

97 年度國外考銓業務考察報告

一、考察緣起

考選部為改進司法官律師考試制度，配合總統府人權諮詢委員會「法律人養成制度興革方案」，95 年 4 月 25 日成立「考選部司法官律師考試改進推動小組」，並依據推動計畫，密集召開小組會議，就司法官、律師考試之應考資格、應試科目採二階段改革、錄取（及格）標準及成績計算、命題及閱卷改進事宜等進行研討。未來將配合相關考試規則之研修，落實於司法官律師考試取才制度，將可達到拔擢優秀法曹的目標。

茂雄為考試改進推動小組的成員，為收集外國的法制，以供本國立法之參考，所以決定前往美國考察。

依照美國的制度，法官之選任，並非經由考試，而是從現任檢察官及律師中遴選，所以實際上，美國的考試制度，僅適用於律師人才的選拔，又律師的考選並非由政府主辦，而是由各州律師公會負責考選業務，例如加州律師的考試，都集中由舊金山律師公會負責，所以，考察的對象就選定為加州舊金山律師公會。

二、考察之主題及項目

選定考察對象後，就擬定考察之主題及項目，經參照改進推動小組研討之重點，提出下列問題，並經由外交部轉請舊金山辦事處與舊金山律師公會洽商，確定座談時間。

- (一)、律師考試應試科目是否有命題大綱，或每次考試都是由命題委員臨時命題？
- (二)、命題委員、閱卷委員是如何產生，為提升命題委員之素質，是否有建立命題委員之人才庫？
- (三)、律師考試之考試科目共有幾科？
- (四)、命題委員之命題是採單獨或合議，除命題委員外，是否還有審題委員？
- (五)、律師考試之應考資格？
- (六)、律師考試多久舉辦一次，錄取之人數是如何決定？
- (七) 律師考試經錄取後，是否需要再接受訓練，才能執行律師業務？

三、實地考察 2008 年 5 月 16 日上午 09:30 先到外交部舊金山辦事處考察。該處業務，適逢該處處長交接，新任處長陳經銓親自接待，介紹該處業務，並且表示非常高興，因為我們是他就任後第一批前來道賀的客

人。上午 10:30 在洪中明組長陪同下，前往舊金山律師公會拜訪，由該會 Dean E.Barbieri Director For Examinations office of Admissions 狄恩先生接待，並且舉行座談歷時二小時，於 12 時 30 分結束，綜合座談的內容摘錄如下：

- (1) 律師考試要經過三天，分申論題及實務演練，第一天上午申論題，下午實務演練，第二天申論題，第三天有 200 個選擇題，其中 60 題比較簡單，其餘 140 題比較困難，前面 60 題是決定要不要繼續考。因為考不好，下面的 140 題就不必考了。
- (2) 考試科目共有 13 科，是從全美教授中所遴選的，收到教授所提供的試題，就放進題庫，再編輯成為試題，由八人負責，有法官、律師、學者都有 20 年以上的資歷，然後再由九位委員審題，試題用一次後即放入題庫，以後可以再用，多重選擇。一份試題中包括多種的科目。
- (3) 律師應考資格非常寬鬆，報考的人很多，所以錄取的人數管制較嚴，這就是加州律師錄取率，在

美國各州中最低的原因。

- (4) 在加州律師考試每年一次，並非由官方主持，所有試務都是由舊金山律師公會負責，全加州的應考人都集中在舊金山考試。
- (5) 律師考試及格後，並沒有嚴格的規定，需要接受訓練，但依照一般慣例，都要在大律師事務所，或跟隨著資深的律師學習。

四、座談結束前，狄恩主任，拿了一疊歷年來，美國律師考試的試卷，覺得非常珍貴，而狄恩主任也很慷慨送了十幾份，所以，將它一併列為本次考察之附件，讓有興趣的人，能有機會更深一層了解美國律師考試試題之趨勢。

報告人： 考試委員 吳茂雄

2008.6.9

TUESDAY MORNING

JULY 24, 2007



California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to

demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Larry leased in writing to Tanya a four-room office suite at a rent of \$500 payable monthly in advance. The lease commenced on July 1, 2006. The lease required Larry to provide essential services to Tanya's suite. The suite was located on the 12th floor of a new 20-story office building.

In November Larry failed to provide essential services to Tanya's suite on several occasions. Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week. On December 5, the heat, electrical and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.

On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of services made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space.

Tanya vacated the suite on February 28 even though between December 12 and February 28 there were no longer any problems with the leased premises.

Larry did not attempt to relet Tanya's vacant suite until April 15. He found a tenant to lease the suite commencing on May 1 at a rent of \$500 payable monthly in advance. On May 1, Larry brought suit against Tanya to recover rent for the months of March and April.

On what theory could Larry reasonably assert a claim to recover rent from Tanya for March and April and what defenses could Tanya reasonably assert against Larry's claim for rent? Discuss.

Question 2

Manufacturer designed and manufactured a "Cold Drink Blender," which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer's brochure that came with the Cold Drink Blender states that it is "perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas," and cautioned, "Do not fill beyond 2 inches of the top."

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

- (1) Consumer's injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.
- (2) Consumer's injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.
- (3) The design of the Cold Drink Blender was not defective since it complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

- (4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Question 3

Dave brought his sports car into the local service station for an oil change. While servicing the car, Mechanic checked the brakes and noticed that they needed repair. The following events occurred:

- (1) Mechanic commented to Helper, "Dave had better get these brakes fixed. They look bad to me."
- (2) Mechanic instructed Helper (who did not himself observe the brakes) to write on the work order: "Inspected brakes — repair?", which Helper then wrote on the work order. However, Helper currently does not remember what words he wrote on the work order.
- (3) Many hours later when Dave picked up his car, Helper overheard Mechanic say to Dave, "I think your brakes are bad. You'd better get them fixed."
- (4) Dave responded, "I am not surprised. They've felt a little funny lately."
- (5) Later that day, when Helper was walking down Main Street, he heard the sound of a collision behind him, followed by a bystander shouting: "The sports car ran the red light and ran into the truck."

The sports car involved in the accident was the one that Dave had just picked up from Mechanic. Polly owned the truck. Polly sued Dave for negligence for damages sustained in the accident. Polly's complaint alleged that the accident was caused by the sports car running the red light because the sports car's brakes failed. Polly's theory of liability is that Dave knew or should have known that his brakes were bad and that driving the car under those circumstances was negligent.

Polly called Helper as a witness to testify as to the facts recited in items (1) through (5) above, and she also offered into evidence the work order referred to in item number (2).

Assume that in each instance, appropriate objections were made.

Should the court admit the evidence offered in items numbers (1) through (5), including the work order referred to in item number (2)? Discuss.

TUESDAY MORNING

JULY 25, 2006



California Bar Examination

Answer all three questions.
Time allotted: three hours

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Question 1

After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed \$1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, "Come back here, thief!" Paul said, "I paid. Look on the counter." Clerk replied, "I've got your license number, and I'm going to call the cops." Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room to wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room.

Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. Mark attributed his forgetfulness to his medication, which is known to impair short-term memory.

Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning. He recalls that, while in the back room, he heard a running engine and felt ill before passing out.

A state statute provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing upon any perceptible grade, turning the front wheels to the curb or side of the highway."

1. Can Paul maintain tort claims against (a) Clerk for false imprisonment and (b) Mark for negligence? Discuss.
2. Is Delta Gas liable for the acts of (a) Clerk and (b) Mark? Discuss.

Question 2

In an effort to “clean up Columbia County,” the County Board of Supervisors recently passed an ordinance, providing as follows:

“(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.

(2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.

(3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.

(4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a \$5,000 fine, or by both.”

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

Question 3

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means \$480 because of your \$20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for \$500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of \$500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was \$100, but RC billed Maria for \$500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

THURSDAY MORNING

JULY 26, 2007



California Bar Examination

Answer all three questions.

Time allotted: three hours

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Question 4

Dan stood on the steps of the state capitol and yelled to a half-dozen people entering the front doors: "Listen citizens. Prayer in the schools means government-endorsed religion. A state church! They can take your constitutional rights away just as fast as I can destroy this copy of the U.S. Constitution."

With that, Dan took a cigarette lighter from his pocket and ignited a parchment document that he held in his left hand. The parchment burst into flame and, when the heat of the fire burned his hand, he involuntarily let it go. A wind blew the burning document into a construction site where it settled in an open drum of flammable material. The drum exploded, killing a nearby pedestrian.

A state statute makes it a misdemeanor to burn or mutilate a copy of the U.S. Constitution.

It turned out that the document that Dan had burned was actually a copy of the Declaration of Independence, not of the U.S. Constitution, as he believed.

Dan was arrested and charged with the crimes of murder and attempting to burn a copy of the U.S. Constitution. He has moved to dismiss the charge of attempting to burn a copy of the U.S. Constitution, claiming that (i) what he burned was actually a copy of the Declaration of Independence and (ii) the state statute on which the charge is based violates his rights under the First Amendment to the U.S. Constitution.

1. May Dan properly be found guilty of the crime of murder or any lesser-included offense? Discuss.
2. How should the court rule on each ground of Dan's motion to dismiss the charge of attempting to burn a copy of the U.S. Constitution? Discuss.

Question 5

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum ("Museum") any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as \$300,000 for it and to pay Paula \$15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.

Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's "The Pond." After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for \$200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer \$200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized that the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the \$200,000. In the notation line of the check, Sally had written, "Refund on 1st of Monay Pond series."

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bound by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, "That's too bad. Our contract wasn't in writing, so you can't force me to sell the painting. Besides, you deceived me about why you wanted to buy it."

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting? Discuss.

Question 6

Husband and Wife married in 1997 in California. Neither of them brought any significant assets to the marriage, and they were both employed. Husband and Wife agreed that Husband should go to law school after they had saved up some money. Husband put his earnings in a savings account in his name alone. Wife deposited her earnings into a joint checking account in both of their names, which was used for their living expenses. Husband had a child support obligation from a previous marriage. Every month, Husband paid his child support by check from the joint checking account.

Husband began law school in 1998. Wife continued to work to support the couple. Husband took out a student loan to pay his tuition. Husband graduated in 2001 and obtained his law degree. He passed the bar exam and got a position with a large law firm.

In 2004 Husband became a partner in the firm. Husband's partnership earnings were substantial. He paid off his student loan using these earnings. Although the actual value of Husband's share of the firm's goodwill was substantially greater, the partnership agreement provided that its value was \$3,000 for purposes of valuation as marital property in the event of a dissolution of a partner's marriage.

In 2006, Husband and Wife filed for dissolution of marriage.

1. Is the community entitled to reimbursement for
 - (a) The child support? Discuss.
 - (b) The payments on the student loan? Discuss.
2. Does the community have an interest in
 - (c) Husband's law degree? Discuss.
 - (d) The goodwill in Husband's law firm and, if so, is the community bound by the firm's valuation? Discuss.

Answer according to California law.

THURSDAY MORNING
JULY 27, 2006



California Bar Examination

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Time allotted: three hours

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Question 4

Beth, Charles, and David are the directors of Web, Inc. (Web), a corporation that is in the business of creating websites.

Adco, Inc. (Adco), a corporation that markets computer advertising, had an urgent need for a complex website that would cost thousands of dollars to create. Adco approached Web about creating the website. Adco explained that it did not have the cash to pay for the work but claimed that it was a well-established corporation and asked Web to extend credit for the work.

Beth, Charles, and David unanimously agreed to take on the work, conditioned upon a prior review of Adco's financial statements and a determination of Adco's credit-worthiness. After learning this, Adco contacted David and told him that the sooner Web could start on the website, the sooner Adco would be able to pay Web.

David was anxious to obtain Adco's business. He falsely told Beth and Charles that he had obtained and reviewed Adco's financial statements and that, based on his review, "we should proceed with the work." Beth and Charles, without further inquiry, agreed, and Web created the costly website. Adco is unable to pay Web.

Beth, Charles, and David have now learned that Adco's shareholders have regularly taken its funds for their personal use.

In an unrelated transaction, Charles received a call from his friend Sam who wanted Web to create a new game website. Charles told Sam that the new game website was such a small job that he could do it at home for less money than Web.

Charles told Sam to send the payment for the game website to Charles at his home. Sam was pleased with the work and sent the check to Charles as requested. Shortly afterwards, Beth and David learned of this transaction.

1. What duties to Web, if any, have been breached by Beth, Charles, and David regarding the money lost on the Adco job? Discuss.
2. What rights, if any, does Web have against Adco's shareholders for Adco's failure to pay for the website? Discuss.
3. What rights, if any, does Web have against Charles regarding the contract with Sam? Discuss.

Question 5

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her \$1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered \$15,000 to settle the case without conceding liability. By this time, Lawyer had advanced \$5,000 in litigation and living expenses, and Client had incurred \$5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

Question 6

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. Tom suffered from severe tremors and had difficulty signing his name. In the presence of one other attendant, Tom directed Lilly to sign his name and to date "my will." She did so and dated the document. At Tom's request, Lilly and the other attendant, in the presence of each other, then signed their names as witnesses.

The 2003 document stated "I give \$100,000 to my niece, Nan. And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. He then asked Lilly to send two attendants into his room to act as witnesses. After the first of the attendants arrived and was present, Tom explained the purpose of the document and then signed his name at the end of the document. The first attendant then signed her name as a witness and left the room. Immediately thereafter the second attendant came into Tom's room and quickly signed the document as a witness. Lilly was not present when Tom or the attendants signed their names. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2005, Tom died, leaving an estate worth one million dollars.

At the time of Tom's death there were only two convalescent hospitals in the county where Tom lived, Happy Home and Sunnyside. A few days after Tom's death, Happy Home went out of business. Sunnyside, also a charitable convalescent hospital, provides care for disabled persons of all ages.

Sunnyside has petitioned the court to substitute Sunnyside as the beneficiary of Tom's estate.

1. What rights, if any, does Nan have in Tom's estate? Discuss. Answer according to California law.
2. How should the court rule on Sunnyside's request to substitute Sunnyside for Happy Home as the beneficiary of Tom's will? Discuss.