of Columbia
Rosslyn, Columbia

RE: Petition to Enjoin the Marriage of Claude Gross

Dear Judge Cole:

Upon appointment by the court to render my opinion regarding the mental capacity of Claude Gross, who is hospitalized at Rosslyn Memorial Hospital, I reviewed the medical records insofar as they shed light on the question and also conducted my own psychological examination of Mr. Gross.

My professional qualifications include that I am licensed to practice clinical psychology in this state, I specialize in geriatric care, I am a Clinical Professor of Psychology at Columbia State Medical School, and I have been qualified as an expert witness more than 300 times by the judges of the Columbia Superior Court.

On June 20, 2007, Tanya Gross, daughter of Claude Gross, filed a petition in the Probate Division of the Superior Court to enjoin the marriage of her father to Maxine Baker. Her petition claims that her father was "seriously medically ill and lacked the capacity to make the decision to marry." It described him as "weak and disoriented," "confused about his surroundings and his condition," and "near death and easily subject to manipulation," and quoted from conversations with one or more of the nurses who questioned "whether he was conscious enough to make a choice to marry."

I spent 3 hours at the hospital on June 22, 2007, the day after the marriage ceremony took place at the bedside of Mr. Gross. Before visiting him, I read through the medical records. The records indicated that the medical staff was concerned about Mr. Gross's mental ability to make his own medical decisions.

On June 16, 2007, **Dr. Eduaro Espinoza**, the attending physician, described his physical condition as "...profoundly jaundiced due to the failure of his kidneys and liver, resulting in fatigue and exhaustion. Patient can move only with assistance." Regarding his mental status, "He answers questions vaguely, has difficulty concentrating, and falls asleep easily. On some days, Gross clearly can't make a decision." Dr. Espinoza said "he is also lucid for short periods, particularly after dialysis restores the balance of his fluids." This doctor ordered a psychiatric evaluation.

On June 16, 2007, **Dr. Daniel Rosenblum**, chief of the Department of Psychiatry, conducted a mental status exam to determine whether Mr. Gross was competent to make medical decisions. He recited the medical history that included renal (kidney) failure and long-term underlying liver damage, as a result of which his blood tests

showed electrolytic abnormalities that would impair his ability to concentrate. He described Mr. Gross as “a very sick man with fluctuating mental states over the past week.” He suffers from “cognitive dysfunction that is presumably secondary to and resulting from renal encephalopathy. Renal encephalopathy is an organic brain disorder. It develops in patients with acute or chronic renal failure. Manifestations of this syndrome vary from mild symptoms (e.g., lassitude, fatigue) to severe symptoms (e.g., seizures, coma). Severity and progression depend on the rate of decline in renal function; thus, symptoms are usually worse in patients as renal function declines. The symptoms of this syndrome are readily reversible following initiation of dialysis. However, the beneficial effect and its duration vary. Thus, it is consistent with this diagnosis that Mr. Gross’s cognitive difficulties are now present about 35% of the time, according to the nurse’s observations. During the times of dysfunction he would be incompetent to participate in medical decisions. The rest of the time, I do not feel that the dysfunction is at a serious enough level to render him incompetent. As there is the possibility of further deterioration of his kidney and liver functions, his mental status may diminish, too, and he may have more frequent and severe periods of cognitive dysfunction. For that reason, I recommend frequent mental status examinations over the course of this treatment.”

I observed Mr. Gross on June 22, 2007, the day after the wedding. I saw him a few hours after his dialysis. His prior dialysis was the day before the wedding. He was in the Intensive Care Unit and was being fed through a nose tube and was receiving a constant flow of antibiotics and other fluids intravenously. I interviewed him for thirty minutes and, although he did not make eye contact, I found him to be oriented to person, place and time. He could remember things in a sequential order but was confused as to dates. For example, he did remember that he had married Maxine Baker but thought that the wedding took place three weeks prior rather than the day before I saw him. He thought that I was a court-appointed lawyer and that I had been there last week and my attempt to explain who I was did not dissuade him. He blamed the fact that the court was trying to intervene in his life on his ex-wife wanting to

continue to control him “as she always had.” He was clearly diminished cognitively as a result of his illness but when I saw him he was reasonably alert. He was trying hard to maintain an air of normalcy. He claimed that he was still active in his business and that he had just negotiated a large transaction to conclusion. I had no way to verify whether this claim was accurate.

It is my opinion that Mr. Gross’s physical condition has had a marked effect on his ability to function mentally and that this varies from day-to-day, perhaps even hour-to-hour. At good times, his cognitive powers enable him to focus and interact at a moderate level but at bad times he is unable to do so. It is my opinion that his competence will continue to vary and probably deteriorate if his medical condition worsens.

Respectfully submitted,

Stephen Quint

Stephen Quint, Ph.D.

LAST WILL AND TESTAMENT OF CLAUDE GROSS

I am Claude Gross, of 32 Harbor Court, Cameo, Columbia. This is my Last Will, and I revoke all previous wills and codicils.

1. At the present time my wife is Irene Hines and we have two children, Tanya Hines Gross and Mark Hines Gross.

2. I give all of my automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible articles of a personal nature at the time of my death to my wife, Irene Hines, if she survives me.

3. I give my wife, Irene Hines, Two Million Dollars ($2,000,000), if she survives me. This bequest is to be paid from my estate in cash or in stock of equivalent value as of the date of my death, or a combination of stock and cash, at the discretion of my executor.

4. The balance of my residuary estate after all debts are paid I give in two equal shares to my children, Tanya Hines Gross and Mark Hines Gross, or to their descendants, if either or both do not survive me.

5. I nominate my trusted friend Marvin Stevens to serve as executor of my estate and empower him to exercise all administrative and management powers conferred on an executor under the laws of the State of Columbia and direct that he not be required to post a bond.

IN WITNESS WHEREOF, I, Claude Gross, have signed this, my Last Will and Testament, on the 19th Day of October, 1995.

Claude Gross

Claude Gross

Witnesses:

David S. Klein
David S. Klein
3216 Chesterfield Road

Joanna Kelly
Joanna Kelly
109 Maple Avenue

Cameo, Columbia
October 19, 1995

Cameo, Columbia
October 19, 1995

CODICIL TO THE OCTOBER 19, 1995 LAST WILL AND TESTAMENT OF CLAUDE GROSS

I, Claude Gross of 475 Dean Street, Rosslyn, Columbia, declare this to be a Codicil to my Last Will and Testament dated October 19, 1995.

For the past eight years I have enjoyed the companionship and care of Maxine Baker, a woman with whom I am in love and with whom I share a home.

Accordingly, I hereby amend my Last Will and Testament dated October 19, 1995 as follows:

First, I give all of my automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible articles of a personal nature at the time of my death to my companion, Maxine Baker, if she survives me. She may distribute my personal effects to my children at her discretion.

Second, I give Ten Million Dollars ($10,000,000) to Maxine Baker, to be paid from the assets of my estate.

IN WITNESS WHEREOF, I, Claude Gross, have signed this Codicil on June 14, 2007.

Claude Gross
Claude Gross

Witnesses

Judith Stern
Judith Stern
1519 Wye Street
Rosslyn, Columbia

Dated: June 14, 2007

Stuart Levy
Stuart Levy
27 Blue Hills Avenue
Cameo, Columbia

Dated: June 14, 2007

THURSDAY AFTERNOON
JULY 26, 2007

California
Bar
Examination

Performance Test B

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TANYA AND MARK GROSS v. BAKER

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SELECTED COLUMBIA STATUTES

COLUMBIA FAMILY CODE

Chapter 2. Voidable Marriage

§ 221. Grounds for nullity

(a) A marriage is voidable and may be adjudged a nullity if at the time of the marriage either party lacked mental capacity, unless the party who lacked mental capacity, after coming to reason, freely cohabited with the other as husband and wife.

§ 222. Effect of judgment of nullity

(a) A judgment of nullity of marriage restores the parties to the status of unmarried persons.

(b) A judgment of nullity of marriage is conclusive only as to the parties to the proceeding and those claiming under them.

* * * * *

COLUMBIA PROBATE CODE

Chapter 8. Legal Mental Capacity

§ 810. Presumption of mental capacity

There exists a rebuttable presumption that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

§ 811. Mental incapacity

(a) A determination that a person lacks the mental capacity to make a decision or do a certain act, including to contract, to make a conveyance, to marry, to make medical

decisions, to execute wills, or to execute trusts shall be supported by evidence of a deficit in at least one of the following mental functions:

(1) Alertness and attention, including level of consciousness; orientation to time, place, person, and situation; and ability to attend and concentrate;

(2) Information processing, including short- and long-term memory; ability to understand or communicate with others, either verbally or otherwise; recognition of familiar objects and familiar persons; ability to understand and appreciate quantities; ability to reason using abstract concepts; ability to plan, organize, and carry out actions in one's own rational self-interest; and ability to reason logically;

(3) Thought processes, including severely disorganized thinking; hallucinations; delusions; and uncontrollable, repetitive, or intrusive thoughts;

(4) Ability to modulate mood and affect, including the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may constitute incapacity only if the deficit, by itself or in combination with other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient by itself to support a determination that a person lacks the capacity to do a certain act.

* * * * *

Chapter 10 . Wills and Trusts

§ 102 . Dissolution of marriage; Provisions revoked

(a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved, the dissolution revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former spouse.

(2) Any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian.

(b) In case of revocation by dissolution, property prevented from passing to a former spouse because of the revocation passes as if the former spouse failed to survive the testator.

* * * * *

§ 720. Limitations on transfers to drafters, care custodians, and others

(a) No provision of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

* * * * *

§ 820. Right to elective share

The surviving spouse of a person who dies domiciled in Columbia has the right to a share of the estate of the decedent as provided in this part, to be designated the elective share. The elective share is an amount equal to 30 percent of the value of the estate.

In re Marriage of Sawyer

Columbia Supreme Court (2004)

This is an appeal from an order granting the petition of Charles Sawyer's conservator to annul the marriage of Charles and Lillie Sawyer. Charles was 86 years old at the time of the trial in July 2002. Charles died on October 12, 2003, one month after entry of the judgment of annulment.

Up until August 2000, Charles spent his days at the Alzheimer's Services Center. In August 2000, he was removed from the center because of his disruptive behavior caused by the advance of late-stage Alzheimer's dementia. From then until April 30, 2002, when he was placed in a locked unit in the facilities of the Adult Protective Service, he spent his time at his personal residence.

In February 2001, the probate court appointed Dovie White as conservator for Charles. In appointing the conservator, the court found that Charles was unable to provide for his personal needs, physical health, food, clothing, and shelter; that he was unable to manage his financial resources and to resist fraud and undue influence; and that he lacked the capacity to give informed consent for medical treatment. The appointment of Dovie White was approved by Charles's family and Dr. Norman Quan, his long-time personal physician.

On April 5, 2002, Charles married Lillie Marshall, his lifelong friend. On April 30, 2002, without notice to Lillie, Dovie White arranged to place him in the locked unit of the Senior Assisted-Living Facility. It was not until Charles called Lillie from there that Lillie knew where Charles had been taken. On May 14, 2002, Lillie managed to make arrangements for Charles to return to his home.

Later in May, 2002, Dr. Norman Quan issued a report to the probate court stating that, based on an April 2, 2002 examination, Charles had mild to moderate impairment

regarding alertness, attention, and information processing capability and that his periods of impairment did not vary substantially in frequency, severity, and duration. He opined that, although Charles had dementia, he was capable of giving informed consent to medical treatment and that there was nothing to be gained by placing him in a special care facility.

Also in May 2002, Teddy Kebede, a public health nurse who tendered care to Charles, wrote the court, stating, "Charles lives with his wife Lillie, whom he has known since childhood and whom he married last month. Lillie is a vibrant 80-year-old woman who takes good care of Charles and fills all his needs. When I visited Charles in the Senior Assisted-Living Facility last month, he was distraught. He is much better now that he is back at his home, and he deserves to live out his days at home with the person he loves."

In June 2002, Conservator Dovie White arranged for Charles to be examined by a University of Columbia neuropsychologist, Jeffrey Kixmiller. Dr. Kixmiller interviewed and tested Charles and spoke with Lillie. The conclusions stated in his report are that, although both Charles and Lillie believed Charles was safe and well taken care of at home, neither of them fully appreciated the safety or functional implications of Charles's condition or the increasing needs that would be imposed on both of them by Charles's predictable further deterioration. Dr. Kixmiller found that Charles had mild to moderate dementia, his capacity to make safe judgments and to solve problems was significantly impaired, and that, when confronted by minor stressors, Charles was subject to emotional disturbances. All this, concluded Dr. Kixmiller, made Charles especially subject to safety lapses, coercion, and abuse. Dr. Kixmiller's examination did not address the question whether, on April 5, 2002, Charles had the capacity to marry.

In July 2002, Dovie White filed the instant petition to annul the marriage under Family Code Section 221(a) based on Charles’s lack of mental capacity.

In addition to the foregoing, the often contradictory evidence that the lower court considered in making its order can be summarized as follows:

(a) Dovie White testified that both before and after the marriage, Charles was frequently confused. He did not know when his first wife had died. When Lillie, who, since 2000, had been serving as Charles's paid home health aide two days a week, told Dovie that she and Charles wanted to get married, Dovie advised her to first obtain the probate court's approval because she doubted that Charles understood what getting married meant. At the time, Charles's assets consisted of about $125,000 in cash and a home that was paid for. When Dovie learned of the marriage, she advised Lillie that Charles needed to be placed in an assisted living facility. Lillie resisted, saying she was perfectly capable of taking care of Charles. Dovie never discussed the marriage with Charles.

(b) Rick George, a social worker from Adult Protective Services, testified that, in October 2000, he had been assigned to conduct an investigation into allegations that Charles's money was being misused. He testified that he concluded that no misuse had occurred but that he found that Charles was impaired and incapable of managing his financial affairs. On April 30, 2002, when Dovie White arranged for Charles to be placed in a locked unit of the assisted living facility, Mr. George found Charles to be upset and disoriented. In George's discussions with Charles, Charles never indicated that he had not wanted to marry Lillie.

(c) Lillie testified that she and Charles had been close and constant friends since childhood and that as far back as 2000, soon after Charles's first wife died, Charles had asked her to marry him, and move in with and to care for him because he was sick and afraid to be home alone, especially at night. She said there was never any doubt that Charles knew what he was doing and what he wanted and that she and Charles were very happily married.

(d) John Dorion, Charles's friend of 40 years, testified that he regularly saw Charles about twice a week and had met Lillie in 2000. Charles had told him that he asked Lillie to marry him and that Lillie had at first resisted because she wanted to "think about it." Dorion thought Charles knew what he was doing and what was going on around him. Charles never told Dorion that he did not want to marry Lillie.

In granting the petition to annul the marriage, the trial court found that Charles had deficits in his mental capacity that substantially impaired his ability to understand the obligations and responsibilities attendant upon marriage. This is the correct standard. Family Code Section 221.

The court found that, notwithstanding that Charles and Lillie were happily married, Charles was incapable of taking care of himself on a daily basis. The testimony that he was alert and aware was outweighed by Dr. Kixmiller's neuropsychological assessment. The court found it significant that Lillie was a paid caregiver at the time of the marriage and that she was in a position to exploit her access to him and his dependence upon her to make and shape decisions. The court found convincing the evidence that suggested that Charles did not have the capacity to enter into a marriage.

Determinations of mental capacity are governed by Probate Code Sections 810 and 811, which require at least one statutorily enumerated deficit in mental function that, by itself or in conjunction with other deficits, substantially impairs the ability to understand and appreciate the consequences of marrying. The day of the marriage is the critical date for determination of lack of capacity, but proof of the party's condition before and after that date is admissible for purposes of determining capacity on the day of the marriage. The standard for determining capacity to marry is separate and distinct from the standard for the appointment of a conservator. The question whether one has capacity to marry is applicable even though a conservator has been appointed.

The court below followed the two steps required by Section 811: first, it marshalled the facts it found to establish a deficit in Charles's mental functions (specifically subsection (a)(2) of Section 811, because of his dementia, memory failures and confusion, and inability to manage his financial affairs); and, second, the court found that these deficits impaired his ability to comprehend the consequences of the marriage.

Lillie contends that the court should not have rejected the evidence supporting Charles's capacity to marry and should not have credited the testimony of biased witnesses as to Charles's incapacity on the day of the marriage. That may be true, and, if this court were the court of first impression, we might well have decided otherwise. However, the test is one of substantial evidence that Charles lacked capacity. For example, Dr. Kixmiller's authoritative report of June 2002, within two months after the wedding, that Charles had significant mental, emotional, and behavioral deficits that rendered him especially vulnerable to safety and emotional lapses and that his ability to make decisions was significantly impaired.

The court was entitled to reject inconsistent evidence from Dr. Quan and others based on other evidence that Alzheimer's dementia is a progressive disease that predictably gets worse and does not improve over time. With that premise, the court could have found that Charles was substantially impaired in his ability to make decisions, problem-solve, and understand the consequences of his decisions as well as upon the evidence that Charles's vulnerability to coercion and abuse could further undermine his ability to make decisions.

WE AFFIRM.

In Re Marriage of Vitale

Columbia Supreme Court (1957)

On the ground of his mental incapacity at the time of the marriage, Ralph Vitale was granted a judgment annulling it. Louise Vitale appeals, claiming that the evidence was insufficient to support the finding that Ralph lacked capacity on the day of the marriage. Louise correctly states that the degree of mental capacity at the precise time when the marriage is celebrated controls as to its validity and that if a marriage is contracted during a lucid interval the marriage is valid.

Ralph is a 56-year-old plumber and Louise is a 38-year-old employee of a telephone company. They met in 1952 and started dating. On May 24, 1954, they married. In June, 1954, Ralph entered Agnew State Mental Hospital and, in July, 1954, based on Louise's petition, he was committed to that institution.

Ralph presented numerous witnesses to the unsoundness of his mind. Ralph's son Frank testified that when his father returned in November 1953 from a trip to Europe he had changed. Frank related many instances in which his father talked incoherently, had hallucinations, and believed that television programs and cards in a drug store revealed plots against him. In Frank's opinion, his father was of unsound mind, although he did not show these behaviors every day. He did not see his father on the day of the marriage.

Laura Tharp, who knew Ralph for over 10 years, testified that after returning from Europe Ralph acted very odd, was upset, and heard voices. In August, 1954, when she visited Ralph at the hospital and mentioned the marriage, Ralph said he knew nothing about it.

Dr. Wilbur saw Ralph at his office two days before the marriage. When Ralph admitted that he had cut himself directly over an artery, Dr. Wilbur sent Ralph to Dr. Johnston, a

psychiatrist. Dr. Johnston saw Ralph two days after the marriage. Ralph told him about delusions he had on the boat returning from Europe. Dr. Johnston diagnosed him as suffering from paranoid schizophrenia and described his ability to do abstract thinking as greatly impaired. Dr. Johnston saw Ralph again on June 8, 1954, and testified that Ralph's paranoid schizophrenia had continued from November, 1953.

Louise also presented several witnesses. Ruth Carey testified that before Ralph went to Europe and after he returned, he stated that he would like to marry Louise. Richard Cavitt, a tax consultant and accountant, knew Ralph since 1948 and prepared his income tax returns from data given by Ralph, including in 1953 and 1954. Cavitt testified that during both of those years, Ralph reported income received from plumbing labor, that he clearly and concisely discussed his business affairs and showed no lack of understanding, and that about two weeks before the marriage, Ralph told him he planned to get married. He said Ralph was always lucid in his understanding of business matters.

Louise testified to her acquaintance with Ralph, his courtship, and the circumstances of the marriage. She described no abnormality in his actions. The taxi driver, who drove them from the airport to the wedding ceremony, served as a witness to the marriage, and drove them back to the airport after the ceremony, noticed nothing unusual in Ralph's manner, conversation or answers to the justice of the peace. The justice of the peace who performed the ceremony and his wife, the other witness to it, saw nothing unusual in Ralph's actions.

While Louise's evidence would have supported a finding that Ralph at the time of the marriage had capacity to marry, it does not compel such a finding. The finding of the jury that he lacked capacity is supported by substantial evidence. That no witness for Ralph testified to seeing him on the day of the wedding and witnesses for Louise had, does not mean there is no evidence of mental incapacity on that day. While it is the mental condition on that day that is in issue, that condition may be determined from his

condition prior and subsequent to that day. Louise further contends that the mental defect must be one having a direct bearing upon the particular act which is brought into question and that Ralph's delusions and hallucinations did not have a direct bearing upon the act of getting married. However, the delusions and hallucinations were only parts of the mental defect or derangement. His whole mental condition, those matters included, caused Ralph to have the inability to comprehend the act of marriage.

The judgment is affirmed.

Answer 1 to Performance Test B

Performance Test B

Popper & Sayles, LLP
245 Vaughn Drive
Rosslyn, Columbia 22222

July 27, 2007

Dear Mr. Philmore:

I am representing Tanya and Mark Gross and am writing to you with regards to the dispute over the will of the late Claude Gross. As you know, Mr. Gross was Tanya and Mark's father. I am hoping that you and I can discuss the legal aspects of the dispute to minimize the cost in money and bad blood between our clients. The last dispute over money in the Gross family tarnished the family name and cost millions of dollars in legal fees. It is my hope that we can avoid that result. I know that our clients do not get along well, but I think that we can conduct ourselves as professionals and achieve the proper legal solution.

My analysis of this case is that my clients are entitled to the entire estate under the residuary clause of the first will. I have three specific contentions that compel this result: (1) the bequest to Mr. Gross' first wife Irene Hines is no longer effective; (2) the bequest to Maxine Baker is invalid; and (3) the marriage to Ms. Baker should be annulled because of Claude's incapacity. My analysis of each individual contention is discussed below.

<u>The bequest to Mr. Gross' first wife Irene Hines is no longer effective</u>.

Mr. Gross' last will and testament dated October 19, 1995 created a gift to Ms. Hines. This gift included: all automobiles, furniture, furnishings, household items, clothing, jewelry, and other tangible items of a personal nature. The will also left Ms. Hines two million dollars. The critical provision of this will from our perspective, however, is that Mr. Gross left the residuary of the estate in two equal shares to his children. The children are Tanya and Mark, my clients.

The bequest to Ms. Hines is invalid by operation of law. Columbia Probate Code section 102 revokes all dispositions or appointments of property made by will to the former spouse upon dissolution of the marriage. Mr. Gross and Ms. Hines' 1997 divorce was widely-publicized and particularly messy.

The bequest to Maxine Baker is invalid.

On June 14, 2007, Mr. Gross executed a codicil to the October 19, 1995 will. This codicil purported to amend the October 19 will. The codicil left all of Mr. Gross' personal belongings to your client, Ms. Baker. This codicil appears validly executed, but I believe that the gift to Ms. Baker is invalid by operation of law. Columbia Probate Code section 720 states that "No provision of any instrument shall be valid to make any donative transfer" to "a person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the document."

The codicil attempts to make a donative transfer of personal property and money to Ms. Baker. The provision is invalid, however, because the will was prepared by Ms. Baker's blood relative, her son Edward Baker. According to Marvin Stevens, the executor of Mr. Gross' first will, Mr. Baker contacted him and requested that Mr. Stevens fax him a copy of the first will. Mr. Baker then apparently drafted the codicil and brought it to Mr. Gross for execution. Because Mr. Baker is Ms. Baker's son, the gift is invalid under section 720.

Please note that I am not discussing whether Mr. Gross had the mental capacity to execute the codicil. His capacity at the time might be an issue, but I am prepared to make a legal statement on that matter.

You might argue that the rule should not apply since Mr. Baker may not have known the probate code since he is a corporate lawyer. The law, however, makes no such exceptions. You might further argue that a gift made to a blood relative of the person who drafted the will creates only a presumption of invalidity. This statement is true in some jurisdictions. Columbia law, however, does not create such a presumption and includes no exception to strong statement of invalidity.

The marriage to Ms. Baker should be annulled because of Mr. Gross' incapacity.

The validity of the Baker-Gross wedding is important because Columbia Probate Code section 820 allows a surviving spouse to take an elective share equal to 30% of the value of the estate. The estate has a current estimated value of 12 million dollars. Thus, the elective share, if appropriate, would allow your client to claim 3.6 million dollars.

Columbia Family Code section 221 states that a marriage may be annulled if at the time of the marriage either party lacked mental capacity, unless the party after coming to reason, freely cohabitated with the other as husband and wife. Section 222 states that the effect of an annulment is to restore the parties to the status of unmarried persons. If Ms. Baker is an unmarried person, she is not entitled to take any part of Mr. Gross' estate.

According to Columbia Probate Code section 810, there is a rebuttable presumption that all persons have the capacity to make decisions. According to case law, however, that presumption may be overcome upon a demonstration that the person had "deficits in his mental capacity that substantially impaired his ability to understand the obligations and responsibilities attendant upon marriage." In re Marriage of Sawyer. A determination of substantial impairment may be based on deficits that are statutorily enumerated by section 811. These deficits include problems with (1) alertness and attention, (2) information processing, (3) thought processes, and (4) the ability to modulate mood and affect. In determining whether the deficit is substantial, section 811 further provides that the court may consider the frequency, severity, and duration of periods of impairment.

The determinative date to consider with regard to the substantial impairment is the date of the marriage. In re Marriage of Vitale. While that day is the one at issue the condition may be determined from the person's condition prior to and subsequent to that day. Based on the evidence that I have gathered, I believe that it is clear that Mr. Gross had deficits in his mental capacity that substantially impaired his ability to understand the obligations attendant to marriage. The determination of a person's mental capacity is extremely fact intensive. Please bear with me as I discuss the reasoning behind my conclusion.

Note that section 221 creates an exception to annulment if after the marriage the couple are freely cohabitants as husband and wife. It is unlikely that any court will find that Mr. Gross and Ms. Baker freely cohabitated as husband and wife. Mr. Gross died just two weeks after the wedding. He died in the hospital, and there is no evidence that he left after being married.

Source of lack of mental capacity: renal encephalopathy

Mr. Gross' lack of mental capacity likely stems from a physical ailment. According to the court-appointed psychologist, Dr. Stephen Quint, Mr. Gross suffers from renal encephalopathy. This disease is an organic brain disorder. It develops in patients with acute or chronic renal failure, and it results in cognitive dysfunction ranging from mild to sever symptoms. Dr. Quint suggested that the severity and progression of the symptoms depend on the rate of decline in renal function and that the symptoms are usually worse in patients as renal function declines.

Near his death, Mr. Gross was on dialysis three times a week because of his failing kidneys. He also died just two weeks after the wedding. Under these circumstances, it stands to reason that Mr. Gross was very sick at the time of the wedding. Furthermore, based on Dr. Quint's analysis, this level of sickness would indicate that Mr. Gross suffered from severe cognitive dysfunction.

I will address specific evidence of mental capacity likely stemming from renal encephalopathy below. The following examples mirror section 811's factors for consideration of mental capacity.

Alertness and attentiveness

Section 811 suggests that deficits to a person's alertness and attention can demonstrate a person's lack of mental capacity. The statute suggests that this category includes level of consciousness; orientation to time, place and person, and situation; and ability to attend and concentrate.

There is ample evidence of Mr. Gross' lack of alertness and attentiveness. My client Tanya Gross reported that on June 15 she visited her father. Her father had a "blank look and seemed confused." Her father did not know what date it was or what was going on. On June 17 Tanya Gross reported that her father did not seem to recognize his grandchildren, even though he seemed to love them. Mr. Stevens even indicated that Mr. Gross had told him that he wanted to be closer to his children and grandchildren. Dr. Quint visited Mr. Gross on June 22, 2007, the day after the wedding. According to Dr. Quint, Mr. Gross was confused on dates. He believed that he had married your client three weeks earlier than the day before the visit. These incidents seem to highlight a problem with alertness and attentiveness before and after the marriage.

I suspect that you will point out that the day in question is not prior to or after the marriage, but instead on the date of the marriage itself. As noted above, In re Marriage of Vitale suggests that evidence of prior and post mental capacity is admissible to determine capacity on the date in question. I further suspect that you will point out that Dr. Quint's report indicated that Mr. Gross was "reasonably alert" when he saw him on June 22. Since this is just one day after the marriage, this fact might indicate that Mr. Gross was alert for his wedding.

While you make a good point, it is important to note that June 22 was the day of Mr. Gross' dialysis. Furthermore, Dr. Quint reports that he visited just a few days after dialysis. Dr. Quint's report indicates that the symptoms of Mr. Gross' disease are readily reversible following initiation of dialysis. Therefore, Mr. Gross was at his most alert in the hours after dialysis. His alertness on that day was not necessarily indicative of his typical state. The wedding occurred the day after his dialysis. By that time he might have been very sick.

This deficit in alertness and attentiveness prevented Mr. Gross from recognizing the consequences of entering into marriage. He could not even recognize his grandchildren, let alone contemplate marriage. He was also unaware of dates and time. He could not recall that he got married the day before rather than three weeks ago. A person with such limited mental capacity cannot have understood the consequences of entering into such an important legal relationship.

Information Processing

Section 811 states a deficit in attention processing, which includes short and long term memory, ability to communicate with others, recognition of objects and familiar persons, and the ability to plan and reason logically, may indicate a lack of capacity.

There are several instances that indicate Mr. Gross lacked the ability to process information. When Mr. Gross was undeniably lucid, he mentioned to many people that he would never marry again. His daughter reported this statement as well as Mr. Stevens, Mr. Gross' lifelong friend. Mr. Gross even went as far as to ensure that Ms. Baker was taken care of financially, since he gave her a house and a "nice nest egg on top of it." Although Mr. Gross affirmed his love for Ms. Baker, he indicated that his first marriage had dissuaded him from ever attempting marriage again. As you may recall, his first marriage ended in a bitter divorce. It is therefore surprising that even with this strongly held conviction Mr. Gross would decide to get married anyway. This dramatic change in decision may be evidence of a man who has lost his capacity to reason logically.

Further evidence of Mr. Gross' lack of capacity comes from his housekeeper. Mark Gross met her at the funeral where she reported that Mr. Gross had been noncommunicative for the past two months. This inability to communicate was noticed by other individuals as well. Dr. Quint indicates that Dr. Espinoza noticed that Mr. Gross had difficulty concentrating and answered questions vaguely. Furthermore, Dr. Espinoza noted that Mr. Gross has trouble making decisions. It is surprising therefore that Mr. Gross would make such a dramatic decision, one that had gone against 10 years of strongly held conviction.

I suspect that you will argue that people can and do reasonably change their minds. You are probably right in this regard. This specific case, however, raises some strong questions. People often change their minds, but it is unusual that they would choose not to tell their friends or family. Tanya Gross found out about the wedding from a nurse. If Mr. Gross wanted to be closer to his children, it seems that he would have likely informed them of this important decision personally. Furthermore, it is surprising that Mr. Gross did not personally speak to Mr. Stevens regarding the codicil. Mr. Gross was allegedly lucid enough to speak to Mr. Edwards on the phone, but he never reached out to his lifelong friend Mr. Stevens.

The most likely reason for Mr. Gross's decision to get married was that he lacked the capacity to understand his actions. Getting married was certainly a step that Mr. Gross took seriously, and it is unlikely that he would have taken it at all. If he chose to take it, it is unlikely that he would have done so without informing his friends or family. This dramatic change in his opinion is likely attributable to his deficit in information processing, which suggests that he lacked capacity for marriage.

Thought processing

Section 811 provides that a deficit in thought processing can be evidence of mental incapacity. Such a deficit includes hallucinations and delusions.

There is evidence of delusions. Dr. Quint indicated that Mr. Gross believed that he was a court-appointed lawyer. Mr. Gross thought that he had met him last week and had to be persuaded that he was a new person. Mr. Gross further blamed the court for trying to intervene in his life and said that his "ex-wife" was always trying to control him. This incident indicates that Mr. Gross may have suffered from a thought processing defect.

Ability to modulate mood and affect

Section 811 provides that a deficit in the ability to modulate mood and affect may be indicative of a lack of mental capacity. Such evidence includes the presence of pervasive and persistent or recurrent states of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances. There is less evidence of this deficit than the others. One indication of his deficit may be a report by Tanya Gross that her father expressed regret that he didn't spend more time with his daughter. He cited Ms. Baker's influence. This resignation seems surprising for a man described as "a former feisty businessman." Furthermore, Mr. Gross apparently never wanted to see his children, at least according to your client. This rejection from a man who wanted to be close to his children is surprising. His lack of desire to see his loved ones may be an indication that he lacked the ability to modulate his mood.

It is clear that Mr. Gross lacked the ability to say no to Ms. Baker. Given Mr. Gross' statements of wanting to be close to his family, his actions are particularly surprising. Because these actions are out of character, it is likely that Mr. Gross' inability to modulate his mood had a substantial impact on his understanding of marriage. He was particularly susceptible to Ms. Baker's suggestions. This susceptibility was likely a result of his sickness and mental deficit.

Conclusion

I have relisted some of the factors that I believe demonstrate Mr. Gross' lack of capacity to enter into his marriage. As noted above, the deficits in mental functions must substantially impair his ability to understand marriage. The discussion of specific facts indicating a lack of capacity give many examples of how his deficits may create a substantial impairment. Specifically, there were times that he did not recognize his grandchildren. He also believed that the court-appointed psychiatrist was a court-appointed lawyer that he met last week. Mr. Gross spent ten years strongly denying his interest in ever marrying again. He further went out of his way to provide for Ms. Baker outside of his will. His sudden change of heart was out of character and unexpected. It is likely that such a change was induced by his medical condition. Consequently, I

believe that a court will find that Mr. Gross lacked the mental capacity to enter into marriage. Because the marriage is null, the court will award the residuary of the estate, in this case all of it, to my clients.

I hope that I have persuaded you that my analysis is correct. Please contact me with your views so that we may discuss this case. Again, let me reiterate my faith that we will be able to resolve this dispute without the negative publicity and problems that has eroded our clients' relationship.

Sincerely,

Applicant

Answer 2 to Performance Test B

To: Mr. Rudolph Philmore
From: Applicant
Date: July 27, 2007
Re: Tanya and Mark Gross v. Baker

Dear Mr. Philmore:

As you are well aware, Tanya and Mark Gross, the children of Claude Gross, are contesting Ms. Maxine Baker's intentions to benefit from the will of the late Claude Gross. Claude executed his initial will in 1995, when he was still married to Irene Hines. As you will undoubtedly agree, that portion of that will that created a gift to Irene Hines has been statutorily revoked, due to the divorce between Claude Gross and Irene Hines. Shortly before his death, Claude also executed a codicil that left much of his estate to Maxine. However, since the one who drafted the will was Maxine's son, Edward Baker, the Columbia statutes will not permit a gift to be given to a relative of the person who drafted the instrument. However, even if the will is valid, Maxine would take 30% of Claude's estate through her elective share rights. However, and I hope you will agree with our analysis, is that Claude's illnesses made him unable to have the necessary capacity to consent to the marriage. Therefore, Claude's children, Tanya and Mark, ought to inherit his estate. However, Claude hardly left Maxine bereft. He left Maxine significant assets, including their house and a nice nest egg on top of that, that Mark and Tanya do not challenge.

(a) The bequest to Claude's first wife Irene is no longer effective.

A codicil will revoke a gift from a previous will if it purports to distribute the same assets as contained in the will. This codicil does so, distributing much of the money in Claude's estate as well as the personal property (listed in greater detail below) although we will argue below that it is not a valid codicil. So if the codicil is valid, Irene will not take any of Claude's property. Yet, even if the codicil is deemed invalid, Irene will not take her share of Claude's estate.

Under Columbia Wills and Trusts Code, section 102(a), "if after executing a will the testator's marriage is dissolved, the dissolution revokes. . .any disposition or appointment of property made by the will to the former spouse." In the 1995 will, Claude left Irene $2 million if she survives him as well as all of the furniture, furnishings, household items, clothing, jewelry, and other tangible items. Claude divorced Irene in 1997. Therefore, under section 102, the gift to Irene was revoked. There is an exception in section 102 that a will could expressly provide otherwise and allow the gift to the divorced spouse. However, no such intention was present in Claude's 1995 will.

Under section 102(b), when a gift is revoked by dissolution, the property does not pass to the former spouse, but instead passes as if the former spouse failed to survive the

testator. Thus, the gift to Irene would enter into the residuary, which belong to Tanya and Mark Gross.

(b) The bequest to Maxine is invalid.

Columbia Wills and Trusts Code section 720 limits transfers to drafters and others: "No provision of any instrument shall be valid to make any donative transfer to any of the following. . .(2) a person who is related by blood or marriage to. . .the person who drafted the instrument." Marvin Stevens, a lifelong friend of Claude and the executor under Claude's first will, spoke to Edward Baker after Stevens received the codicil a week before Claude's death. Edward described the circumstances that led up to the creation of the codicil and these circumstances indicate that it was Edward, son of Maxine, who drafted the will.

According to Edward, Claude had told Maxine that he wanted to rewrite his will. Claude received a call from Maxine at 8:00 pm before Claude went back into the hospital, asking Edward if he could write a new will. Edward then spoke personally to Claude and asked him if he was sure he wanted to change his will; Claude responded yes. Maxine then faxed over a copy of Claude's current will. According to Edward, the will reflected the instructions that Claude had wanted in terms of the gifts. Edward then drafted the codicil and took it over first thing the next morning. Although Edward did not sign the will himself, he clearly drafted it. Thus, because Edward is related by blood to Maxine, his mother, the codicil will be invalid under section 720.

(c) The marriage to Maxine should be annulled because of Claude's incapacity.

Grounds and effect of judgment of nullity of marriage

When a marriage is null, it restores the parties to the status of unmarried persons (Columbia Family Code section 222). If the marriage is deemed to be valid, the surviving spouse has the right to an elective share of the estate, equal to 30 percent of the value of the estate (Columbia Wills and Trusts Code, section 820). Thus, the issue of whether Maxine and Claude's marriage is valid will determine whether Maxine has a right to the 30% elective share of Claude's estate (over $3 million) or does not receive anything beyond what Claude has already given her.

A marriage is voidable "if at the time of the marriage either party lacked mental capacity, unless the party who lacked mental capacity, after coming to reason, freely cohabitated with the other side as husband and wife" (Columbia Family Code section 221). There is no question about Maxine's capacity, just Claude's, but that is sufficient grounds to nullify the marriage. Nor does the exception apply here, as Claude remained in the hospital after their marriage, and never returned home to freely cohabitate with Maxine. While they may have had plans to cohabitate together once Claude got out of the hospital (Maxine indicated in the Columbia Times article that they planned their honeymoon for when he got out), they never did manage to do so.

Standards for mental capacity

There is a rebuttable presumption that all persons have the capacity to make decisions (Columbia Probate Code section 810). Thus, it is presumed that Claude has the capacity, unless enough evidence can be marshaled to prove otherwise. However, there is clearly enough evidence to find that Claude did not have sufficient capacity, at the time of his marriage, to consent.

The standard for mental capacity "shall be supported by evidence of a deficit in at least one of the following mental functions:
(1) Alertness and attention, including level of consciousness; orientation to time, place, person and situation; and ability to attend and concentrate
(2) Information processing, including short and long term memory, ability to understand or communicate with others, either verbally or otherwise; recognition of familiar objects and familiar persons. . ."
(3) Thought processes, including severely disorganized thinking; hallucinations; delusions. . ."
(4) Ability to modulate mood and affect, including the pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear. . .that is inappropriate in degree to the individual's circumstances." (Columbia Probate Code 811 (a)).

To at least some degree, Claude exhibited all four of these traits, as will be discussed below. However, the most important one appears to be Claude's level of alertness and attention.

"A deficit in the mental functions may constitute incapacity only if the deficit, by itself or in combination with other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." (Columbia Probate Code 811 (b)). Thus, if the deficit of one of the above four mental functions significantly impacts Claude's ability to understand and appreciate the consequences of his marriage to Maxine, it will constitute incapacity. When analyzing mental impairment, the court may consider the "frequency, severity and duration of periods of impairment." (Columbia Probate Code 811 (c)). The courts readily use this standard, as in In re Marriage of Sawyer.

As noted above, the critical moment to analyze Claude's incapacity is "at the time of marriage" (Columbia Family Code 221), a fact that has been emphasized in the cases; "the day of marriage is the critical date for determination of lack of capacity;" Maxine and Claude got married on June 21, 2007. A marriage is valid if "contracted during a lucid interval." (Vitale). Nevertheless, courts are willing to look both in the past and after the marriage to determine capacity, finding "proof of the party's condition before and after that date is admissible for purposes of determining capacity on the day of the marriage" (Sawyer), a finding echoed in Vitale.

Although I will analyze Claude's mental functions below, it is important to note that one looks at the "whole mental condition" (Vitale), and not just examines these factors independently.

Claude's alertness and attention level probably began to deteriorate when he began experiencing kidney problems, about 4 months ago. Dr. Daniel Rosenblum, chief of the Department of Psychiatry and thus an expert in this field, indicated that renal (kidney) failure leads to electrolytic abnormalities that would impair Claude's ability to concentrate. A patient with chronic renal failure, as Claude started to experience, develops renal encephalopathy, an organic brain disorder. Manifestations of this syndrome vary from mild (lassitude, fatigue) to severe symptoms; severity and progression depend on the rate of decline in renal functions; thus, symptoms are usually worse in patients as renal function declines. Thus, Claude may have been experiencing some of the milder functions a couple of months prior to his death; Claude's housekeeper indicated that he had been very sick and noncommunicative. As these conditions worsened, Claude became progressively unable to be alert and pay attention. However, Claude would have better moments, particularly after dialysis, which readily reverse the symptoms of renal encephalopathy. However, the beneficial effect and its duration vary.

When Tanya saw Claude on June 15, 2007 at the hospital, Claude had a blank look and seemed confused, indicating a loss of his ability to concentrate. Claude talked distractedly about his service in WWII, an unusual topic of conversation for him, thus indicating that he was confused as to his orientation of time. He interspersed this discussion of WWII along with questions about his present-day business, indicating both that he was confused as to his orientation to time as well as that he was unable to focus on one topic, indicating he had a limited ability to concentrate.

On June 16, Dr. Rosenblum conducted the mental status exam on Claude to determine his competency. At this time, he estimated Claude's cognitive difficulties were present at about 35% of the time, where he would be incompetent to participate in medical decisions. Again, however, it is important to note that as Claude's renal problems became worse, his level of competency would decrease due to the renal encephalopathy. The wedding itself did not occur until June 21, 5 full days for Claude's health and mental capacity to deteriorate further. Even an attending nurse noted a few days later that Claude had his good days and bad days.

On the same day, Dr. Eduardo Espinoza examined Claude and noted that Claude was fatigued and exhausted. He found Claude to not be alert, as he answers questions vaguely, has difficulty concentrating (one of the factors in the alertness and attention analysis), and falls asleep easily. Espinoza also reiterated the notion that dialysis did help Claude remain lucid for short periods.

On June 17, Claude apparently had one of his better days, as he recognized his granddaughter and asked to see her sister, indicating that his information processing, including his ability to recognize familiar persons, was working well.

On June 18, however, he did not seem to recognize either Tanya or Mark, or their children, indicating that his ability to process information through recognizing familiar persons, was lacking.

On June 21, Claude and Maxine got married. Claude appeared "shrunken and frail," indicating that his renal and liver problems were continuing. His previous dialysis session was the day before the wedding. The wedding ceremony lasted a mere 5 minutes, and Claude did not need to say anything on his own, merely repeat after the judge who conducted the ceremony. Thus, the ceremony itself sheds little light on whether it was one of his good or bad days. However, Claude did comment "I love Maxine very, very, very, very much;" his repetitive use of the word "very" may indicate that his thought processes were disorganized, as the statutory definition indicates "repetitive" thoughts are an indication that his thought processes became muddled.

On June 22, an expert, Stephen Quint, examined Claude. This was but a day after the wedding and also a few hours after his dialysis, so Claude should have been about as close to the best state of mental health as he was capable of at this time. And, as it was just a day after the wedding, it provided a window of what Claude was capable of at the time of the wedding. Here, Quint found that Gross was oriented as to person, place and time, thus indicating some alertness and attention. However, Quint's conclusion is at odds with some of the details he divulged. Claude believed that Quint was a court-appointed lawyer who had been present last week. However, Quint had never before seen Claude; this, this incident indicates Claude's inability to recognize familiar persons, a failure of information processing. Moreover, Quint's attempt to explain who he was did not dissuade him, thus indicating Claude's inability to reason logically (information processing) and a delusion (a failure of thought process). Furthermore, he indicated that he was still active in his business and that he had just negotiated a large transaction to the conclusion; however, there is no evidence to support the notion that he was still involved to this degree in his business. Thus, this is again a failure of information processing and thought processes.

Claude was confused about dates, although he could remember things in sequential order. Nevertheless, his information processing was suspect at this time. He believed that he had married Maxine three weeks prior, while the wedding was just a day before. This indicates that his short term memory (information processing) was in poor shape, as he did not slearly remember the timing of a wedding that occurred but a day before.

Again, however, it is important to recognize that when Quint examined Claude, it was but a day after the wedding, the critical time to examine his lucidity. Moreover, Claude had his dialysis just a few hours before Quint examined him. Nevertheless, even when

examining Claude when Claude was in relatively good mental shape after the dialysis, Claude exhibited severe problems in information processing, thought processes, and alertness and attention. But when the wedding occurred, it was a full day after Claude's last dialysis session, not just a few hours. Additionally, the wedding was in the early evening, which increased the period of time from his previous dialysis session to the wedding.

Thus, it is quite likely that at the time of the marriage, Claude likely suffered from a deficit from either information processing or thought processes that prevented him from having the requisite capacity to consent to the marriage.

Claude's unwillingness to marry

Claude also exhibited a strong unwillingness to marry again after his bitter divorce from Irene. Thus, it is suspicious that he would overturn a long-held belief by choosing to marry Maxine, and so provides a strong ground that Claude suffered from a defect in one of his mental functions. According to Stevens, Claude stated often and in public that he didn't want to marry again and that he said it in the presence of Maxine. In fact, his statement appeared in the Columbia Times article when he vowed to friends that he would never wed again. He also told Tanya the same thing, in strong words: "Even though I love Maxine, I will never marry her or any other woman." He had been with Maxine for a long time; his feelings towards her remained strong throughout the years they were together. This provides evidence that he would not suddenly change his mind and choose to get married.

Claude's desire to renew relations with his children

Claude also expressed a desire to get closer to his children. Although they had been estranged for a period of time, Stevens indicated that Claude frequently expressed sorrow over the state of his relationships with his children and was pleased at recent moves toward reconciliation and talked of doing more to regain their affection and companionship. Both children also indicate that they felt similarly. Also, even though relations with the children were strained at times, those difficulties did not extend to the grandchildren, a sentiment which Stevens found that Claude echoed; he particularly wanted to be closer with his grandchildren.

Naturally, Edward Baker will disagree, noting that Claude would still leave a few million for his children, and that he had made his children rich through trusts and gifts; Claude felt that they had treated him with ingratitude. However, part of their strained relationship was in fact due to Maxine, who tried very hard to keep them apart. Maxine prevented them from visiting Claude, told lies about the family, and refused to relay phone messages; her actions made it very difficult for Claude and his children to have a relationship. In fact, Claude even admitted as such, because he chose not to fight with Maxine because she couldn't stand it when Claude saw his children. Nevertheless, Claude did want to try to repair the relationship.

Thus, it could be viewed as a symptom of lack of mental capacity that he would suddenly change his will to exclude his children and grandchildren from the bulk of his estate.

Other cases

Other cases indicate that the court is willing to find a lack of mental capacity in situations where the mental capacity is less extreme than in this case. In Sawyer, the court found that Charles Sawyer did not have sufficient capacity to enter into the marriage because he was substantially impaired in his ability to make decisions, problem-solve and understand the consequences of his decisions. As in this case, the court relied heavily on expert doctors to determine his mental capacity.

In In re Marriage of Vitale, Ralph was deemed to not have sufficient capacity to marry even though some of the time he clearly exhibited a desire to marry his spouse before he became sick on a trip which substantially injured his mental capacity. Another friend noted that he was always lucid in his understanding of business matters. Nevertheless, the doctors declared that he suffered from paranoid schizophrenia and believed that his ability to do abstract thinking was greatly impaired, one of the factors above. The analysis is very fact-sensitive, but court placed great weight on these experts and other observers and found that he lacked capacity to get married.

Conclusion

Though this is a close case and it is possible that Claude might have had the capacity at the time to get married, it is likely that the time from his dialysis was too great for him to have necessary capacity.