California
Bar
Examination

Performance Tests
and
Selected Answers

February 2005

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains two performance tests from the February 2005 California Bar Examination and two selected answers to each test.

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

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TUESDAY AFTERNOON
FEBRUARY 22, 2005

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

SANDRA CASTRO v. TOM MILLER

SANDRA CASTRO v. TOM MILLER

INSTRUCTIONS

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

Law Offices of Mariah Malone

98 Prentiss Street, Suite A

Palo Verde, Columbia 83013

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

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

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

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

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

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

Palo Verde Police Report

CASE NO.: 2004-97531

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(1) REPORT TYPE:

Hate Crime_____ Gang-related_____ Accident xxxx

Cited & Released_____ In Custody_____

(2) LOCATION OF EVENT/CROSS STREET:

Intersection of Willow & Oak

(3) SUSPECT:

Name Russell, Bryon Address_____

M/F M Race W Birth Date____ Height____ Weight____

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

Hair Color____ Facial Hair____ Complexion____ Appearance____

(4) VICTIM:

Name_____ Address_____

M/F____ Race____ Birth Date____ Height____ Weight____

Sexual Assault____ Domestic Violence____

Phone #_____ Col. Drivers License #_____

Hair Color____ Facial Hair____ Complexion____ Appearance____

(5) REPORTING PARTY:

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

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

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

Hair Color____ Facial Hair____ Complexion____ Appearance____

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

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

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

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

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

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

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

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

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

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

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

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

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

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

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

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

NARRATIVE/STATEMENTS/PHYSICAL EVIDENCE/ADDITIONAL INFORMATION

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

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

COLUMBIA DEPARTMENT OF MOTOR VEHICLES
CAPITOL CITY, COLUMBIA

DRIVER LICENSE SEARCH REPORT

DATE: February 5, 2004 TIME: 10:35

REQUESTING AGENCY: Palo Verde Police Department

INFORMATION PROVIDED:

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

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

IDENTIFYING INFO:

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

LICENSE STATUS: Valid

RESTRICTIONS: None

CONVICTIONS:

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

FAILURES TO APPEAR: None

ACCIDENTS: None

Columbia Insurance Company

Peninsula Office

Claims and Adjustment Department

MEMORANDUM

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

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

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

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

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

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

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

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

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

Prepared report. Waited to hear from possibly injured party.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PALO VERDE MEDICAL CENTER ADMITTING FORM:

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

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

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

Dictated but not read

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

Direct Billing Statement of Account

Date: February 15, 2004

Account No.: 83187

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

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

Balance Due: $250

TUESDAY AFTERNOON
FEBRUARY 22, 2005

California
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Performance Test A
LIBRARY

SANDRA CASTRO v. TOM MILLER

LIBRARY

Table of Contents

SELECTED COLUMBIA VEHICLE CODE PROVISIONS

§ 17150. Liability of Owner

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

§ 17151. Limitation of Liability

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

§ 21200. Rights and Duties of Bicycle Riders

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

§ 21950. Right-of-Way at Crosswalks

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

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

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

within any unmarked crosswalk at an intersection.

§ 23152. Driving Under Influence

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

SELECTED COLUMBIA BOOK OF APPROVED JURY INSTRUCTIONS (BAJI)

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

3.50 Comparative Negligence Defined

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

5.13 Yield Right-of-Way--Intersection

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

5.40 Influence of Alcoholic Beverage--Driver

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

5.41 Influence of Alcoholic Beverage--Circumstances to Consider

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

13.51 Liability of Owner--No Issue as to Permission

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

13.52 Liability of Owner--Contested Issue as to Permission

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

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

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

Armenta v. Churchill

Supreme Court of Columbia, 1954

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

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

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

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

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

The judgment is affirmed.

Osborn v. Hertz Corporation

Columbia Court of Appeal, 1988

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

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

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

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

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

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

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

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

The judgment is affirmed.

Allen v. Toledo

Columbia Court of Appeal, 1980

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

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

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

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

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

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

The judgment is affirmed.

Green v. Otis

Columbia Court of Appeal, 1979

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

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

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

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

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

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

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

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

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

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

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

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

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

The judgment is reversed.

Answer 1 to PT - A

1)

February 22, 2005

Dear Attorney:

As you know, this firm represents Tom Miller with respect to Ms. Castro's (Castro) complaint for personal injuries. At this time, we believe it would be helpful for the parties to assess the strength of their respective positions and entertain the possibility of settlement. In furtherance of this undertaking, we have prepared the following statement of facts and statement of Mr. Miller's (Miller) position of the matter. Based on the analysis detailed below, Miller is willing to make an offer of settlement. The details of Miller's offer are contained in this letter.

Statement of Facts

On February 2, 2004, Miller gave Bryon Russell (Russell) [sic] returned to the 24-7 Gym and discovered that Russell's car would not start. Russell had an important appointment regarding a job he was trying to obtain and needed to get to his appointment. As such, Miller gave Russell permission to borrow his car for the purpose of attending a job interview but asked that Russell return the car by 7:00 p.m. that night. At the time Miller entrusted Russell with the car, Miller did not know that Russell had previously plead [sic] guilty to drunk driving.

Unbeknownst to Miller, Russell's meeting was at a bar and while there Russell endulged [sic] in a few beers. Thereafter, without Miller's permission, Russell decided to run a personal errand before returning Miller's car. This personal errand was in the area of the Leland University. While running this personal errand, Russell was engaged in an accident with Castro.

The accident occurred around 5:00 p.m. at the corner of Willow and Oak. At this corner there is a yield sign for those turning right, but it does not require a full stop. As you probably know, this is a tricky intersection because it has [a] large utility pole partially blocking view and the bike lane runs alongside of the road. Russell [w]as slowing to round the corner traveling about 10 miles an hour when Castro darted out from the sidewalk into the crosswalk. Although Russell attempted to stop to avoid the accident, Castro's appearance in the road was so sudden that he could not stop the vehicle. Russell struck Castro[,] causing her to fall from her bicycle. Russell stopped the car and aided Castro. Castro indicated that her arm and leg hurt so Russell took Castro to the hospital to get her treatment.

Castro sustained superficial lacerations to her leg and arm and was released from the medical center with ointment to treat her scrap[e]s. Castro also incurred some bruising. Castro's total medical bills amount to $250. Castro's bicycle was also damaged in the accident[,] causing about $150 damage. Thus, Castro's total actual damages are $400.

The police investigated the accident and found that there was insufficient evidence to charge Russell with any fault and the investigation was closed. Castro subsequently filed a personal injury claim alleging two causes of action: (1) liability based on permissive use under vehicle code section 17150; and (2) negligent entrustment. Miller denies all liability and contends that Castro's negligence also contributed to the accident.

Analysis of Ms. Castro's Claim

Cause of action for permissive use under section 17150 of the Columbia Vehicle Code

Section 17150 of the Columbia Vehicle Code provides that when an owner gives his permission to another to operate his vehicle, the owner is liable for any death or injury to person or property resulting for the negligence or wrongful act of the driver. Thus, there is no doubt that under this statute, Miller is vicariously liable for Russell's negligence if it occurred within the scope of the permission granted to him. However, Miller contends that Russell's use of the vehicle exceeded the permission granted and therefore Miller is not liable for Russell's negligence.

Russell's Use of Tom's Vehicle Exceeded the Scope of Permission Granted

There are many ways that "permission" can be defined. However, courts have applied the "minor deviation" rule finding that use is permissive so long as the deviation is minor in nature. Green. However, as you know, Miller contends that Russell's deviation was not minor and therefore was beyond the scope of the permission granted. Miller granted Russell permission to use his car to get to a job interview. That was it. Miller did not grant Russell permission to run personal errands or to drive while intoxicated. Miller did not know that Russell would be driving the car to a bar for the meeting or that he would be drinking before returning the car. As such, Russell's engagement in drinking before driving and using the car for personal errands substantially deviated from Miller's permission granted. As you know, pursuant to vehicle code section 23152, driving while under the influence is unlawful. As such, there is no way that Miller's permission would have included permission for Russell to break the law.

BAJI 3.52 says that if the jury finds that Russell did not have permission to use the car at the time of the accident that the jury must return a verdict in favor of Miller. As discussed above, Russell did not have permission to use the car for the personal errand. As such, should this case go to trial, we will ask that the judge instruct the jury as to BAJI 3.52, in which case a jury will find Miller not liable.

Alternatively, if the court finds there was permission, Miller will ask the judge to instruct a jury as to BAJI 13.53[,] which provides that if the use of the vehicle deviates substantially b[e]yond the scope as to either time, place or purpose, the jury may reli[e]ve the owner of liability for the permission. As discussed above, it is Miller's contention that Russell's use was was [sic] substantially beyond that permitted. Miller did not authorize the personal errand or the drinking and driving. As such BAJI 13.53 is appropriate and the jury will have no choice but to find in favor of Miller.

Police Investigation Closed Because there was Insufficient Evidence to Cite Russell

Also, as you know, the police thoroughly investigated the accident. After interviewing witnesses and inspecting the scene the police were unable to formulate a sufficient bases [sic] upon which to cite Russell. Also, it is unlikely that Castro will be able to make out a claim that Russell was drunk because Castro herself admits that he was not driving erratically or slurring his words. Further if Russell was drunk as Castro contends, why would she have accepted a ride to the medical center from Russell[?] Castro must seriously evaluate how this fact will be viewed by the jury. Castro's acceptance of a ride from Russell coupled with the police's decision not to cite Russell severely undermines Castro's argument for liable [sic] on Russell's part.

Thus, if Russell was not negligent and was not violating the law, then Miller cannot be vicariously liable.

Cause of action for Negligent Entrustment

Under the common law tort of negligent entrustment, anyone who entrusts his vehicle "in the hands of a driver whom he or she knows or, from the circumstances, is cha[r]ged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by that driver, provided plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness["]. Osborn.

As you know, Miller was unaware of Russell's prior conviction for drunk driving. Miller was only aware that Russell had received a couple speeding tickets.

Tom was not required to investigate Russell's driving record

Castro contends that Miller had a duty to investigate Russell's driving record before entrusting him with the car. However, the law has imposed no such duty on a private individual loaning his car to a friend. In fact, the Columbia Court of Appeal has not even imposed such duty upon rental car companies who routinely rent cars to drivers. Osborn. In Osborn the rental car agency, Hertz, rented a car to defendant who had been convicted of drunk driving on two occuasions [sic] and had his license revoked. Hertz only asked that

driver [to] present a driver[']s licence. It did not inquiry [sic] into the driver's driving history. Had it done so it would have discovered the drunk driving convictions. The court found that it would be burdensome to require the agencies to check the driving records of every driver it rents a car to and therefore found that it had no duty to investigate the driver's driving history. Osborn.

Thus, if a rental car agency who routinely rents cars out has no duty to investigate, surely a private citizen loaning a car to [a] friend has no duty. Similarly because it would be burdensome on a rental company to check driving history, it would be exponentially more burdensome for a private individual who is not familiar with such things to run such a check.

There are two cases where the Columbia courts of appeal has [sic] imposed liability for negligent entrustment where the drivers had bad driving histories. However those cases are distinguishable for the case at hand. In the Allen case the court imposed liable [sic] for negli[g]ent entrustment because a father knew that his son had been involved in three accidents prior to loaning him the car. There the court found that a reasonably prudent person with knowledge of the son's driving record would not have entrusted him the car. In Allen there was a father and son, so of course the father was clearly aware of his son's driving record. That is not the case at hand. Miller is not a close friend of Russell and cannot be held to have an intimate knowledge of his driving record.

The Green case is similarly distinguishable on its facts. In Green, a car deal[er] had allowed a driver to take a car out for a testdrive without checking for license or driving history. While out on a testdrive, the driver was arrested by the police for outstanding traffic warrants. The dealer subsequently recovered the car. Later, the driver sought to testdrive the same car ago [sic]. After persistence the dealer allowed driver to testdrive the car. While out on the testdrive, driver was involved in a head-on collision killing the other driver. In Green, the court found that where the owner "routinely" entrusts automobiles it owes a duty of ordinary care and skill in entrusting the car. Because of the dealer's knowledge of the outstanding warrants, it was negligent in entrusting the car. Here, Miller is not in the business of "routinely" entrusting cars – he is not a dealer – and he was not aware of any warrants for Russell's traffic violations. As such, our case is factually distinct from Green. In addition, the Green case was decided in 1979 and the Osborn case was decided much more recently in 1988. Therefore the Osborn case better reflects the state of Columbia law on this issue.

Russell's Drunk Driving Record is Not Admissible

Castro will not necessarily be able to get into evidence Russell's drunk driving conviction. According to the Columbia Supreme Court in Armenta, this will only be relevant if the court finds that Miller knew of it. Further, if Miller is found vicariously liable for Russell's negligence, the driving record will similarly not be admissible. In Armenta, the defendant admitted vicarious liable [sic] for the negligence of its employee and plaintiff

sued for the alternative theory of negligent entrustment. The court found that if liability is established vicariously, there is no material issue to which the driver's driving record would be relevant. As such, it could not be admitted into evidence. In Armenta, the driver's record was far worse than Russell's. The driver in Armenta had 37 traffic violations and had been convicted of manslaughter. All of these facts were known to the owner of the car at the time it was entrusted. The case at hand is care [sic] less severe and Miller had no knowledge of drunk driving. As such, under Armenta, it is unlikely that Castro will be successful in getting the conviction admitted.

Russell was not Drunk When the Car was Entrusted

Russell was not drunk when Miller entrusted the car to him. While it is true that Miller and Russell share[d] a pitcher of beer a couple hours before the accident, Russell was not drunk or intoxicated. As BAJI 5.41 indicates, "one is not necessarily under the influence of an alcoholic beverage as a result of consuming one or more drinks. The circumstances and effect must be considered." This will be a fact for the jury to decide.

Here, the facts weigh in favor of the fact that Russell was not drunk when entrusted with the car. He did not rise to the level of legal intoxication which requires that his "physical or mental abilities are impaired to the extent that such person is not able to drive a vehicle in the manner that a person of ordinary prudence would [d]rive under the same or similar circumstances.["] BAJI 5.40. Russell was on his way to a job interview. It is highly unlikely that he was impaired because the reasonable person does not attend a job interview drunk. This further supports Miller's belief that Russell was not intoxicated. Given the strong case law support and instructions that would be given to a jury, we are confident that a jury would find that Miller did not negligently entrust his vehicle to Russell.

Ms. Castro was Contributorily Negligent and Therefore her Damages Recovery Will be Reduced

Even if a jury were to find that Russell was negligent and Miller thereby is vicariously liable, such liability will be reduced by the fact that Castro was also negligent in causing the accident.

As you know, the state of Columbia adopts comparative negligence. As such, we will ask that the judge read the jury BAJI 3.50 which provides that "Comparative negligence is negligence on the part of the plaintiff, which combined with the negligence of defendant, contributes as a cause in bringing about the injury. Comparative negligence, if any, on the part of the plaintiff does not bar a recovery by the plaintiff against the defendant, but the total amount of damages to which the plaintiff would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the plaintiff."

Here, Castro had a duty as a cyclist to abide by all the vehicle code provisions applicable to drivers of vehicles. Section 21200. Also because Castro was crossing the

crosswalk like a pedestrian, she is also subject to the obligations imposed on pedestrians. Pedestrians have a duty to use due care for their safety and shall not suddenly leave a curb or other place of safety and run into the path of a vehicle. Section 21950(b).

Here, Castro did not even look before darting into the crosswalk. Witnesses to the accident can confirm this fact. Because she darted into the crosswalk without looking, she violated vehicle code section 21950. Castro's breach of duty care is further shown by the fact that she is familiar with the intersection. Thus, she knew that it was a tricky intersection that required her to exercise additional care for her safety. Castro failed to do so and as a result Russell was not able to stop in time to avoid the accident. In fact, Castro admits that she saw Russell coming. Thus, it remains a mystery as to why she didn't get out of the way. Castro's violation of this statute contributed to her negligence and therefore she will not be permitted to recover in full.

Ms. Castro's Injuries and Damages are Minimal

Castro's medical records indicate that she sustained superficial lacerations of the leg and arm and bruises. There were no fractures and the injuries are not permanent nor permanently disabling. Castro's medical bills amount to only $250 and damage to her bike is estimated at only $150. Castro has suffered no lost wages. Thus, Castro's actual injuries are only $400.

This was a minor accident and Castro's own doctor has indicated that her injuries were "superficial". Castro's demand of $15,000 is more than 30 times her actual damages. Castro's pain and suffering for "superficial" injuries are not that great. There is no doubt that a jury will not find Castro's injuries warrant a 30 times multiplier. Thus, Castro must be realistic about what she will be able to obtain, if anything, if this goes to trial. She must also take into account the additional costs associated with going to trial. Further, Castro must take into account that whatever figure she believes she can realistically recover at trial, that number will be reduced proportionally to her negligence. Thus, her recovery will be even lower. Further, keep in mind that any vicarious liability imposed is limited by statute. Section 17151.

Offer to Settle

Based on the foregoing, Miller is willing to offer Castro a total of $5,000 in settlement of her entire claim against Miller, including any claim for pain and suffering. We believe that this is a very generous offer[,] especially given Castro's contributing negligence. Thus, we hope that your client will give this offer very serious consideration. Please let me know no later than March 5, 2005, whether Castro wishes to accept this offer. If Castro does not accept the offer by March 5, 2005, Miller is prepared to take this matter to trial.

Sincerely,

Mariah Malone, Esq. END OF EXAM

Answer 2 to PT - A

2)

LAW OFFICES OF MARIAH MALONE
98 Prentiss Street, Suite A
Palo Verde, Coliumbia 83013

February 22, 2005

Plaintiff's Counsel
Address

Re: Castro v. Miller
DOA: February 5, 2004

Dear Plaintiff's Counsel:

As you are aware, my client, Mr. Tom Miller (Miller) has declined your client's (Castro) offer to settle this case for $15,000.

In this letter I outline my arguments against your client's allegation that my client is negligent for the accident between your client and Mr. Bryon Russell (Russell) for (1) the permissive use of an automobile and (2) negligent entrustment of the vehicle. In the interests of settlement, I would like to offer your client $5,000, which would include compensation for her injuries, property damage, and any pain and suffering as a result.

As you are aware, our answer affirmatively sets forth the allegation that your client was comparatively negligent and that Russell's use was beyond the scope and permission granted by my client. Let me first turn to the issue of permissive use of an automobile, followed by our allegation that its use was beyond the scope and permission granted, and finally the issue of your client's negligence. I will then turn to the issue of negligent entrustment.

Permissive Use of an Automobile

As you are aware, according to Columbia Statute Section 17150, a motor vehicle owner is liable and responsible for injury to a person or property resulting from a negligent or wrongful act or omission in the operation of a motor vehicle by any person using or operating the same with the permission, express or implied, of the owner. Col. Stat. Sec. 17150. The word "permission" has been determined by the courts to mean a few things. There is (1) the "initial permission" rule that if a person has permission to use an

automobile in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties, is a permissive use; (2) the "minor deviation" rule that use is permissive so long as the deviation is minor in nature; and (3) the "conversion" rule that any deviation from the time, place, or purpose specified by the person granting permission is sufficient to take the owner outside of the statutory liability. Green v. Otis. However, in Green the permission exceeded the scope and was treated more like a theft.

In our case, Miller gave Russel[l] permission to use his car for the sole purposes [sic] of meeting someone who was attempting to help him get a job. Miller did give Russell permission to use his car and under rule #1, any use while in his possession during that time would constitute a permissive use. Under rule #2, any minor deviation would still be considered permissive use. Under rule #2, any minor deviation would still be considered permissive if it is minor. However, Miller will argue that although he gave Russell permission to use the car to drive to a meeting to get a job and then drive back[,] Miller did not know where the meeting would take place and did not know that Russel[l] would be driving around otherwise. Therefore, Miller will argue that the permission exceeded the scope of driving to a job meeting and back.

However, even if permission was given and not outside the scope of the permission granted, Miller's liability as an owner is limited to $15,000 for property damage injury to one person. Col. Stat. Sec. 17151. However, as discussed below, your client's contributory negligence will reduce any recover[y] to her in proportion to the amount of negligence attributable to her, as defined under Col. Jury Instruction 3.50.

Comparative Negligence of Castro

As stated above, Columbia Jury Instructions provides for a plaintiff's recovery to be reduced in the event plaintiff is determined to be comparatively negligent.

In this case, Castro was comparatively negligent when, according to the Palo Verde Police Report[,] Castro admitted to riding her bike along the bike path on Oak Avenue and entering the crosswalk at the intersection of Oak and Willow when, just "as she entered," she looked to her left and "immediately" saw the vehicle that hit her. This evidence supports the statement that Russell gave to the police officer that "as he approached the crosswalk a cyclist 'suddenly darted' in front of his car and that he was unable to stop in time." Further, this evidence supports the statement that the witness gave to the police officer that "the cyclist did not stop before she entered the crosswalk." The witness further stated that she believed Russell applied his brake lights and was slowing to approximately 20 mph before he entered the turn and that he was unable to stop in time. Additionally, the witness stated that Castro was probably behind the guardrail and that she was not visible to the driver until she actually entered the crosswalk, again, "without stopping."

The evidence supports our contention that Castro was negligent in that she entered the

crosswalk, knowing that there was also a guardrail that could block her view and vehicle driver[']s view, without looking for oncoming traffic and that she merely darted in front of traffic. Col. Stat. Sec. 21950(b) states that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard." Col. Stat. Sec. 21950(b). Although Castro was riding a bike, she was on the sidewalk and attempting to cross a pedestrian crosswalk; therefore, she would be considered a pede[s]trian for the purposes of this statute. Further, cyclists have all the rights and are subject to all the provisions applicable to the driver of a vehicle. Col. Stat. Sec. 21200. That being said, common sense would provide that Castro had the right to look for vehicles that were approaching and unable to stop for sudden movements of others.

If it weren't for your client's negligence in not looking for traffic before entering a "blind" intersection before darting into the crosswalk, your client would not have been injured. Additionally, your client was riding a bike without a light, near dusk, and was wearing dark clothing, all of which may have contributed to her injury.

Therefore, a reasonably jury [sic] could find in favor of defendant 100%, or would reduce your client's recovery by approximately 50%, due to the fact that she was probably at least 50% at fault.

As to your second cause of action, it is my opinion that your client will not prevail under a negligent entrustment theory, my reasons for which are stated below:

Negligent Entrustment

Negligent Entrustment due to knowledge of driving record:

The tort of negligent entrustment requires demonstration of actual knowledge that the driver is incompetent or knowledge of circumstances which should indicate to the vehicle owner that the driver is incompetent. Allen v. Toledo. Liability for negligent entrustment is determined by applying general standards of negligence, and ordinarily it is for the jury to determine whether the owner has exercised the required degree of care. Allen.

The evidence in our case shows that Miller had no knowledge of Russel[l]'s previous drunk driving conviction. He was, however, aware that Russell had two speeding tickets and was afraid of losing his license. Allen is distinguishable because in that case the father knew for a fact that his son's driving record was poor and that it consisted of three accidents within a two year period, and the fourth accident was only caused three weeks after his last injury accident. In our case, Russell confided that he had two speeding tickets, not accidents. However, Russell did not tell Miller about a previous DUI and Miller had no reason to believe he had such a record.

Therefore, Miller was not negligent in entrusting Russel[l] with his car based on knowledge

of his driving record.

Negligent Entrustment due to failure to further question or investigate driving record:

Although Miller was informed about Russell's prior speeding tickets, he was not informed of his prior DUI and does not have a duty to inquire further into his driving record if there were no circumstances surrounding the reason to ask further questions. In Osborn v. Hertz Corporation, the court held that an ordinary prudent car rental agency was not obligated to ask its customers for information that has no useful purpose. Osborn. In that case, a driver who had been twice convicted of drunk driving and that [sic] his license had been suspended in the past, presented a valid driver's license in order to rent a car from Hertz. There was no evidence in that case to show that the driver was unfit to drive and therefore, Hertz did not have to inquire into his driving record relating to drunk driving convictions.

Because a rental car company has no duty to inquire into the driving record of a licensed driver, a lay person should not have a greater duty to inquire into the driving record of a friend or acquaintance before he lends his car, especially, if there were no circumstances surrounding the need to question. Russell's car would not start and Miller offered to lend him his car after he expressed his disappointment and stress by the fact that he would be unable to meet who was going to help him find a job. There were no odd circumstances that would have alerted Miller to be concerned about his past drunk driving record. Therefore, there was no need to investigate further. This was a good [S]amaritan offering and lay persons should not have to be subject to inquiring into personal driving records of those who do not obviously pose a threat to the public. Miller had no reason to believe that Russell would get drunk and drive, especially since he was going to meet someone regarding a job and then was going to return back by 7:00[;] that was only a little over 2 hours after he lent him his car.

Further, in Green, a used car dealer was held responsible for not inquiring if Dietrich had a valid license; however, the court only held that ordinary care and skill on the part of a used car dealer requires that the dealer make inquiry of persons wishing to testdrive the dealer's cares [sic] whether such persons are duly licensed drivers. Green. It did not hold the dealer responsible for not inquiring into the driving record of a testdriver. This case further supports our contention that Miller had no duty to inquire into the driving record of Russell. Moreover, Miller did not doubt Russell was a licensed driver because Russell stated that he was "concerned" about losing his license. A licensed driver would not say he was concerned about loosing [sic] his license if he didn't have a valid license. Therefore, Miller appropriately had enough information that he needed to safely and non-negligently lend Russell his car.

Miller was not negligent in not inquiring into Russell's driving record further.

Negligent Entrustment if Person was Intoxicated:

Your client has alleged that Russell was going too fast and that she thought he had been drinking. However, your client's statement to the police contradicts this statement. Your client told the police officer that she did not observe slurred speech or other indications of alcohol impaired behavior. In fact, she stated that he was calm, and well groomed. Had she smelled alcohol on his breath, as she later mentioned she did when getting into the car with him, she would have mentioned that to the police officer. She failed to mention this important fact to an officer of the law, which casts doubt on her later contrived story that she believed Russell may have been drinking. In my opinion, I do not think a jury would take too well to this.

However, even if Miller should have been aware that he was handing his keys to a person who may consume alcohol (that is, if he knew that Russell had a prior DUI record), the circumstances surrounding the lending of his car would not lead Miller to believe Russell was intoxicated or impaired to the point where lending his car would be negligent.

Further, Col. Jury Instruction 5.41 holds that one is not necessarily under the influence as a result of consuming one or more drinks. Therefore, even if Russel[l] had one or two drinks to the point where maybe your client had smelled the presence of alcohol, the mere smell and the fact he may have consumed some alcohol does not render him automatically impaired. Your client's statement to our investigator admits that she accepted a ride to the hospital from Russell and that she did not notice anything erratic in his driving or behavior. This would support our contention that Russell was not intoxicated or impaired by any means.

Further, the police report stated that Russell took your client to the emergency room himself. Additionally, the interview of Russell by our investigator reveals that Russell waited at the hospital after dropping off your client for approximately 30 minutes and then returned later after trying to find a phone to call Miller. A person who had been drinking and was intoxicated would not have offered to take an inured victim to the hospital or even go into the hospital where nurses and other staff would be able to smell alcohol on his breath. Further, a person who had been drinking would not have returned to the hospital approximately an hour later if he had been intoxicated. I believe a jury would tend to believe this fact and determine that Russell was not intoxicated.

Therefore, Miller will not be liable under negligent entrustment to a "potentially" intoxicated person.

<u>Injury Must be Proximately Related:</u>

Moreover, it is further held that one who entrusts his motor vehicle in the hands of a driver whom he or she knows or, from the circumstances, is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by that driver, provided that the plaintiff can establish that the injury was proximately caused by the

driver's disqualification, incompetency, inexperience or recklessness. Osborn v. Hertz.

The injury occurred when your client suddenly darted out from the sidewalk into the crosswalk. Evidence will show that Russell had slowed down (yielded) before entering the turn area. Both Russell and the witness attest to this fact. The witness, as stated above, believes she saw the brake lights illuminate just before the turn and that Russell was not able to stop in time because your client came from behind the rail and entered the crosswalk without stopping. Russell also admits that he was paying attention to traffic, noting no traffic, turned his attention back to what was in front of him as he slowed to approximately 10 mph before making his turn and that it was at that time that he saw your client enter the crosswalk on his [sic] bike. Further, the fact that there was damage to his car, and your client's injuries were slight, tends to show that the impact was not severe[;] therefore, the speed was probably slow and appropriate for the area.

Therefore, all of this evidence tends to refute that any intoxicating impairment had anything to do with the accident. Even if Russell were looking to his left for any oncoming traffic and hit your client, his negligence would be due to his inattention, not to anything relating to intoxication. Further, an intoxicated person would probably not have slowed down to make the turn. The witness will admit that Russell did slow down and the injury to your client and the lack of damage to his car would again support our contention that he was driving slow. Moreover, when Russell reported the accident to Miller, Miller did not make any comment regarding the smell of alcohol and a reasonable person would probably have attempted to ascertain whether intoxication could have anything to do with the accident or a reasonable person would have tended to smell the presence of it, especially if your client claims that she smelled it on Russell. So, why didn't Miller?

Admissibility of Evidence of Prior Record

Your client may attempt to introduce into evidence the Dept. of Motor Vehicles Driver License Search Report, which includes a conviction for DUI in January of 2003, over one year ago. However, the probative value of this report will probably be outweighed by the likelihood of prejudice in that the jury may improperly infer that Russell had been negligent or reckless (and intoxicated) in this accident. Col. Evid. Code Sec. 352 excludes such items if its probative value is far outweighed by likelihood of prejudice. Evidence of involvement in a prior DUI is inadmissible when its purpose is solely to prove intoxication (and, therefore, negligence) in the accident in question. Allen.

Therefore, because the report will be prejudicial, your client will most likely not be able to use it. Therefore, you[r] client does not have sufficient evidence to prove that Russell was negligent or that Miller knew about it or should have know [sic] about it.

Furthermore, even if Miller had known about the prior DUI, it's [sic] use would be irrelevant in this matter anyway. According to the case Armenta v. Churchill, a Supreme Court case, evidence of defendant[']s 37 traffic violations was inadmissible because it was irrelevant

to the case at hand. It was irr[e]levant because Alece Churchills' unqualified admission that Dale Churchill was her agent and employee at the time effectively removed from the case the issue of her liability for the tort[,] because if Dale Churchill was negligent, Alece Churchill, as his employer, was negligent. Armenta.

Therefore, if it is conclusively established that Miller is liable for the negligent acts of Russell under the liability of owner statute, Col. Stat. Sec. 17150, Miller will be liable for your client's injuries. As a result, the report will be irrelevant to show that he was negligent in entrusting Russell with the vehicle because he will be liable as a result of giving him permission to use the vehicle.

Amount of Plaintiff's Injuries

Additionally, your client should take a look at the amount of her actual injuries. Your client incurred a hospital bill of $250 for the treatment of lacerations to her arm and leg. She did not sustain any fractures or sprains/strains of any kind. In fact, she was released from the emergency room with Lanocane approximately one hour after she arrived. Although your client returned to the ER two days later complaining of continued pain in her leg and arm, examination revealed that she had normal movement, although such movement was limited by pain. The doctor examined for fractures and determined there were none, and noted that she had bruises in the areas of complaint. The doctor advised her that she would continue to have some pain in those areas but that it should diminish over the next two weeks to a month. Your client has not returned to the ER nor sought additional treatment that would support a damage request of $15,000.

Furthermore, the damage to her bicycle is less than $150, which is the amount of her bike when purchased one year ago.

Even if we were to add her damages together, we are looking at $400. Therefore, based on the above discussion regarding our liability and your client's own negligence, I feel that an offer of $5,000 is more than fair and is probably more than she may recover in front of a jury, especially since she a jury [sic] may find her comparatively negligent and reduce her recovery.

I look forward to hearing from you after you have had a chance to discuss this offer with your client.

Sincerely Yours,

Mariah Malone

END OF EXAM

THURSDAY AFTERNOON
FEBRUARY 24, 2005

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

MARRIAGE OF EIFFEL

MARRIAGE OF EIFFEL

INSTRUCTIONS

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

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

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

MEMORANDUM

To: Applicant

From: Rena Tishman

Re: **Marriage of Eiffel**

Date: February 24, 2005

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

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

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

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

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

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

OFFICE MEMORANDUM

To: Associates

From: Rena Tishman

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Kevin J. Burke
Judge of the Superior Court

EXHIBIT A

Angela and I agree to the following terms:

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

I hereby agree to the above:

Angela Eiffel
Angela Eiffel

I hereby agree to the above:

Paul Alexandre Eiffel
Paul Alexandre Eiffel

July 19, 2002 July 19, 2002

Date Date

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

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

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

BY PETITIONER'S COUNSEL, RENA TISHMAN:

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

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

Q: Where do you live?

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

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

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

Q: Is that your signature on the document?

A: Yes, and that of Paul, too.

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

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

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

THE COURT: Admitted as Petitioner's Exhibit A.

Q: Would you please describe the document?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q: Is that roughly what you did?

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

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

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

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

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

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

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

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

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

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

Q: What was the reason?

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

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

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

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

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

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

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

Q: You agreed with and signed the agreement?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: Yes I do.

Q: No further questions.

RESPONDENT'S COUNSEL, MR. HENKE:

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

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

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

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

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

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

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

TESTIMONY OF ROBERT GANT

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

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

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

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

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

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

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

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

Q: Did that finally persuade you?

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

Q: How so?

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

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

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

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

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

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

Q: But they did?

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

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

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

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

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

Q: Thank you. Nothing further.

RESPONDENT'S COUNSEL, MR. HENKE:

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

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

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

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

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

A: No.

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

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

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

A: No.

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

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

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

A: That is possible.

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

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

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

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

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

A: That's what I did.

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

A: No.

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

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

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

TESTIMONY OF RESPONDENT PAUL ALEXANDRE EIFFEL

RESPONDENT'S COUNSEL, MR. HENKE:

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

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

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

A: Just Mr. Gant.

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

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

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

A: Yes. That too.

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

A: No, none.

Q: What were you thinking?

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

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

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

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

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

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

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

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

PETITIONER'S COUNSEL, MS. TISHMAN:

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

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

Q: What did you do with the money?

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

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

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

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

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

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

A: Yes, that is what the agreement said.

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

A: Yes, that too was in the agreement.

Q: The building is leased.

A: Yes.

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

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

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

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

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

A: Yes, at that time.

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

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

Q: No more questions.

THURSDAY AFTERNOON
FEBRUARY 24, 2005

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MARRIAGE OF EIFFEL

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COLUMBIA RULES OF PROFESSIONAL CONDUCT

Rule 3-310. Avoiding the Representation of Adverse Interests

(A) For purposes of this rule:

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

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

* * * * *

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

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

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

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

* * * * *

Discussion:

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

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

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

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

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

Klemm v. Superior Court

Columbia Court of Appeal (1977)

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

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

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

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

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

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

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

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

The court denied the motion, stating,

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

period of time."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Marriage of Vandenburgh

Columbia Court of Appeal (1993)

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

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

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

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

In *Adams*, the Supreme Court stated,

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

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

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

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

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

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

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

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

The judgment is affirmed.

Answer 1 to PT - B

1)

To: Rena Tishman
From: Applicant
Re: Marriage of Eiffel – Statement of Facts And Argument For Appellant's Opening Brief
Date: February 24, 2005

Below is the two part project you requested – a statement of facts and an argument demonstrating the trial court erred in the Marriage of Eiffel matter. Please let me know should you need further assistance in this matter.

PART A. STATEMENT OF FACTS

Angela and Paul Eiffel ("Husband and Wife") were married on September 24, 1994. Up until their divorce, Wife had dutifully put Husband through paralegal school while she was still working (despite the fact that this is generally not considered a community property expense) and also made payments on Paul's separate property commercial building which he had inherited. Wife made such payments for the last eight years. As a result of some marital difficulties involving underlying criminal charges and financial debts, the couple agreed to separate on July 13, 2002, and filed a joint petition for marital dissolution. Husband and wife privately and voluntarily each agreed to and signed an agreement dividing their property and payment of debts in an agreement on July 19, 2002. Specifically, Husband voluntarily agreed to refinance and borrow money against real property in his name to pay off the community debts owed by the couple and to fund their separation.

Thereafter, the parties also contacted an attorney, Robert Gant, who had previously represented both Husband and Wife in previous criminal matters in which they were not adverse parties. Mr. Gant drafted a Marital Settlement Agreement ("MSA") on July 19, 2002 despite the fact that the couple had already agreed to and drafted an enforceable contractual agreement between the two [of] them.

The MSA contained the following provisions: 1) $750 of spousal support from Husband to Wife until a new lease is signed by Wife, 2) 50% of new lease income to be paid to Wife, 3) Husband will make up the difference if the new lease accounts for less than $2000 per month, 4) Wife will receive 50% of yearly percentage income from Northland for the lease, 5) the agreement would be in effect for five years or until Wife got back on her feet, 6) Wife would be responsible for $15,000 in legal fees for her defense and Husband would be responsible for his fees in a paternity case, and finally, 7) Wife would receive a copy of new lease after it is signed. Although he was to perform mere perfunctory tasks in his capacity as an attorney, Mr. Gant informed Husband and Wife of the conflict of interest involved by presenting two spouses in this matter, and had them sign

a written conflict waiver. (See Exhibit A.)

Despite the fact that these provisions seem to lean in Wife's favor, she allowed Husband to keep a number of community property assets, including art purchased with her community property funds in her account, as well as his car. Wife also made mortgage payments on a commercial building inherited by husband. Attorney Gant fully informed Husband and Wife of a potential conflict in [sic] and did advise them to seek the advice of independent counsel during discussions when 1) they asked him to be an attorney in this matter, 2) when he asked them to sign the MSA, and 3) when he provided a written waiver of conflict form, which specifically mentioned a potential conflict.

PART B. ARGUMENT

I. The Court Erred Because The Parties Had Entered A Valid And Binding Marital Agreement Not Tainted By Fraud Or Compulsion And Thus Requires A Peremptory Writ Of Mandate Directing The Trial To Consider Only Whether There Has Been Informed Written Consent.

Under California Rule of Civil Procedure §3-310 regarding "Avoiding the Representation of Adverse Interests," an attorney must make a full written disclosure of an actual or potential conflict and obtain informed written consent before proceeding with the case. The Rule holds that "disclosure" means informing the client or former client of the relevant circumstances and actual and reasonably foreseeable adverse consequences to the client or former client. "Informed written consent" means written agreement by the client to representation following written disclosure. The rule prohibits, without informed written consent, 1) accepting representation where there is a potential conflict, 2) accepting or continuing representation where there is an actual conflict, and 3) representing a client in while representing another at the same time in an adverse matter. Thus, the central issue before this court in the matter at hand is whether parties, Husband and Wife, received full written disclosure.

A. Despite The Trial Court's Premature Dismissal Of The Agreement At Issue, It Is Common Practice For Attorneys To Represent Husbands And Wives In Drafting Dissolution Agreements, Especially Where Such Agreements Are Not Tainted By Fraud Or Compulsion.

Although the court seems to summarily assume that the case at hand could not have possibly involved informed written consent by the clients, it is common practice for attorneys to represent a husband and wife and other types of joint parties in forming dissolution agreements. For example, in Lessing v. Gibbons, cited by the court in Klemm v. Superior Court, the court approved an attorney acting for both a studio and an actress in concluding negotiations and drawing agreements. The court refers to the common practice of attorneys acting for both parties in drawing and dissolving partnership agreements. Thus, it is common practice for attorneys to represent a husband and wife

in drawing up dissolution agreements.

Also as the court in Adams v. Adams, cited by the court in Marriage of Vandenburgh, put it: "When the parties have finally agreed upon the division of their property, the courts are loath to disturb their agreement except for equitable considerations. A property settlement agreement, therefore, that is not tainted by fraud or compulsion or is not in violation of the confidential relationship of the parties is valid and binding on the court." Here, the court has found that the MSA was "in fact the free and voluntary agreement of the parties as of the date it was made and specifically rejects the claim that Husband was forced to consent to its terms as a result of fraud, duress, or undue influence." (See Memorandum of Decision, p. 7.) Although the opponents might argue that the underlying agreement and MSA were not valid because Husband was a paralegal and therefore must have had superior knowledge as to contractual arrangements, this argument will fail because, as noted in the trial transcript, Wife indicated that she understood what she was signing repeatedly and Gant repeatedly asked if she had any questions. (See Transcript p. 14.)

Accordingly, the only issue to consider was whether the parties had received full disclosure of the conflict such that they were fully informed before signing the waiver of conflict form.

II. There Was No Attorney's Role[;] Was Merely That Of a Scrivener Because He Was Merely Typing And Adding Boilerplate Provisions To What Was Merely An Enforceable Contractual Agreement And Thus Requires A Peremptory Writ Of Mandate Directing The Trial To Consider Only Whether There Has Been Informed Consent.

In Blevin v. Mayfield, cited by the author's discussion under CRPC §3-310, it is noted that some tasks by lawyers did not really require legal skill and thus implies that the underlying communications are not subject to the same privilege. Although Appellants do not make the argument that privilege does not apply, it is important to note that Attorney Gant's tasks here were simple and uncomplicated, involving a mere recitation and formalizing of an underlying agreement, and he was merely acting in his named capacity as an attorney to give the document a greater legal effect. In these circumstances, it would seem that the conflict of interests would not be as pressing because the confidentiality interest is not being compromised and the attorney's interests are not tainting the underlying agreement.

Opponents may attempt to argue that no distinction under the Rule is drawn where the lawyer performs perfunctory services and those involving greater complexity, but this is only applied absent unusual circumstances. An unusual circumstance exists here, which is the fact that the husband and wife Angela Eiffel, had already wrote [sic], agreed to, and signed an agreement before the lawyer prepared a later Marital Settlement Agreement. Furthermore, martial dissolution contracts are enforceable and subject to defenses such

as mistake, illegality, prejudice to public interests, as well as inequity. (See Marriage of Vandenburgh.) The facts and record established that the parties had already established an enforceable agreement. Moreover, the parties actually signed a waiver of conflict which specifically stated that "Robert Gant's mere typing of an agreement made between the parties...," which indicates all parties and their attorney's knowledge of the attorney's minimal duties in this matter. Considering these unusual circumstances, Appellant submits that the court should reconsider the setting aside of the Marital Settlement Agreement, because Attorney Grant was merely acting as a scrivener.

III. The Court Erred Because The Eiffel Case Involved A Potential, Not Actual[,] Conflict Because There Was No Point of Difference to Be Litigated As To Husband and Wife's Agreement And The Case Must Be Mandated To The Trial Court To Determine Only If There Was Informed Consent.

In Klemm v. Superior Court, the court deal[t] with the case of a husband and wife who had orally agreed that child support was waived. An attorney– Catherine Bailey, had repres[e]nted the wife during the dissolution hearing. Because the wife was receiving ADFC payments, however, the judge at the family court custody case referred the issue of child support to the Family Support Division, which recommended that the husband actually pay $50 per month in child support. As a friend of husband and wife, Bailey agreed to appear at the hearing on the issue of child support and state that the parties were in agreement on the matter. Later, Baily obtained and filed written consents to joint representation.

The Klemm court determined that this case involved a potential, not actual[,] conflict, despite the fact that Bailey had represented both Husband and Wife and [sic] different points. The court's rationale was that "[t]he parties had settled their differences by agreement. There was no point of difference to be litigated." The only issue of conflict was the county's decision regarding the issue of support, and this was an issue upon which both husband and wife had agree[d]. Thus, once the attorney had obtained written consent of both the husband and the wife, the only remaining issue was whether such consent was procured after knowing, informed, and full disclosure.

Similarly here, Attorney Gant had represented both Husband and Wife in a matter in which they were not adverse. Wife had been charged after threatening a DA's office when they threated [sic] to browbeat her into turning against her Husband. And Husband had a paternity case. Thus, Husband and Wife were not represented by the same attorney in an adverse matter. There was also no point of difference between them as to the current agreement and MSA. Rather, as is indicated in the trial transcript, each agreed to the agreement and simply wanted Attorney Gant to type it up and add boilerplate provisions. The only issue possibly remaining for the court[,] therefore, is to determine whether there has been informed consent based on the prior discussions and waiver of conflict form.

V. Attorney Fully Advised Parties Of Their Rights And Right to Independent Counsel In The "Waiver Of Conflict" Form And In Prior Discussions[,] Thereby Meeting A Standard Of Heightened Scrutiny[,] And The Only Issue Remaining Is For The Trial Court To Determine the Waiver Was Signed After Informed Consent And Full Disclosure.

Again, under CRPC §3-310 regarding "Avoiding the Representation of Adverse Interests," "disclosure" means informing the client or former client of the relevant circumstances and actual and reasonably foreseeable adverse consequences to the client or former client. "Informed written consent" means written agreement by the client to representation following written disclosure. Also, in Marriage of Vandenburgh, the court indicated that an attorney drafting a dissolution agreement for both parties is held to a standard of "heightened scrutiny." The attorney must make sure that each part[y] is fully advised of his rights and right to independent counsel.

Here, Attorney Gant actually made sure that the parties actually signed a waiver of conflict which specifically stating [sic] that "Angela Eiffel and Paul E[i]ffel have been advised that Robert Gant's mere typing of an agreement made between the parties may be a potential conflict of interest...". thus foreclosing the possibility that the parties were unaware of the potential conflict. Also, once Husband and Wife asked Attorney Gant to represent them, he refused, stating that each of them had to get their own attorneys. The parties told Mr. Gant that they had no disputes and agreed on everything, and only after which did Gant agree to "merely type" the dissolution agreement. Attorney Gant also insisted that if he were in their shoes he wouldn't sign the agreement or have him as counsel, and the parties still signed and had him as counsel. Thus, the only remaining issue for the court to consider is whether this waiver and the previous discussions was [sic] sufficient.

VI. Property Settlement Agreements Occupy A Favored Position In Columbia Barring Equitable Considerations And The Settlement Agreement At Issue Was Fair and Equitable, Especially Given Wife's Generous Allowances Of Community Property Assets To Husband, Leaving The Trial Only With The Issue Of Whether There Was Informed Consent And Full Disclosure.

The Columbia Supreme Court has established that "property settlement agreements occupy a favored position in the law of this state." (See Adams v. Adams). The Legislature has also embraced this principle by codifying Columbia's Family Code section 3850, which provides that husbands and wives may agree to a dissolution agreement based on mutual consent. Barring any claims of unenforceability or conflict of interest or lack of written disclosure, the agreements will be upheld unless they are inequitable.

A. Respondents Will Fail In Their Argument that The Agreement Was Inequitable Because Wife Paid For Separate Property Mortgage Payments And Agreed To Let Husband Have A Car And Art Purchased With Community Property

Funds.

The court in Marriage of Vandenburgh setting [sic] aside the separation agreement based on the heightened scrutiny standard of focusing on equitable considerations. The agreement in that case involved the a [sic] dissolution agreement that was "hurried, stressful, and questionable." Specifically, the wife was given the right to buy the husband's interest in the marital home containing an income [a]partment, which husband had purchased prior to the marriage, for a minimal sum. Also, a major family asset in the possession of the wife was ignored. Under such inequitable circumstances, the court determined that the trial court's judgment setting aside the separation agreement should be affirmed.

Here, the MSA contained a provision that Husband would repay the entire loan on the Texas property. Although opponents will argue that this [was] inequitable, it was actually quite generous considering that Wife had dutifully put Husband through paralegal school while she was still working (despite the fact that this is generally not considered a community property expense) and also made payments on Paul's separate property commercial building which he had inherited. This was $460.90 per month. Wife made such payments for the last eight years. Paul also insisted on keeping his car and the avant garde art, all of which had been purchased with Wife's income, which was community property funds.

Accordingly, the case should be issued a peremptory writ of mandate back to the trial court to determine only if there has been informed written consent.

END OF EXAM

Answer 2 to PT - B

2)

FACTS

Appellant Angela Eiffel (Wife) and Appellee Paul Alexandre Eiffel (Husband) dissolved their marriage in 2002. As part of this dissolution, the parties negotiated and executed a detailed Marital Settlement Agreement (MSA).

The parties proceeded through the bulk of the divorce process without the help of counsel. Both parties are competent and intelligent. Paul Eiffel has training as a paralegal, although he does not practice in the field. Angela Eiffel is a competent public administrator in the city planning office. They were therefore able to effectively negotiate the legal system without counsel.

Acting without representation, the parties negotiated the terms of their settlement agreement. However, the parties realized that they were more likely to be able to produce an enforceable, legally binding settlement agreement if they enlisted the help of counsel in the drafting. The parties contacted an attorney, Robert Gant. Gant had represented both parties in the part [sic], in criminal matters that were unrelated to the terms of the settlement agreement. The parties requested that Gant, whom they viewed as their attorney, write up their Marital Settlement Agreement.

As first, Gant flatly refused, stating his concern that this would create a conflict of interest. The parties became concerned that now, in order to realize the enforcement of their deal, they would each need to retain expensive new counsel. To avoid this expense, they attempted to convince Gant to carry out their wishes. Paul Eiffel told Gant emphatically that the parties had agreed on all of the provisions of the ultimate agreement, and that there were no remaining disputes. Based on the parties' persuasion, Gant agreed to "be a draftsman" and to put the parties[‘] agreement into legally operative form. However, Gant continued to encourage them both to seek independent counsel.

Notwithstanding Gant's advice, both parties chose not to retain independent counsel. At Gant's request, Paul Eiffel "drafted and freely executed" an agreement that would serve as the basis for Gant's full MSA. He then faxed this draft agreement to Gant. Gant used the agreement as the basis for the settlement document, and added boilerplate language to create a legally effective MSA. Where provisions in the faxed agreement were unclear, Gant called the parties and requested clarification.

Throughout the process, Gant declined to give any legal advice to either of the parties. At one point during his telephone conversations with the parties, Paul Eiffel asked Gant for advice about his legal rights. However, Gant responded that giving legal advice would exceed the scope of what he had agreed to do, and he refused to give the requested

advice.

After the MSA had been drafted, Gant met with both parties. Before proceeding, Gant requested that both parties read and sign a written waiver that Gant had prepared. The waiver contained the following language:

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

After reading this form, the parties voluntarily signed it. After obtaining this consent, Gant reviewed with them the MSA that he had typed on the basis of the parties' written agreement. He explained each provision to them in full. Then, each party voluntarily signed the Marital Settlement Agreement.

Following execution of the agreement and the dissolution of the marriage, Appellee [sic] performed her obligations under the settlement agreement in full. However, Appellant's [sic] has not lived up to his obligations under the contract. Specifically, the settlement agreement required that Appellee pay Appellant 50% of the rental income on an out-of-state property. The obligation was to continue until Appellant found a stable job and was capable of self-support. However, the Appellee has made only one, one-time payment of $750 to Appellant. His rental income has been approximately $4400 per month.

Appellee had intended to use this money to finance additional education to obtain a higher paying job. Since the Appellant [sic] has failed to live up to his obligations, Appellee has been unable to obtain this further education.

ARGUMENT

I. THE COURT'S FINDING THAT THE MARITAL SETTLEMENT AGREEMENT IS UNENFORCEABLE IS INCORRECT AS A MATTER OF LAW, BECAUSE THE COURT MUST GIVE EFFECT TO A SETTLEMENT AGREEMENT UNLESS THE COURT FINDS THAT IT IS THE PRODUCT OF FRAUD OR COMPULSION OR IS MANIFESTLY UNFAIR, AND THIS COURT EXPRESSLY FOUND THAT THE AGREEMENT WAS NOT THE PRODUCT OF SUCH IMPROPRIETY.

Property settlement agreements on dissolution of marriage "occupy a favored position" in the law of Columbia. *Adams v. Adams.* According to the Adams court: "A property settlement agreement . . . that is not tainted by fraud or compulsion or is not in

violation of the confidential relationship of the parties is valid and binding on the court." *Id.* Later courts have added as grounds for rejection of a property agreement a finding by the court that the agreement is "manifestly unfair to one spouse because of overreaching by the other." *Marriage of Vandenburgh*.

The trial court ignored this principle of law when it held that the Eiffels' marital settlement agreement was unenforceable. The sole reason for the court's decision was that the parties' attorney had not "adequately" disclosed a potential conflict of interest. The court did not find that the settlement agreement was the product of fraud or compulsion or that it was manifestly unfair.

Indeed, the court expressly found that "the MSA was in fact the free and voluntary agreement of the parties as of the date it was made, and [stated that it] specifically rejects the claim that Husband was forced to consent to its terms as a result of fraud, duress, or undue influence." This finding should have forced the court to find the agreement enforceable as a matter of law.

Instead, the trial court sought to avoid this result by fashioning a new rule of law, under which marital settlement agreements are to be rejected if the court determines that an attorney's disclosure of conflicting interests was less than adequate.

This rule conflicts with Columbia courts' general policy of effecting the voluntary, expressed will of parties to a dissolution as expressed in their marital settlement agreements. Furthermore, this new rule does not serve any overriding public interests. In this case, an informed written consent was obtained, following lengthy discussion between parties and counsel of counsel's role in the matter. Any additional requirement that the court seeks to have imposed would do little to protect parties' interests, over and above what was undertaken in this case.

The court, through its technical rule, has not only failed to promote the purpose of ensuring that settlement agreements are fair and equitable. It has created a situation that is patently *unfair*. In this case, the parties agreed to a discrete set of terms that would govern the dissolution of their marriage. The terms, as in any contract, should be understood as a trade-off between competing interests. However, the court, in finding the agreement unenforceable for a technicality, has denied Appellant the right to receive the benefit of her bargain. She has performed her obligations under the contract, and Appellee has been excused from performing his. This ruling has therefore resulted in an inequity, and should be corrected.

Any concern by the court that the parties were not adequately informed of the risks of the settlement would be better considered, not through the fashioning of an arcane and technical rule regarding disclosures, but through common-sense application of the existing rule that a marital settlement agreement is not valid where it is the product of fraud or duress or where its terms are grossly unfair.

In this case, the court determined that the agreement was not unfair or the product of duress. The facts on which this finding rest presumably include the participation of Attorney Gant in the drafting of the settlement. Therefore, if the court were to properly consider the conduct of the attorney under this jurisdiction's existing precedent, it would be constrained to conclude that the agreement was enforceable.

In sum, the court's expansion of the law in this field should be rejected, and the court's holding that the material settlement agreement is unenforceable should be overturned.

II. THE COURT'S FINDING THAT THE ATTORNEY'S DISCLOSURES WERE INADEQUATE UNDER THE CIRCUMSTANCES IS ERRONEOUS, BECAUSE THE PARTIES HAD RESOLVED THEIR DIFFERENCES BEFORE SEEKING GANT'S ASSISTANCE, GANT WAS ACTING IN A LIMITED CAPACITY AS A DRAFTSMAN, AND GANT HAD EXPRESSLY ADVISED THE PARTIES NOT TO RELY ON HIM FOR LEGAL ADVICE, BUT TO SEEK THEIR OWN, INDEPENDENT COUNSEL.

Even if this Court were to conclude that the rule of law applied by the trial court was proper, it should nevertheless overturn the decision of the trial court for its failure to faithfully apply its rule. The court reasoned that a marital settlement agreement should not be enforceable where the attorney drafting the agreement did not obtain valid, informed consent. However, in this case the attorney did obtain adequate consent. Therefore, failure of consent cannot provide a proper ground for denying enforcement of the parties' settlement agreement.

The trial court's conclusion that the consent obtained in this case was not adequate is erroneous. First, the court mistakenly believed that an attorney can almost never represent two parties to a transaction. This is incorrect. Second, the court seemed to rely on the special status of family law as precluding dual representation. However, this goes against precedent and is not supported by strong policy considerations.

Dual Representation is a Common Practice

The trial court concluded that, as a matter of law, a lawyer may represent two parties to a deal only "in exceptional circumstances." This reading of the law of professional responsibility is erroneous. In *Klemm v. Superior Court* (the very case on which the district court relies for support of its conclusion), the court recognizes that it is a "common practice of attorneys [to] act[] [sic] for both parties in drawing and dissolving partnership agreements, for grantors and grantees, sellers and buyers, lessors and lessees, and lenders and borrowers."

Moreover, this practice of acting on behalf of both sides to a deal is expressly permitted by the Columbia Rules of Professional Conduct. Rule 3-310 provides that

attorneys may with the "informed written consent of each client . . . [a]ccept representation of more than one client in a matter in which the interests of the clients potentially conflict." The Rule requires only written consent. It does not require "exceptional circumstances."

Dual Representation Merely Requires Informed Consent, Which Must Be Adequate Under the Circumstances

The requirement of informed written consent is satisfied when the client agrees in writing to the representation, following full written disclosure "of the actual and reasonably foreseeable adverse consequences" of dual representation. Rule 3-310. In this case Attorney Gant provided full disclosure of the relevant circumstances. He informed the parties that they were accepting a grave risk if they entered into a settlement agreement without seeking legal advice as to their respective rights. In addition, Gant informed them that he could not, because of the conflict involved, serve as a advisor to either of them. He agreed only, at the parties' insistence, to serve in the limited capacity of a draftsperson of a legal document based on the parties' independently negotiated agreement, and he fully explained the limitations of his representation. Throughout the process of preparing the document, he refrained from giving the parties any advice whatsoever as to its provisions.

The services performed by Gant were analogous to those found to be proper in *Blevin v. Mayfield*. The court rejected an argument that a deed that had been drafted by a single attorney acting for two parties was invalid. The court stated that "the agreement had already been reached between the two parties and therefore the only service performed by the attorney was that of a scrivener." *Id.* Here, the agreement as to the terms of the marital settlement had already been reached before Gant's participation. This fact is memorialized in the written agreement that Paul Eiffel wrote and both parties signed. Gant simply translated the terms of the pre-existing agreement into the format of a valid marital settlement agreement.

As suggested by the trial court, the adopters of the Columbia Rules of Professional Conduct rejected a per se rule that an attorney acting as scrivener be exempted from the rule regarding disclosure of potential conflicts. However, this conclusion was based on their presumption that "in contemporary practice, it will be unusual for an attorney to fulfill the role of mere scrivener.["] However, the adopters allowed for "unusual circumstances clearly indicating otherwise."

The facts of this case clearly indicate these unusual circumstances. Attorney Gant made every effort to limit his role in the preparation of the settlement agreement to that of scrivener, and to insure that the parties fully understood his function.

The court found that the disclosures were inadequate simply because the attorney did not spell out, in detail, the possible interests of the parties that might be compromised by the agreement. However, this would place a significant burden on attorneys to

familiarize themselves with the legal issues in a case for which they intend to provide no legal advice. There would be very little benefit from placing such a burden on attorneys and clients to require extensive research solely for the purpose of securing a waiver allowing the attorney to act in a non-advisory capacity.

Finally, Appellee might dispute that the informed consent is not valid, because the disclosures made by Gant were not "written." As Rule 3-301 provides, the informed written consent must be based on written disclosures. However, the spirit of the rule has clearly been complied with, and Appellee's attempt to enforce this requirement of a writing would not serve to promote the purposes of the rule.

The Court's Suggestion That Family Law is a Special In [sic] Not Supportable.

The court seems to suggest that the context of this case- - - family law - - - merits special requirements. The court quotes language in *Klemm v. Superior Court* to the effect: "Despite spouses' assurances they are in agreement on all issues, all marital cases involve a potential conflict of interests. In our opinion, dual representation is ill-advised, even if arguably permissible under Rule 3-310." This quote is, however, taken out of its context. Indeed, in *Klemm*, the court permitted an attorney to engage in joint representation of two spouses. The court, furthermore, allowed such dual representation where the parties clearly had a serious risk of ending up adverse to each other in future litigation over child support payments, and, furthermore, where there was every indication that the parties were generally confused by the legal process and uncertain whether they should agree to waive their conflict.

Furthermore, the court emphasized that parties should be permitted to make their own waivers, if those waivers appear to be voluntary and knowing. It is not the job of the court to second-guess the wisdom of the parties' decision because, for example, "[w]hile on the face of the matter it may appear foolhardy for the wife to waive child support, other values could very well have been more important to her than such support, such as maintaining a good relationship. . ."

Rather, parties to family-law contracts should be accorded the same sort of freedom of will that parties to other types of contracts enjoy. These parties should be able to choose their attorney based on the considerations that the parties consider important.

In sum, this honorable Court should permit the parties to this case to make decisions on the basis of their own values and to choose to engage the attorney of their choice, where there has been adequate consideration given to this choice. The court should find that the waiver in this case was effective, and that the failure of consent could not possibly operate as a bar to enforcement of the parties' duly negotiated marital settlement agreement.