California
Bar
Examination

Performance Tests
and
Selected Answers

February 2006

PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains two performance tests from the February 2006 California Bar Examination and two selected answers to each test.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

Contents

TUESDAY AFTERNOON
FEBRUARY 21, 2006

California Bar Examination

Performance Test A
INSTRUCTIONS AND FILE

HENSEN v. BUILD A BURGER

FILE

HENSEN v. BUILD A BURGER

INSTRUCTIONS

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

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

To: Applicant
From: Beverly Cohen
Date: February 21, 2006
Re: Hensen v. Build a Burger

Our firm represents Gail Hensen in an action against Build a Burger (Burger), the regional fast food restaurant chain. During a deposition yesterday, an issue arose whether there had been improper contact by this firm with two witnesses. After a conversation with the judge, both parties were ordered to submit simultaneous briefs addressing Burger's allegation that our firm engaged in improper *ex parte* communication with two Burger employees.

We need to prepare our brief anticipating defendant's argument that the actions of the firm violated the Columbia Rules of Professional Conduct. Please draft a persuasive memorandum of points and authorities that argues that the firm has done nothing improper. Disputes like this are won or lost on how well we use the facts, so it is very important that you pick the key facts that support our position, set them forth cogently in your statement of facts, and weave the facts into your legal arguments. Follow the guidelines in the attached office memo regarding persuasive briefs.

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

To: Attorneys
From: Gregory Mandel
Date: March 27, 2003
Re: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to all attorneys, all persuasive briefs or memoranda such as memoranda of points and authorities to be filed in state court shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our position.

Following the Statement of Facts, the Argument should begin. This office follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, Improper: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. Proper: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA, HAS

SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs. Associates should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Cohen & Mandel
Attorneys at Law
12 Manning Blvd.
Balston Springs, Columbia

To: File
From: Beverly Cohen
Date: June 1, 2004
Re: Hensen v. Build a Burger – Interview Notes

Gail Hensen is a former general manager of a restaurant owned by Build a Burger. She worked for the company for fifteen years, starting as a server and working her way up to general manager. She was general manager of a Henniker, Columbia Build a Burger for approximately three years.

Ms. Hensen quit over a salary dispute. For her first twelve years at Build a Burger, she worked approximately 50 hours per week. As a result she received regular overtime pay. After being promoted to general manager, she worked for approximately 60 hours per week. From the beginning of her job as general manager, she submitted requests for overtime but was routinely denied. She claims that her Area Training Director, James Gathii, told her that now that she was management, she was an exempt employee and no longer eligible for overtime.

Ms. Hensen states that just before her promotion to general manager she was making $9.00 per hour. She was making on average about $23,000 per year including overtime. When she left Build a Burger her income as general manager was approximately $25,000. She figures that on an hourly basis she was making less money than before the promotion.

I told her I would look into the matter and we set up another appointment.

ADDENDUM/JULY 16, 2004:

I met with Ms. Hensen today to discuss the potential lawsuit against Build a Burger.

I explained that research indicates we can bring a claim against Build a Burger for unpaid wages, fraud, deceit, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. The basis of the complaint is that Build a Burger misclassified her as exempt from the overtime pay provisions of Columbia law.

I explained, therefore, that the principal focus of a lawsuit would be on what duties Ms. Hensen actually performed and what percentage of those duties were properly classified as exempt work. In Columbia, employees are exempt from overtime requirements if they are employed in an "administrative, executive or professional" capacity. A person is considered to be employed in an administrative, executive or professional capacity if, among other things, the employee is "engaged in work that is primarily intellectual, managerial, or creative, and that requires the exercise of discretion and independent judgment."

Ms. Hensen wishes to pursue the matter.

ADDENDUM/NOVEMBER 6, 2004:

Suit filed today.

Excerpts of Deposition of Harold Dubroff

February 20, 2006

FOR PLAINTIFF: Beverly Cohen (Cohen)

FOR DEFENDANT: Neil Levine (Levine)

* * *

BY BEVERLY COHEN

Q: Please state your name.

BY HAROLD DUBROFF

A: My name is Harold Dubroff.

Q: Where do you work?

A: I'm currently an Area Training Director with Build a Burger.

Q: Since when?

A: I began in November, 1997.

Q: Since you've been an Area Training Director for so long, you are obviously familiar with the position's responsibilities.

A: Sure.

Q: Are these responsibilities the same at Build a Burger for all Area Training Directors?

A: Oh yes. We all do the same thing.

Q: What are your responsibilities?

A: Area Training Directors are each responsible for the management of multiple restaurants owned by Build a Burger.

Q: What does that entail?

A: Area Training Directors directly supervise the general managers. The Area Training Directors report directly to Build a Burger's Regional Vice President.

Q: Who does the Regional Vice President report to?

A: She reports directly to the President of Build a Burger.

Q: How much contact is there between the general managers and the Area Training Directors?

A: They talk at least once a day.

Q: How familiar are the Area Training Directors with the operation of individual outlets?

A: As the direct supervisors of the general managers, the Area Training Directors are familiar with what the general managers do on a day-to-day basis.

Q: I think we may be able to move this along a bit more quickly if we refer to your signed declaration, Plaintiff's Exhibit A. In that declaration you said . . . .

Levine: Okay, let's stop right here. Ms. Cohen, am I to understand that you have previously spoken to Mr. Dubroff?

Cohen: Certainly.

Levine: When was this?

Cohen: You can see on the declaration Mr. Dubroff signed. It was several months before the complaint was filed.

Levine: I don't believe this. You previously deposed Mr. Gathii during the course of this lawsuit, and I appeared at the deposition representing Build a Burger and Mr. Gathii. Don't tell me you also talked to Gathii before his deposition.

Cohen: Of course I did, as part of the preparation.

Levine: Are you telling me you have a signed declaration by Gathii too?

Cohen: Sure. Would you like to see it?

Levine: This is outrageous. You were well aware that Build a Burger's attorneys of record were representing the company's Area Training Directors. You have clearly violated professional ethics by communicating *ex parte* with both Mr. Dubroff and Mr. Gathii without the consent of Build a Burger's counsel. You've compounded this misconduct by obtaining declarations from these individuals with an intent to use them against Build a Burger. Such conduct is intolerable.

Cohen: Oh, come on. These people are not high-level management employees. There was nothing improper.

Levine: I think we will end this deposition.

Cohen: I think we should call the judge right now.

RECESS

JUDGE SPAIN ON SPEAKER PHONE: Are we on the record?

Levine: Yes, your honor.

Judge Spain: So, talk to me.

Levine: Your honor, it is outrageous that Ms. Cohen talked *ex parte* to two of the managers of my client. As lawyer for the company, I represent all of its employees. I don't ever let them talk to lawyers suing the company unless I'm present. I even met with one of the employees, Mr. Gathii, to prepare our defense and assumed our conversation was in confidence. Ms. Cohen and her firm should be disqualified from representing Ms. Hensen.

Cohen: Mr. Levine is not happy that I talked to some employees that he wants to label as high-level management. In fact, either one of these gentlemen could have been potential plaintiffs. The logical conclusion of what Mr. Levine is saying is that an employee can never hire an attorney to sue his or her employer. My behavior was above reproach.

Judge Spain: Okay, counselors, I can't resolve this today. Be in my court tomorrow at 2:00 p.m. Submit briefs by the end of today. Goodbye.

Cohen & Mandel
Attorneys at Law
12 Manning Boulevard
Balston Springs, Columbia

MEMORANDUM

To: File

From: Beverly Cohen

Date: January 6, 2006

Re: Hensen v. Build a Burger – Gathii Interview

Mr. James Gathii called to set up an appointment with me today. He is employed by Build a Burger as an Area Training Director. He is Gail Hensen's direct supervisor. He is not particularly happy with the company and felt that he had some information that would help in our preparation of our lawsuit against Build a Burger.

I asked him if he was represented by anyone and he indicated no. I asked if he had talked to counsel for Build a Burger concerning Gail Hensen and he indicated that he had been called to a meeting at corporate headquarters a couple of weeks ago and that Build a Burger's General Counsel, Neil Levine, asked him some questions about both the general role of Area Training Directors and Ms. Hensen.

I explained to Mr. Gathii that I was going to stay away from asking him what he told Mr. Levine, but that it was okay for him to answer my questions, even if he had been asked the same thing by Mr. Levine.

Mr. Gathii described to me the general duties of the Area Training Directors, as well as the duties of general managers of restaurants. Regarding the general managers, he said that they handle the day-to-day operation of the specific restaurants. They supervise

employees, establish weekly schedules, and work the counter during rush periods and when someone calls in sick. They monitor running the cash registers. They do anything that needs to be done by any level of employee. I asked Mr. Gathii if he would sign an affidavit that summarizes the role of the general manager. He indicated he would.

Regarding Area Training Directors, I asked if he had responsibility for Ms. Hensen's job classification as an exempt employee. He indicated that job classifications are handled at company headquarters and that, as far as he knew, all general managers are classified exempt; at least all those that work in his restaurants are so classified. Gathii told me he has no involvement in the development of this or any other policy for the company.

I asked him what his duties were. He said Area Training Directors assist general managers and deal with problems that arise on a day-to-day basis in the restaurants in their area. They are in charge of hiring and firing and handle matters related to benefits. Area Training Directors also ensure that general managers know about and carry out all procedures regarding services to customers, scheduling of employees, sanitation and daily receipts.

I asked him about his contacts with his supervisors and other management above him. He meets with his Vice President once a month to report on the five stores he supervises. He does not attend Vice President meetings or Board of Directors meetings and sees the President and Board only at the annual staff holiday party and on other ceremonial occasions.

As he was leaving, Mr. Gathii asked for more details about the nature of the lawsuit. After I explained the basic theory, he asked whether he should think about hiring a lawyer since he used to be a general manager and maybe he could receive back wages. I told him I would need to look at the statute of limitations and we could talk about it when he came back to sign the declaration.

ADDENDUM JANUARY 23, 2006:

Mr. Gathii returned today to sign the declaration. He indicated that, on reflection, he thought suing Build a Burger was not worth the aggravation, since it would clearly harm his career opportunities with the company.

Affidavit of Harold Dubroff

September 27, 2004

My name is Harold Dubroff. I am not a party to any potential lawsuit between Gail Hensen and Build a Burger. On or about September 17, 2004, I was contacted by Beverly Cohen, who suggested I might be of some help in her litigation against Build a Burger. I have no personal knowledge of Gail Hensen, but as a member of the Build a Burger management team, I have knowledge of the operation of the company.

Since November 1997, I have held the position of an Area Training Director. I reported to the Regional Vice President who, in turn, reported directly to the President of Build a Burger. As one of the Area Training Directors in Columbia, I am responsible for the management of five Build a Burger restaurants in Southern Columbia. I am the direct supervisor of the restaurant general managers. Throughout my tenure as the Area Training Director, I saw what they did on a day to-day-basis.

The general managers perform menial tasks; they do not exercise independent judgment and discretion in the operation of the restaurant; they have no managerial authority. The general managers do no hiring, firing, or promoting; they have minimal time to supervise the other employees employed in the restaurant. Up to 80% of the general managers' time is spent on manual, non-managerial type of activities and the remaining time they spend performing administrative clerical chores.

_Harold Dubroff_____

Harold Dubroff

Acknowledged before me this __27th_____ day of __September_____, 2004

_Lisa Empe_____

Lisa Empe
Notary Public

Affidavit of James Gathii

January 23, 2006

My name is James Gathii. I am not a party to this action. I have been employed by the Defendant Build a Burger from May 1991 to present. I currently hold the position of an Area Training Director. As a member of the Build a Burger management team, I have knowledge of the operation of the company.

As the Area Training Director, I am responsible for the management of five Build a Burger restaurants in Henniker, Columbia. I am the direct supervisor of the restaurant general managers. Throughout my tenure as the Area Training Director, I see what they do on a daily basis.

The general managers perform menial tasks; they do not exercise independent judgment and discretion in the operation of the restaurant; they have no managerial authority. General managers do no hiring, firing, or promoting; they have minimal time to supervise the other employees employed in the restaurant. Up to 80% of the general managers' time is spent on manual, non-managerial type of activities and the remaining time they spend performing administrative clerical chores.

James Gathii

James Gathii

Acknowledged before me this 23rd day of January, 2006

Lisa Empe

Lisa Empe
Notary Public

TUESDAY AFTERNOON
FEBRUARY 21, 2006

California
Bar
Examination

Performance Test A
LIBRARY

HENSEN v. BUILD A BURGER

LIBRARY

Snider v. Quantum Productions, Inc.

Columbia Court of Appeals (2003)

In this appeal we are presented with the question whether the trial court properly disqualified attorney Dale Larabee from representing David Snider because of his contacts with two employees, one a sales manager and the other a director of production, of respondent Quantum Productions, Inc. The trial court found that Larabee violated Columbia's State Bar Rules of Professional Conduct, Rule 2-100 that provides in part:

> (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a *party* the member *knows to be represented by another lawyer in the matter,* unless the member has the consent of the other lawyer.
>
> (B) For purposes of this rule, a '*party* ' includes:
>
> > (1) *An officer, director, or managing agent of a corporation* or association, and a partner or managing agent of a partnership; or
> >
> > (2) An association member or *an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.* (Italics added.)

We conclude that there was no violation of Rule 2-100 as the contacted employees were not "represented parties" within the scope of that rule as (1) they were not "officer[s], director[s] or managing agent[s]" of the organization; (2) the subject matter of the communications was not an act or omission of the employees that could be binding or imputed to the organization; and (3) they were not employees whose statements might

constitute admissions on behalf of the organization. We further conclude that if the employees were subject to Rule 2-100, the court still erred in ordering the disqualification of Larabee, as the evidence did not show that he had actual knowledge the employees were represented parties.

We emphasize, however, that counsel desiring to contact an employee of a represented organization should endeavor to ensure, prior to the contact, that the employee, either because of his or her status within the organization or the subject matter of the proposed communication, does not come within the scope of Rule 2-100. Further, once contact is made, counsel should at the outset pose questions designed to elicit information that would determine whether the employee comes within the scope of Rule 2-100 and should not ask questions that could violate the attorney-client privilege. By the same token, if organizations do not want employees within the scope of Rule 2-100 to have contact with opposing counsel, it is incumbent upon them to take proactive measures to ensure that the employees and opposing counsel understand the organization's position. Ethical violations and unnecessary litigation over such *ex parte* contacts would largely be obviated by prudent actions taken by counsel and organizations in applying Rule 2-100.

Snider was employed by Quantum, an event design company, as a sales manager. In 2002 Snider resigned and formed his own business. Quantum alleged that Snider misappropriated confidential and secret business information and used that information to compete with Quantum. In July 2002, Quantum filed a complaint against Snider, alleging misappropriation of trade secrets, breach of contract and intentional interference with contractual relations.

In the joint pretrial statement, Quantum listed as a percipient witness its employee Toni Lewis. Snider listed as a percipient witness Laura Janikas, also a Quantum employee.

Thereafter, before trial, Larabee contacted Lewis and Janikas to talk about the pending case. When counsel for Quantum discovered the contacts, he brought a motion to

disqualify Larabee.

In support of the motion, Quantum submitted the declaration of its president, Pam Navarre, as well as declarations from Janikas and Lewis. In Navarre's declaration she stated that Quantum employs 40 people. She stated that she and Quantum's vice-president, Bill Hardt, were the only executive-level personnel. Below the executives were two sales managers, a director of operations, and a director of production. Janikas was a sales manager, and her duties included selling Quantum's goods and services and directly supervising two subordinate employees. She was also responsible for enforcing Quantum's rules, policies and procedures. According to Navarre, the position of sales manager was a position of great confidence, and she relied on the counsel of Janikas in making corporate policies and decisions. Navarre did not describe Lewis's position at Quantum.

In her declaration, Janikas described her work for Quantum as including "management responsibilities." She stated that she had been aware of the litigation for months but had not discussed it at length with her superiors. She stated that in January 2003 Larabee called her at home on two occasions and left messages for her. She returned one of his calls and left a message for Larabee. Larabee was able to reach her on her work cellular phone. According to Janikas, she talked to Larabee for about 10 minutes.

Janikas stated that Larabee "asked [her] many questions about this lawsuit, and made [her] feel like [she] was on the witness stand." He asked her if she knew the "real reason" why Quantum had sued Snider. She replied that she understood that he had been sued because he breached his contract with Quantum. Larabee asked if she had seen Snider's contract with Quantum. She replied that she had not. Larabee asked her if she had signed a contract. She replied that she had, as had all other employees. Larabee asked her what she thought the contract meant, and Janikas attempted to explain it to him. Larabee also asked her about a meeting of key employees in October 2001. Larabee also asked her if she took a pay cut after September 11, 2001, and whether that made her want to leave Quantum. At the end of the conversation Larabee asked her if Quantum's counsel had ever

called and talked to her. She responded that he had not.

In her declaration, Lewis stated that she was the director of productions for Quantum, and described her work there, which included supervising the production department and its 19 employees. Larabee first called her before Christmas 2002. He left multiple messages but she never spoke to him.

Larabee filed a declaration in opposition to Quantum's motion. In that declaration he stated that he had no intention of calling Janikas or Lewis as witnesses in the case. He also confirmed that he never spoke with Lewis concerning the case. He stated that he had asked Janikas if counsel for Quantum had talked to her about trial testimony and she stated that she had not. Before contacting them, he asked Snider what duties and responsibilities they had. Snider told Larabee that they were salespeople with no corporate responsibility. Based upon this he concluded that they were not within the "control group" of Quantum's management and he did not believe that they could bind or make an admission on behalf of the organization. Larabee only wanted to ask them about matters of which they had percipient knowledge, particularly about a meeting in the Fall of 2001 when Navarre told the employees that business was bad and that if they wanted to look for another job they could do so. Larabee admitted asking Janikas if she had any idea why Snider had been sued. According to Larabee, she stated that she did not.

Larabee also stated that he told Janikas and Lewis that he was Snider's counsel and they did not have to talk to him if they did not want to. He stated that Lewis had called him back as many times as he called her and that she wanted to talk to Larabee. According to Larabee, Lewis also contacted Snider on her own and told Snider that she had to rewrite her declaration multiple times because Quantum's attorneys did not like it and that they "told her what to say."

I. Were Janikas and Lewis Employees Subject to Rule 2-100?

A. Covered Employees

Contact with represented parties is proscribed to preserve the attorney-client relationship from an opposing attorney's intrusion and interference. Moreover, with regard to the ethical boundaries of an attorney's conduct, a bright-line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client. Further, Rule 2-100 must be interpreted narrowly because a rule whose violation could result in disqualification and possible disciplinary action should be narrowly construed when it impinges upon a lawyer's duty of zealous representation.

To determine whether Larabee violated Rule 2-100 by contacting Janikas and Lewis, we must first determine whether they were "covered employees," i.e., those with whom contact was proscribed under Rule 2-100. Rule 2-100 permits opposing counsel to initiate *ex parte* contacts with present employees (other than officers, directors or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability.

The drafters of Rule 2-100 characterize rule 2-100 as prohibiting contact only with members of an organization's "control group," citing the United States Supreme Court in *Upjohn Co. v. United States* (U.S. 1981). The actual text of paragraph (B)(2), however, suggests that the rule reaches beyond the control group. It is true that paragraph (B)(1) states the control group test: officers, directors and managing agents of the organization may not be contacted for any purpose. However, paragraph (B)(2) focuses on the subject matter of the communication. It applies first to employees outside of an organization's control group if the subject matter of the conversation is the employee's act or failure to act in connection with the matter at issue, *and* that act or failure to act could bind the organization, or be imputed

to it, *or*, second, if the employee's statement could constitute an admission against the organization.

With regard to statements that could constitute admissions on the part of the organization, Evidence Code section 1222 provides in part:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
>
> > (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement.

In Columbia this applies only to high-ranking organizational agents who have actual authority to speak on behalf of the organization.

B. *Janikas's and Lewis's Status at Quantum*

1. *Paragraph (B)(1)*

To determine whether Lewis and Janikas were within the ambit of Rule 2-100, we must first determine whether they were officers, directors or managing agents. The parties agree that neither were officers nor directors. Quantum, however, argues that a broad interpretation must be given to the term managing agent, one that would include Lewis and Janikas even if they were mid- or lower-level employees, in order to protect the attorney-client privilege.

We must look to the meaning of the term managing agent and the intent of the drafters to determine whether it applied to Janikas and Lewis. Snider contends that the definition of "managing agent" in Rule 2-100 is the same as that in Civil Code section 3294, subdivision (b), which requires wrongdoing by an "officer, director, or managing agent" before punitive damages will be awarded against an organization for an employee's act. In *White v. Ultramar* (1999), a wrongful termination action, the Columbia Supreme Court defined managing agent for the purposes of organizational liability for punitive damages as

including only an employee that exercises substantial discretionary authority over significant aspects of a corporation's business. In reaching this conclusion, the high court stated that the Legislature placed the term managing agent next to the terms officer and director, intending that a managing agent be more than a mere supervisory employee. The court also rejected a broader definition of managing agent, stating that, "if we equate mere supervisory status with managing agent status, we will create a rule where corporate employers are liable for punitive damages in most employment cases."

We conclude that the definition of managing agent in *White* applies equally well to Rule 2-100(B)(1). Like Civil Code section 3294, the term managing agent immediately follows the terms officer and director, indicating an intention to limit the term to high-level management, not mere supervisory employees.

There is no evidence that Janikas and Lewis fit the definition of managing agents. Quantum's president Navarre describes Janikas as a supervisory employee that could enforce Quantum's policies, and that she relied upon Janikas in setting corporate policy. However, Navarre does *not* state that Janikas had the discretion and authority to set corporate policy as to any issues, much less the matter involved in this litigation. Navarre stated nothing concerning Lewis's status. Therefore, Janikas and Lewis did not fall within the terms of paragraph (B)(1) of Rule 2-100.

2. *Paragraph (B)(2)*

Quantum argues that Janikas and Lewis fall within the terms of paragraph (B)(2), as each was an employee whose "act or omission ... in connection with the matter ... may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

This argument fails because there is no evidence that the subject matter of the contacts with the employees was concerning "any act or omission of such person in connection with

the matter." The interview with Janikas did not concern her own actions or omissions concerning the dispute, but her percipient knowledge of events surrounding the dispute.

Quantum focuses on the second category in paragraph (B)(2), those employees whose statements "may constitute an admission on the part of the organization." However, as discussed, this category only applies to high-ranking executives and spokespersons with the authority to speak on behalf of the organization. This interpretation is again consistent with the drafters of Rule 2-100's rejection of the broader interpretation of the no-contact rule under former Rule 7-103.

Rule 2-100(B)(2) applies to persons outside the "control group" if the management-level employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation. Under this "managing-speaking agent" test, those employees having managing authority sufficient to give them the right to speak for, and bind, the corporation are covered by the rule. This interpretation best reconciles the language of the statute and the drafters' intent to narrowly circumscribe the type of employees who would be covered by the rule.

Even under this test there is no evidence presented that Janikas or Lewis had authority from Quantum to speak concerning this dispute or any other matter, or that their actions could bind or be imputed to Quantum concerning the subject matter of this litigation.

C. *Attorney Larabee's Knowledge*

Even if Quantum could demonstrate that Janikas or Lewis were subject to the terms of Rule 2-100, we still would not conclude there was a violation of Rule 2-100 as Quantum did not demonstrate that Larabee had actual knowledge that Janikas and Lewis were deemed "represented parties" under that rule.

Quantum argues that it is enough that Larabee should have known that Janikas and Lewis

were employees subject to Rule 2-100, that there was a duty to inquire of opposing counsel, and if an agreement could not be reached as to the contact, Larabee was required to submit the matter to a court.

Actual knowledge is required before an attorney can be held to have violated Rule 2-100. Nor does Rule 2-100 require advance permission of opposing counsel or an order from the court prior to contacting employees that are not within the scope of Rule 2-100. A bright-line rule is necessary because attorneys should not be at risk of disciplinary action for violating Rule 2-100 because they should have known that an opposing party was represented or would be represented at some time in the future. Rule 2-100 does not provide for constructive knowledge. It provides only for actual knowledge.

Nevertheless, to avoid potential violations of Rule 2-100, an attorney contacting an employee of a represented organization should question the employee at the beginning of the conversation, before discussing substantive matters, about the employee's status at that organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization's counsel concerning the matter at issue. If a question arises concerning whether the employee would be covered by Rule 2-100, the communication should be terminated. Once a dispute arises that could lead to litigation, it is also incumbent upon an organization and its counsel to take proactive measures to protect against disclosure of privileged information by informing employees and/or opposing counsel their position concerning communications between employees and opposing counsel. The exercise of caution and prudence on both sides will avoid much of the potential for violations of Rule 2-100.

There is no evidence that in this case Larabee had actual knowledge that Janikas and Lewis were "represented parties" under Rule 2-100. Without such actual knowledge, there can be no violation of Rule 2-100.

We, therefore, reverse.

Jorgensen v.Taco Bell Corp.

Columbia Court of Appeals (1996)

Defendant Taco Bell Corp. (Taco Bell) contends the trial court abused its discretion by denying its motion to disqualify counsel for plaintiff Noelle Jorgensen (Jorgensen). Jorgensen's counsel had retained an investigator to interview witnesses concerning facts relevant to Jorgensen's claims of sexual harassment before her lawsuit against Taco Bell and one of its employees was filed.

Taco Bell contends these interviews with its employees violated Rule 2-100 of the Columbia Rules of Professional Conduct, because counsel for Taco Bell was not informed of the interviews, and they constituted attempts to interview parties without the consent of their counsel. Jorgensen argues that no lawsuit had been filed at the time of the interviews, and neither the employees of Taco Bell nor Taco Bell itself were parties represented by counsel at the time of the interviews. We conclude that the trial court did not abuse its discretion.

Jorgensen, a former employee of Taco Bell, filed this action in June 1995, alleging that she was sexually harassed and sexually assaulted by another Taco Bell employee, Javier Hernandez (Hernandez), her supervisor, in July of 1994.

By November of 1994, Jorgensen had retained counsel. Jorgensen's counsel retained a private investigator, Linda Hoen, who interviewed the alleged harasser, Hernandez, and two other Taco Bell employees. No counsel for Hernandez, Taco Bell, or the other employees gave their consent for the interviews. Seven months after the interviews, Jorgensen filed this action against Hernandez and Taco Bell.

Taco Bell moved to disqualify Jorgensen's counsel. The basis for Taco Bell's motion was that the interviews violated Rule 2-100, which provides as follows, in pertinent part:

(A) While representing a client, a member shall not communicate directly or

> indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

Jorgensen argued that Rule 2-100 was not violated because there was no lawsuit pending, and her counsel did not know that either Taco Bell or any of its employees were a "party the member knows to be represented by another lawyer in the matter."

On these bases, the trial court denied the motion to disqualify.

The employees and Taco Bell were not represented by counsel in "the matter," since no such matter had yet been asserted against Taco Bell by Jorgensen.

Taco Bell advocates a broad interpretation of Rule 2-100, contending that it should apply not simply where a lawyer "knows" the other person is represented, but also where the lawyer "should have known" that the other person *would* be represented.

The interviews in issue occurred not on the eve of the filing of the lawsuit, but seven months prior. The record does not support Taco Bell's speculation that these interviews were conducted prior to the filing of the lawsuit as a subterfuge to allow violation of Rule 2-100. These interviews were routine prelitigation investigation activities, which many counsel engage in before deciding whether to send a demand letter or file a lawsuit.

Taco Bell's proposal has wide and troubling implications. Under it, counsel for a plaintiff who is a tort victim would risk disciplinary action by interviewing adverse parties or their employees, if that counsel "should have known" such interviewees would be represented by some unidentified counsel *after* a complaint is filed. Reasonable investigations by counsel in advance of suit being filed to determine the bona fides of a client's claim would be precluded.

Taco Bell's proposed expansion of Rule 2-100 would mean that attorneys would be subjected to disciplinary action for violating Rule 2-100 if they directed interviews of claimants or alleged tortfeasors, although no determination to file suit had been made and no lawyer to file or defend it had been retained.

Taco Bell contends that it had "house counsel," as Jorgensen's attorney "should have known," available to communicate with Jorgensen's attorney before her investigator conducted interviews. Numerous corporations in America have full or part-time house counsel. That knowledge or presumptive knowledge does not trigger the application of Rule 2-100, unless the claimant's lawyer knows *in fact* that such house counsel represents the person being interviewed when that interview is conducted.

It became apparent at oral argument that Taco Bell's contention had a curious and defense oriented hook in it. Before suit was filed, defense counsel would be unimpeded by Rule 2-100 in investigating employees and taking their statements for purposes, inter alia, of evaluating their claims. Counsel attempting the same evaluation for their plaintiff clients will be precluded from the same action as to prospective defendants, because they "should have known" any lawsuit filed, post such investigation, will be defended by a lawyer. We cannot approve such an uneven playing field.

Frivolous litigation is frequently avoided by a careful lawyer's investigation of a client's claims. Rule 2-100 should not be applied to prevent investigation of such claims before suit is filed because the party or employee investigated *may* obtain counsel at a future time.

We will not interpret Rule 2-100 to make the routine investigation of claims prior to filing of a lawsuit more difficult, when the persons being interviewed are *not* in fact known to be represented by counsel in the matter at the time of that interview.

Affirmed.

Answer 1 to PT - A

1)

Memorandum of Points and Authorities

I. Statement of Facts

Beverly Cohen ("Cohen") represents Gail Hensen ("Hensen") in a suit against Build a Burger ("Burger") for unpaid wages, fraud, deceit, negligent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. The basis of this complaint is that Burger misclassifed Hensen as an employee who is exempt from the overtime pay provisions of Columbia law.

Hensen is a former general manager of a restaurant owned by Burger. She worked for the company for 15 years, working her way up from server to general manager. She quit her job shortly before June 1, 2004, due to a salary dispute. After being promoted to general manager, she worked approximately 60 hours per week, but did not receive overtime pay. Hensen filed a complaint against Burger on November 6, 2004.

Burger has alleged that Cohen, Hensen's attorney, engaged in improper ex parte communications with two Burger employees, in violation of Columbia Rule of Professional Conduct s2-100 ("Rule 2-100").

A little less than a month prior to filing the complaint, Cohen, Hensen's attorney, met with Harold Dubroff ("Dubroff"), an employee of Burger. Cohen contacted Dubroff on or about September 17, 2004. Dubroff holds the position of Area Training Director ("ATD") with Burger. Dubroff executed an affidavit at Cohen's behest on September 27, 2004, detailing his personal knowledge of the operation of Burger and the respective responsibilities of ATDs and general managers.

On January 6, 2006, James Gathii ("Gathii"), also an employee of Burger, contacted Cohen to talk to her about the Hensen litigation. Gathii is also employed by Burger as an ATD. Prior to initiating a substantive discussion with Gathii, Cohen asked him whether he was represented by anyone. Gathii told Cohen that he was not represented. Cohen then asked Gathii whether he had spoken to counsel at Burger concerning Hensen, and Gathii indicated that Neil Levine ("Levine"), counsel for Burger, had called him to a meeting a few weeks prior and spoken to him about the general role of ATDs and about Hensen.

Cohen then explained to Gathii that she was going to stay away from asking Gathii what he had told Levine, but indicated that Gathii would answer her questions, even if he had been asked the same questions by Levine.

In the interview with Gathii on January 6, 2006, Cohen asked about and Gathii

described the general roles and duties of ATDs and general managers. Gathii also questioned Cohen about whether he should also consider taking legal action for unpaid wages.

On January 23, 2006, Gathii returned to Cohen's offices to sign a declaration regarding the general responsibilities of ATDs and general managers. At this time he also indicated that he did not wish to pursue a lawsuit.

On February 20, 2006, Cohen took Dubroff's deposition, which was cut short when Levine learned of Cohen's prior contact with Dubroff and Gathii.

Gathii and Dubroff are both ATDs for Burger. The responsibilities of ATDs include: assisting general managers with problems that arise on a day-to-day basis in the restaurants they cover, hiring and firing employees at restaurants, and handling matters relating to benefits. ATDs also ensure that general managers know about and carry out company procedures regarding customer service, employee scheduling, sanitation, and daily receipts.

ATDs meet their supervising vice president once a month to report on the five stores they each supervise. ATDs do not attend vice president meetings, nor Board of Director meetings. Gathii indicated that he only saw the President and Board at the annual staff holiday party and at other ceremonial occasions.

ATDs are not responsible for classifying employees as exempt or not exempt. Job classifications are handled at company headquarters, and it appears that all general managers are classified as exempt. Gathii has no involvement in the development of any policy for Burger, nor is there any indication that Dubroff is involved in setting policy.

II. Argument

A. Harold Dubroff and James Gathii are not "parties" for purposes of Rule 2-100 because neither is an "officer, director, or managing agent" of Burger, the subject of the communications did not involve their acts or omissions in connection with Hensen's dispute, and their statements are not admissions against Burger because they do not have authority to speak for Burger.

Rule 2-100(A) provides that an attorney shall not communicate regarding the subject of representation with a party the attorney knows to be represented by another lawyer in the matter, without the consent of the other lawyer.

Rule 2-100(B) further defines a "party" to include:
(1) an "officer, director, or managing agent of a corporation";
(2) an employee of a corporation "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the [corporation] for purposes of civil...liability"; or

(3) an employee "whose statement may constitute an admission on the part of the [corporation]."

Whether Rule 2-100 is violated when an attorney communicates with an employee of a corporation thus depends on whether the employee constitutes a "party" as defined by the Rule. Additionally, in order for an attorney to be disciplined under the Rule, the attorney must have actual knowledge that the employees were represented parties. Snider, p. 2.

As discussed below, Dubroff and Gathii are not parties within the meaning of the rule because they are not with the "control group" of Burger, because the communications did not discuss any acts or omissions by them in connection with Hensen's dispute, and because they had no authority to speak for Burger. Therefore, they were not "represented parties" under the Rule, and Cohen did nothing improper in speaking with them.

Moreover, even if Dubroff and Gathii are found to be "parties," Cohen did not have actual knowledge that they were represented parties. Additionally, she followed all of the suggestions by the court in Snider to ensure that she complied with her ethical obligations.

1. Neither Dubroff [n]or Gathii are "officer[s], director[s], or managing agent[s]" because they do not exercise substantial discretionary authority over significant aspects of Burger.

Dubroff and Gathii are clearly not officers or directors. Like the sales manager and Director of Production in Snider, they are merely managers. Thus, the question is whether they are "managing agent[s]."

The court in Snider defined "managing agent" by reference to Civil Code s3294. According to the court, a managing agent is only someone who "exercises substantial discretionary authority over significant aspects of a corporations's business." Snider at 7. Additionally, a managing agent is more than "a mere supervisory employee." Id. In Snider, one of the employees was a supervisory employee that enforced the company's policies, and the court held that this was not a managing agent.

Similarly, the ATDs at Burger each have a supervisory role over the general managers and employees at five restaurants under their supervision. Although the ATDs enforce Burger policies, they do not set corporate policy. The court in Snider was careful to note that the employees at issue there did not have the authority to set corporate policy with regard to any issues, including the matter involved in the litigation. ATDs are not responsible for determining which employees are exempt; this policy is set at corporate headquarters. Since Gathii and Dubroff only enforced Burger policies and did not set them, they similarly should not be considered managing agents, but rather "mere supervisory employees."

Therefore, an argument that Gathii and Dubroff are managing agents because they are responsible for enforcing corporate policy should fail under Snider.

2. The subject of the communication did not concern any "act[s] or omisison[s]" of Dubroff or Gathii, but rather only the percipient knowledge of each of the events surrounding the dispute.

Cohen's communications with Dubroff and Gathii concerned the general roles of general managers and ATDs at Burger. The court in Snider held that where an attorney speaks to a percipient witness about his knowledge of the events surrounding the dispute rather than the witness' own actions or omissions concerning the dispute, the communication is not in connection with the witness' acts in connection with the matter.

Here, Cohen did not ask Gathii about any actions he took with regard to Hensen and her dispute with Burger. Rather, she asked Gathii about Hensen's role as general manager and about his own role at Burger. Gathii has personal knowledge of these events that surround the dispute. Therefore he is merely a percipient witness, as in Snider.

Dubroff has no personal knowledge of Hensen and did not discuss any acts or omissions of his own. Therefore he is also a percipient witness.

Burger may claim that Gathii can testify as to Hensen's complaints regarding her pay and whether Burger had notice, yet failed to take action. However, Cohen's communications with Gathii did not concern Hensen's complaints to Gathii or any of Gathii's discussions with Hensen. Therefore, the subject of the communications did not concern any acts or omissions by Gathii.

3. Dubroff's and Gathii's statements could not constitute admission against Burger because they do not have actual authority to speak on behalf of Burger.

The court in Snider looked to Evidence Code s. 1222 to determine whether an employee's communications could constitute an admission against a corporation, and therefore make the employee a "party" for purposes of Rule 2-100. Under the Evidence Code, a statement is an admission if "[t]he statement was made by a person authorized by the party to make a statement... concerning the subject matter of the statement." The court noted that, in Columbia, the rule only applies to "high-ranking organizational agents who have actual authority to speak on behalf of the organization." Snider at 6. For the reasons discussed above, Gathii and Dubroff are not "high-ranking" agents of Burger. They have no authority or discretion to set corporate policy, they only meet with vice presidents about once a month, and they do not attend meetings of vice presidents or Board of Directors meetings. Additionally, they only see the President and Board of Burger at ceremonial occasions. Therefore, they are not "high-ranking" agents of Burger.

Admissions can apply to persons outside of the so-called "control group" if the "management-level employee was given actual authority to speak on behalf of the

organization or could bind it with regard to the subject matter of the litigation." Snider at 8. As in Snider, there is no evidence that Gathii or Dubroff had actual authority to speak on behalf of Burger, nor is there evidence that they can bind Burger with regard to the subject matter of the litigation. Gathii and Dubroff merely communicated their personal knowledge of the roles of general managers and ATDs at Burger; Burger is free to counter with its own witnesses as to the role of a general manager or ATD at Burger.

B. Cohen did not have actual knowledge that Dubroff and Gathii might be "represented parties" under Rule 2-100 because Cohen determined prior to communicating with Dubroff and Gathii that they were not "parties."

1. Cohen's communications with Dubroff were not made "knowing" that he was represented by another lawyer in the matter because there was no such "matter when she communicated with him.["]

In Jorgensen, an attorney retained an investigator to communicate with two employees of a corporation prior to filing a complaint. The court held that the employees and the corporation were not represented by counsel "in the matter" because no matter had yet been asserted against the corporation. The court held that for routine prelitigation investigation activities, an attorney was entitled to interview relevant witnesses in order to decide how to proceed in a suit.

In this case, Cohen interviewed Dubroff a little less than a month prior to filing a complaint. Additionally, it occurred only two months after Hensen decided that she was interested in pursuing a lawsuit. The court in Jorgensen emphasized the public policy in encouraging thorough investigations by counsel to avoid frivolous lawsuits. Additionally, the court pointed out the "curious and defense oriented hook" in the position that defense counsel could interview employees to investigate their claims, but plaintiff counsel could not. In the instant case, Levine admits that he interviewed Gathii[.]

Burger will likely argue that Cohen's conduct was different than the conduct in Jorgensen because Cohen obtained an affidavit from Dubroff, which is closer to litigation preparation than investigation. However, the evidence of the timing of Cohen's interview with Dubroff shows that it was prior to the filing of a lawsuit, and therefore should be protected by the public policy rationale of Jorgensen.

Additionally, Burger will argue that since Levine is in[-]house counsel for Burger, Cohen should have known that Dubroff was represented. However, as the court discussed in Jorgensen, numerous corporations have in[-]house counsel. The knowledge that a corporation has in[-]house counsel "does not trigger the application of Rule 2-100 unless the lawyer knows in fact that such counsel represents the person being interviewed when that interview is conducted." Jorgensen at 12. Here, there is no evidence that Cohen knew that Levine represented Dubroff.

2. Cohen's communications with Gathii were not made knowingly because she had no actual knowledge that Gathii was represented and she followed the court's suggestions in

Snider[.]

Prior to speaking with Gathii, Cohen asked whether he was represented. Gathii said he was not. Further, Cohen asked whether Gathii had spoken to Burger's counsel, and indicated that she did not wish to ask him about his communications with Burger's counsel. Additionally, Cohen was already aware that the duties and responsibilities of ATDs did not meet the high level required to constitute a managing agent or someone with authority to speak for the corporation because of her earlier communications with Dubroff. Finally, Cohen took care to avoid asking Gathii about any acts or omissions of his own with respect to Hensen's dispute.

Thus, Cohen took all the steps advised by the court in Snider to avoid an ethical problem up front: she asked whether Gathii was represented, she avoided discussing anything that might be protected by the attorney-client privilege, and she determined whether Gathii's role rose to the level such [as] speaking to Gathii would be the equivalent of speaking to a represented party.

Therefore, Cohen did not have actual knowledge that Gathii was a party, even if the Court determines that he is one.

Answer 2 to PT - A

1)

MEMORANDUM

To: Beverly Cohen

From: Applicant

Date: February 21, 2006

Re: Hensen Points and Authorities on Improper ex parte Communication

STATEMENT OF FACTS

Gail Henson is suing Build a Burger for their misclassification of her as an "exempt employee" and not entitled to overtime pay (Hensen interview (HI)). Exempt employees, under Columbia law, are not required to receive overtime pay for any work completed over 40 hours in a week. (HI). Hensen disputes her classification and is suing to receive back wages for the overtime she has worked since being promoted to general manager. (HI).

After filing suit against Burger on her behalf, Hensen's direct supervisor, James Gathii, contacted our firm and desired to set up an appointment to discuss the lawsuit. (Gathii Interview (GI)). Gathii is an Area Training Director for Burger whose primary responsibility is to keep track of general managers and their stores. (GI). He does not have any involvement in officer or director meetings, talks to the vice president only once a month and rarely sees the president of the company. (GI).

Our firm specifically asked Gathii if he was represented by counsel prior to discussing any matter with him and he claimed that he was not represented. (GI). Our firm further inquired as to whether Gathii, as an employee of Burger, discussed any matter pertaining to a lawsuit with attorneys representing Burger. (GI). He indicated that he had spoken with Levine, Burger's general counsel, at a corporate meeting and that Levine had asked him some questions about Hensen and her role as general manager. (GI). Our firm further impressed upon Gathii that it would not inquire into matters he had discussed with Levine. (GI).

Gathii revealed only the general duties of directors and managers within Burger. (GI). He then agreed to sign an affidavit summarizing the roles of the general managers. (GI). Gathii further revealed his duty as a regional area training director and his personal responsibilities within the working structure of the Burger company. (GI). Aside from revealing the general roles of all employees within Burger, Gathii was not asked any specific question pertaining to the pending lawsuit nor asked to reveal any information that

may be confidential only to employees within Burger. Gathii voluntarily came to our law firm to discuss his work at Burger and his concerns about his potential claim for back pay that he did not receive while general manager.

Our firm contacted Harold Dubroff approximately two months prior to filing the lawsuit in an effort to determine if a valid cause of action existed. (Dubroff Affidavit (DA)). Because the suit against Burger had not been filed, Dubroff was contacted to discuss the roles of the parties in determining if a lawsuit was necessary. Dubroff did not know Hensen nor did he supervise Hensen's activities in any way. (DA). His affidavit reveals only that he has a working knowledge of Burger and the responsibilities of each of the level [sic] of employees. (DA). Like Gathii, he is not executive level personnel and does not participate in executive level decisions. He holds the same position as Gathii and interacts with the executive officers and directors rarely.

ARGUMENT

I. Gathii and Dubroff, as area training directors, are not "officer[s], director[s] or managing agent[s]" under CRPC 2-100 with whom contact is proscribed because they enjoyed a mere supervisory status over the general managers and had no authority over significant aspects of Burger, but instead oversight of day to day activies.

Gathii and Dubroff were both "area training directors" in charge of supervision over the general managers. (GI, DA). CRPC 2-100 applies to all ex parte communication with officers, directors or managing agents. Gathii and Dubroff are clearly not officers. If a broad interpretation is given to "director or managing agent", they might both be included in either of these terms. However, the Columbia Supreme Court had defined managing agent as including only employees that exercise substantial discretionary authority over significant aspects of a corporation's business. (Quantum citing Ultramar). If Gathii and Dubroff fail to qualify even as managing agents, the lesser of the three categories, they cannot be held liable under CRPC 2-100 (the three terms are limited to high level management; see Quantum). Gathii and Dubroff are nothing more than supervisory employees. They assist the general managers in day to day activities. (GI). They hire, fire, and handle employee benefits. While they enforce policies of Burger and are third on the chain of command at Burger, they have no discretion or authority to set or change corporate policy. (GI). Important decisions such [as] job classifications and overtime pay exemptions are handled at company headquarters and Gathii and Dubroff have no involvement in the development of this or any other policy for Burger. (GI). In fact, the area training managers have more contact and similar duties with the general managers of the restaurants they supervise than they do with the officers and directors of Burger. (GI, Dubroff Depo).

Because there is no evidence that Gathii or Dubroff are anything other than supervisory employees with no discretion to set policy or control significant aspects of Burger's business, they do not qualify as officer[s], directors or managing agents within the meaning of CRPC 2-100 (see Quantum).

II. The ex parte communication with Gathii and Dubroff, as area training directors, does not fall within the proscribed communication of CRPC 2-100 because neither interview concerned their own actions or omission in the lawsuit, but instead involved percipient knowledge of events surrounding the suit.

Gathii and Dubroff do not fall within CRPC 2-100 (B)(2), as employees whose "act of omission....in connection with the matter....may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." (CRPC 2-100). There is no evidence that the subject matter of the interviews with Gathii or Dubroff was concerning any act or omission of themselves in connection with the suit. Neither the interview with Gathii nor Dubroff concerned their own actions in regards to Hensen's overtime pay. (GI, DA). Gathii was Henson's direct supervisor, however, his communication was limited to his job duties, the duties of the general managers and the corporate officers['] duties. (GI). The dispute in the lawsuit was whether Hensen was entitled to back pay for overtime worked. (HI). Neither Gathii nor Dubroff had any control over whether Hensen received back pay, was classified as exempt, nor was entitled to a change in classification. (DA, GI). Both the interviews with Gathii and Dubroff did not concern their actions or omissions in the dispute, but instead involved their percipient knowledge of events surrounding the dispute. Their percipient knowledge included the duties of all employees within Burger, their own duties, and the ability of officer[s] and directors to control corporate policy. (DA, GI).

Such percipient knowledge is admissible ex parte communications. (Quantum). Therefore, neither Gathii nor Dubroff's interviews by our firm fell within the proscribed communications of CRPC 2-100.

III. Gathii and Dubroff, as area training directors, are not employees whose statements might constitute admissions on behalf of Burger because they were not given the authority to speak on behalf of Burger nor bind them with regards to this lawsuit.

As stated previously in Section I., neither Gathii nor Dubroff can be classified as high ranking officials. Whether their statements may be regarded under CRPC 2-100 as "an admission on the part of the organization" depends upon their being high ranking officials. (Quantum). To constitute their interviews as admission on the part of Burger, Gathii and Dubroff would have to be executives or spokespersons with the authority to speak on behalf of the organization. (Quantum). Both Gathii and Dubroff admitted that they had minimal contact with the vice president and president of Burger (DA, GI). With such minimal contact, it would be difficult to find that Burger trusted these low level employees to speak on their behalf or to bind the organization. Their supervisory roles limit them to decisions affecting only day to day activities and the necessary services provided to employees below them and their customers. (GI).

The (B)(2) admissions section of CRPC 2-100 applies only to employees outside the

director level "control group" only if that employee was given actual authority to speak on behalf of the organization or could bind it with regard to the subject matter of the litigation. (Quantum). Under this test, those employees who are given authority to speak for and bind Burger are covered by CRPC 2-100. (Quantum). There is no evidence that Gathii or Dubroff had the authority for Burger to speak concerning this dispute or any other matter. There is also no evidence that their actions could bind Burger or be imputed to Burger concerning the specific subject matter of this litigation. In fact, Gathii spoke to Burger's in[-]house counsel and was not told nor given authority then or at any other time to speak on Burger's behalf nor bind the corporation with regards to this dispute. (GI). Therefore neither Gathii nor Dubroff are subject to CRPC- 2-100 (B)(2) and no violation has occurred.

IV. <u>There was no actual knowledge that Dubroff and Gathii were represented by counsel at the time of the interview because (1) Gathii explicitly denied being represented by counsel, and (2) Dubroff was interviewed prior to filing of the lawsuit and involved only careful investigation of a litigant's claims, thereby neither communication triggers CRPC 2-100</u>.

Dubroff was interviewed approximately two months prior to the filing of a lawsuit against Burger. (DA, HI). An employee cannot be 'represented by counsel in the matter' under CRPC 2-100 if no such matter has been asserted (Taco Bell). Routine pre-litigation activities such as interviews prior to filing a lawsuit is [sic] not a violation of 2-100 (Taco Bell) because such interviews are necessary to determine whether to file suit. The interview with Dubroff was intended to determine whether Hensen's activities as general manager were exempt or qualified for overtime wages. In order to determine the scope of Hensen's responsibilities in comparison with other employees, it was necessary for our firm to interview an employee of Burger who held more responsibilities than Hensen. Our firm went one step further and interviewed an employee who did not know Hensen nor had any knowledge of her claim against Burger. (DA). This employee was chosen in order to protect the integrity of the parties to the lawsuit should one be filed and in order to insure that no improper inside information was revealed regarding the suit by Dubroff. Because no lawsuit was filed, and because Dubroff was carefully chosen as a third party with no interest in the suit, CRPC 2-100 has not been violated.

Gathii was not chosen by our firm for interview after suit had been filed, but instead came to us of his own accord requesting to speak about his position at Burger. (GI). Because Gathii was interviewed after the suit had been filed, the issue is whether our firm had knowledge that he was a represented party (2-100). The standard is not "knew or should have known" that the party was represented by counsel, but whether the attorney "in fact" had actual knowledge at the time the interview is [sic] conducted (Taco Bell). Gathii was specifically asked if he was represented by counsel prior to the interview taking place. (GI). He denied being represented and was actively seeking out our firm to discuss his work with Hensen and Burger. (GI). Simply because Burger had in[-]house counsel and Gathii had spoken with that counsel does not mean that our firm "should have known" that Gathii was represented. (Taco Bell). Numerous corporations have in[-]house counsel and that knowledge does not trigger CRPC 2-100 unless our firm knew in fact that Burger's

house counsel represented Gathii when he was interviewed. (Taco Bell). Gathii denied being represented. (GI). Even though he revealed that he had spoken to Burger[']s in[-]house counsel, he did not indicate that he was represented by their counsel. (GI). He simply indicated that Burger's in[-]house counsel asked him some questions. (GI). He also never indicated that Burger's in[-]house counsel informed him that he was a represented party nor that counsel advised him not to communicate with anyone about the pending litigation. Despite our lack of actual knowledge about Gathii's representation, we attempted to limit our discussion with him to matters that we wanted to discuss and not intrude upon the conversation between Burger's counsel and Gathii. (GI). Because there was no actual knowledge of representation, CRPC 2-100 has not been violated.

Public policy further supports the actual knowledge requirement to afford plaintiffs against corporations with in[-]house counsel the opportunity to seek out legal advice and not be precluded from investigating potential lawsuits (Taco Bell). Such an "uneven playing field" in factor of the numerous corporations with in[-]house counsel would place a chill on all litigation by employees upon their employers (Taco Bell). If Burger were able to assert that they represented all employees anytime an employee was aggrieved, actually injured employees would have a difficult time getting redress for their grievances. Hensen is no exception. Without our firm's discussion with Dubroff and Gathii, Hensen might lose her claim against Burger and Burger may go on violating their employees['] rights. Public policy would not support such a position.

CONCLUSION

We ask this court to conclude that there was no violation of CRPC 2-100 as Gathii and Dubroff were not "represented parties" within the scope of that rule as (1) they were not officers, directors, or managing agents to the organization; (2) the subject matter of the communications was not an act or omission of Gathii or Dubroff that could be binding or imputed to the organization; (3) they were not employees whose statements might constitute admission on behalf of the organization; (4) even if the interviews with Gathii and Dubroff were subject to CRPC 2-100, our firm did not have actual knowledge that [they] were represented parties and one communication with an employee was prior to the filing of a lawsuit; and (5) public policy supports the ability to talk to employees of organizations with in[-]house counsel in certain circumstances to even out an already "uneven playing field" for employees with real claims against their employers. Our firm has done nothing improper in violation of CRPC 2-100 and we ask that our attorneys for Hensen not be disqualified.

THURSDAY AFTERNOON
FEBRUARY 23, 2006

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

ESTATE OF SMALL

FILE

ESTATE OF SMALL

INSTRUCTIONS

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

WASHINGTON & SHEEHAN, LLP
1000 Greenpoint Avenue
Valley Stream, Columbia 09546

MEMORANDUM

To: **Applicant**
From: **Jonathan Washington**
Date: **February 23, 2006**
Subject: **Estate of Small**

We represent Patricia Sanchez Small. Ms. Small was the wife of Robert Small, a prominent Valley Stream businessman who died more than a year ago. She is involved in litigation over Mr. Small's sizable estate with Mr. Small's heirs, who are his three adult children from two prior marriages. She filed a petition for determination of her entitlement to share in the estate as an omitted spouse. The superior court denied the petition, and she has appealed.

Last week, with Ms. Small's consent, I approached Lillian MacKenzie, who is counsel to Mr. Small's heirs, with a suggestion to try to settle the litigation by resort to appellate mediation. After obtaining her clients' consent, Ms. MacKenzie agreed.

Please draft *only* (1) the statement of facts and (2) the argument of an appellate mediation brief, following the accompanying guidelines. In the argument, take the position that the superior court erred in denying Ms. Small's petition because: (1) contrary to the court's conclusion, she is indeed an omitted spouse and, as such, is entitled to share in Mr. Small's estate (see Colum. Prob. Code, § 610); and (2) the conditions that might defeat her entitlement (see *id.*, § 611)—which, in light of its conclusion, the court did not address—are not satisfied under the law and the evidence.

WASHINGTON & SHEEHAN, LLP

1000 Greenpoint Avenue

Valley Stream, Columbia 09546

MEMORANDUM

To: **All Attorneys**
From: **Executive Committee**
Date: **April 5, 2005**
Subject: **The Drafting of Appellate Mediation Briefs**

The Columbia Court of Appeal has recently instituted an appellate mediation program.

Mediation is an informal process in which a neutral person—the mediator—assists each of the parties to an appeal in understanding its own interests, the interests of the other party, and the practical and legal realities they each face. The mediator does not resolve the dispute, but simply helps the parties do so.

In approaching appellate mediation, the single most important step we take is the drafting of an "Appellate Mediation Brief." An appellate mediation brief is similar to an appellate brief, but shorter and more focused, since (1) its intended audience is primarily the opposing party, who is already acquainted with the law and the facts, and (2) its intended purpose is primarily to persuade the opposing party of the strength of the position it will encounter.

All appellate mediation briefs must include the following sections and conform to the following guidelines.

The *introduction* must briefly summarize the argument.

The *statement of the case* must concisely indicate the major procedural events from commencement of the proceeding to the judgment or order appealed from.

The *statement of facts* must contain the facts that support our client's position, and must also take account of the facts that may be used to support that of the opposing party. It must deal with all such facts in a persuasive manner, reasonably and fairly attempting to show the greater importance of the ones that weigh in our client's favor and the lesser importance of the ones that weigh in the favor of the opposing party.

The *argument* must analyze the applicable law and bring it to bear on the facts, urging that the law and facts support our client's position. It must respond to, or anticipate, the attacks that the opposing party has made, or may reasonably be expected to make, against our client's position. It must display a subject heading summarizing each claim and the outcome that it requires, such as, "Because the Contract Was Not Entered Into Freely, the Trial Court Erred in Holding It Enforceable." The subject heading should *not* state a bare conclusion, such as, "The Contract Was Unenforceable."

The *conclusion* must state, in simple fashion, that the appellate court would likely grant the relief sought by our client for the reasons set forth in the argument.

As with an appellate brief, an appellate mediation brief will have its cover, table of contents, and table of authorities prepared after approval of its substance.

WILL OF ROBERT SMALL

I, Robert Small, declare that this is my will.

First: I revoke any and all wills that I have previously made.

Second: I am not married. I was formerly married to Betty Harold Small and to Helen Barrett Small, from each of whom I have obtained a final judgment of dissolution. I have two children of my marriage to my former wife Betty Harold Small, whose names are John Small and Joseph Small. I have one child of my marriage to my former wife Helen Barrett Small, whose name is Rebecca Small. The term "my children" in this will refers to John Small, Joseph Small, and Rebecca Small.

Third: I give my estate as follows:

A. I give my estate in equal shares to my children who survive me.

B. If none of my children survives me, I give my estate to the University of Columbia.

Fourth: I nominate my sister, Frances Small Wiggins, as executor of this will, to serve without bond.

I subscribe my name to this will this 29th day of June 1976, at Valley Stream, Columbia.

Robert Small

Robert Small

On the date above written, Robert Small having declared to us that this was his will, and having asked us to act as witnesses, in his presence and in the presence of each other, we hereby subscribe our names as witnesses.

Barbara Collier residing at

1021 Nebraska Street

Barbara Collier Valley Stream, Columbia

Judy Myers residing at 14 Herman Avenue

Judy Myers Valley Stream, Columbia

PREMARITAL CONTRACT

OF

ROBERT SMALL AND PATRICIA SANCHEZ

Robert Small (Robert) and Patricia Sanchez (Patricia), having each separately consulted with independent counsel, enter into this agreement in contemplation of marriage in order to define their respective property rights.

1. At the time this agreement is entered into, Robert warrants that he owns the property listed in Exhibit A hereto, and Patricia warrants that she owns the property listed in Exhibit B hereto, both of which are hereby incorporated by reference.

2.. Robert and Patricia each acknowledge that he or she has read Exhibits A and B, and that he or she is entering into this agreement voluntarily and with knowledge of the facts stated herein.

3. Robert and Patricia each agree that all property belonging to the other at the commencement of their marriage shall be, and remain, the separate property of the other.

4. Robert and Patricia each agree to relinquish, disclaim, release, and forever give up any and all right, claim, or interest that he or she may acquire in the separate property of the other by reason of their marriage.

5. Robert and Patricia each acknowledge that he or she understands that, under the law of the State of Columbia, and in the absence of any agreement to the contrary, the earnings and income resulting from the personal services, skills, effort, and work of the other during their marriage would be community property in which he or she would have a one-half interest. Robert and Patricia each agree that such earnings and income that

would otherwise be community property shall be separate property, unless, as to any item of property, they each execute an express written agreement to treat such item as community property.

6. Robert agrees that if Patricia survives him as his lawful widow, there shall be paid to her from his estate the sum of $10,000.

7. If for any reason Robert and Patricia do not marry, this agreement will have no force or effect.

In witness whereof, Robert and Patricia have executed this agreement on the 5th day of July, 1981.

Robert Small

Robert Small

Patricia Sanchez

Patricia Sanchez

EXHIBIT A

Property of Robert Small

1. Home at 110 Haven Street, Valley Stream, Columbia, with furniture, appliances, and personal effects.

2. One 1981 Mercedes-Benz 300 sedan; one 1979 Corvette convertible; and one 1972 Datsun 240Z coupe.

3. Restaurant known as Sloane's and land at 1833 Summer Road, Valley Stream, Columbia.

4. Apartment building and land at 1083 Maple Avenue, Valley Stream, Columbia.

5. Commercial complex and land at 582-588 Parker Way, Fenton, Columbia.

6. Raw land of approximately 26,412 acres in Township 325, Range 38E, Kittridge County, Columbia.

7. Cash, stocks, bonds, and miscellaneous financial instruments in the approximate amount of $6.3 million.

EXHIBIT B

Property of Patricia Sanchez

1. Condominium at 13B Heald Avenue, Valley Stream, Columbia, with furniture, appliances, and personal effects.
2. One 1980 Mercury Cougar sedan.
3. Cash in the approximate amount of $1,500.

CODICIL TO WILL OF ROBERT SMALL

This is a change of executor of my will.

I, Robert Small, being of sound mind, appoint on this date my wife Patricia Small as executor of my will. I sign this freely and without any reservation as to what is being done. She is to comply with the laws of the State of Columbia as to the distribution of my estate according to my wishes dictated in my will.

Dated: September 3, 2004 Robert Small

Robert Small

Witnessed on this date by:

Lana Schmitz

Lana Schmitz

Ralph Schmitz

Ralph Schmitz

EXCERPTS OF DEPOSITION TESTIMONY OF PATRICIA SANCHEZ SMALL

* * *

Q [By Ms. Lillian MacKenzie (MacKenzie)]: Mrs. Small, you were the wife of Robert Small?

A [By Ms. Patricia Sanchez Small (Small)]: Yes, I was.

Q: When did you and Mr. Small marry?

A: On July 8, 1981.

Q: How long had you known each other prior to the date of your marriage?

A: Oh, almost three years.

Q: You met at his restaurant, Sloane's?

A: Yes, I worked there as a pastry chef.

Q: Mr. Small was not married at the time you met him?

A: No, he had been divorced from his second wife for a number of years.

Q: Before your marriage, did you sign a premarital contract with Mr. Small?

A: Yes, I did.

Q: You consulted with your own lawyer before signing it?

A: Yes.

Q: You understood it?

A: Yes.

Q: You signed it freely?

A: Yes.

Q: Mr. Small didn't force you to sign it, did he?

A: No, he didn't.

* * *

Q [By MacKenzie]: You were with Mr. Small when he drafted the codicil to his will?

A [By Small]: Do you mean that short document he wrote a month before he died?

Q: Yes.

A: Yes, I was.

Q: He drafted it himself, did he not?

A: Well, he copied it from a form he found on the Internet.

Q: But it was he who found it and copied it, is that correct?

A: Yes.

Q: And he had his wits about him?

A: Yes, he did.

* * *

Q [By Mr. Jonathan Washington]: About the codicil, did Mr. Small say why he drafted it?

A [By Small]: Yes.

Q: And what he did say?

A: He didn't want his sister Frances as executor.

Q: Did he say why?

A: He said he couldn't stand her any longer. After years of difficult relations, they had had a big fight. "That's it," he said.

Q: Did he describe the language he copied from the Internet?

A: Yes: "Boilerplate."

* * *

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

Estate of Robert Small,	)	No. 26-20519
	)	
Decedent.	)	**Order re Entitlement to Share**
_____	)	**in Estate as Omitted Spouse**
Patricia Sanchez Small,	)	
Petitioner,	)	
v.	)	
John Small, Joseph Small, and Rebecca Small,	)	
Respondents.	)	
_____	)	

The cause is before the court on petition by petitioner Patricia Sanchez Small (Patricia), who was the wife of decedent Robert Small (Robert), to determine her entitlement to share in Robert's estate as an omitted spouse. Respondents John Small, Joseph Small, and Rebecca Small, who are Robert's children and his heirs, oppose the petition.

On October 3, 2004, Robert died. Robert was survived by Patricia. Prior to their marriage, which was solemnized on July 8, 1981, Robert and Patricia entered into a premarital contract, which was executed on July 5, 1981. According to the terms of the premarital contract, Robert and Patricia agreed that all property each owned at the commencement of their marriage would remain separate property. They also agreed that all property each acquired during their marriage would be separate property, unless, as to any item of property, they each executed an express written agreement to treat such item as

community property. It turns out that during their marriage, Robert and Patricia did indeed expressly agree in writing to treat many of the items they each acquired as community property, including the family home and a surrounding vineyard, with a total value of about $13.6 million. In addition, Robert and Patricia each acquired separate property, valued at about $5.1 million for Robert and about $110,000 for Patricia.

On March 6, 2005, Patricia initiated this proceeding by submitting a petition asking for admission to probate of Robert's will, executed on June 29, 1976, and a codicil to that will, executed on September 3, 2004, and for appointment as executor.

On April 14, 2005, the court granted Patricia's petition and admitted Robert's will and codicil to probate and appointed Patricia as executor.

On November 23, 2005, Patricia submitted the present petition.

There is no dispute that Patricia is entitled to her separate property and to her share of the common property. What *is* disputed is whether she is entitled to share in Robert's estate, including its community property and/or separate property components, as an omitted spouse.

Columbia Probate Code section 610 states that "if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate," as specified therein. Columbia Probate Code section 601(a) defines "testamentary instrument" to include a will.

Patricia contends that she falls within Columbia Probate Code section 610 as an omitted spouse because Robert's will, which makes no provision for her, was executed prior to their marriage.

After consideration, the court rejects the claim. After the marriage, Robert executed a codicil to his will, which appointed Patricia as executor and directed her to distribute his estate "according to my wishes dictated in my will." Although it is true that a codicil is not defined as a "testamentary instrument" for purposes of Columbia Probate Code section 601(a), a codicil can republish a will (*Estate of Riddell* (Colum. Ct.App. 1981); but see *Estate of Challman* (Colum. Ct.App. 1984) (dictum)), which *is* defined as a "testamentary instrument" by Columbia Probate Code section 601(a). Thus, the will as republished by the codicil must be deemed executed *during the marriage*, and Patricia falls *outside* Columbia Probate Code section 610.

Patricia argues that in applying the doctrine of republication, the court must consider Robert's intent. The court has done so. The court finds that Robert's intent was to exclude Patricia from taking under his will. Robert executed the codicil to his will a month before he died, stating in pertinent part: "I . . . appoint on this date my wife Patricia Small as executor of my will. . . . She is to comply with the laws of the State of Columbia as to the distribution of my estate *according to my wishes dictated in my will*." (Italics added.) In her deposition testimony, Patricia stated that Robert found the language of the codicil in a form on the Internet, called it "boilerplate," and said his purpose was simply to remove as executor his sister Frances Small Wiggins, from whom he had become estranged. Patricia contends that this evidence calls into question Robert's intent to have his estate distributed "according to my wishes dictated in my will" and thereby to exclude her from taking under it. The court, however, finds no ambiguity in the plain language of the codicil. Whether the language is "boilerplate" or not, it is clear—and controlling.

In summary, the court finds that the codicil executed by Robert operated to republish his will, and that his will as republished must be deemed executed after Robert and Patricia were married, thereby putting Patricia outside Columbia Probate Code section 610 and precluding her characterization as an omitted spouse. Because of this result, the court need not, and does not, address whether any of the conditions, stated in Columbia Probate

Code section 611, that might have defeated Patricia's "entitlement" to share in Robert's estate as an omitted spouse was satisfied.

For the reasons stated above, Patricia's petition to determine her entitlement to share in Robert's estate as an omitted spouse must be, and hereby is,
DENIED.

Dated: January 19, 2006

Rachel Garaventa

Rachel Garaventa
Judge of the Superior Court

THURSDAY AFTERNOON
FEBRUARY 23, 2006

California
Bar
Examination

Performance Test B
LIBRARY

ESTATE OF SMALL

LIBRARY

SELECTED PROVISIONS OF THE COLUMBIA PROBATE CODE

* * *

§ 88. Will

"Will" means an instrument by which a person directs the disposition of his or her property, to become effective only on his or her death.

§ 89. Codicil

"Codicil" means a later instrument that affects the terms or validity of an earlier will.

* * *

§ 600. Family Protection: Omitted Spouses and Children

Section 600 through Section 630 provides family protection to the benefit of omitted spouses and children.

§ 601. Definitions

(a) For purposes of Section 600 through Section 630, "decedent's testamentary instruments" means the decedent's will under Section 88 and any revocable trust.

* * *

§ 610. Omitted spouse; share of omitted spouse

Except as provided in Section 611, if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all of the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate, consisting of (1) the one-half of the community property that belongs to the decedent, and (2) one-half of the decedent's separate property.

§ 611. Omitted spouse not to receive share; circumstances

An omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if any of the following is established:

(a) The decedent's failure to provide for the omitted spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

(b) The decedent provided for the omitted spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

(c) The omitted spouse waived the right to share in both the community property portion and the separate property portion of the decedent's estate.

* * *

Columbia Court of Appeal (1981)

This is an appeal from an order of the superior court denying a petition by George Riddell, the surviving husband, to determine his entitlement to share, as an omitted spouse, in the estate of his wife, Ethel Riddell, pursuant to section 610 of the Columbia Probate Code.

Ethel made a will prior to her marriage to George leaving "all my estate to my daughter, Florence," her sole child by a former marriage, but did not mention George. She then married him. In a codicil she later signed, again leaving all her estate to her daughter, she made no provision for him.

George contends that the superior court's order denying his petition was erroneous. He argues that because Ethel made no provision for him in her will, which preceded their marriage, he is entitled to share in her estate as an omitted spouse.

After review, we cannot find any error. Under the doctrine of republication, a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during the marriage. By its terms, section 610 of the Columbia Probate Code comes into play only if the decedent marries "*after* the execution of all of the decedent's testamentary instruments," including a will. Here, by virtue of republication, Ethel must be deemed to have married *before* making her will. We recognize that republication may not be applied to defeat the purpose of the testator as indicated in the codicil. But in her codicil, Ethel's purpose was express—to leave all her estate to her daughter. By such language, George is wholly barred from sharing in Ethel's estate.

The order is affirmed.

ESTATE OF CHALLMAN

Columbia Court of Appeal (1984)

This cause comes up on appeal by James Challman, the son and beneficiary under the will of Eugene Challman, from a judgment of the superior court as follows:

"That Helen Challman, as surviving spouse, was not provided for in the will of Eugene Challman, nor was she mentioned therein in such way as to show an intention not to provide for her.

"That pursuant to Columbia Probate Code Section 610, Helen Challman, as an omitted spouse, is entitled to receive as her share of the estate one-half of the community property belonging to Eugene Challman and one-half of his separate property.

"That James Challman is entitled to the balance of the estate."

Eugene's will was dated, signed, and witnessed on June 2, 1978. In his will, Eugene made a specific bequest of $2,500 to Helen Dollinger, one of his oldest friends, with the residuary to his son James. On December 10, 1979, Eugene married Helen Dollinger, who then became Helen Challman. On November 1, 1980, Eugene deleted the specific bequest to "Helen Dollinger" in his will in his own handwriting and appended his signature; he inserted "Helen Challman, Wife," after his son James' name in the residuary clause by typewriting without any signature. Also on November 1, 1980, Eugene handwrote and signed the following on a separate piece of paper as a codicil: "Helen Challman should be repaid the $1,620 she paid to repair my car."

On July 6, 1981, following Eugene's death, the superior court made an order on Helen's petition admitting Eugene's will and codicil to probate and appointing Helen as executor. The order reads in part as follows: "The document, dated June 2, 1978, excluding the typewritten and unsigned additions . . . is hereby admitted to probate as the will of Eugene Challman; and the holographic document dated November 1, 1980, is hereby admitted to probate as a codicil to the will."

In the proceeding now engaging our attention, it must be kept in mind that Eugene's will, as admitted to probate, contained neither the specific bequest to his wife Helen under her maiden name, which he effectively deleted, nor Helen's married name in the residuary clause, which he ineffectively attempted to insert. Consequently, the only mention of Helen in the instruments as admitted to probate is in the codicil, which was merely an acknowledgment of a debt to her.

The superior court concluded that, notwithstanding Eugene's codicil, dated November 1, 1980, Helen was an omitted spouse because Eugene's will, dated June 2, 1978, preceded his marriage to her on December 10, 1979.

Relying on the doctrine of republication, James contends that the superior court erred.

We recognize that *Estate of Riddell* (Colum. Ct.App. 1981) held that, for purposes of the protection afforded omitted spouses under Columbia Probate Code section 600 et seq., a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during marriage. *Riddell* seems questionable. Columbia Probate Code section 610(a) defines the requisite "testamentary instruments" to include "will[s]" and "revocable trust[s]"—but *not* "codicils." In effect, *Riddell* added "codicils" to Columbia Probate Code section 601(a) through the doctrine of republication—contrary to what may be assumed to have been the Legislature's intent.

In any case, we need not pass on *Riddell*'s soundness. For even if the doctrine of republication is applicable, it does not aid James. As *Riddell* itself states, "[R]epublication may not be applied to defeat the purpose of the testator as indicated in the codicil." From the provisions of Eugene's codicil and its circumstances, the superior court found that Eugene intended that Helen be repaid out of his estate to cover his debt and that she share what remained of his estate with James. There is simply no basis to disturb that finding.

It follows that we may not apply the doctrine of republication to treat Eugene's will as though it had been executed during marriage. To do so would deprive Helen of her entitlement to share in Eugene's estate as an omitted spouse and thereby leave her unprovided for—a result that would be contrary to Eugene's intent in his codicil.[1]

The judgment is affirmed.

[1] We note that James makes a perfunctory claim that the superior court erred by refusing to treat a certain letter Helen had written to Eugene as a waiver of any right to share in either the community property portion or the separate property portion of Eugene's estate, or both—a circumstance that would have defeated her entitlement to share in either portion of his estate (see Colum. Prob. Code, § 611(c)). A waiver of a right requires the knowing and intentional relinquishment of the right. The letter in question does not even purport to waive any right whatsoever.

Answer 1 to PT - B

1)

To: Jonathan Washington

From: Applicant

Date: February 23, 2006

Re: Estate of Robert Small – Draft Appellate Mediation Brief

I write in response to you[r] request to draft an appellate mediation brief on behalf of our client, Patricia Sanchez Small ("Pat") in support of her claim to entitlement to share in the estate of her deceased husband Robert Small ("Rob") as an omitted spouse. Per your instruction, I have drafted only (1) the statement of facts and (2) the argument of an appellate mediation brief, following the guidelines you provided.

I. Statement of Facts

Rob passed away on October 3, 2004, after being happily married to his devoted wife Pat since July 8, 1981. About two years before Rob met Pat in 1978, who worked as a fine pastry chef at his Sloane's Restaurant, he executed a will on June 29, 1976, leaving his estate to the surviving children of the two children he shared with his ex-wife Betty, John and Joseph, and a daughter, Rebecca, who he had with his ex-wife Helen.

Three days prior to their marriage, Rob and Pat entered into a premarital contract, which provided that all property each owned at the commencement of their marriage would remain separate property, and outlines [sic] all of Rob's property in the incorporated Exhibit A. They also agreed that all property each acquired during their marriage would be separate property, unless, as to any item of property, they each executed an express written agreement to treat such item as community property. Based on their enduring and committed relationship of 23 years in marriage and three years before, Rob and Pat did, in fact, expressly agree in writing to treat many of the items they each acquired as community property, including their warm family home and a surrounding vineyard, symbols of their commitment to each other, and other separate property.

Exactly one month before Rob's passing, he executed a codicil, the first line of which boldly expressed its purpose and his intent, reading, "This is a change of executor of my will." In fact, the codicil names Pat, his loving wife, as the new executor of his will to replace his sister Frances. He made this change in the executor of his will after [he] had a tumultuous relationship and serious falling out with Frances for several years, culminating in a big fight that led to his desire to not wanting anything to do with her. In deciding to change the executor, he looked on the Internet to aid him in drafting the codicil. He ultimately copied language from a codicil found thereon, describing it in his own words as standard

"boilerplate" language. This language included standard provisions involving the basic understanding of the executor as willing to "comply with the laws of the State of Columbia as to the distribution of my estate according to my wishes dictated in my will." This "boilerplate" language followed other "boilerplate language" such as, "I sign this freely and without any reservation as to what is being done."

II. Argument

A. CONTRARY TO THE SUPERIOR COURT'S CONCLUSION, PAT IS INDEED AN OMITTED SPOUSE AND, AS SUCH, IS ENTITLED TO SHARE IN ROB'S ESTATE BECAUSE THE COURT ERRONEOUSLY FOCUSED ON ROB'S "BOILERPLATE" LANGUAGE INSTE[A]D OF HIS TRUE INTENT, WHICH WAS TO CHANGE THE EXECUTOR OF THE WILL[.]

Columbia Probate Code section 610 states that "if a decedent fails to provide in a testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all the decedent's testamentary instruments, the surviving spouse is an omitted spouse and, as such, shall receive a share in the decedent's estate," as specified therein.

The Columbia Court of Appeal in Estate of Challman recognized that Estate of Riddell, the case on which Superior Court Judge Rachel Garaventa relied in this case, held that, for purposes of the protection afforded omitted spouses under the Prob Code section 600 et seq., a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during marriage. Challman, written three full years after Riddell, clearly refers to Riddell as "questionable" because it added "codicils" to the Prob. Code section 601(a) through the doctrine of republication – contrary to what was the Legislature's intent. The Legislature expressly defined "decedent's testamentary instruments" as the decedent's will under Section 88 and any revocable trust, and deliberately made no reference to "codicils," which are defined in section 89.

Even if the doctrine of republication is applicable, it does not help John, Joseph, and/or Rebecca. As Riddell itself state[s], "[R]epublication may not be applied to defeat the purpose of the testator as indicated in the codicil." From the provisions of Rob's codicil and its circumstances, it is unequivocal that Rob unambiguously intended to execute the codicil merely for the purpose of changing the executor from his sister Frances, who he could no longer stand after several years of tumultuous relations and big fight[s], to his loving and devoted wife, Pat. This primary purpose is clearly evidenced by the first line of the codicil, which prominently stands alone and reads, "This is a change of executor of my will." Moreover, the provision relating to the "distribution of [his] estate according to [his] wishes dictated in [his] will" simply serve[s] as a formality that was included in the "boilerplate" – to use Rob's own words – form codicil that Rob copied off of the Internet when he intended to simply change his executor to Pat. This "boilerplate" language followed other "boilerplate language" such as, "I sign this freely and without any reservation as to what is being done."

The Superior Court clearly and erroneously ignored the circumstances pertaining to Rob's clear intent to execute the codicil in favor of a strict formalistic interpretation of the "boilerplate" secondary language that he obtained off of the internet.

For this season, too, Riddell is further and critically distinguished from the present case. In Riddell, the testator specifically reiterated in her codicil that she was leaving all her estate to her daughter, while not at all mentioning her spouse, who later claimed entitlement to his deceased wife's estate. To elaborate, in executing the codicil, the testator in Riddell specifically intended to leave her estate to her daughter and not to the husband to which she was already married. On the other hand, in the case at bar, Rob's mere intent was to change executors. Similarly, in [sic]

Similarly, Challman is soundly analogized to the present case. In Challman, the testator's will, as admitted to probate, did not contain the name of his wife, and the only mention of the wife in the instruments as admitted to probate was in the codicil, which was merely an acknowledgment of a debt to her. Likewise, in the case at issue, Rob's will did not contain Pat's name, and the only mention of Pat was in the codicil, which was merely appointing her as executor of his estate in lieu of his sister Frances.

Therefore, for these reasons, contrary to the Superior Court's conclusion, Pat is indeed an omitted spouse and, as such, in [sic] entitled to share in Rob's estate, including its community property and separate property components, under section 610.

B. THE THREE CONDITIONS THAT MIGHT DEFEAT PAT'S ENTITLEMENT, WHICH THE COURT DID NOT ADDRESS, ARE NOT SATISFIED UNDER THE LAW AND EVIDENCE BECAUSE ROB'S FAILURE TO PROVIDE FOR PAT WAS NOT INTENTIONAL, ROB DID NOT PROVIDE FOR PAT BY TRANSFER OUTSIDE OF THE ESTATE PASSING BY HIS WILL AND PAT DID NOT WAIVE HER RIGHT TO SHARE IN HIS ESTATE[.]

Having established that Pat is clearly an omitted spouse under section 610, it is obvious that the Superior Court erred in not addressing that any conditions that might have precluded Pat's entitlement to share in Rob's estate[sic]. Columbia Probate Code section 611 states that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if any of the three conditions elaborated below is established. Pat will clearly demonstrate that those conditions are not satisfied under the law and evidence because: (1) Rob's failure to provide for Pat was not intentional; (2) Rob did not provide for Pat by transfer outside of the estate passing by his will; and (3) Pat did not waive her right to share in Rob's estate.

1. Rob's failure to provide for Pat, his omitted spouse, in his testamentary instrument(s)

was not intentional and such intention does not appear from the codicil because the codicil was merely a change in executor and not an express and intentional disinheritance.

Section 611(a) provides that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if the decedent's failure to provide for the omitted spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

In executing his June 29, 1976, will, Rob gave his estate in equal shares to his children who survive him, and if none of them survive him, to the Univ of Columbia. He clearly declared that he was not married at the time – not to Betty, Helen or Pat. As a matter of fact, he did not know Pat at the time, with whom he had a relationship beginning in 1978 and who he married on July 8, 1981, and therefore, omitted her. Therefore, because he did not know Pat at the time, any omission as to Pat in the original will could not have been "intentional" for the purposes of the section 611(a) analysis.

Moreover, the premarital contract of July 5, 1981, between Rob and Pat, was not Rob's "testamentary instrument" within the meaning of Prob Code section 600 et seq. because the Legislature did not include premarital agreements as such in section 601. Therefore, that agreement also does fall under the purview of section 611(a).

As stated above, the Challman court stated that considering a codicil as a "testamentary instrument" is "questionable" because it appears to go against the Legislature's intent. However, even if it is considered as such, Rob's codicil does not show Rob's intentional failure to provide for Pat. In executing his September 3, 2004, codicil, it is agreed that Rob was of sound mind. However, as stated above, and as evidenced by the clear first and prominent line of the codicil, Rob clearly only executed the codicil to "change [the] executor of [his] will." The failure to provide for Pat in the codicil is irrelevant because the purpose of [the] codicil did not indicate how or to whom to distribute or redistribute Rob's estate. In other words, the intent of the codicil had nothing to do with determining the distribution of the estate to anyone, including Pat, John, Joseph or Rebecca. Rather, the purpose, or intent, clearly and merely involved a change of executor. The fact that the codicil states that Pat is to comply with the laws of the State of Columbia as to the distribution of his estate according to Rob's wishes dictated in his will, is secondary; it merely reflects the "boilerplate" language, as Rob described it, that he copied from the codicil he found on the Internet. Moreover, because the will was written about 18 ½ years before the codicil and his death, and that he met Pat only two years after the will was executed, it is highly likely that Rob forgot that the will was written at a time when he did not know Pat, and therefore, did not provide for her.

Therefore, Rob's failure to provide of [sic] Pat in his will was not intentional and such intention does not appear from any of the instruments involving the distribution of Rob's estate.

2. Rob did not provide for his omitted spouse, Pat, by transfer of property under the premarital agreement or subsequent written agreements in lieu of provisions in his will or codicil because no additional property owned by Rob existed that could have been given to Pat outside of the testamentary instruments, and alternatively, those designated in the written agreements cannot be deemed a satisfaction of Pat's interest in Rob's estate.

Section 611(b) provides that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if the decedent provided for the omitted spouse by transfer outside of the passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

Rob's 1976 will relates to his entire estate. Likewise, all the property Rob owned before he married Pat was more specifically referenced in their premarital contract from Exhibit A. In addition, the subsequent written instruments recharacterized the agreed-to characterized separate property in the premarital agreement as community property. Moreover, Rob's 2004 codicil did not mention any property, but even if it involved his property, it involved his entire estate. Therefore, all of the same property that Rob mentioned in his will was all of the property involved in the premarital agreement, the subsequent express written instruments and codicil. Therefore, there was no other additional property that Rob owned that Rob even possibly could have provided to Pat in lieu of a provision in the his testamentary instruments.

Alternatively, John, Joseph and Rebecca may argue that the property which Rob expressly agreed to treat as his and Pat's community property pursuant to the written agreements should be considered in satisfaction of Pat's interest in Rob's estate. However, such an argument would clearly be erroneous because no evidence exists showing that the expressly designated community property were [sic] expressly agreed to as a satisfaction.

Thus, logically, Rob did not provide for Pat by transfer of property in any way that would show that he intentionally transferred property to Pat in lieu of a provision in his will or codicil.

3. As an omitted spouse, Pat did not waive the right to share in Rob's estate because she did not knowingly and intentionally relinquish the right, and evidence of the express written agreements in which they entered recharacterizing much of Rob's property as community property shows that fact.

Section 611(c) provides that an omitted spouse shall not receive a share of either the community property portion or the separate property portion of the decedent's estate under Section 610 if the omitted spouse waived the right to share in both the community property portion and separate property portion of the decedent's estate. In a footnote, the Columbia Court of Appeal in Challman clearly elaborates that "[a] waiver of a right requires the knowing and intentional relinquishment of the right."

In the premarital contract of July 5, 1981, between Rob and Pat, each agreed that all property each owned at the commencement of their marriage would remain separate property. They also agreed in Paragraph 5 that all property each acquired during their marriage would be separate property, unless, as to any item of property, they each executed an express written agreement to treat such item as community property. The evidence clearly shows, and Judge Garaventa clearly points out, that during their loving marriage, Rob and Pat did indeed expressly agree in writing to treat many of their items they each acquired as community property, including the family home and a surrounding vineyard, with a total value of about $13.6 million. Such subsequent express written agreements prove that Pat did not knowingly and intentionally relinquish her right to share in his portion of community property.

Paragraph 4 of the premarital agreement between Rob and Pat provides that they each agree to relinquish any interest that he or she may acquire in the separate property of the other by reason of their marriage. However, this provision is inextricably linked to the provision in Paragraph 5 mentioned above, that is[,] that property acquired during their marriage would be characterized as each of their separate property unless they agree to treat such items as community property. First, the provisions are adjacent to one another. While Paragraph 4 states the basic rule that they disclaim all interest in the other's separate property, Paragraph 5 elaborates on the Columbia legal presumption and that the Paragraph 4 provision overrides the presumption, but that the exception to that Paragraph 4 presumption exists where there is an express agreement. Rob and Pat each acquired separate property during the course of their strong marriage, of which Rob's portion is valued at about $5.1 million. The evidence shows that they expressly agreed in writing to include this separate property as an exception to the Paragraph 4 provision and characterize it as community property.

Thus, the existence of subsequent written agreements recharacterizing Rob's separate property as community property evidence the fact that the underlying premarital agreement does not waive any of Pat's right to share in Rob's estate whatsoever.

Answer 2 to PT - B

Appellate Mediation Brief

I. Statement of Facts

As you know, Robert Small executed a will which was dated, signed and witnessed on June 29, 2006. In his will, Mr. Small expressly stated that he was not married, and that his estate was to be devised into equal shares to his children who survive him. In the event that none of the children survived him, his estate was to go to the University of Columbia. The will also expressly nominated Mr. Small's sister as executor of the will.

On July 8, 1981, Mr. Small married Patricia Sanchez Small, whom he had met at his restaurant while she was working there as a pastry chief. Prior to the marriage, on July 5th, 1981, Patricia and Mr. Small voluntarily entered into a premarital contract. In the contract, it was agreed that all property they had acquired prior to marriage would be separate property, and that all property acquired during the marriage would also be separate property. However, they expressly agreed that any property acquired during marriage would become community property if they entered a written agreement to treat it as such. Indeed, they later did enter into numerous express written agreements to treat much of [sic] the assets they acquired during the marriage as community property, thus taking those items outside the scope of the premarital agreement. The agreement also covered a waiver of each's rights to any separate property, but did not refer to any of their rights to the community property. Finally, the premarital agreement provided that if Patricia survived Mr. Small, she would be paid a mere $10,000 from his estate.

On September 3, 2004, about one month before his death, some 28 years after he originally executed his will and some 23 years after marrying Patricia, Mr. Small copied a standard codicil form from the internet and had it validly executed. The codicil merely appointed Patricia as his executor, replacing his sister, whom Mr. Small no longer got along with. The codicil mentioned that as executor, Patricia's duty was to comply with the laws of the State of Columbia as to the distribution of his estate in accordance with his will.

On March 6, 2005, Patricia initiated a proceeding in superior court in the County of Newall by submitting a petition asking for admission to probate of the will and the codicil, and for appointment as executor. On November 23, 2005, Patricia petitioned the court to determine her entitlement to share in Mr. Small's estate as an omitted spouse under Columbia Probate Code §610. The court denied her petition, and Patricia appealed.

II. Argument

A. Because Patricia was not provided for in Mr. Small's will and because the subsequent codicil did not republish the will, the superior court erred in denying her petition for entitlement under §610 of the Columbia Probate Code[.]

Columbia Probate Code §610 provides that if a decedent fails to provide in a testamentary instrument for decedent's surviving spouse who married the decedent after execution of all of decedent's testamentary instruments, the surviving spouse is entitled to a share of the estate as an omitted spouse. Probate Code §610. Thus, if it is found that Mr. Small did not provide for Patricia in any testamentary instrument and that she married him after execution of all testamentary instruments, then the court erred in finding she was not an omitted spouse.

(i) Because Patricia was not provided for in any testamentary instrument executed by Mr. Small prior to their marriage, she is an omitted spouse[.]

Mr. Small executed his will on June 29, 1976. This was almost five years prior to his marriage to Patricia. The will makes no mention of her, but rather devises all of the estate to his surviving children, or if none of them survived him, to the University of Columbia.

Under §601(a) of the Columbia Probate code, only a "will" and a revocable trust are "testamentary instruments" within the meaning of §610. There is no evidence showing that Mr. Small executed any other testamentary instrument after they were married on July 8, 1981. Thus, because Patricia was not provided for in the will, executed prior to the marriage, she is an omitted spouse under §610.

(ii) Because the intent of the codicil was merely to appoint Patricia as the executor and not to republish the will, the court erred in finding that the doctrine of republication applies[.]

Even where a surviving spouse was not provided for in a will executed prior to a marriage, she may not qualify as an omitted spouse where the doctrine of republication applies. Riddell. Under this doctrine, a codicil executed during marriage republishes a will made prior to marriage, and the will, as republished, is deemed to have been executed during the marriage. Riddell. However, this doctrine does not apply to defeat the purpose of the testator as indicated in the codicil and its circumstances. Challman. Here, the superior court erred in failing to consider the circumstances surrounding the codicil and in relying solely on the ambiguous language of the codicil in determining Mr. Small's intent.

First, Challman clearly states that the republication doctrine shall not apply where it would defeat the purposes of the testator, which is to be determined by the codicil language and the circumstances surrounding it. In Challman, the Columbia Court of Appeal held that the doctrine did not apply to a codicil despite the fact that the codicil was executed after the marriage and specifically referred to the surviving spouse. The court so

held in part because of the fact that the decedent spouse had, prior to that codicil, attempted to revise his will to provide for his spouse. Although that revision was not valid because it was not executed properly, the court was clearly influenced by it in determining that the decedent spouse intended to provide for his spouse, and therefore evoking the republication doctrine would defeat his intent. The court also noted that the purpose of the codicil was to make sure his surviving spouse was repaid out of his estate to cover his debt, and nothing more. Thus, the codicil was not meant as a republication of the old will, and should not be treated as such.

Here, similar to Challman, Mr. Small's intent in making the codicil was merely to make Patricia the executor of his estate, and nothing more. As Patricia attested, Mr. Small copied the language of the codicil from the internet, drafted the document by himself, and referred to the language as "boilerplate".

As she explained, he had a falling out with his sister, and he didn't want to have her be the executor anymore. This codicil was drafted a month before his death, some 28 years after he executed his will and some 23 years after his marriage to Patricia, and contained only one, sparse provision regarding Patricia's appointment as executor. These surrounding circumstances, which the superior court failed to give weight to despite controlling precedent, shows that Mr. Small did not intend for this codicil to leave Patricia unprovided for, and therefore prevents application of the republication doctrine.

Furthermore, the superior court erred in finding that the language in the codicil was "clear" in referring to his "wishes dictated in my will". While the court's citation was correct, it is not clear when taken in context that the language evinces an intent to republish the old will and exclude Patricia from his estate. As discussed above, the codicil was merely meant to make Patricia his executor to the estate. The final sentence begins with "she is to comply with the laws of the State of Columbia...", which thus suggests that he was merely describing the duties she would have as executor. The fact that he referred to this as "boilerplate" language supports this interpretation, rather than the superior court's interpretation that this sentence somehow manifested an intent to exclude Patricia. At the very least, the intent of the language is ambiguous. Combined with the surrounding circumstances, there is strong evidence to suggest that applying the republication doctrine would defeat Mr. Small's purpose of the codicil, and thus it should not be applied.

Finally, Riddell is distinguishable from this case. In Riddell, the codicil that was executed after the marriage expressly referred to the specific gift made in the will, and made no mention of the surviving spouse. Here, the opposite is true. No mention is made to the specific gifts of the will, but rather there is only a general reference to it using "boilerplate" language. Thus, to apply the republication doctrine here would deprive Patricia of her entitlement to share in Mr. Small's estate as an omitted spouse and thereby leave her unprovided for - "a result that would be contrary to [Robert's] intent in his codicil". Challman.

In summary, the superior court erred in holding that Patricia was not an omitted

spouse, because she was not provided for in his will and because the doctrine of republication does not apply to the codicil he drafted shortly before his death. As such, she will likely be found to be an omitted spouse entitled to a share of the estate.

B. Because none of the exceptions in §611 of the probate code apply to Patricia, her entitlement to a share of Mr. Small's estate will not be defeated[.]

Because the superior court wrongfully concluded that Patricia was not an omitted spouse, it did not analyze the exceptions under §611. On appeal, assuming the court will find that Patricia is indeed an omitted spouse for the reasons discussed above, the court will also likely find that the exceptions will not defeat her entitlement.

(i) Because Mr. Small's failure to provide for Patricia was not intenti[on]al and no intention appeared from the will, exception §611(a) will not apply[.]

Under §611(a), §610 will not apply where the decedent intentionally failed to provide for the omitted spouse and that intention appears from the "testamentary instruments". Because only a "will" and a revocable trust is [sic] a testamentary instrument (§601(a)), the appellate court would only look at the will in making this determination. In the will, Mr. Small specifically states that he is not married. There is no reference to the possibility of a future wife. His gift to the University in the event that no child survives him does not clearly show an intent to leave a future wife out of his estate, primarily because there is no language on the face of the will referring to such a possibility. Because the intention must "appear" from the will, a court is likely to find that no such intention can be established from his will.

(ii) Because the amount of the transfer mentioned in the premarital agreement was for a mere $10,000, only a tiny fraction of Mr. Small's estate, it is not evidence of a transfer in lieu of a provision in the will under §611(b)[.]

§611 (b) says that where the decedent spouse provides for a transfer outside of the estate and intended for the transfer to be in lieu of a provision in the will, then that serves as a bar to entitlement under §610. Here, Patricia concedes that the premarital agreement provided $10,000 for her if she survived Robert. However, as §611(b) expressly provides, the intent that the transfer be in lieu is evinced by "the amount of the transfer or other evidence". The transfer was only for $10,000, which is a tiny fraction of the estate, which is worth millions. Clearly, given the minuscule amount, a court will not find this a sufficient transfer.

(iii) Because the waiver in the premarital agreement was not knowing and

> intentional, or at the very least was only knowing and intentional with respect to Mr. Small's separate property, it does not preclude Patricia from entitlement under §611(c)[.]

§611(c) states that there is an exception where the omitted spouse waived the rights to share in "both" the community property portion and the separate property portion of decedent[']s estate. The court in Challman clearly states that such a waiver requires the "knowing and intentional" relinquishment of the right. Challman.

While the premarital agreement expressly states that Patricia agreed to relinquish her right to all separate property of Robert's acquired by reason of marriage, it is not clear from that language whether she "knowingly" or "intentionally" was waiving her rights as an omitted spouse upon his death. This was a premarital agreement, and for the most part referred to property related to their impending marriage. It is possible that she only thought this was in reference to her rights on divorce.

Even if not true, at the very least it only applies to the separate property. §611 (c) uses the word "both", so she would have had to have separately waived her rights to the community property, which she didn't. They expressly made agreements to treat the family home, surrounding vineyard, and other assets [as] community property, so under the terms of the agreement, and under §610, she would still at least be entitled to Robert's one half community property interest in those assets.