California Bar Examination

Performance Tests

And

Selected Answers

February 2013

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2013 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the February 2013 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 the authors.

Contents

February 2013

California Bar Examination

Performance Test A INSTRUCTIONS AND FILE

Doral Digestive Medical Clinic v. Dr. Kyle Harris

Instructions

FILE

Memorandum from Catherine Tedesci to Applicant

Memorandum from Executive Committee to All Attorneys

Transcript of Interview with Dr. Kyle Harris

Excerpt from Employment Agreement

Memorandum from Joan Malzone to Catherine Tedescii

DORAL DIGESTIVE MEDICAL CLINIC v. DR. KYLE HARRIS

INSTRUCTIONS

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

LAW OFFICES OF CATHERINE R. TEDESCI

1199 Brian Drive

Sweetwater, Columbia

MEMORANDUM

TO: Applicant

FROM: Catherine Tedesci

DATE: February 26, 2013

RE: Dr. Kyle Harris

One of our clients, Dr. Kyle Harris, a gastroenterologist, is involved in a contract dispute with Doral Digestive Medical Clinic (DDMC). Four years ago, Dr. Harris signed a contract that included a covenant not to compete. Dr. Harris left DDMC about a month and a half ago. He would like to open up a gastroenterology (GI) practice near DDMC, and wishes to know whether the covenant not to compete is enforceable in whole or in part. You can glean all of the facts from his interview transcript and a "market survey" of the market in which DDMC operates, generated by an associate here along with a medical economist, both of which are in the file.

At this point, however, Dr. Harris needs to know the likelihood that the non-compete covenant is enforceable. Please prepare, for my signature, an opinion letter to Dr. Harris in accordance with the firm's guidelines.

LAW OFFICES OF CATHERINE R. TEDESCI
1199 Brian Drive
Sweetwater, Columbia

MEMORANDUM

TO: All Attorneys
FROM: Executive Committee
DATE: September 28, 2010
SUBJECT: Opinion Letter Guidelines

Often the firm's attorneys must prepare an opinion letter to communicate their views to a client. An opinion letter should follow this format:

-- State your understanding of the legal issue or issues you are asked to address.

-- Analyze the client's legal position objectively, in light of the applicable law and the relevant facts, and resolve each of the issues implicated, arriving at a conclusion and identifying the degree of certainty as to each.

-- Remember that many opinion letters are written to lay clients and that an opinion letter must provide genuine assistance to the client. Although you must discuss the law, you should do so as clearly and straightforwardly as possible.

Transcript of February 12, 2013 Interview with Dr. Kyle Harris

CATHERINE TEDESCI: Good afternoon, Dr. Harris. If it is okay with you, I'd like to record our conversation, so it can be transcribed if necessary to review your case.

DR. HARRIS: That's fine with me.

TEDESCI: Okay. I understand you have a contract matter to discuss with me?

HARRIS: Yes. I need some advice about whether I can open up my own practice.

TEDESCI: Why don't you start at the beginning and tell me the whole story?

HARRIS: Sure. I graduated from Medical School and did both my internship and residency at the University of Columbia Medical School in internal medicine. After that, I went out on the job market and ended up with a medical group whose patients are in Doral County, Columbia. The name of the organization is Doral Digestive Medical Clinic, or "DDMC." They did gastroenterology and general internal medicine. I was looking for a place to learn gastroenterology (GI), learn how to find patients and develop a practice, and get my career going. And I like Doral County a lot -- it is quite rural, a great place to live and raise a family, and develop a practice. I thought they had a lot to offer me, so I kept after it, and eventually the clinic decided to give me a try.

TEDESCI: How big was the group?

HARRIS: Actually, the term "group" is a little misleading. The guy who ran it as the president and owner was Dr. David Medved. Dr. Medved set up the practice in 1998 as Doral Digestive Medical Clinic.

TEDESCI: Did you sign an employment agreement with the clinic?

HARRIS: Yes. I originally signed an agreement that was a one-year trial period, terminable-at-will on their part. It was a pretty simple document. It said I would be employed as an associate for a trial period of 12 months, identified the pay schedule, which was about $160,000 for the year, said that the clinic could terminate me at any time for any reason, and that was about it.

TEDESCI: How did that year go?

HARRIS: The year went great. It was sort of like a fellowship year in gastroenterology. There were only two gastroenterologists in the entire county, Medved and me. That is still the way it is today, by the way, although I've heard Medved is looking quite hard to find someone to replace me in the clinic. I learned the practice of gastroenterology and got to see just how Medved did it. I got training and took a lot of his overflow. I learned how to evaluate patients with gastrointestinal complaints, treat a broad range of conditions, and perform colonoscopies, which is the big part of the practice. But I also did the occasional biopsy and some interpretation of the results, and learned to make recommendations concerning the longer run health of the patients. As well, I did some endoscopies, mostly for ulcer diagnosis, and learned a little about irritable bowel syndrome. So I both got a lot out of the year and did a lot of good work for Medved and the patients in the county.

TEDESCI: What happened after the year?

HARRIS: We both agreed that I should join the clinic as a member, and had some vague discussion that if it continued to work out I might end up with equal ownership eventually. So I bought into the clinic as a shareholder member and signed a stock transfer and an employment agreement to work for DDMC. The agreement set up a 4-year employment term, with the pay increased to over $200,000. That agreement has a non-compete clause in it. The language is in paragraph 14 of the agreement. I've brought a copy of it for you to look at.

TEDESCI: Were you aware of that term in the agreement when you signed it?

HARRIS: Yes, I knew about it. I read the whole thing and discussed it with some of my professors at the University and one of their lawyers. They all said it was fairly standard in the medical profession, that all practices had similar terms, and that they were in all the employment agreements because clinics and practices don't want to train someone, help them develop a specialty and a patient base, and then have the doctor leave with all of the patients. Otherwise they might not hire me at all. One of the professors told me that she heard that if the terms are totally unreasonable, and try to keep you from practicing medicine of any kind or anywhere, sometimes they can't hold you to it, but that 3 years and the 20-mile radius are probably okay. That seemed fair enough to me. I understood Medved's point of view, and I went ahead and signed it. I was the one who

really wanted DDMC to hire me, so I wasn't about to wreck the opportunity by objecting. It wasn't really something to negotiate about at that point.

TEDESCI: After you became a member, how did things go?**HARRIS**: It continued to go quite well. The clinic had a lot of patients. We were getting plenty of referrals from the doctors in the county and we were making a lot of money. Colonoscopies, believe it or not, are in big demand because they are so effective for screening for colon cancer.

TEDESCI: So what happened?

HARRIS: It was all working out well until we sat down not that long ago to figure out what would happen when the 4-year agreement ended. I wanted to become an equal with Medved at that point, concerning the pay and ownership. I thought I had earned it, and I have brought in a lot of business for DDMC. Medved at first said we ought to be able to work that out. But I concluded that he never was genuinely interested in that, and he was just stringing me along on the equal ownership thing.

TEDESCI: Does the employment agreement say anything about renewal or negotiating in good faith towards a new arrangement at the end of the 4-year term?

HARRIS: Nothing. Medved had hinted that we might go in the direction of equal ownership at some point, but in all honesty he hadn't made any promises about that. So after going around and around with Medved about it, I got frustrated, told him it wasn't going to work, and when the 4-year term expired about a month ago, I resigned from DDMC and sold him back my shares.

TEDESCI: Was there anything in the agreement concerning what would happen to the shares if you left the practice?

HARRIS: Yes, there was a "buyout" provision. He gave me a fair amount for the shares. If anything, he was generous. I have no complaints about that.

TEDESCI: What have you been doing since?

HARRIS: I took a little time off, and then got into planning for my own practice. I'd like to open up my own office in Sweetwater to do gastroenterology. I've done some estimates, and if most of my patients stick with me and I get my share of referrals, I can do very well. There is some growth in the area, and I'm betting that the patients I developed during the five years with DDMC will be quite willing to come with me to my new office.

TEDESCI: Sweetwater isn't that big a place. Has Medved figured out that you would like to open up your own practice in Sweetwater?

HARRIS: Oh, yeah, he knows. That's why I'm here, really. Yesterday he called up and asked if I was going to be doing gastroenterology. When I said of course, that's what my practice is, he got mad, started yelling, and said that I couldn't do that, that that was a violation of the agreement, and that if I tried that I would have to shut down and move away. I tried to talk to him about it and said, "You know I live here now and have a family here, and this is the only way for me to make a living." But he wouldn't listen. He said I was violating the covenant not to compete in the agreement, and that he was going to get his lawyer to get an injunction to keep me from practicing.

TEDESCI: Has he filed a lawsuit?

HARRIS: He hasn't done anything yet, but it is only a matter of time, I think. He isn't the type to say he is going to do that and not do it. So I guess I need some help with this.

TEDESCI: Looking at the language in paragraph 14, it says that the geographic scope of the non-compete agreement is a 20-mile radius of Sweetwater, and a 5-mile radius around hospitals or offices served by Doral Digestive Medical Clinic. Is there a way to just move your practice outside of that radius? If that is easy to do, that is one easy way to solve the problem.

HARRIS: I wish, but it wouldn't make any sense to do that. Almost all of my patients live near Sweetwater. Many patients needing GI care are elderly and frail. Neither they nor I would be enthusiastic about making a long trip, and the only place that makes sense to locate outside the radius is about 75 miles away. There is one hospital and medical building area that might be outside the 20 miles, but DDMC has a contract with them and does their gastroenterology, so according to the agreement I can't locate within 5 miles of that place. So none of it makes sense. Besides, I shouldn't have to move out, should I? These are my patients. I'm meeting a real need for these patients, and all Medved would have had to do was be reasonable and I wouldn't have left DDMC.

TEDESCI: Let me ask you something else. According to paragraph 14, the duration is three years. Is it feasible to do gastroenterology elsewhere for that time and then come back to Sweetwater?

HARRIS: No, for a couple of reasons. I'd lose my patients and I feel responsible for them. This is a medical practice we are talking about. I can't just cut and run. When I got back, who knows where they would be? I wouldn't blame them for being upset if I abandoned them for three years. In addition, and maybe the main thing, I'd lose out on referrals I can get from local doctors. It took a while before they started referring to me. I'll lose all of that. Furthermore, I bought a home here, I'm married now and have a young child, and we want to stay in this area.

TEDESCI: The payment term in the agreement is 25% of the monthly income. Sometimes such terms are interpreted to be a buyout provision that enables you to choose to practice if you are willing to pay it. I'm not saying that is the way it would be interpreted, but is that reasonable?

HARRIS: Sure. But things would be tight those first three years.

TEDESCI: Yes, but given that the 25% figure is reasonable, that portion is enforceable. So it comes down to whether the non-compete provision itself is enforceable. I think I have a pretty good picture of it. But why don't you tell me exactly what you would like to know from us?

HARRIS: I'd like some advice on what will happen if I go ahead and open up my practice. I need to know if Medved can really close me down. It is hard for me to believe the law really lets him do that. That doesn't seem right at this point. I also need to know if I will have to pay the money. I may have to move away to practice.

TEDESCI: Okay. We can evaluate all that. I can see that you need an answer to this quite soon. We need to do some research and then we'll give you an opinion letter advising you.

HARRIS: Great.

Excerpt from Employment Agreement:
Dr. Kyle Harris and Doral Digestive Medical Clinic

Paragraph 14

The parties recognize that the duties to be rendered under the terms of this Agreement by the Employee are special, unique and of an extraordinary character. The Employee, in consideration of the compensation to be paid to him pursuant to the terms of his employment with the Employer Corporation, expressly agrees to the following restrictive covenant:

(A) The Employee agrees that for a period of three (3) years after the date of termination of this Agreement, the Employee shall not, either separately, jointly, or in association with others, establish, engage in, or become interested in any entity that directly or indirectly competes with the business of the Employer Corporation. For purposes of this paragraph, "the business of the Employer Corporation" is defined as the general practice of gastroenterology, within a geographical area of a 5-mile radius of any office or hospital used by or serviced by the Employer Corporation, or within a 20-mile radius of Sweetwater, whichever is a larger area.

(B) The Employee agrees that a violation on his part of any covenant set forth in this Paragraph 14 will cause such damage to the Employer Corporation as will be irreparable. For that reason, the Employee further agrees that the Employer Corporation shall be entitled, as a matter of right, to an injunction from any court of competent jurisdiction, restraining any further violation of said covenants by the Employee, his corporation, partners or agents. Such right to injunctive remedies shall be in addition to, and cumulative with, any other rights and remedies the Employer Corporation may have pursuant to this Agreement or law. In addition to injunctive relief and other rights and remedies, the Employee agrees that he will pay to the Employer Corporation, to indemnify the Employer Corporation for the Employee's breach of any covenant, liquidated damages of twenty-five percent (25%) of the gross receipts received for medical services provided by the Employee, or any employee, associate, partner, or corporation of the Employee during the term of this Agreement and for a period of three (3) years after the date of termination, for any reason, of this Agreement.

MEMORANDUM

TO: Catherine Tedesci

FROM: Joan Malzone

DATE: February 22, 2013

RE: Market and Other Factual Data Concerning Doral Digestive v. Dr. Harris

Pursuant to your request, with the help of medical economist Steven J. Long, I have developed data concerning gastroenterological (GI) medical care as it pertains to Doral Digestive Medical Clinic (DDMC) and the Doral County/Sweetwater area. Two hospitals serve the area. We interviewed many physicians and hospital administrators knowledgeable about the area and gastroenterology, and generated additional data via questionnaires.

It is correct that the only two gastroenterologists in the greater Sweetwater area are Dr. Medved and Dr. Harris. Other than those two, the nearest GI specialist is in Porter, a major metropolitan area about 70 miles away.

Gastroenterology is a subspecialty of Internal Medicine that focuses on the intestinal tract and liver. Ailments such as heartburn, ulcers, pancreatitis, hepatitis and colitis are the most common gastrointestinal complaints. Much of the field focuses on early colon cancer detection and endoscopy. Endoscopy is performed to visualize and examine internal organs and to treat conditions such as colon polyps, intestinal bleeding, and stones in the bile duct. Most patients see a GI specialist at least once every five years for basic checkups and colon cancer screening. Most care can be done in the office and does not involve hospitalization.

The nature of the doctor-patient relationship in a GI practice often is not particularly close. The bulk of the DDMC practice is devoted to colon cancer screening and thus concerns colonoscopy, a procedure in which a gastroenterologist threads a scope into the colon inspecting for cancer or precancerous polyps, both of which can be biopsied or removed during the procedure. The patient is usually not awake for the procedure, and there is little contact between the doctor and the patient. Gastroenterologists don't ordinarily treat cancers. They do remove polyps for testing.

There are other aspects of the practice, including endoscopies of the stomach, mostly to inspect for ulcers. But this is waning, as the bacteria that causes ulcers have begun to disappear, so there are fewer patients with chronic ulcers treated by gastroenterologists. A large amount of the remainder of the practice constitutes standard tests, including prescribing and then interpreting blood tests, x-rays, and endoscopy results. Occasionally, recurring pancreatitis, GI bleeding, liver disease or irritable bowel syndrome lead to a more personal, patient-specific relationship, but it is the exception rather than the norm for the practice of gastroenterology in the greater Sweetwater area. There is a financial disincentive to treating patients with these conditions because they require extensive discussions with patients to help them cope, for which there is not much remuneration. The major issue for a patient switching from one gastroenterologist to another is not the personal nature of the doctor-patient relationship, but rather the inertia effect. Most of the procedures are diagnostic and not particularly comfortable, and if given a reason not to go, some patients may not seek colonoscopies at all.

Colonoscopies currently can be done only by gastroenterologists. On the horizon in this field, however, is colon cancer screening done by radiologists using CT scans to create a "virtual" picture of the colon without the need to use the scope. Also, primary care physicians will be able to take routine DNA samples from the colon and then send them to a lab to test for cancer. These technologies are expected to come on the market in about five years.

A couple of physicians stated that losing Dr. Harris's services would be "tragic" for the community. Most did not state it that strongly, but stated that "people need to go to GIs for routine services such as colonoscopy." They explained that for most patients over 50, colonoscopy every five years can drastically reduce the death rate from colon cancer. They all expressed concern that patients might be more likely to stop going if they had to switch to a different GI specialist or if there were less availability, and that that result would be troubling.

All physicians believed that having more than one gastroenterologist in the area would be "desirable." Quite a few physicians stated that, in their view, one gastroenterologist would not be able to meet the community's demand for such services, and that losing Dr. Harris's services would create an excessive workload on Dr. Medved, and would "likely result in undesirable and possible critical delays in patient care and treatment." But many other physicians and hospital administrators commented that Dr. Medved did not appear pressed for time, and they anticipated he could probably fairly easily meet the community's demand for services, including those patients that until recently were handled by Dr. Harris. They pointed out that, in addition to treating his patients, Dr. Medved has had time to obtain and complete a large number of pharmaceutical contracts for major drug companies, has worked with local businesses in conducting preventive medicine programs and cost benefit studies, and, even prior to Dr. Harris's arrival in Sweetwater, has traveled outside the city to other communities in order to serve patients. Many of the physicians also stated that Dr. Medved has provided prompt and efficient care, and that they had no knowledge of patients going untreated. No one had heard of any circumstance in which a patient has gone without proper care at those times when Dr. Medved was the only gastroenterologist in Sweetwater, both before and after Dr. Harris was with DDMC.

Many physicians noted that many patients needing GI care are elderly and frail, and would be forced to travel about 70 miles from Sweetwater if Dr. Medved were unavailable or if the patients preferred to see a different gastroenterologist. They stated that several emergency situations, such as GI bleeding, liver coma and jaundice, and pancreatitis from biliary stones, occur in the GI field, and could make travel for care life-threatening. But no one said that patients needing emergency care had gone untreated and no one stated strongly that such a result was likely if Dr. Harris were unable to continue to practice in Sweetwater. A few indicated that Dr. Harris might perform certain highly specialized procedures that Dr. Medved does not perform, but everyone else thought the two were virtually identical concerning what they provided and their respective abilities. They also noted that there are presently four surgeons in Sweetwater who can perform surgery for GI bleeding and certain other semi-surgical

procedures performed by gastroenterologists. In addition, they mentioned that GI emergencies, mostly GI bleeding, are rare and that in severe cases patients can be transferred by helicopter from the hospital in Sweetwater to Baptist Hospital in Porter, a trip of about 70 miles. Helicopter facilities are available at both of the local hospitals in the greater Sweetwater area.

One internal medicine specialist stated that he and Dr. Medved cover each other's cases. He also noted that there are a large number of internal medicine specialists in the county area served by DDMC, but that no one else is certified in the subspecialty of gastroenterology, which generally requires two additional years of training beyond that required to become an internist. He wasn't aware of any internists presently in the Sweetwater area who had started the training.

Prior to Dr. Medved's arrival in 1998, there had never been a gastroenterologist practicing in Sweetwater. Dr. Medved established a successful practice. At least sixteen gastroenterologists practice in Porter, 70 miles from Sweetwater. There is no shortage of specialists in internal medicine in Sweetwater.

The geographic area described in the non-compete covenant encompasses approximately 1200 square miles in and near Sweetwater and that portion of Doral County. All physicians agreed that DDMC's patients were from all over Doral County in the Sweetwater area. According to the doctors, Dr. Medved has "a well-established referral network" in the greater Sweetwater area. Most physicians have been referring their patients to Dr. Medved for GI work. The statement of one physician was typical: "Medved and Harris get my referrals. They are local and they do very good work. If Harris goes out on his own, I'd refer to both." When asked how long it would take for a new GI specialist to build up such a referral base, everyone agreed that it would take a minimum of two years to become known by the physicians in the area, and that realistically it might take up to three years. They said they didn't start seriously referring people to Dr. Harris, instead of Dr. Medved, until Dr. Harris had been with DDMC for two or three years.

There was a lot of speculation that Dr. Medved was trying to hire someone to replace Dr. Harris. There is a bit of a shortage of GI specialists throughout Columbia. One might think that this fact would make it easy to attract someone to Doral County,

but in fact the opposite is true. The fact that it is somewhat rural in the county is not particularly attractive to most GI specialists, and in a comparative sense it would be easy and more lucrative to set up a GI practice around Porter. Since that is easy to do, and Porter is not yet overcrowded, it is harder to attract someone out to Doral County. Nevertheless, Dr. Medved has interviewed four or five doctors, and could hire at least one, and that might alleviate some of the situation of having only one provider if Dr. Harris were unable to practice in the area.

February 2013

California Bar Examination

Performance Test A LIBRARY

Doral Digestive Medical Clinic v. Dr. Kyle Harris

LIBRARY

Canyon Medical Specialists v. Eiger

Columbia Court of Appeal (2005)

Canyon Medical Specialists v. Eiger

Columbia Court of Appeal (2005)

We granted review to determine whether the restrictive covenant between Dr. Eric Eiger and Canyon Medical Specialists is enforceable. We hold that it is not.

Canyon Medical Specialists ("CMS"), a professional corporation, hired Eric S. Eiger, an internist and pulmonologist who, among other things, treated AIDS and HIV-positive patients and performed brachytherapy -- a procedure that radiates the inside of the lung in lung cancer patients. Brachytherapy can only be performed at certain hospitals that have the necessary equipment. The employment agreement, which initially committed both Dr. Eiger and CMS for three years, contained the following restrictive covenants:

> The parties recognize that the duties to be rendered under the terms of this Agreement by the Employee are special, unique and of an extraordinary character. The Employee, in consideration of the compensation to be paid to him pursuant to the terms of this Agreement, expressly agrees that in the event either Employee or Employer terminates Employee's employment with the Employer, the Employee shall not
>
> (a) Establish, engage in, become interested in, or work for anyone competing with, or who may compete with, the Employer in the practice of medicine within a five (5) mile radius of any office currently maintained or utilized by Employer for a period of two (2) years following the date of termination or dissolution or
>
> (b) Either separately, jointly or in association with others, provide medical care or medical assistance to any person or persons who were patients of Employer during the period that Employee was in the hire of Employer.
>
> Employer shall be entitled as a matter of right to an injunction restraining any violation of this covenant.

Dr. Eiger ultimately left CMS and began practicing within the area defined by the restrictive covenant. CMS sought preliminary and permanent injunctions enjoining Dr. Eiger from violating the restrictive covenant. The trial court denied CMS's request for a preliminary injunction, finding that the restrictive covenant violated public policy, as it interfered with the ability of AIDS patients to select the doctor of their own choosing or, alternatively, the restriction was unreasonable because it did not provide an exception for emergency medical aid and was not limited to pulmonology.

I. DISCUSSION

A. Level of Scrutiny

Despite the freedom to contract, the law does not favor restrictive covenants because they restrain trade, particularly in the employer-employee context. This disfavor is particularly strong concerning such covenants among physicians because the practice of medicine affects the public to a much greater extent. In fact, for the past 60 years, the American Medical Association (AMA) has consistently taken the position that non-competition agreements between physicians have a negative impact on patient care. Dr. Eiger signed the covenant not to compete in the context of an employee-employer relationship. Accordingly, the covenant will be strictly construed against CMS.

B. Columbia Law for Non-Competition Covenants

Under Columbia law, non-competition covenants are enforced only when reasonable. Reasonableness is a fact-intensive inquiry that depends on the totality of the circumstances. Each case hinges on its own particular facts. A restriction is unreasonable and thus will not be enforced: (1) if the restraint is greater than necessary to protect the employer's legitimate interest; or (2) if that interest is outweighed by the hardship to the employee and the likely injury to the public. Thus, in the present case, the reasonableness inquiry requires us to examine the interests of the employer, employee, patients, and public in general, to accommodate a right to work, a right to contract, and the public's right to competition. Balancing these competing interests is no easy task and no exact formula can be used. Accordingly, when strictly construed, a

physician's covenant not to compete will be enforced only if it (1) is in writing; (2) was entered into at the time of and as part of a contract of employment; (3) is based on valuable consideration; (4) can be shown by the covenantee to be reasonable in scope, including time, territory, and activity; and (5) does not fail due to public policy concerns.

The first two requirements, which are routinely present, exist here. It is uncontested that the agreement is in writing and was part of the contract of employment.

1. Consideration

The covenant must be based on valuable consideration. When the employment relationship is established before the covenant not to compete is executed, unless there is separate consideration to support the covenant such as a pay raise or other employment benefits or advantages for the employee, the covenant will not be enforced. Here the relationship was established at the time of the covenant, however, so there is consideration for the covenant: Dr. Eiger obtained, in exchange for the promise, the chance at a job.

2. CMS's Protectable Interest

CMS contends that it has a protectable interest in its patient base and network of referral sources. In the commercial context, it is clear that employers have a legitimate interest in retaining their customer base. The employer's point of view is that the company's clientele is an asset of value which has been acquired by virtue of effort and expenditures over a period of time, and which should be protected as a form of property. CMS has thousands of patients and a well-developed referral network. The employer's interest in its patient "customer base" is balanced with the employee's right to the patient "customers." Where the employee took an active role and brought already developed skills and customers with him or her to the job, courts are more reluctant to enforce restrictive covenants.

Dr. Eiger was a pulmonologist when he joined CMS, and brought some of his patients with him. He did not learn his skills from CMS. Restrictive covenants are designed to protect an employer's customer base by preventing a skilled employee from

leaving an employer and, based on his skill acquired from that employment, luring away the employer's clients or business while the employer is vulnerable; that is, before the employer has had a chance to replace the employee with someone qualified to do the job. These facts support the trial judge's conclusion that CMS's interest in protecting its patient base, ordinarily a strong interest, was less significant here. We agree with CMS, however, that in addition to its patient base, CMS has a protectable interest in its referral sources. Clearly, the continued success of a specialty practice, which is dependent upon patient referrals, is a legitimate interest worthy of protection.

3. Scope of the Restrictive Covenant

The restriction cannot be greater than necessary to protect CMS's legitimate interests. A restraint's scope is defined by its duration, geographic area, and definition of activities prevented. The idea is to give the employer a reasonable amount of time to overcome the loss of the former employee, usually by hiring a replacement and giving that replacement time to establish a working relationship, while giving the employee a reasonable opportunity to return to the geographic area after practicing outside of the area or in a different specialty for the duration.

a) Scope - Duration

An unduly lengthy time restraint in a covenant affords more protection to the employer than is justified, given the protectable interests, and will not be enforced. The duration of the restrictive covenant here is two years. Such durations have been found reasonable in many cases concerning physician covenants not to compete. While flat rules of reasonableness do not exist with regard to duration, two years appears to be near the outer edge of permissible restrictions, although some longer covenants (e.g., three years) have been found reasonable in duration even using the strict scrutiny applied to these covenants in employment contexts. Here, in order to protect CMS's interest in the referral base, the two years is reasonable, as it would take three to five years for Dr. Eiger's replacement to develop his pulmonary practice referral sources to the level they were when Dr. Eiger resigned.

b) Scope - Geographic Considerations

A covenant which includes more territory than necessary to protect the legitimate business interests of the employer is not reasonable, as it excludes the physician from practicing in areas where the employer has no claim to need protection. The question thus is whether the size of the territory at issue here, which encompasses approximately 235 square miles, is necessary to protect CMS's legitimate interests. Evidence supports the trial court's finding that this was a reasonable restricted territory, as CMS attracted patients and referrals from throughout the designated area. Significantly, larger areas have been upheld as reasonable geographic restrictions on a physician's practice (e.g., an 1800 square mile area was upheld because the clinic attracted patients from throughout the restricted area; a ten county territory was upheld because the professional corporation had patients in all ten counties; and in the non-physician context, a half million square mile area was upheld because the employee and employer did business throughout substantial portions of the area). See generally, Sasabe v. Island Dialysis Clinic.

c) Scope - Activity Prevented

The activity prohibited by the restraint also defines the covenant's scope. In order to protect the employer's legitimate interests, the restraint must be limited to the particular areas of the present employment. Peairs v. Old Town Orthopedic (upholding injunction that enforced restrictive covenant preventing doctor from practicing only orthopedic medicine and orthopedic surgery). Otherwise, the restriction on the physician is too great.

On its face, the restriction at issue here precludes any type of medical practice, even in fields that do not compete with CMS. The covenant prohibited Dr. Eiger from providing any and all forms of "medical care," including not only pulmonology, but emergency medicine, brachytherapy treatment, and HIV-positive and AIDS patient care. Thus, we agree with the trial judge that this restriction is too broad.

4. Public Policy Considerations

The general rule is that a covenant not to compete is contrary to public policy unless the covenant protects a legitimate interest of the employer and is not so broad as

to be oppressive to the employee or the public. In examining covenants not to compete between physicians, many courts in many jurisdictions have recognized the need to balance the public interest in health care with personal freedom of contract, and have determined that under the particular facts before them, the public interest must prevail. If ordering an employee physician to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interest outweighs the contract interests of the employer, and the court will refuse to enforce the covenant. But public policy can sometimes best be served by enforcing a narrowly tailored physician covenant not to compete. There is benefit to the public as well as to the employer physician if the covenant encourages agreements between young doctors and older or more experienced practitioners. If ordering the employee physician to honor his agreement will merely inconvenience the employee physician without causing substantial harm, and enforcement can be seen to facilitate a desirable type of risk-taking physician relationship, the employer is entitled to have the covenant enforced.

There are several aspects to this consideration, including the availability of other physicians in the community affected by the covenant, the extent to which a patient's ability to select the doctors of his/her choice is significantly impaired by the covenant, and the hardship to the individual physician.

a) Are Covenants Restricting Medical Professionals Unreasonable Per Se as a Matter of Public Policy?

Dr. Eiger asks us to hold, as some states do, that restrictive covenants in the medical profession are void per se as against public policy. Such a rule assumes restrictive agreements are not in the public interest because free choice of doctors is the right of every patient, and free competition among physicians is a prerequisite of optimal care and ethical practice. Dr. Eiger's argument, however, would overturn a staggering number of Columbia cases that have implicitly rejected his argument by enforcing restrictive covenants in the medical context. We decline to overrule the longstanding principle that such agreements are not unreasonable per se.

b) Undue Hardship to the Physician

An original public policy concern with covenants not to compete was that, in addition to being anti-competitive and thus depriving the public of adequate choice, enforcement might deprive the restricted employee from earning a living. If the covenant would effectively remove a physician from the marketplace entirely, by either explicitly or as a practical matter prohibiting him or her from practicing entirely, such an undue hardship can render a covenant unenforceable.

The trial court concluded that hardship to Dr. Eiger was not a sufficient justification for refusing to enforce the covenant. Again, we agree. Although Dr. Eiger and his expert testified that they did not believe Dr. Eiger could maintain an adequate practice outside the restricted areas, the facts demonstrated that Dr. Eiger is a highly qualified pulmonologist who could quite easily continue to practice outside of the restricted area. It might necessitate a move of offices, and perhaps a move to an alternative metropolitan area in the state, although there appear to be hospitals outside the restricted area near enough to where Dr. Eiger currently lives that he need not relocate or face an untenable commute. The question is whether doing so would be such a hardship that, as a practical matter, he would be unable to continue his practice and be forced to leave medicine entirely. Case law from many jurisdictions indicates that the physician must face such a significant relocation that so disrupts his or her personal life as to render a move impractical. Here, and generally, the "inconvenience" category is a large one. While enforcement of the covenant would no doubt have an adverse effect on Dr. Eiger's practice, it would not amount to an "undue hardship" that would prevent enforcement of the covenant.

c) Availability of Other Physicians

The public always has an interest in the availability of an adequate number of providers of any good or service. Thus, all non-compete agreements are scrutinized to make sure that the covenant does not shield the covenantee from minimal competition necessary to provide goods and services at the highest output and lowest cost to society. Such a concern is paramount concerning non-compete agreements applicable to physicians, as the public needs for available medical care are crucial. Courts in

many jurisdictions have refused to enforce covenants that otherwise appeared reasonable in scope for this public policy concern. For example, an injunction was denied against a podiatry specialist where there was testimony of a shortage of such specialists in the county and patient delays in getting appointments. Similarly, a covenant was not enforced against an ear, nose, and throat (ENT) doctor where the court noted that it was common knowledge that specialists were in short supply in the state, despite the fact that there was conflicting testimony as to the number of ENT specialists in the area. See generally, ENT Inc. v. Atkinson. In New Castle Orthopedic Associates v. Burns, enforcement against an orthopedic specialist who was one of only two such physicians in a small community was denied, because the result might leave the community in a vulnerable position.

Here, the trial court concluded that the restrictive covenant is not so broad as to violate public policy concerning a restricted number of physicians. We agree. The record contains nothing to suggest there will be a lack of pulmonologists in the restricted area if Dr. Eiger is precluded from practicing there. To the contrary, there appears to be an abundance of highly qualified pulmonologists in the five-mile radius from each of the three CMS offices, even though it covers a total of 235 square miles.

d) Patient Physician Choice

A court must evaluate the extent to which enforcing the covenant would foreclose patients from seeing the departing physician if they desire to do so. If a covenant not to compete fully removes patients' ability to continue to see a particular doctor of their choice, where successful treatment relies on the individualized nature of the doctor-patient relationship, the covenant may run afoul of public policy. For example, a court recently denied enforcement of a covenant against two pediatric specialists with many special needs patients in the restricted area, even though the community would still have had five pediatricians in the restricted area. Given the nature of the relationship between the pediatricians and their special needs patients, the covenant was unenforceable due to public policy. Similarly, a covenant asserted against a speech and hearing pathologist was struck down when she demonstrated that the patients she treated were not readily transferable to another therapist, even though there were other

therapists in the area. Where there is less of a personalized nature of the doctor-patient relationship, however, this concern bears less weight. It is a reality of modern medical practice that patients find many doctors interchangeable within particular practices, and patients change doctors frequently due to changes in insurance. Practices that involve mostly standard diagnostic procedures and tests, such as x-rays, CAT scans, endoscopy and blood tests, create less of a concern and covenants have been enforced against physicians whose practices predominantly involved those areas, although the covenant must be evaluated on a case-by-case basis rather than solely on the area of practice.

Here, the trial court found a crucial need for patients to select a particular pulmonologist with whom to work. We agree, particularly concerning pulmonologists who treat AIDS patients, given the potential for ongoing and specialized treatment. The geographic scope of this covenant encompasses approximately 235 square miles, making it very difficult for Dr. Eiger's existing patients, some of whom established their relationships with Dr. Eiger before he joined CMS, to continue treatment with him if they so desire. We thus hold that the covenant not to compete is unenforceable as a matter of public policy because it interferes with Dr. Eiger's patients' ability to select the doctor of their choice.

C. Judicial Rewriting of Covenants Not to Compete

On its face, the covenant broadly restricts Dr. Eiger from providing "medical care or medical assistance to any person or persons who were patients of Employer during the period that Employee was in the hire of Employer." CMS invites this court to use a "blue pencil" to rewrite the covenant to make it reasonable and thus enforceable. CMS's proposed approach has some superficial appeal on the theory that it results in enforcement of reasonable prohibitions. Columbia courts, however, have consistently refused to "blue pencil" or otherwise rewrite a non-compete covenant to make it reasonable. We decline to overturn this longstanding rule.

II. CONCLUSION

We hold that the restrictive covenant between Dr. Eiger and CMS cannot be enforced. Canyon Medical Specialists' interest in enforcing the restriction is outweighed by the likely injury to patients and the public in general.

ANSWER A TO PERFORMANCE TEST A

Applicant
Law Offices of Catherine R. Tedesci
1199 Brian Drive
Sweetwater, Columbia

February 26, 2013

Dear Dr. Harris,

I understand that you have recently left your employment with Doral Digestive Medical Clinic (DDMC) and part of your employment contract with DDMC contained a covenant not to compete should you leave DDMC employ. You have contacted the Law Offices of Catherine R. Tedesci to learn whether or not this covenant is enforceable in whole or part. This letter provides the Firm's opinion of whether and to what extent the covenant is enforceable.

Whether or not and to what extent a covenant not to compete is enforceable is a matter governed by case law of Columbia, the jurisdiction in which DDMC is located and the jurisdiction in which the covenant would be enforced. In determining whether a covenant not to compete is enforceable Columbia courts will look at a variety of factors which are balanced against each other. No one factor is necessarily determinative of whether or not the covenant will be enforceable. However, as discussed below, it is likely that the covenant will be held to be reasonable in all respects except its negative impact on the availability of gastroenterologists (GI doctors) in Sweetwater.

ANALYSIS

As an initial matter, it should be noted that covenants not to compete are disfavored and the disfavor is particularly strong with respect to covenants not to compete applicable to physicians. In fact, Columbia courts have recognized that the American Medical Association regards such covenants are having a negative impact on patient care. Because of this disfavor, Columbia courts "strictly construe" non-competition agreements against the employer seeking to enforce the covenant. This means that Columbia courts are very critical of covenants not to compete and will view such agreements with an eye against enforcement. This general disfavor is a factor in your favor.

Factors the Court Will Consider

In general, at a very high level of generality, a covenant not to compete will not be enforced if either the restraint is greater than necessary to protect the employer's legitimate interest or if the employer's interests are outweighed by the hardship the covenant places on the employee and the public. In an attempt to balance these interests, Columbia courts have held that a covenant not to compete will be enforced only if (1) it is in writing, (2) was entered into at the time of employment and as part of the employment contract, (3) is based on valuable consideration, (4) is reasonable in scope (time/duration, geographic territory, and activity), and (5) is not contrary to public policy.

1. Writing

In this case, there is no dispute that the employment agreement with the non-compete clause you signed was in writing. This factor is not going to be an issue in the case.

2. Entered into At Time of Employment and As Part of Employment Contract

In this case, the covenant not to compete was entered into while you were employed and as part of an employment agreement. This factor is not going to be an issue in the case.

3. Valuable Consideration

The covenant not to compete must be based upon consideration. This means that in exchange for agreeing not to compete the employee received something valuable from the employer in return.

If the covenant not to compete was part of the original employment agreement, meaning that the employer-employee relationship had not already been established, consideration is not an issue. This is because the employer's agreement to hire the employee based on the employee's promise to fulfill his employment duties including a promise not to compete is regarded as fulfilling the consideration requirement. In short, being hired is the consideration.

If the covenant not to compete was entered into after the employment relationship had already commenced, the covenant will be enforceable only if it was supported by some separate, additional consideration. Mere employment will not suffice in this context. An increase in salary or additional employment benefits would be examples of separate additional consideration to support the covenant not to compete that was introduced into an already existing employment relationship.

In this case, when you officially started as an employee of DDMC will be an issue. You described your initial agreement with DDMC as a trial-period agreement and as "sort of like a fellowship year". Moreover, when you signed the employment agreement with the covenant, it was as part of a discussion of you joining the clinic as a "shareholder member" for which you signed an "employment agreement". If the original agreement you had with DDMC is regarded as a fellowship relationship rather than an employment

relationship, DDMC will not have to show additional or separate consideration for the covenant because there was technically no prior or pre-existing employment relationship between you and DDMC. Thus, the covenant was included at the commencement of the official employment relationship meaning that employment was sufficient consideration for the covenant.

On the other hand, even if the court were to find that the trial year or fellowship year was an employment relationship, DDMC can show that it paid separate additional consideration for the covenant not to compete that it included in the second employment agreement. Since the second employment agreement included a pay raise (from $160,000 per year to $200,000 per year) and a stock transfer this would constitute separate, additional consideration beyond the pre-existing employment relationship.

Thus, DDMC will be able to show valuable consideration supported the covenant regardless of whether or not the covenant was introduced at the commencement of the employment relationship or was introduced into a pre-existing employment relationship.

4. Reasonable in Scope

Whether a covenant not to compete is reasonable in scope is dependent upon employer's ability to show that the restrictions in the covenant are reasonable in relation to the importance of the employer's interest. Columbia courts have recognized that an employer has a legitimate interest in keeping its "customers" and that a covenant not to compete can be a reasonable means of protecting this interest. This is because the employer has expended time and money in acquiring its client base. The courts regard this expenditure as giving employers a property interest in the client base which is entitled to protection.

However, the strength of the employer's interest in protecting its client base is reduced when the employee subject to the restriction played an active role in the development of that client base and/or brought clients with him to the employer. Thus, the strength of an employer's interest in protecting its client base is weakened when the very employee it

is seeking to restrain was a driving force behind development of the client base. Examples would include a doctor who has garnered a strong following among patients such that they refer others to the doctor (and by extension to the employer) or a doctor whose pre-existing patients continued to go to him after he was hired by the employer.

The employer also has a strong interest in protecting its client base when the employees sought to be restricted obtained their skills from the employer. This is because the employer has expended time and resources in training the employee and it would be unfair to allow the employee to use his skills acquired at the employer's expense to immediately take away clients from the employer.

However, the strength of the employer's interest in protecting its client base would be reduced if the employee were already skilled prior to being hired. If a doctor was already well-experienced at the time he was hired, his ability to lure patients away from the employer would not be based on skills acquired at the employer's expense; thus, the employer's interest in protecting its client base on the grounds that it trained the employee are less strong.

In this case, you were a novice doctor at the time you joined DDMC. Indeed, you stated that you sought out DDMC in order to learn and acquire skills and knowledge and to get your career going. DDMC provided you with training and experience. In short, DDMC has invested a great deal of resources in you and thus has a strong interest in ensuring that you do not immediately turn around and use those skills against them to take its patients. Indeed, you stated that you recognized this interest of Dr. Medved at the time you were presented with the covenant not to compete in your employment agreement.

DDMC is also likely to make a strong argument that the vast majority of the patients who would form the clientele for your new practice were gained during your employment with DDMC and that DDMC provided you with the opportunity, resources, and training to develop these patients. We can argue that you played an important role in the development of the patient base as evidenced by the fact that your patients are willing

to following you to your new practice. However, since DDMC did provide you with all of your practical experience and training, it is likely they have the stronger interest with respect to the development of the client base.

Once the strength or importance of the employer's interest is known, the employer has the burden to show that the covenant not to compete's restrictions are not greater than necessary to protect that interest. The employer cannot use means that are overbroad or excessive in relation to his interest. The restrictions must be proportionate to the strength of the employer's interest. A covenant not to compete is based on the rationale that it will take an employer time to recover from the loss of an employee with specialized skills. Thus, restrictions give the employer a bit of time in which to hire a replacement and allow the replacement to become an effective employee but they must also allow the former employee a reasonable opportunity to return to practice.

a. Time/Duration

The length or duration of the covenant cannot be excessive. While there is no bright-line rule that says “x number years is too long but y number of years is okay”, Columbia courts have found that generally two years is at the outer edge of what is permissible. While covenants for a longer period have been upheld, in general two years appears to be reasonable but at the outer limit. In determining whether a particular amount of time is reasonable, the court will likely look to the length of time it would take for the replacement to develop the skills and customer base the former employer had at the time he left.

The covenant not to compete has a duration of 3 years. This period is outside what is generally regarded as the outer edge of permissible. However, as there is no bright line it is not necessarily unreasonable. On the other hand, based on the Firm's interview with you, it appears that it took about 1 year for you to acquire the skills necessary to practice with and become a full member of DDMC as a gastroenterologist. If DDMC could hire and train a replacement for you within a year then a 1 year restriction will certainly be upheld as reasonable. The question is how long would it take

for DDMC to hire and train a replacement with your level of skill and patient base. You were employed with DDMC for an additional 4 years before you left for a total of 5 years for you to acquire the skills and client base you had when you left. It is likely that it would take at least 3 years for DDMC to hire a replacement, train him in the specialty, and have him obtain the same sized client base as you. Indeed others have indicated such a client base takes 2 years to develop. Thus, it is quite possible that the 3 year restriction is not unreasonable. This is all the more likely to be upheld as reasonable since the GI specialty requires an additional two years of training and currently no internists in the Sweetwater area have started that training. It is thus very likely the duration of 3 years is reasonable.

b. Geographic Territory

The territory covered by a covenant not to compete cannot be greater than necessary to protect the employer's interest. There is no bright-line rule setting a specific number of miles as permissible or impermissible. Rather, the court will look to the geographic area of the employer's customer base. If the restricted territory is limited to areas from which the employer draws its clients and referrals that restriction is likely to be held as reasonable. Thus, even very large areas could be restricted if it were shown that the employer draws clients from that large a geographic area.

In this case, the geographic area in which you are restricted from practicing is the larger of within a 5 mile radius of any office or hospital used by DDMC or within a 20 mile radius of Sweetwater. Based on the Firm's assessment this covers 1200 square miles. These 1200 square miles also represents the area from which DDMC draws its patient and referral base. Thus, it is very likely to be held to be reasonable.

c. Activity

The covenant not to compete must be limited to the particular areas of the former employee's employment. Thus, the Columbia Court of Appeal has held that a covenant not to compete purportedly restricting a specialty doctor from not only practicing his specialty but also all forms of medical care was unenforceable as too broad.

In this case, the covenant is limited to your specific area of practice while employed with DDMC. You are precluded under the covenant only from the general practice of gastroenterology. This is likely a reasonable restriction because it is limited to the area you practiced while employed with DDMC and it is a specific area of practice. Thus, you would be free to practice other types of medicine and provide other types of medical care.

5. Public Policy

Unlike some other jurisdictions, Columbia courts have consistently refused to hold that covenants not to compete among physicians are unreasonable per se as against public policy. Rather, Columbia courts will assess the level of harm or benefit to the public from the covenant not to compete. Indeed, it should be noted that Columbia courts have acknowledged that a narrowly drawn covenant not to compete between physicians can benefit the public by encouraging what would otherwise be uncertain or risky agreements between young doctors and more experienced doctors. This is because the covenant protects the more experienced doctor's investment in his client base and the resources expended to train the younger doctor.

Your relationship with DDMC is just the kind of relationship that covenants not to compete foster. Dr. Medved was an experienced doctor who took a chance by expending resources training you. As a result, you are now an experienced GI doctor with much to offer. However, such relationships would not be possible if covenants were not enforced and employees were allowed to immediately use the skills their employers paid for against those same employers by taking away patients. Thus, if the covenant is found to be narrowly drawn, it will likely be enforced.

(a) Undue Hardship to Physician

The public policy assessment also includes the hardship to the employee who is restricted. If the covenant is so restrictive that it effectively removes a physician from the marketplace, it will not be enforced. This is a high burden to show. The Columbia Court of Appeal has found that a highly qualified specialist doctor could easily continue to

practice outside of the restricted geographic area. Indeed, the costs and hassle associated with relocation do not suffice as sufficiently unduly burdensome unless it is so significant and disruptive to the doctor's personal life to render the relocation impractical. The relocation must present such a hardship that the doctor would be unable to continue practice and have to leave medicine completely.

Although you have recently bought a home, got married, had a child, and wish to stay in Sweetwater, this is unlikely to constitute an undue burden on relocation to such an extent that you would forego medical practice altogether. It would certainly be a major inconvenience to you and would reduce your ability to retain clients and obtain referrals. However, this hardship will be offset by the fact that you gained those patients and the referrals from the investment that DDMC placed in you during your employ.

Additionally, the fact that you would be able to afford, although it would be tight, the 25% penalty for violation if you were to practice in Sweetwater also indicates that the covenant does not impose a severe and unreasonable hardship on your personal life such that you would be taken out of the medical practice entirely.

The court is unlikely to find that you will personally incur a substantial and undue hardship if the covenant were enforced.

(b) Availability of Other Physicians

The public has a strong interest in an adequate number of medical providers. Competition contributes to the goals of quality services at a decrease in cost. However, even absent the economic benefits of competition, Columbia courts have consistently ruled against covenants not to compete among physicians when there was evidence of delays in appointments among patients or merely common knowledge that specialists were in short supply in the restricted area. Moreover, even when this evidence of shortage was conflicted, Columbia courts have ruled against the restriction.

There is a shortage of gastroenterologists in the county. There is only you and Dr. Medved. Although you stated that he plans to hire another GI doctor, it is likely that this would still constitute a dearth of available GI doctors. Indeed, the nearest other GI doctors are 70 miles away in Porter. Moreover, there is no indication that any internists in the Sweetwater area have yet started the 2 year training required to become a GI doctor. This strongly supports the unreasonableness of the covenant.

On the other hand, while there is concern that only having one GI doctor in Sweetwater would put a strain on services, there is no evidence that prior to your arrival or after your departure, any patients were delayed in receiving service or received anything other than prompt and efficient care. Moreover, there is evidence that Dr. Medved would have time to serve the additional patients previously served by you and other physicians and hospitals have also opined that he could handle the increased caseload.

In the case of an emergency, such as internal bleeding, patients could be transported to Porter 70 miles away. Although such cases are rare, emergency treatment that is 70 miles away is a very long distance especially for elderly patients who are those most likely to require such treatment. On the other hand, such bleeding can be treated in Sweetwater by four surgeons who, although not GI doctors, could provide similar semi-surgical procedures in an emergency.

There is a strong argument to be made on the basis that competition among doctors would increase the quality of services and also serve to curtail price increases. With only Dr. Medved practicing in Sweetwater, patients do not have a choice if they want to stay within Sweetwater for treatment and their only other option is to travel 70 miles away. Given that the demographics of the clientele for GI doctors is older patients, it is unlikely they would make such the choice or even have the ability to make a choice to receive care so far away if their mobility or transportation options are limited.

It is unclear how the court will rule on this factor. You have a strong argument. Only one GI doctor in all of Sweetwater with the nearest available other GI doctor 70 miles away is likely not reasonable especially since many of the patients are elderly and would be disinclined or unable to travel that distance. While the quality or availability of care has not yet been compromised, there is a strong argument to be made that the court should allow you to practice to protect against a decline in services and/or an increase in prices.

(c) Patient Physician Choice

If a covenant not to compete would preclude individualized treatment of patients who are not easily transferable to other physicians, the covenant is likely not enforceable. If the nature of the doctor-patient relationship is such that successful treatment is dependent upon a specialized or highly individualized and ongoing method of treatment a covenant restricting a doctor from providing such care to a pre-existing patient will not be enforceable. It would burden the patient's ability to select the doctor of their choice for a particularly specialized medical issue. Conversely, if the treatment is more standardized, including routine diagnostic procedures and tests, the doctor is regarded as more easily interchangeable without negative impact on the patient or treatment success and, thus, the covenant is more likely to be enforced.

While you have understandably expressed a concern for many of your elderly patients, the court is unlikely to find that gastroenterology is the type of specialty that requires a close doctor-patient relationship with highly individualized and specialized care required for successful treatment. Since much of the practice focuses on early colon cancer detection and endoscopy, the court is likely to find that these are routine diagnostic tests that are standardized to such a degree that doctors are interchangeable. Moreover, most patients only receive a screening once every five years and do not require hospitalization. While this does not and should not diminish the importance and value of the service you provide, it does mean that the court is unlikely to find that the covenant not to compete will greatly impair patient choice in a negative manner.

On the other hand, early colon cancer detection is critical to survival. Thus, the fact that many patients in Sweetwater stated that if you were not available they would no longer go for their colonoscopies every five years. While this sentiment does favor allowing you to continue to practice in Sweetwater, it is not clear that it will be sufficient to find the negative impact on patient physician choice required.

Finally, it should be noted that Columbia courts have consistently refused to rewrite covenants not to compete in order to make them enforceable. This practice of eliminating the unreasonable portions or rewriting the provisions to make them reasonable is known as "blue penciling" and it is not an accepted remedy in Columbia. Thus, although, as discussed above, it is likely that the covenant is enforceable, if the court finds that particular provisions are not reasonable, you do not have to worry that the court may attempt to rewrite otherwise unenforceable provisions of the covenant not to compete in order to make them enforceable.

In conclusion, it is likely that the court will uphold the covenant not to compete as reasonable in all respects except for the impact on the availability of GI doctors. The strongest argument that can be made against enforcement is the dearth of available GI doctors in Sweetwater which raises the public policy concern that lack of competition will result in a decline in the quality of services and/or an increase in the cost of care. However, it is unclear how the court will rule on this issue. There is currently no evidence that this has been a problem in the past or is currently a problem. However, it does portend as a potential problem. Given the great importance of the availability of quality medical care, it is possible that the court may hold the covenant not to compete to be unenforceable on this ground alone. The Firm is of the opinion that the negative impact on doctor availability is a viable argument and that it would be reasonable to attack any attempt to enforce the covenant on these grounds. However, it should be emphasized that there is no certainty that this argument will be successful and the covenant, which as discussed above, is in all other respects reasonable, may be upheld and enforced against you.

The Firm thanks you for consulting it on this matter and awaits your response as to what, if any, steps you would like to take in this matter. Please do not hesitate to contact the Firm with any questions or concerns.

Respectfully,

Applicant

ANSWER B TO PERFORMANCE TEST A

To: Dr. Kyle Harris
From: Catherine Tedesci
Date: February 26, 2013
Re: Covenant Not to Compete with DDMC

Summary of the Legal Issue in this Matter

The issue at hand concerns the enforceability of a non-compete clause in an employment agreement that you entered into approximately four years ago with Dr. David Medved at the Doral Digestive Medical Clinic ("DDMC"). The non-compete clause restricts you from engaging in the practice of gastroenterology ("GI") for a period of three years after the date of termination of the agreement. Furthermore, the non-compete clause geographically restricts you from establishing a GI practice within a 5-mile radius of any office or hospital used by DDMC, or within a 20-mile radius of Sweetwater. A month after the 4-year agreement expired, you resigned from DDMC and decided that you wanted to open up your own office in Sweetwater to set up a GI practice. As such, you are interested in knowing whether or not Dr. Medved will successfully be able to enjoin you from setting up your own GI practice in Sweetwater, pursuant to the terms of the non-compete clause in your employment agreement with DDMC, and also if you will need to pay money to DDMC in order to maintain your GI practice in Sweetwater.

The Enforceability of the Non-Compete Clause

The underlying issue in this case is whether or not Dr. Medved will be able to enjoin you from setting up your own GI practice in Sweetwater, pursuant to the terms of non-compete clause in the employment agreement you entered into with DDMC approximately four years ago. Generally speaking, the law disfavors restrictive covenants because they restrain trade, and in the law particularly disfavors such

covenants among physicians because the practice of medicine affects the public to a much greater extent and such covenants tend to negatively impact patient care. Under Columbia law, non-compete clauses are enforced only if they are reasonable. To determine whether a particular non-compete clause is reasonable, a court will conduct a fact-intensive inquiry into 1) whether the restraint is greater than necessary to protect the employer's legitimate interest, and 2) whether that interest is outweighed by the hardship to the employee and the likely injury to the public.

In order to more systematically analyze the abovementioned factors, the courts have established five requirements for enforcing a non-compete clause:

1) It must be in writing;
2) It must have been entered into at the time of and as part of a contract of employment;
3) It must be based on valuable consideration;
4) It can be shown by the employer to be reasonable in scope, including time, territory, and activity; and
5) It must not fail due to public policy concerns.

DDMC's failure to satisfy all five of these requirements will result in invalidation of the non-compete clause. My objective analysis of each of these factors follows.

The Non-Compete Clause in this case was in writing and was entered into at the time of and as part of a contract of employment

DDMC will be able to easily satisfy the first two elements of the test. First, the non-compete clause is in writing, as evidenced by the written agreement that you have provided me with. Second, you agreed to the non-compete clause at the time of and as part of a contract for your employment with DDMC. At the conclusion of your one-year trial period, you entered into a 4-year employment term agreement with DDMC that

included the non-compete clause that forms the basis of this inquiry. As such, DDMC will be able to satisfy the first two elements of this test.

The Non-Compete Clause was based on valuable consideration since the employment relationship was established at the time of the non-compete clause.

For the non-compete clause to be valid, it must be based on valuable consideration. Consideration is a legal term which essentially means that there must have been a bargained-for exchange between you and DDMC. Courts have held that where the employment relationship was established at the time of the non-compete clause, there is consideration for the covenant, because in exchange for the promise not to compete, you are being given a chance at the job. In this case, your employment relationship was probably established at the same time that you agreed to the non-compete clause. You might be able to argue that your employment relationship arose a whole year earlier, when you began the one-year trial period; however, DDMC will successfully argue that the prior 1 year was just a trial, and therefore it did not constitute the beginning of an official employment relationship. Rather, the official employment relationship commenced when you entered into the 4-year agreement that included the non-compete clause, because that is when you bought into the clinic as a shareholder and signed a stock transfer and employment agreement with DDMC. Furthermore, even if DDMC is unsuccessful in making this argument, they will succeed in arguing that you were nonetheless given valuable consideration in exchange for the non-compete clause. DDMC will point to the increased pay of $200,000 and shareholder status in the organization. As such, it is unlikely that you will prevail in showing that DDMC did not provide you with valuable consideration in exchange for the non-compete clause.

DDMC has a strong, protectable interest in its patient base and its network of referral sources that must be considered

Before considering the reasonableness of the scope of the non-compete clause, it is also important to determine if DDMC has a strong protectable interest that justifies the

non-compete clause, because such an interest is weighed against the restrictions placed on scope. In another case heard before the Columbia Court of Appeal, Canyon Medical Specialists v. Eiger ("Eiger"), the Columbia Court of Appeal held that a medical group much like DDMC had a protectable interest in its patient base and network of referral sources. The facts of that case are actually very similar to the facts of your case, and so I will be making reference to the facts and analysis the Eiger court conducted in reaching its conclusion. Much like your case, Eiger involved the enforceability of a non-compete clause that barred a pulmonologist who left a medical group from setting up his own practice (in that case, the court found the restrictive covenant to be unenforceable, although the facts of that case differ in some significant ways from the facts of your case).

In Eiger, the court held that where an employee took an active role and brought already developed skills and customers with him to the job, it is less likely that a non-compete clause will be enforced. The court held that an employer has a stronger interest in his customer base and referral sources where a departing employee brought patients with him and did not learn his skills from the employer. Unfortunately, in your case, the reality is that you actually learned a lot from DDMC and brought no patients into the practice. You joined DDMC after completing your residency, and you joined DDMC to learn GI and to learn how to find patients and develop a practice. Since you learned a lot from the practice, both about GI and about running a GI practice, DDMC has a much stronger interest in protecting its patient referrals and customer base. With this in mind, let us take a look at the reasonability of the scope of the non-compete clause.

The scope of the non-compete clause is reasonable in terms of duration, geographic considerations, and the type of activity prevented.

A non-compete clause's scope will be defined by its duration, geographic area, and activities prevented, and cannot be greater than necessary to protect DDMC's legitimate interests. The idea behind these restrictions is to give DDMC enough time to both

overcome your loss by hiring someone else, while still allowing you to come back to the area after practicing outside of it for a reasonable period of time.

Duration

A restraint that is unreasonably long in time given the protectable interests will not be enforceable. Here, it is important to remember that because of the circumstances surrounding your case, DDMC has a strong protectable interest in maintaining its patient referrals and customer base. In Eiger, where that protectable interest was not as strong as DDMC's here, the court found that a 2-year duration was reasonable. It noted that while 2 years was on the outer edge of what was considered permissible, other courts have found durations of three years to also be permissible. In our case, the 3-year duration is probably reasonable, because DDMC has a much stronger protectable interest than the employer did in Eiger, and because all physicians in the area agree that realistically it will take up to 3 years for a new GI specialist to build up a referral base. And of course, those 3 years do not take into account the time it will take Dr. Medved to find a new physician, since it is harder to attract someone to Doral County (because of its rural background). Although it seems like Dr. Medved has some options lined up, a three year restriction is nevertheless likely to be upheld as reasonable.

Geographic Considerations

A non-compete clause that includes more territory than necessary to protect the legitimate business interests of the employer is not reasonable. In Eiger, the court upheld a 235 square miles restriction, which is significantly smaller than the one imposed on you -- 1200 square miles. However, in the same breath, the Eiger court noted that other courts have approved an 1800 square mile restriction, because the clinic in that case attracted patients from throughout the restricted area. The current restriction on you prevents you from setting up a practice within a 1200 square mile radius around Sweetwater and surrounding areas. Unfortunately, the report from our

medical economist suggests that all physicians agree that DDMC patients span that entire 1200 square mile radius and, according to them, Dr. Medved has a "well-established referral network" in the greater Sweetwater area. Given these facts and once again keeping in mind DDMC's strong protectable interest in protecting its referral source and customer base, it is unlikely that the proposed 1200 square mile restriction will be deemed unreasonable.

Activity Prevented

Finally, a restriction may be unreasonable in scope if it is not limited to the particular areas of the present employment. Once again, in Eiger, the court found the restriction to be unreasonable, because it prohibited Dr. Eiger from providing any and all forms of medical care, not just pulmonologist. But in your case, the non-compete clause is limited to GI practice only, and would allow you to still practice in other areas of medicine. Since another court upheld a similar restriction -- one preventing a doctor from practicing only orthopedic medicine and orthopedic surgery -- it is highly unlikely that the restriction's restraint on GI practice alone will not be deemed unreasonable.

In sum, a court is likely to find that the restrictions imposed on you by way of the non-compete clause are reasonable with respect to their scope.

Public policy considerations weigh in favor of enforcing the non-compete clause in your employment agreement with DDMC.

Generally speaking, a non-compete clause is contrary to public policy unless it protects a legitimate interest of the employer and is not so broad as to be oppressive as to the employee or the public. In examining these clauses, courts have recognized the need to balance the public interest in health care with the personal freedom of contract, and have determined that the public interest must prevail. However, there is also benefit in enforcing these agreements, because the covenant may encourage agreements between young doctors like yourself and more experienced doctors like Dr. Medved.

Thus, if ordering the employee physician to honor his agreement will merely inconvenience the employee physician without causing substantial harm, and enforcement can be seen to facilitate a desirable type of risk-taking physician relationship, the employer is entitled to have the covenant enforced. In light of these competing considerations, courts have been unwilling to deem such agreements unreasonable on their face.

In making this determination, the Eiger court looked to a few different factors: 1) the undue hardship to the physician; 2) the availability of other physicians; and 3) patient physician choice.

Undue Hardship to You

If a non-compete clause would effectively remove a physician from the marketplace entirely, such an undue hardship can render a covenant unenforceable. Courts have held that the physician must face such a significant relocation that so disrupts his personal life as to render a move impractical. I know that you've pointed to a couple of reasons why this non-compete clause imposes a significant hardship on you. You noted that most of your patients live near Sweetwater and requiring them to travel long distances is inconvenient. Moreover, you noted that leaving temporarily would cause you to lose patients and referrals in the three years you were gone. Unfortunately, the reality is that these reasons in and of themselves are not likely to be strong enough reasons to constitute an "undue hardship." Even if this non-compete clause was enforced, you still would be able to maintain a GI practice -- albeit further away in a metropolis, like Porter -- and your personal life would not be greatly disturbed for a three year period in any unusual way. A court is unlikely to find that this clause imposes a significant hardship on you such that it would render you incapable of practicing altogether. Granted it would certainly upset you because you would lose your patients who you care so deeply for, but the inconveniences do not outweigh DDMC's strong interest in enforcing the non-compete clause.

Availability of Other Physicians

The public has an interest in the availability of an adequate number of providers of any good or service. It is no secret that you and Dr. Medved were the only 2 GI doctors in Sweetwater. Courts have noted that healthy competition is important to ensure the high quality of service and care to patients, but courts have also held that enforcing non-compete clauses is permissible where the only worry is that the result might leave the community in a vulnerable position. Although you may have a very strong argument here, it is still unlikely that a court will invalidate the non-compete clause on these grounds.

The reviews from your colleagues in the area with respect to this issue are mixed. Some have described your loss as "tragic," and most agreed that it would be desirable to have more than one GI in the area. That being said, there is no evidence that Dr. Medved has been pressed for time and many agreed that he would be able to meet the community's demand for his services, even in your absence. While others also noted the inconvenience of having to travel 70 miles to see another GI for an emergency, none of those doctors stated that there has ever been a problem of people going untreated in the Sweetwater area. Additionally, most of your colleagues noted that the two of you were virtually identical in what you did, even though there might have been a couple of things you could do that Dr. Medved could not. Finally, while Dr. Medved is the only GI practicing in Sweetwater, he could always cut back his internal medicine practice to focus more on patients needing GI services, and there is an abundance of other internal medicine doctors in Sweetwater to accommodate this situation.

In sum, it will be a very close call on how the court rules on this issue, but taking into account all of the evidence, my impression is that the court is not likely to find that your absence will create such a devastating situation for both patients and Dr. Medved that it would be unreasonable to enforce the non-compete clause. While you are gone, Dr. Medved will likely hire another GI to help him with patients (he is already interviewing

more people), and there is no reason to believe that patients will suffer a significant detriment in terms of the quality of care they will receive due to your departure.

Patient Physician Choice

Finally, a court has stated the importance of invalidating a non-compete clause where successful treatment relies on the individualized nature of the doctor-patient relationship, and the departure of a physician would mean that a patient would no longer be able to continue to see their doctor of choice. Unfortunately, in a GI practice, as you know, the nature of the doctor-patient relationship is not particularly close, because it involves colonoscopies, during which the patient is not awake, and a large amount of the practice constitutes standard tests and involves interpreting blood tests, x-rays, and endoscopy results. Although there may be parts of the GI practice that still may be personal in nature, for a large part the practice tends to be more impersonal in nature. As such, even though I know that you deeply care about your patients and the relationships you have established with them, a court is unlikely to find that the GI practice is of the type that requires a personal relationship with their doctor. You may be able to argue that some of your colleagues have noted that your departure might lead them to not see a GI doctor at all as a result of having to switch to a new GI specialist, and that this result would be troubling because of the harms associated with colon cancer. That being said, it is unlikely still that a court will believe that the GI practice requires a personal relationship between the doctor and patient, such that your absence will deprive them altogether of the important need for them to choose a doctor they can feel comfortable with.

Payment and the Liquidated Damages Clause

Courts will typically not rewrite agreements to make them more reasonable, but it may nonetheless invalidate a particular portion of an agreement. Here, the liquidated damages clause, which would require you to pay 25% may be deemed a "penalty," and if that is the case, it may be unenforceable. If that is the case, you will simply have to

abide by the terms of the non-compete clause except for the liquidated damages provision. If, however, the liquidated damages clause is deemed to be fair by the courts and not a penalty, then it will be enforceable and you will have to pay the money in addition to abiding by the terms of the non-compete clause.

Conclusion

In sum, although I sympathize with your desire to remain in Sweetwater and open your own GI practice, unfortunately, based on the foregoing analysis, I think it is unlikely that you will prevail in defeating the non-compete clause in your employment agreement with DDMC. I apologize for the bad news, but I hope that this opinion provides you with an understandable basis for my conclusion.

Best regards,
Catherine Tedesci

February 2013

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

In re. Yamata Logging, Inc.

Instructions

FILE

Memorandum from Scott Rawlins to Applicant

Transcript of Interview with Hari Yamata

Note from Hari Yamata to Marvin Cox

Letter from Stanley Merrick to Hari Yamata

IN RE. YAMATA LOGGING, INC.

INSTRUCTIONS

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

Rawlins Baird, LLP

One Parkstead Plaza, Suite 1200

Fair City, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant

FROM: Scott Rawlins

SUBJECT: Yamata Logging, Inc.

DATE: February 28, 2013

Hari Yamata, the owner of Yamata Logging, Inc., has asked us to represent him in a contract dispute with Marvin Cox, owner of Albion Flat Properties. Yamata made a "handshake" deal with Cox to log a stand of timber at Albion Flat.

When Yamata was gearing up to begin logging, Cox told Yamata that he would not allow Yamata and his crews onto the property. Cox's attorney wrote Yamata a letter asserting that Yamata has no enforceable contract to cut the timber.

Mr. Yamata does not want to commence litigation if it can be avoided. He has commitments to provide logs to buyers in Japan this spring, and his failure to deliver would have a disastrous long-term effect on his business. He would prefer first to try to persuade Cox to honor his contract. Stan Merrick, Cox's attorney, is a reasonable, levelheaded counselor. If we can demonstrate persuasively that his client would be exposing himself to large damages by refusing to allow Yamata to do the logging, I'm confident he would counsel Cox to go forward with the contract.

What I would like you to do is to draft a persuasive letter for my signature to Cox's attorney setting forth the facts and the law supporting Yamata's position that he has an enforceable contract to log the tract at Albion Flat starting in March. Be sure to address each of the points asserted in Stan Merrick's letter and, in addition, to explain to him the terms of the contract we believe Yamata will be able to prove.

Transcript of Interview with Hari Yamata

February 25, 2013

SCOTT RAWLINS: Good day, Mr. Yamata. I'm glad you could come in to flesh out the details of our short telephone conversation a few days ago. Since this is our first representation of you and your business, why don't we start with the basics?

HARI YAMATA: Sure, but let's get on a first name basis. I'll call you Scott if you'll call me Hari. Okay?

RAWLINS: Terrific! You faxed me this letter you got from Stan Merrick dated February 19th. I need to understand in detail what happened so I can make sense of the letter. So, tell me about your business.

YAMATA: I've been in the logging business for about 20 years. I've developed relationships with Japanese buyers for cut timber. I ship logs in 18-foot lengths to Japanese mills, where the logs are cut into lumber. Lately, there's been a big demand in Japan for red cedar. There's a small market for it here in the States, but in Japan they can't get enough of it.

RAWLINS: How does this fit in with what we talked about on the phone the other day?

YAMATA: Okay. Marvin Cox owns a thousand or so acres called Albion Flat on the north coast. He sells the trees and replants. It's a managed, renewable tract heavily forested with second-growth cedar. About four months ago, I logged 50 acres on the southwest corner of Albion Flat, and since then I've tried to get Cox to let me log a larger swath.

RAWLINS: Explain that to me. Were there discussions with him, or what?

YAMATA: Yeah. My Japanese buyers contacted me and asked me if I could get some more of the Albion Flat cedar.

RAWLINS: Is there something unique about Albion Flat cedar?

YAMATA: From what I hear from the buyers, the growing conditions in the area create an environment in which the timber grows rapidly and produces a lighter kiln-dried cedar that suits the Japanese needs better. From my point of view, logging at Albion is more productive because it's in a flat area and the growth is very dense and concentrated.

RAWLINS: Okay. Back to your discussions with Cox.

YAMATA: When I was logging the southwest corner, I saw a stand of trees of about 200 acres in the northwest corner that looked about ready for harvest. I told him I'd like to log that plot and that I'd pay him a premium for the logs.

RAWLINS: Did he agree?

YAMATA: Not right away. He said he'd think about it and get back to me. About a month later, I ran into him having breakfast at the Chatterbox Café, and I raised the subject again. We talked for a while, and he finally said, "Okay. I'll let you log those trees, but only those 18 inches or bigger."

RAWLINS: Do you mean 18 inches tall?

YAMATA: No, no. That's trade talk for the diameter of the tree trunks. I believe there are enough 18-inch trees in the stand to make the logging worthwhile.

RAWLINS: Did you talk about any further details?

YAMATA: Sure. We talked about all the usual stuff that's involved in logging -- price, start and finish time, marking the trees, cutting in the roads, storing the logs, cleaning up and burning slash, environmental permits, replanting seedlings, and so forth.

RAWLINS: Did you reduce any of this to writing?

YAMATA: Not really. It was basically a handshake deal. We're both in the business. He's been selling timber from Albion for years as the trees mature and I've been logging in the vicinity a long time, so we know how it works.

RAWLINS: Well, how would you know how much timber you could cut?

YAMATA: A few days later, we walked the northwest plot, marked the corners with stakes, did a rough count of the 18-inch trees, and estimated the board-footage. I figured about 750,000 board-feet, and he said that sounded about right.

RAWLINS: Tell me more about the details. Let's start with price.

YAMATA: There's a price the local mills will pay for logs, and there's an export market FOB price that fluctuates. But the export price is always a lot higher than the local price. We agreed I'd pay Cox 20% of the export FOB price. That was the same price deal we made the time before when I logged the 50 acres.

RAWLINS: What do you mean by "FOB" price?

YAMATA: That means "free on board," the price the buyer will pay for the logs once they're delivered to the shipping company at the Port Columbia dock.

RAWLINS: All right. Is there a way someone could find out exactly what those prices are at any given time?

YAMATA: For the local mill price, you just ask the mill operators -- but it's pretty much common knowledge in the trade. The export price is posted daily in the trade journals and financial newspapers.

RAWLINS: Well, is there any document you or he signed?

YAMATA: I know he's never signed anything, and I don't believe I have either.

RAWLINS: Has either of you ever put the terms of the deal in writing?

YAMATA: Not really. I believe he took some notes on a napkin while we were sitting at the table at the Chatterbox Café. The only thing I ever put in writing was that, on November 26th, about a week after we met, I typed a very short memo on a message pad I keep by my phone and made a copy of it. I dropped the original off at Cox's office.

RAWLINS: What did the memo say?

YAMATA: I brought the copy with me. Here it is. [Attached to this transcript.]

RAWLINS: Did you actually hand it to Cox?

YAMATA: No, I left it on the counter in his office. I know he saw it because I ran into his office assistant at the Chatterbox, and she told me she had given the note to him when he got back from lunch later that same day.

RAWLINS: Did he ever respond to your note in any way?

YAMATA: Not until February 5th. I ran into Cox at the Chatterbox at around breakfast time. That's when he shocked me.

RAWLINS: Shocked you? How?

YAMATA: I asked him how it was going cutting in the road and marking the trees and told him I was all geared up to start the logging on Albion Flat on March 5th. He just looked at me blankly and said, "You're not gonna do any logging on my property." I said, "Wait a minute. What about the deal we made back in November?"

RAWLINS: What did he say about that, Hari?

YAMATA: He said, "What deal? I never signed any contract. That piece of paper you gave my secretary doesn't mean squat."

RAWLINS: Did you talk any further about it?

YAMATA: All I said was, “Come on Marv. Don’t make me have to sue you over this.” Then, he just got up and walked out. In fact, I got stuck with his breakfast tab. I’ve tried several times to call him, but he won’t return my phone calls.

RAWLINS: Do you have any idea why his sudden reversal?

YAMATA: I mean it’s just scuttlebutt around town, but I hear he’s having big marital troubles and he expects his wife to file for divorce. My guess is that he’s trying to avoid generating any income that his wife can get her hands on. I know he inherited Albion Flat from his father and that he’s always run it as a separate business. I’m no lawyer, but I guess the income is subject to claims by his wife.

RAWLINS: How much money is involved in your deal with Cox?

YAMATA: Assuming the 750,000 board-feet we estimated, at the export market price, my sale price comes to about $500,000, plus or minus, depending on the spot price on the day I deliver. Cox’s piece of that is about $100,000. That’s the price he would receive for the logs based on our agreement. But you know, Scott, that’s the least of it. I really can’t make another logging contract for such high quality logs anywhere quickly or buy them on the open market and turn them over for a profit in time to meet my delivery commitments -- and that assumes I can even get them, which is highly doubtful. If I can’t deliver to my Japanese buyers, they’ll find other sources and that’ll be the end of that. I’d lose a very large amount of future business, which I estimate would net me about $750,000 to $1,000,000 over the next five years.

RAWLINS: How much would you net from this deal?

YAMATA: My net, after expenses, would be about $200,000.

RAWLINS: Okay. Let’s talk about the details of the deal you believe you had with Cox. It’ll help me understand the things Cox’s attorney says in his letter.

YAMATA: Right. What the letter says is just plain not true. We *did* talk about those things, and we agreed on them.

RAWLINS: Okay, a minute ago you mentioned that when you last met Cox at the Chatterbox you asked him how cutting the road and marking the trees was coming along. Explain those things to me.

YAMATA: To get equipment and trucks into the logging site, you have to have a road. There wasn't a road there, so when we talked about it, Cox said he would cut in the road.

RAWLINS: The time you logged the 50 acres four months ago, who cut the road?

YAMATA: It wasn't necessary because there was an existing road.

RAWLINS: Well, is cutting in a road a major item?

YAMATA: Definitely. It's expensive. And what it would cost him was all figured into the percentage I agreed to pay him. Plus, it's pretty much standard practice for the landowner to do it because it's his land and he can do it without additional permits. If I were to do it, I'd have to hassle with local bureaucrats about a permit.

RAWLINS: Okay. And what about marking trees?

YAMATA: Well, someone has to go through the stand and mark the trees that are 18 inches and over. You spray a stripe on the trunks with a can of blue spray-paint. Usually, the landowner and the logger will walk the tract together and mark the trees. That's how we did it the time I logged the 50 acres. But, at this time, since we had already walked through the area, we both had a good idea of how many trees would be marked, so I suggested that Cox do the marking. He nodded his head, so I took that to mean that he agreed.

RAWLINS: How big a deal is that?

YAMATA: Not a big deal at all. Two workers with two cans of spray-paint can do it in a matter of hours.

RAWLINS: You said something about cleaning up and burning slash. What does that mean?

YAMATA: Slash is the bark, stumps, roots, limbs, and other debris that's left when you fell and strip the logs. It has to be piled up and burned, which is something the logger usually does. But sometimes it can be hauled away and sold to woodchip mills. Cox said he wanted to see if he could make any money selling the slash, so we agreed that I'd rake it into piles and leave it.

RAWLINS: What's this about environmental permits?

YAMATA: Well, before you can cut any trees, the local forest protection agency has to issue environmental permits. Cox told me that he already has an approved

environmental impact plan, which includes a logging schedule. He also told me that the 200 acres in the northwest plot have already been approved for logging, so all he has to do is request the permits. I can't get them because I'm not the landowner.

RAWLINS: Okay. Another item you mentioned was replanting. What's that all about?

YAMATA: As I said, Albion is a managed, renewable forest. Every tree that's cut is required by law to be replaced with a seedling -- a tree sprout, if you will. That's a condition of Cox's getting some renewable resource tax benefits that I don't fully understand.

RAWLINS: What was your discussion with Cox about that?

YAMATA: Well, since it's his forest, he's the one obligated to replant. He's got a greenhouse operation where Albion Flat sprouts the seedlings.

RAWLINS: Okay. And, finally, you said something about log storage. What's the significance of that?

YAMATA: Ordinarily, I'd haul the logs to local mills as I cut them. In this case, since I was to ship them overseas I would need to store them on site until I accumulate enough for a shipping container load. Without an onsite storage area, I'd have to rent a storage yard at Port Columbia. Double handling is expensive. So it's an important piece of the deal for me.

RAWLINS: How big a deal is it for Cox?

YAMATA: I don't see how it would cost him anything. There are lots of bare areas right alongside the 200 acres I'd be logging where I can stack the logs temporarily.

RAWLINS: Is on-site log storage standard practice in the industry?

YAMATA: No. Usually you just load the logs on trucks and haul them directly to the local mills. But Cox certainly knows it's different in this case because he knows the logs are going to be shipped in containers from Port Columbia and that double handling makes no sense. In fact, he let me store the logs on his land for a few days when I logged the 50 acres.

RAWLINS: I want to be certain that I've got it straight. It sounds like a few of the items you agreed to were critical. That is, if no agreement on them between you and Cox, then no deal. I mean the road, environmental permits, replanting, and on-site storage were a necessary part of the deal to you?

YAMATA: Yes. Any one of them would have been a deal breaker. But as I said, we did agree on each.

RAWLINS: Anything else that you and Cox agreed on?

YAMATA: No. I think that's about it. I know to a certainty that Marv and I settled on all the things I've told you. That's why I'm so upset by the letter from his attorney. My past experiences with Marv have always been on the up and up, so I can only assume he must be under a lot of pressure, because it's not like him to back out of a deal.

RAWLINS: All right. Based on what you've told me, I believe we stand a good chance in a lawsuit for breach of contract. Is that what you want us to do?

YAMATA: I'd rather try to work it out amicably with Marv. I was supposed to start logging in a few days, but two or three weeks delay won't make much difference to me. So, if you can try to work it out quickly, that would be the best for me. But I guess, as a last resort, if he won't come around I'll have to sue.

RAWLINS: Are you willing to renegotiate any of the points you and Cox agreed on?

YAMATA: Sure, within limits, on things like marking trees and burning slash, but not on the expensive things.

RAWLINS: Okay. Let me see what I can do. I've found Stan Merrick to be a reasonable guy in my past dealings with him. I'll send him a letter and then sit down with him.

YAMATA: Great. Please keep me posted on the status.

RAWLINS: I will.

YAMATA LOGGING

Wooden you like to call me back?

Bailey Road & Sawmill Lane

Fair City, Columbia

(541) 434-7237

November 26, 2012

Marv: Just a note to let you know I plan, per our deal, to start logging Albion Flat (marked trees in staked area of NW corner) on March 5, 2013. Estimate 750K board-feet. Pricing per our discussion payable to you upon my delivery of logs FOB Port Columbia dock.

Stanley J. Merrick
Attorney at Law

Law Offices of Stanley J. Merrick

South Shore Center, Room 275
Fair City, Columbia
(541) 444-0790

February 19, 2013

Hari Yamata
Yamata Logging, Inc. **Delivered by Hand**
Bailey Road & Sawmill Lane
Fair City, Columbia

Re: Albion Flat Properties

Dear Mr. Yamata:

Marvin Cox, owner of Albion Flat Properties, has asked me to communicate with you regarding your claim that Yamata Logging, Inc. has a contract to conduct logging operations on a designated tract at Albion Flat. Apparently, at your last meeting with Mr. Cox, you threatened to sue him for breach of contract. By this letter, I hope to persuade you that you do not have an enforceable contract and that any such suit would be fruitless.

Under Section 2-201 of the Columbia Commercial Code, any contract for the sale of goods for more than $500 must be in writing and signed by the party against whom you are asserting the contract. Moreover, if there is a writing upon which you base your claim, that writing must be detailed and definite enough to clearly evidence the existence of a contract. I realize that you delivered to Mr. Cox's office an informal note stating your intention to start logging on March 5th, but that note in no way satisfies the requirements for a written, signed contract.

Mr. Cox informs me that he has never signed any document evidencing any such contract and that, in any event, your assertions regarding the terms of what you claim is a contract are widely at odds with anything he would ever have agreed to. Let me explain the reasons why we believe there is no enforceable contract.

- Mr. Cox never signed any such contract.
- The informal note that you delivered is so vague that it cannot be determined from it what the terms of the contract you claim might be.
- The quantity of timber you claim the right to take is a mere estimate and cannot be ascertained from the document.
- The location of the tract you claim to log is not certain.
- The price of the timber you claim the right to take is not stated.

In addition to the foregoing, Mr. Cox informs me that you have insisted on many additional terms to which he would never have agreed. Moreover, notwithstanding the fact that there was never even a general understanding that Yamata Logging, Inc. might be allowed to log an area on Albion Flat, it appears that you have belatedly insisted on the inclusion of the following additional terms:

- That Mr. Cox would be required to mark the trees,
- That Mr. Cox would be required to cut in a road,
- That Mr. Cox furnish you a temporary storage site,
- That you would not be required to burn the slash,
- That Mr. Cox would be required to obtain the necessary environmental permits, and
- That Mr. Cox would have to do the replanting.

Within the meaning of Section 2-207 of the Commercial Code, these are additional terms that would materially alter anything Mr. Cox might conceivably have agreed to. For that reason as well, there was never any enforceable contract between you.

I hope the foregoing convinces you that suing Mr. Cox for breach of contract would not be worth your while.

Very truly yours,

/s/ Stanley J. Merrick

STANLEY J. MERRICK

February 2013

California
Bar
Examination

Performance Test B
LIBRARY

In re. Yamata Logging, Inc.

LIBRARY

Excerpts from Columbia Commercial Code

Marlene Industries v. Carnac Textiles
Columbia Supreme Court (2005)

A & G Construction Co. v. Reid Brothers Aggregate Co.
Columbia Court of Appeal (1999)

In re. Estate of Frost
Columbia Court of Appeal (2001)

EXCERPTS FROM COLUMBIA COMMERCIAL CODE

1-303. Course of Performance, Course of Dealing, and Usage of Trade.

(a) A "course of performance" is a sequence of conduct between parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

(d) A course of performance or course of dealing between the parties, or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware, is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement.

2-201. Formal Requirements; Statute of Frauds.

(a) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in the writing.

(b) As between merchants, if within a reasonable time, a writing in confirmation of the contract and sufficient against the sender is received, and the party receiving it

has reason to know its contents, it satisfies the requirements of subsection (a) against the party, unless written notice of objection to its content is given within 10 days after it is received.

Official Comments to Section 2-201.

The required writing need not contain all of the material terms of the contract, and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated, but recovery is limited to the amount stated. The price, time, and place of payment or delivery, the general quality of the goods, or any particular warranties may be omitted.

Special emphasis must be placed on the permissibility of omitting the price term in view of the insistence of some courts on the express inclusion of this term, even where the parties have contracted on the basis of a published price list. Frequently, the price is not mentioned because “market” prices and valuations that are current in the vicinity can normally be supplied without the danger of fraud.

Only three definite and invariable requirements as to the memorandum are made by this section. First, it must evidence a contract for the sale of goods; second, it must be “signed,” a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

Between merchants, failure to answer a written confirmation of a contract within 10 days of receipt is tantamount to a writing under subsection (b) and is sufficient against both parties under subsection (a). The only effect, however, is to take away from the party who fails to answer, the defense of the statute of frauds. The burden of persuading the trier of fact that a contract is in fact made orally prior to the written confirmation is unaffected. Compare the effect of a failure to reply under Section 2-207.

2-207. Additional Terms in Acceptance or Confirmation.

(a) A definite and seasonable expression of acceptance, or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) The additional terms are to be construed as proposals for addition to the contract. Between merchants, such terms become part of the contract unless:

(1) The offer expressly limits acceptance to the terms of the offer;

(2) They materially alter it; or

(3) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Official Comments to Section 2-207.

If no answer is received within a reasonable time after additional terms are proposed, it is both fair and commercially sound to assume that their inclusion has been assented to. The written confirmation is also subject to Section 2-201. Under that section, a failure to respond permits enforcement of a prior oral agreement. Under this section, a failure to respond permits additional terms to become part of the agreement.

Marlene Industries v. Carnac Textiles

Columbia Supreme Court (2005)

This appeal involves yet another of the many conflicts which arise as a result of the all too common business practice of blithely drafting, receiving, and filing unread numerous purchase orders, acknowledgments, and other diverse forms containing a myriad of discrepant terms. Both parties agree that they have entered into a contract for the sale of goods; indeed, it would appear that there is no disagreement as to most of the essential terms of their contract. They do disagree, however, as to whether their agreement includes a provision for the arbitration of disputes arising from the contract.

The dispute between the parties, insofar as it is relevant on this appeal, is founded upon an alleged breach by Marlene Industries ("Marlene") of a contract to purchase certain fabrics from Carnac Textiles ("Carnac"). The transaction was instituted when Marlene orally placed an order for the fabrics with Carnac. Neither party contends that any method of dispute resolution was discussed at that time. Almost immediately thereafter, Marlene sent Carnac a "purchase order" and Carnac sent Marlene an "acknowledgment of order." Marlene's form did not provide for arbitration. Carnac's form, on the other hand, contained an arbitration clause placed in the midst of some thirteen lines of small type "boilerplate." Neither party signed the other's form. When a dispute subsequently arose, Carnac sought arbitration, and Marlene moved for a stay.

The courts below applied subsection (b) of Columbia Commercial Code section 2-201 and denied the application to stay arbitration, reasoning that as between merchants, where a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, written notice of objection should be given within 10 days after it is received. Since Marlene had retained without objection the form containing the arbitration clause, the court concluded that Marlene was bound by that clause. We disagree.

This case presents a classic example of the "battle of the forms," and its solution is to be derived by reference to Section 2-207 of the Columbia Commercial Code, which is specifically designed to resolve such disputes. The courts below erred in applying subsection (b) of Section 2-201, for that statute deals solely with the question whether a

contract exists which is enforceable in the face of a statute of frauds defense. It has no application to a situation such as this, in which it is conceded that a contract does exist and the dispute goes only to the terms of that contract. In light of the disparate purposes of the two sections, application of the wrong provision will often result in an erroneous conclusion.

The easiest way to avoid the miscarriages this confusion perpetrates is simply to fix in mind that the two sections have nothing to do with each other. Though each has a special rule for merchants sounding very much like the other, their respective functions are unrelated. Section 2-201(b) has its role in the context of a challenge to the use of the statute of frauds to prevent proof of an alleged agreement, whereas the merchant rule of Section 2-207(b) is for use in determining what are the terms of an admitted agreement. The proper and rather limited role of subsection (b) of Section 2-201 is a partial exception to the statute of frauds which merely ameliorates the writing requirement. A writing is still required, but it need not be signed by the party to be charged. The character of this exception is best understood in light of the form of fraud it was designed to combat.

Assume that two merchants, Orval Orfed and Len Lemhi orally agree over the telephone that Orfed will sell Lemhi 1000 bushels of wheat at $40 a bushel. Orfed, the seller, thereafter sends a signed confirmatory memorandum to Lemhi reciting the terms of the deal, a common practice in such transactions. Such a memo would be good against Orfed under Section 2-201 should Orfed back out and Lemhi sue him for damages. But absent Section 2-201(b), the confirmatory memo would not be good against Lemhi, for it is not signed by him as required by Section 2-201(a). Thus Lemhi would be free to sit back and play the market. If at delivery date the cost of wheat had fallen to some level below $40 a bushel, and he wanted to buy elsewhere, he could back out, whereas Orfed could not back out, at least so far as the statute of frauds goes, should the market rise. Section 2-201(b) is designed to prevent the Lemhis of the world from taking advantage of the Orfeds. It says that a memo good against Orfed will also be good against Lemhi provided that: (1) both are merchants, (2) the memo is sent by Orfed to Lemhi within a reasonable time after the phone call, (3) the memo by its terms confirms the oral contract, (4) the memo is good against Orfed under Section

2-201(a), (5) Lemhi receives it, (6) Lemhi has reason to know its contents, and (7) Lemhi does not object to its contents within 10 days of receipt. This carefully circumscribed section thus seeks to combat one form of fraud which pre-Code versions of the statute of frauds actually facilitate. At the same time, Section 2-201(b) itself encourages the common and wise business practice of sending memoranda confirming oral deals, for the section obviates a disadvantage to which the sender would otherwise be subject.

Subsection (b) of Section 2-207, on the other hand, is applicable to cases such as this, in which there is an agreement that a contract exists, but disagreement as to what terms have been included in that contract. Subsection (a) of Section 2-207 was intended to abrogate the harsh "mirror-image" rule of common law, pursuant to which any deviation in the language of a purported acceptance from the exact terms of the offer transformed that "acceptance" into a counteroffer and thus precluded contract formation on the basis of those two documents alone. Under subsection (a) of Section 2-207, however, an acceptance containing additional terms will operate as an acceptance unless it is "expressly made conditional on assent to the additional or different terms." Having thus departed from the common-law doctrine, it became necessary for the Code to make some provision as to the effect upon the contract of such additional terms in an acceptance. Subsection (b) of Section 2-207 was designed to deal with that problem.

Subsection (b) of Section 2-207 provides that any additional terms in an acceptance or a written confirmation are to be considered merely proposals for additions to the contract, and that such terms normally will not become a part of the contract unless expressly agreed to by the other party. As with many sections of the Code, however, there is a special provision for merchants: "(b) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (1) the offer expressly limits acceptance to the terms of the offer; (2) they materially alter it; or (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

The parties to this dispute are certainly merchants, and the arbitration clause is clearly a proposed additional term. As such, it became a part of the contract unless one of the three listed exceptions is applicable.

We hold that the inclusion of an arbitration agreement materially alters a contract for the sale of goods, and thus, pursuant to Section 2-207(b)(2), it will not become a part of such a contract unless both parties explicitly agree to it. The reason is that by agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.

Applying those principles to this case, we conclude that the contract between Marlene and Carnac does not contain an arbitration clause; hence, the court below erred in refusing to permanently stay arbitration.

Reversed.

A & G Construction Co. v. Reid Brothers Aggregate Co.

Columbia Court of Appeal (1999)

This appeal concerns a dispute as to the amounts due for materials furnished for use on a highway construction project. Our resolution of the issues involves application of provisions of the Columbia Commercial Code (hereinafter CCC) to the contract in dispute.

On August 10, 1996, A & G Construction Company ("A & G") and Reid Brothers Aggregate Company ("Reid") entered into a materials supplier agreement wherein Reid agreed to supply A & G with sand and hot bituminous pavement aggregate (hot rock). The material was to be used in a State highway construction project in the Petersburg area for which A & G was the general contractor. Payment for the materials was to be on the basis of State-accepted scale ticketed tonnage at the price of $23.65 per ton of hot rock.

During the course of performance, the agreement was modified. At Reid's request, the parties agreed to increase the price of additional hot rock by $10.00 per ton to $33.65.

A & G contests the award of $58,000 for 5,800 tons of hot rock. The lower court found that, as to that additional quantity of hot rock, the original contract setting a price of $23.65 per ton had been modified to $33.65 per ton. The original agreement did not contain any reference to the amounts of material to be supplied. On August 30, 1997, A & G sent Reid a purchase order for 5,800 tons of hot rock. Earlier in the summer of 1997, Fred Hardesty, A & G's superintendent, orally informed Glenn Reid that an additional 10,000 tons of hot rock would be needed. Mr. Reid replied that the hot rock could be furnished, but that the price would have to be increased $10.00 per ton to $33.65 per ton. Mr. Hardesty asked Mr. Reid to send a letter on the subject. The letter, sent on July 13, 1997, stated:

On any additional hot rock to be delivered from this date, we will have to have $33.65 a ton, as we are not breaking even. We have already delivered the original order but understand that you need about 10,000 tons more.

Yours truly,
(No personal signature)
Glenn W. Reid

The 5,800 additional tons were used by A & G for the project. A & G paid Reid only $23.65 for the additional hot rock. A & G contends that Reid's claim for the additional sum is barred by the statute of frauds. CCC section 2-201 specifies, in pertinent part: "(a) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars ($500) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. . . .(b) As between merchants, if within a reasonable time, a writing in confirmation of the contract and sufficient against the sender is received, and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (a) against the party, unless written notice of objection to its contents is given within 10 days after it is received."

A & G cites subsection (a) of Section 2-201 and argues that since the letter from Reid to A & G was the only writing evidencing the modified agreement, and since A & G, the party to be charged, did not sign the writing, the statute of frauds was not satisfied. The necessity of the signature of the party to be charged required by subsection (a) is not absolute. It may be dispensed with if certain conditions set forth in subsection (b) are satisfied. Subsection (b) of Section 2-201 dispenses with the signature requirement if the following conditions are met: 1) the agreement is one between merchants; 2) the writing in confirmation is sent within a reasonable time after the agreement is reached; 3) the writing is sufficient as against the sender (i.e. would satisfy subsection (a)); 4) the party receiving it had reason to know of the contents; and 5) no written notice of objection is sent to the sender within 10 days of its receipt by the party to be charged.

Here, there is no question as to criteria (1), (2), and (4). CCC section 2-104(a) defines "merchant" as meaning a person who deals in goods of the kind, or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods, involved in the transaction. "Goods" is defined in CCC section 2-105(a) as "all things . . . which are movable at the time of identification to the contract for sale" and, in some cases, things that are not movable at the time of the contract. For example, a contract for the sale of timber to be cut is a contract for the sale of goods whether the subject matter is to be severed by the buyer or the seller even though it forms part of the realty at the time of contracting. Both Reid and A & G dealt with the materials here involved and held themselves out as having knowledge or skill with reference thereto and are therefore merchants.

Criterion (3) requires that the writing be sufficient as against the sender, in this case, Reid. The letter from Glenn Reid to Fred Hardesty confirming the oral agreement indicates that a contract for sale had been made between the parties – approximately 10,000 tons of additional hot rock at $33.65 per ton. The writing thus complied with the portion of Section 2-201(a) requiring it to be sufficient to indicate that a contract for sale had been entered into between the parties.

The question remains as to whether it may be regarded as sufficient against Reid, "the sender," so as to come under the exception set forth in Section 2-201(b). This, in turn, depends on whether a typewritten signature may be adequate. The letter did not contain Mr. Reid's personal signature. "Glenn W. Reid," however, was typed at the end of the letter. CCC section 1-201(39) defines "signed" as including "a symbol executed or adopted by a party with present intention to authenticate a writing." The official comments to that section state: "The inclusion of authentication in the definition of 'signed' is to make clear that . . . a complete signature is not necessary. Authentication may be printed, stamped, or written; it may be by initials or thumbprint. It may be on any part of the document and in appropriate cases may be found in a billhead or letterhead. A typed name is sufficient to meet the requirement."

As to criterion (5), A & G did not send any written notice of objection. In its brief, A & G states that "[b]y telephone, George Atkinson of A & G informed Reid that the money would not be paid." A & G does not cite any portion of the record in support of this allegation, and an independent review of the record and trial transcript has not revealed any supporting material. Furthermore, even if Mr. Atkinson did object by telephone, this does not meet the statutory requirement of a "written notice of objection." In the absence of a written objection from A & G, the confirmatory letter sent by Reid to A & G meets the statutory requirements, and accordingly the claim for the modified price as to additional hot rock was not barred by the statute of frauds.

Affirmed.

In re. Estate of Frost

Columbia Court of Appeal (2001)

Appellant, Glenn L. Gest ("Gest"), appeals from the probate court's denial of his claim against the estate of Warren Bert Frost.

Warren Bert Frost ("Decedent") died on February 2, 1999. On February 19, 1999, appellee Jerry Lee Frost ("Frost") filed a petition to commence probate proceedings. Gest filed his claim against the estate on March 23, 1999, alleging that he and Decedent had entered into a written agreement on October 25, 1997, whereby Gest was to remove all specified timber from a parcel of land owned by Decedent. Decedent, it was alleged, had subsequently breached the agreement by allowing others to remove timber from that land. Attached to appellant's claim was a copy of the agreement, which read as follows:

Glenn L. Gest 10/25/97

Sold all trees for $4.00 per rick. 16" dimensions 8 feet

high, 4 feet long. Does not cut anything that will log out

16 feet long and 12 inches on top end.

Take all wood sawable. Bunch brush burnable.

Owner Warren Frost [signature]

Buyer G.L.Gest [signature]

At the January 28, 2000 hearing on Gest's claim, Frost raised the statute of frauds as a defense, arguing that the writing was insufficient to support Gest's claim of a contract because it failed to include a quantity term. The probate court rejected Gest's

argument that the word “all” was a quantity term and held that the agreement was unenforceable under the statute of frauds provision of the Columbia Commercial Code (CCC). The court held that a quantity term could not be supplied by parol evidence and, since Decedent had owned several parcels of land, the court would not guess at which one had been referred to in the contract. Gest’s claim was dismissed.

QUANTITY TERM

Both parties have conceded that the agreement in question falls within the Columbia Commercial Code. Section 2-201 of the Code provides that such a contract is not enforceable unless “there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . . A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this paragraph beyond the quantity of goods shown in the writing.” The Official Comment to this provision states that the purpose of the writing requirement is to “afford a basis for believing that the offered oral evidence rests on a real transaction.” The only term which must appear in the agreement is the quantity term.

In earlier discussions, this Court has held that parol evidence could not be offered to supply a missing quantity term. Instead, stated the Court, the quantity term must appear in the writing. In the instant case, however, appellant argues that the quantity term does appear in the written document as the word “all” which describes the number of trees which may be taken by appellant. Once a quantity term appears in the writing, it may be explained or supplemented by parol evidence.

The parties’ failure to describe the parcel of land upon which the trees to be cut were located lends ambiguity to the agreement. The agreement is unenforceable, however, only where no quantity term appears at all. When quantity is not precisely stated, parol evidence is admissible to show what the parties intended as the exact quantity, but where the writing relied upon to form the contract of sale is totally silent as to quantity, parol evidence cannot be used to supply the missing quantity term.

PAROL EVIDENCE

CCC section 2-204 provides that "[e]ven though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." This reflects the Commercial Code policy of authorizing courts to fill in gaps in sales agreements. Parol evidence may be admissible under CCC section 2-202, which provides that terms intended by the parties to be a final expression of their agreement as they are set forth in a writing may not be contradicted "by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented" by course of dealing, usage of trade, or course of performance and by evidence of "consistent additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement."

It is apparent from a reading of these two sections that, once the basic requirements of Section 2-201 are met, additional evidence may be offered to explain or complete the writing. In this case, however, the probate court ruled that, because the writing failed to describe the land on which the trees were located, the agreement did not state an ascertainable quantity and that Gest could not introduce evidence to further clarify the writing, as that would be violative of the parol evidence rule.

In this case, it is clear from the face of the writing that it did not contain the complete agreement as assented to by the parties. Under the parol evidence rule, parties may introduce evidence not intended to contradict an integrated writing. Since the rule is supported by the public policy of preventing frauds and perjuries by limiting evidence of facts that contradict a valid contract, the rule does not apply to prevent proof of one or more of the terms of the contract. Where the quantity term is included in the writing, however, other omitted items may be shown by parol evidence. Such evidence should have been admissible in this case since it is clear from the face of the writing itself that it was not intended to be a "complete and exclusive statement of the terms of the agreement."

Section 2-202 “makes admissible evidence of course of dealing, usage of trade and course of performance to explain or supplement the terms of any writing stating the agreement of the parties in order that the true understanding of the parties as to the agreement may be reached.” Appellant claims on appeal to have evidence showing that he had partially removed the trees referred to in the writing on a particular parcel of land, pursuant to the agreement, prior to Decedent’s breach of their contract. This would be evidence of course of performance. Such evidence is particularly relevant for “the course of actual performance by the parties is considered the best indication of what they intended the writing to mean.”

Parol evidence consisting of the descriptions of the various parcels of land owned by Decedent at the time of the writing was made may also be helpful. It is possible that much of the land owned by Decedent was unsuited to the harvesting of timber, thus further clarifying the terms of the agreement. We do not limit here, however, the types of parol evidence which may be offered on remand. That evidence shall be whatever is relevant and helpful in proving the intent of the parties to the contract, subject to the probate court’s discretion as regards applicable rules of evidence.

CONCLUSION

The probate court erred in finding that no quantity term appeared in the writing evidencing the agreement between Gest and Decedent. The term “all” referred to a quantity and was sufficient to meet the requirements of the statute of frauds. Since additional evidence was required to explain the quantity term, however, parol evidence should have been admitted.

Reversed and remanded.

ANSWER A TO PERFORMANCE TEST B

To: Scott Rawlins
From: Applicant
Subject: Yamata Logging, Letter to opposing counsel drafted for your signature
Date: February 28, 2013

Dear Mr. Merrick:

It is my understanding that you represent Marvin Cox in relation to a dispute arising over a contract he entered into with Mr Yamata. I represent Mr. Yamata in this matter and I hope that we can come to a quick and reasonable resolution.

I am in possession of a copy of your letter dated February 19, 2013 to Mr Yamata. I understand that your position is that no contract was formed, and that this is based on an assertion that 2-201 of the Columbia Commercial Code (CCC) bars enforcement of a contract unless it is signed by the party to be charged. Further you assert that any writing on which a contract claim is based must be detailed and definite enough to clearly evidence a contract. You also allege that there are a number of terms alleged to exist by my client that Mr Cox would never have agreed to.

I believe that you have misunderstood how to apply the relevant law to the facts of this transaction. We know that our clients have done business together before in that Mr. Yamata logged 50 acres of his land. That during this logging Mr Yamata requested to be able to log the portion of timber now in dispute. I think that we can agree that there was some sort of conversation that occurred between our clients after this concerning the logging of Albion Flat. This is evidenced by the fact that they staked out a portion of Mr. Cox's land and my client sent a letter to your client stating his intention to proceed based on that conversation. Further I think we can agree that goods are involved here and that both parties are merchants; therefore the CCC and the merchant sections in

particular will apply. The question then is what does it take to create an enforceable agreement under the CCC?

As I will explain in detail below the 2-201 of the CCC requires a writing signed by the party to be charged or, as between merchants, a writing which is sufficient against the other merchant and not objected to. Here the letter that Yamata gave to Cox satisfies this part of the requirement and Mr. Cox did not object within 10 days. You are correct in asserting that there is a requirement of certainty of terms; however, under the CCC this merely requires that the writing contain a quantity term. The quantity term need not be precise; once it is stated it may be explained or supplemented by parol evidence (see In re. Estate of Frost, herein Frost). Since the writing states that the quantity is the "marked trees in staked area of NW corner" and approximately "750k board-feet," there is a stated quantity term and a contract exists.

Your assertion that CCC 2-207 prevents additional material terms to a contract is correct. However, application of 2-207 only occurs where the parties agree that a contract exists but do not agree on its terms; 2-207 is used to deal with the "battle of the forms." Our supreme court, in Marlene Industries (Marlene), stated "2-201(b) has its role in the context of a challenge to the use of the statute of frauds to prevent proof of alleged agreement, whereas the merchant rule of 2-207(b) is for use in determining what are the terms of an admitted agreement." There is no battle of forms here, merely a battle over the existence and terms of a contract; therefore 2-207 is inapplicable.

As the writing Yamata gave Cox is sufficient against Yamata, not objected to and contains a quantity term, the contract was formed. Once formed we can prove its terms using parol evidence.

We will be able to prove that Yamata is looking at lost profits on this transaction in excess of $200,000. Further, as Mr. Cox knows that the purpose of this was to fulfill Mr. Yamata's need to supply his Japanese customers, and that failure to do so would result

in a loss of customer base, Mr. Cox will be liable for lost future earnings. We estimate that these damages will be close to 1 million dollars over the next five years alone.
My client is not unreasonable. We know that your client is sacrificing his stake in the approximately $100,000 in profits; it seems as though it is in his interest to allow Yamata to proceed. We understand that your client objects to many of the terms that Mr. Yamata asserts are part of the contract. We would be willing to negotiate some of these terms. I hope that my arguments and explanations below convince you of the strength of our claim and that you will convince your client that coming to a resolution without litigation is the best course of action. We both know that litigation is an expensive route that is usually not in the best interest of our client.

The Letter Yamata Sent Mr. Cox Satisfies CCC 2-201 Because it is Sufficient against him and Contains a Quantity term.

CCC 2-201(a) requires a writing signed by the party to be charged. Mr. Cox took notes on a napkin during the initial conversation that occurred between Cox and Yamata at the Chatterbox Café where this transaction occurred. Although I am uncertain of what was on this napkin, it is possible that this napkin satisfies 2-201; according to the A & G case, a fingerprint can be sufficient if it was intended to authenticate the writing. I assume that Cox's fingerprint would be on this napkin. I am not certain he intended to authenticate.

Even if 2-201(a) is not satisfied, which I admit seems unlikely, 2-201(b) can be used to satisfy the section. Under 2-201(b) and Marlene, a memo that is good against Yamata will be good against Cox if 1) both are merchants, 2) the memo was sent within a reasonable time by Yamata to Cox, 3) the memo by its terms confirms the oral contract, 4) the memo is good against Yamata under 2-201(a), 5) Cox received it, 6) Cox knows of its contents, and 7) Cox did not object to its contents within 10 days of receipt.

Each of these is looked at below.

1) Both are merchants

A merchant is one who deals in goods of the kind (A&G). Yamata has been buying and selling timber for 20 years, he deals regularly in timber, and this makes him a merchant. Cox plants, grows, and sells timber on his land; this makes him a merchant as he regularly deals with selling timber.

2) The memo was sent within a reasonable time by Yamata to Cox

Yamata sent the memo on November 26th about a week after their conversation; this is a reasonable time. Especially considering that performance was not to occur until March 5th, over three months later.

3) The memo by its terms confirms the oral contract

This is clearly satisfied because the memo states "as per our deal" indicating that it is a confirmation of the oral contract and that the oral contract was an agreement to sell timber. This confirms that the writing is referencing an oral contract.

4) The memo is good against Yamata under 2-201(a)

To be good against Yamata the memo must be signed by him and contain a quantity term (see A&G and Frost).

Signed, under CCC 1-201(39) and A&G is any symbol executed or adopted with the present intention of authenticating the writing. Specifically the comments to the CCC state that a complete signature is not necessary, that it may be found in a billhead or letterhead. Here as the memo given to Cox was on Yamata's letterhead, it is sufficiently authenticated or signed.

As to the quantity term. This is the only term that is required by 2-201 (see Frost). The other terms of the contract need not appear in the writing. Here the quantity term is stated as being the "marked trees in staked area of NW corner," and "750k board-feet." It is not necessary that these terms are ambiguous, as once it is established that there is a quantity term the writing is enforceable. It can further be noted that this writing specifically references Cox's land as being Albion Flat, helping to eliminate some of the ambiguity.

The writing has both a valid signature in the form of the letterhead and it has a quantity term; therefore it would be enforceable against Yamata under 2-201(a).

5) Cox received it

You have admitted that your client received the letter. Further your client's secretary told Yamata that she gave him the letter. Cox received the letter.

6) Cox knows of its contents

Cox has presumably read the letter and gone over it with you; this indicates that he knows of its contents.

7) Cox did not object to its contents within 10 days of receipt.

The objection to the letter must be in writing (A&G). The only writing rejecting the letter is your letter to my client; this was sent months after Yamata delivered the letter to Cox. As such there is no valid objection.

As I have explained, the letter Yamata sent to Cox, that you describe as an informal note, is sufficient to satisfy the statute of frauds and create a binding contract. The question still remains as to what the terms of the agreement are. As a preliminary matter you have asserted that 2-207 applies. It does not.

CCC 2-207 does not apply because there is no agreement as to the terms of the contract.

The Supreme Court states in Marlene that 2-207 only applies in determining the terms of an admitted agreement. Here there is no admitted agreement; therefore 2-207 does not apply.

The terms of the contract can be proved by extrinsic evidence because the evidence will not contradict the writing

As 2-207 does not apply, we are left to determine the terms of the contract based on the writing we have, Mr. Cox's actions, Mr. Yamata's actions and provisions of the CCC.
CCC 2-204 provides that contracts for sale do not fail for indefiniteness if the parties intended to make a contract and there is a reasonably certain basis for giving a remedy. The CCC allows for gap fillers to be used: course of performance, course of dealings and trade usage can be used to supplement or qualify the terms of the agreement (CCC 1-303 and Frost). Further consistent additional terms are allowed so long as the writing is not intended as a complete and exclusive statement of the terms of the agreement (Frost); it is unquestionable that the note from Yamata to Cox is not complete and exclusive. It merely contains a few sentences of ambiguous writing (however this is sufficient to form a contract).

Once it is determined that the writing is not integrated, the terms may be explained by extrinsic evidence. The court has said that the course of performance of the parties is particularly relevant (Frost.)

With this in mind we can look at each term in the contract that you dispute.

Quantity of timber

The quantity of timber to be taken will be supplemented by the course of dealings and performance. My client is not asking for more than what was promised. Which are trees larger than 18" in diameter. As Cox has already staked off the land to be logged with Yamata the court will have no problem determining what is to be given.

Location

The location is clearly referenced in the memorandum as the NW corner of Albion Flat. Further Cox and Yamata staked the area off. This evidence can all be used to show that the location is not uncertain.

Price

Price does not need to be stated. The writing references a "pricing discussion" and specifically states that it is payable on delivery of the logs FOB to Port Columbia Dock. Further my client admits that the pricing agreed upon is 20% of the price the buyer will pay, which will be the published export price in the trade journals. Although this term is unknown now it will be certain at the time of payment.

The marking of trees

Although there is no course of performance here, the prior dealings do indicate that my client was the one who marked the trees in the prior contract. My client is willing to mark the trees in this agreement. This term is not essential to us coming to a resolution of the dispute and we are happy to appease Mr. Cox's wishes as to who should mark the trees.

Cutting the Road

Although in the prior timber deal between Yamata and Cox there was no need to cut a road, the industry standard is that the landowner cuts the road. This is due to the permitting required when third parties try to do so. As such the court will find that this was a term of the contract.

Temporary Storage

In the prior deal between Yamata and Cox Yamata was allowed to store timber on Cox's land for a short time. Further Cox is aware that Yamata is not taking the timber to the mills as is usually done. This shows that the industry standard of not allowing storage should not apply. I would like to point out to you that not only is the law on our side as to this contract term but it is easy for your client to satisfy us here; Cox has considerable open space next to the tract Yamata will be logging and it can be used at no cost or damage to Cox.

Slashing and Burning

My client understood that Cox wanted to try to sell the slash. If your client is not interested in doing so, after Yamata puts it in piles for him, then Yamata is willing to negotiate some other solution to this point.

Obtaining Permits

It is impossible for Yamata to obtain the necessary permits to take the timber because he is not the landowner. As such the court will infer that the duty to do so rests on Cox. Further my client is under the belief that this will merely require Cox to request the permits as the environmental impact report and logging schedule are complete. It seems that your client could easily comply with this.

Replanting

Cox is the one obligated to replant. Further he has a greenhouse operation where he sprouts the seedlings. Further as the replanting is something that Cox does to get a renewable resource tax benefit it is likely the court will side with Yamata and determine that Cox was likely responsible for replanting.

Conclusion

Although I am unsure why Mr. Cox no longer wishes to make around $100,000 off of his sale of timber, I do know that my client has a valid contract claim. Our case that a contract exists is very strong. We have a writing that is sufficient to satisfy CCC 2-201. Further the missing terms can all be supplied by extrinsic evidence. We can show that it is reasonable under course of performance or course of dealings, trade usage and other extrinsic evidence that Cox needs to cut the road, allow for storage and obtain the permits. Further my client is not going to have to replant the harvested trees.

Mr. Cox made this agreement with my client so they could both make money. He proceeded to actually enter on his land and stake out the trees to be cut. My client thinks that his refusal to perform is based on a divorce proceeding; I am unsure of whether or not this is true. However, I am sure that if we cannot quickly resolve this dispute my client will suffer great losses and we will be forced to proceed with litigation.

I urge you to discuss the strength of our case with Mr. Cox and explain to him the potential extent of liability. I look forward to resolving this issue and allowing both of our clients to profit by this transaction.

ANSWER B TO PERFORMANCE TEST B

DRAFT LETTER TO STAN MERRICK FOR MR. RAWLINS' REVIEW

CONFIDENTIAL

Rawlins Baird, LLP
One Parkstead Plaza, Suite 1200
Fair City, Columbia

February 28, 2013

Stanley J. Merrick
Attorney at Law
Law Offices of Stanley J. Merrick
South Shore Center, Room 275
Fair City, Columbia

Re: Albion Flat Properties

Dear Mr. Merrick,

We are representing Mr. Hari Yamata in his dispute regarding a logging contract with your client, Mr. Marvin Cox. We have reviewed your letter to Mr. Yamata, and appreciate the concerns you raised regarding the enforceability of an agreement between our clients and the terms of such agreement. However, for the reasons stated below, we believe our client does have an enforceable agreement and that certain terms you noted as being belatedly added were part of the original agreement and would be enforceable by the courts.

The following discusses (1) why there is an enforceable logging agreement between our clients, and (2) the terms of the agreement between our clients.

THERE IS AN ENFORCEABLE LOGGING AGREEMENT

As you know, the Columbia Commercial Code (CCC) Section 2-201(a) provides that contracts for the sale of goods for the price of $500 or more is not enforceable unless in writing and signed by the party against whom enforcement is sought. The timber to be cut would be roughly $100,000, so well more than the $500 threshold. In addition, an agreement for the sale of timber to be cut is a contract for the sale of goods even though it forms part of the realty at the time of contracting. A&G Construction Co. v. Reid Brothers Aggregate Co., Col. Ct. of Appeal, 1999. Accordingly, we believe Section 2-201(a) is applicable.

Pursuant to Section 2-201(a), an agreement should be signed by the party to be charged, which would be your client. As you pointed out in your letter to Mr. Yamata, the note Mr. Yamata sent to your client is not signed by your client, so the agreement would fail under Section 2-201(a).

We agree with you that there is no enforceable agreement under Section 2-201(a); however, we believe the note would be enforceable under Section 2-201(b). The necessity of the signature of the party to be charged is not absolute, and Section 2-201(b) provides for an exception to the signature requirement. A&G.

Confirmatory Memo Rule

Section 2-201(b) deals directly with the question of whether a contract exists which is enforceable. Marlene Industries v. Carnac Textiles, Col. Sup. Ct., 2005. Section 2-201(b) provides that a contract is enforceable if it is (1) between merchants, (2) the memo is sent within a reasonable time after an oral agreement, (3) the memo by its terms confirms the oral agreement, (4) the memo is good against the sender of the memo, (5) the recipient receives the memo, (6) the recipient has reason to know of its contents, and (7) the recipient does not object to its contents within 10 days of receipt. See Marlene, A&G. Each of these elements is satisfied in our case as detailed below.

1. Merchants

Merchants are persons who deal in goods of the kind, or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. CCC Section 2-104(a), A&G. Here, Mr. Yamata is in the business of logging and selling logs to end-customers and your client is in the business of selling logs. Since both of our clients deal in the goods of the kind sold (i.e., logs) they are both merchants.

2. Memo is sent within a reasonable time after the oral agreement

The note that Mr. Yamata sent your client was sent on November 26, 2012, which was about a week after the oral agreement between our clients. In A&G, the court found that a memo sent almost two weeks after the oral agreement was unquestionably sent within a reasonable time. As a result, the one week lapse between the agreement and Mr. Yamata sending the confirmatory note is reasonable.

3. Confirms the oral agreement

Mr. Yalata's note expressly references the oral agreement by stating "per our deal" and "per our discussion". Accordingly, the note confirms their oral agreement.

4. Memo is good against the sender

As discussed above, Section 2-201(a) would require Mr. Yamata's signature and that the material terms are in writing.

Signed

You may argue that the memo is insufficient against the sender because it was not signed by Mr. Yamata. However, "signed" means "a symbol executed or adopted by a

party with present intention to authenticate a writing." Section 2-201(39), A&G. The comments to the definition of "signed" state that "a complete signature is not necessary" and that a signature may be found on any part of the document including "letterhead." In this case, the note Mr. Yamata sent your client was on Mr. Yamata's letterhead, so the note was "signed" by Mr. Yamata.

Terms

You have noted that the terms of the note are vague, lacks a quantity term as the quantity reference is a mere estimate, and location of logging is not certain. At first glance, your arguments would indeed render the memo insufficient and the agreement could therefore not be saved by Section 2-201(b). However, we think that you'll agree that on closer inspection the note is not vague and has sufficient material terms.

First, as the CCC comments state, "The only term that must appear is the quantity term". You found the quantity term to be an estimate and vague. Mr. Yamata's note provides that the logging will be of an estimated 750K board-feet that are the marked trees in the staked area of the NW corner of the Albion Flat. In other words, while 750K is an estimate of the total production from the logging, the note references a staked area, which is certain. All of the marked trees in the staked area are subject to logging.

You may still argue that the staked area is vague as there may be many staked areas and that parol evidence could not be used to show the existence of the staked area in question. As you know, the parol evidence rule provides that terms in a writing that is to be a final expression of the agreement may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement, but may be explained or supplemented by course of dealing, usage of trade or course of performance, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. This rule does not apply to prevent proof of one or more terms of the contract. As discussed by the Columbia Court of Appeal in In

re Estate of Frost (2001), once a quantity term appears, then it may be explained or supplemented by parol evidence.

We believe the staked area that Mr. Yamata and your client agreed upon and as described in Mr. Yamata's note is a clear and sufficient quantity term on its face. However, even if you find it vague given the existence of other staked areas or the lack of current markings, parol evidence of our clients' prior conversations may be used to explain what the marked trees and staked area is, as the note was not meant to be exclusive statement of terms and other evidence may be used to explain a term. This is similar to the case in Frost, where the quantity term was "all" trees, which was considered complete and exclusive on its face, but other evidence was admissible to show what parcel was intended to be subject to the agreement. Here, we have a clear quantity term on the face of the note (i.e., marked trees in a staked area), and parol evidence can be used to show that this means the 18" trees in the staked area.

Your last objection is that the price term is missing. However, since we have a clear quantity term, no other term is required to be put in writing pursuant to the comments to the CCC section 2-201. There is a Commercial Code policy of authorizing courts to fill in gaps in sales agreements, and CCC section 2-204 provides that "[e]ven though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonable certain basis for giving appropriate remedy". See Frost.

In sum, because Mr. Yamata's note is "signed" by Mr. Yamata and has a clear quantity term, the note would be good against Mr. Yamata and the fourth element of Section 2-201(b) is met.

5. Recipient receives the memo

Mr. Yamata left his note at your client's office. Your client's assistant told Mr. Yamata that Mr. Cox received Mr. Yamata's note the same day Mr. Yamata left his note at Mr.

Cox's office. Your client referred to the note when he repudiated the agreement to Mr. Yamata. You also referred to the note in your letter to Mr. Yamata. As a result, there is no reason to believe that your client did not receive the note.

6. Recipient has reason to know of its content

Mr. Yamata and your client have had prior dealings and spent time together marking the plot to be logged before Mr. Yamata sent your client the note. Your client surely must have understood what the note was referring to. Moreover, your client's defense to Mr. Yamata was that he didn't sign a contract, not that he didn't know what Mr. Yamata was talking about. Accordingly, this element of Section 2-206(b) is also met.

7. Recipient does not object within 10 days

Mr. Yamata did not receive any evidence that your client objected to the note within ten days of receipt. Even if there was an oral objection, the objection must be in writing to be sufficient. A&G.

In sum, all of the elements of Section 2-201(b) are met. This means that, despite all of your objections noted in the first set of bullet points in your letter, there is an enforceable agreement between Mr. Yamata and Mr. Cox.

TERMS OF THE AGREEMENT

As touched upon above and discussed in Frost, the public policy of the parol evidence rule is to prevent fraud and perjuries by limiting evidence of facts that contradict a valid contract; however, the rule does not apply to prevent proof of one or more terms of the contract. This means that when a quantity term is included in writing, other omitted terms may be shown by parol evidence. Frost.

Each of the omitted terms is discussed below in turn, and we understand all of the terms were agreed to with your client when the deal was initially struck orally.

1. Marking the trees

We understand your client nodded his head when asked to mark the trees. We believe this parol evidence would be admissible to show that your client agreed to mark the trees. Having said that, given the ease of marking, we believe our client may be willing to mark the trees if this is difficult for Mr. Cox and if Mr. Cox is reasonable on other terms of the agreement. We would of course have to discuss this with our client, but we do not believe this item should be a deal-breaker.

2. Cut the road

Again, we understand that your client agreed to cut the road, which we believe would be admissible. Pursuant to Section 1-303 of the CCC, usage of trade in the area of trade is relevant to supplement the terms of an agreement. Here, cutting roads is standard practice for the landowner to do, because it's his land and he can do it without additional permits. Moreover, the pricing agreed to take into account the cutting of the road.

Course of dealing is also important evidence showing a contract term. Course of dealing is conduct between the parties in previous transactions, which establish a common basis of understanding for interpreting their expressions and conduct. CCC Section 1-303. Here, you may argue that in the last transaction between our clients, Mr. Cox did not build a road. However, there was no need for a new road in the last logging, because there was already a road on the property.

Given the custom in the industry for the landowner to cut the road, your client will be obligated to cut the road. Note, your client is being compensated for this in the agreed pricing.

3. Temporary storage

Your client also agreed to allow Mr. Yamata to store logs on Mr. Cox's land. While this is not customary in the industry, course of dealing between parties is also relevant to understanding the terms of an agreement. CCC Section 1-303. Mr. Cox has allowed Mr. Yamata to store logs on his land on a prior logging project, and knows that Mr. Yamata needs to do this to avoid double handling. We also note that this storage will not cost your client any money as there is ample storage area on Mr. Cox's land.

In sum, given your client's agreement, the course of dealing and the immaterial effect to your client, allowing storage is also part of the agreement.

4. Burn the slash

We understand your client wanted to see if he could make money selling the slash. You may want to check in with your client on this term, as we think your client would like to keep the slash. We don't believe this term should upset the agreement though, and, if required and subject to further discussion with our client, our client may be able to burn the slash as it would be customary for the logger to do so.

5. Obtaining environmental permits

Before cutting trees, the forest protection agency has to issue environmental permits. These permits must be requested by the landowner, so it is not something Mr. Yamata could do even if he wanted to. In addition, we understand your client has an approved logging environmental plan, which includes the logging contemplated by the agreement in this case. Since your client agreed, it is customary and required for the landowner to request the permits, and since it would not be difficult for your client to do so, obtaining environmental permits would also be part of the agreement.

6. Replanting

Similar to obtaining environmental permits, replanting is the duty of the landowner and customary for the landowner to do. We also note that your client has a greenhouse operation with seedlings, so it's his seedlings to plant, and that your client will receive the tax benefit of planting the seedlings. Given the agreement for Mr. Cox to replant and since it's customary for Mr. Cox to do so, this would be a required part of the agreement.

7. Price

The price of 20% of the export FOB price was agreed to and is what our clients have agreed to in the past in their course of dealing. As a result, this price would also be found by a court to be applied to the contract between our clients.

In sum, there was an agreement on all of these terms at the time of the deal. Given the agreement, the custom and prior course of dealing between the parties, all of these items would be considered to be part of the agreement.

Section 2-207

We also wanted to discuss Section 2-207. In your letter, you reference this section as a reason for why the terms discussed above should not be part of the agreement and why the agreement fails. However, Section 2-207 only applies when a confirmation includes an additional term than what was agreed to orally. In other words, if Mr. Yamata's confirmatory note to your client included additional terms, Section 2-207 would be applicable. For instance, in Marlene, there were two confirmatory notes with different terms, so Section 2-207 was applicable. Here, your client agreed to each of the terms above at the time of the original handshake agreement. None of these terms were subsequently added to the agreement. The fact that Mr. Yamata's note doesn't refer to additional terms further shows that these terms were agreed upon orally. These are

experienced businessmen and would have discussed these terms at the time of agreement and they did so.

Moreover, even assuming Section 2-207 applies, this would not mean there is no agreement between the parties. Section 2-207 of the CCC is for only for use in determining what the terms of an admitted agreement are. Marlene. But, this is beside the point, as Section 2-207 is simply inapplicable to this case.

DAMAGES

We do not want to get ahead of ourselves and believe that our clients can agree to move forward with the contract they agreed to previously. However, we do not want to underestimate the gravity of the situation and believe it is important for you to know the potential cost of breaching the contract. At this point, we understand Mr. Yamata can proceed with logging without too many damages, but if your client continues to prevent the logging, Mr. Yamata's damages will be serious. This is a large contract for our client and if your client continues to breach the contract, our client would seek full damages from the breach of contract, which could be hundreds of thousands of dollars. Again, we do not believe it has to come to this given the clarity of the situation, but we wanted to give you a sense of Mr. Yamata's injuries and your client's potential exposure.

CONCLUSION

We appreciate the objections you raised in your letter to Mr. Yamata. However, as discussed above, under Section 2-201(b), a court would find an enforceable agreement between our clients despite your objections. In addition, all of the additional terms you raised in your letter were actually agreed upon by the parties, and given custom and course of dealing, indicate that a court would enforce these terms in the agreement. They are not additional terms after an agreement, so Section 2-207 is inapplicable.

To help come to an amicable agreement and resolution, we believe our client would be flexible on the marking of the trees and the burning the slash terms, subject to further discussions with our client.

Once you've had a chance to review this letter, we think it would be helpful to discuss in person. Please let us know if there is a convenient time to meet and we'll set up a meeting. We look forward to working with you to resolve this matter in a timely and efficient manner to the benefit of both our clients.

Sincerely,

[MR. RAWLINS TO SIGN]