# California Bar Examination

## Performance Test and Selected Answers

## February 2025

The State Bar of California

OFFICE OF ADMISSIONS

# PERFORMANCE TEST AND SELECTED ANSWERS

## FEBRUARY 2025

### CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2025 California Bar Examination and two selected answers.

The selected answers are not to be considered "model" or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

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# INSTRUCTIONS AND FILE

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# PERFORMANCE TEST INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem.

2. The problem is set in the fictional State of Columbia, one of the United States. In Columbia, the intermediate appellate court is the Court of Appeal and the highest court is the Supreme Court.

3. You will have two sets of materials with which to work: a File and a Library.

4. The File consists of source documents containing all the facts of the case. The first document in the File is a memorandum containing the directions for the task you are to complete. The other documents in the File contain information about your case and may include some facts that are not relevant. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or supervising attorney's version of events may be incomplete or unreliable. Applicants are expected to recognize when facts are inconsistent or missing and are expected to identify sources of additional facts.

5. The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant to the assigned lawyering task. The cases, statutes, regulations, or rules may be real, modified, or written solely for the purpose of this performance test. If any of them 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 references. Applicants are expected to extract from the Library the legal principles necessary to analyze the problem and perform the task.

6. In answering this performance test, you should concentrate on the materials in the File and Library. 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. This performance test is designed to be completed in 90 minutes. Although there are no restrictions or parameters on how you apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response before you begin writing it.

8. Do not include your actual name or any other identifying information anywhere in the work product required by the task memorandum.

9. Your performance test answer will be graded on its responsiveness to and compliance with directions regarding the task you are to complete, as well as on its content, thoroughness, and organization.

***WILLIAMS & O'BRYANT, LLP***

**121 Spring Valley Drive**

**Columbia City, Columbia**

**MEMORANDUM**

TO: Applicant

FROM: Julie Williams

DATE: February 25, 2025

RE: Jamison v. Sunrise Ladder Co., Inc.

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Our firm represents Mrs. Valerie Jamison, the widow of Bruce Jamison, in this wrongful death and products liability suit against the Sunrise Ladder Co., Inc. (Sunrise). On February 25, 2024, Mr. Jamison was working near the top of a 36-foot extension ladder when the metal extension supports, known as "rung locks," gave way, causing Mr. Jamison to plunge to the ground. He suffered severe head injuries, which ultimately led to his death.

In the lawsuit we filed in April 25, 2024, against Sunrise, the manufacturer of the ladder, we allege that the rung locks contained a manufacturing defect, causing them to malfunction on the day of Mr. Jamison's death. However, Advanced Testing, LLC, a testing company hired by Sunrise to examine the ladder, destroyed the rung locks before they could be examined by our expert, Professor Juan Hernandez.

I would like you to prepare a letter to Mrs. Jamison addressing the following two questions:

1. First, can she obtain a default judgment or other sanctions against Sunrise, based on its failure to preserve the allegedly defective rung locks?

2. Second, can she bring an independent tort action against Advanced Testing based on its destruction of the rung locks?

# DEPOSITION OF STEVEN MITCHELL

**October 25, 2024**

**JULIE WILLIAMS:** Good afternoon, Mr. Mitchell. My name is Julie Williams. I represent Valerie Jamison in a wrongful death and products liability case against Sunrise Ladder Company.

**STEVEN MITCHELL:** Good afternoon.

**WILLIAMS:** Mr. Mitchell, are you the owner of the Reliable Roofing Company?

**MITCHELL:** Yes, that's right. I've owned the company for over 25 years now.

**WILLIAMS:** Was Bruce Jamison one of your employees?

**MITCHELL:** Yes, Bruce was one of our best roofers.

**WILLIAMS:** How long did Mr. Jamison work for your company?

**MITCHELL:** He had been with us for nearly 10 years when he had his accident.

**WILLIAMS:** Can you tell me what happened on the day of Mr. Jamison's accident?

**MITCHELL:** Well, I'm still sort of confused about it myself. Bruce was up near the top of one of our tall ladders, working on the edge of a roof on a two-story house. All of a sudden, we heard this loud crashing sound. The ladder had collapsed on itself, and Bruce was on the ground. It was just terrible.

**WILLIAMS:** What do you mean when you say that the ladder had collapsed on itself?

**MITCHELL:** I'm sorry, let me try to explain it to you better. This was one of our 36-foot extension ladders. An extension ladder is really two ladders that are connected together with a rope and pulley system. To extend the ladder to its full height, you pull the rope and the one ladder rises up above the other, sort of like a telescope extending. When you get the ladder up to its desired height, two metal locking devices drop over the ladder rungs and hold it in place. Those metal locking devices are called "rung locks" in the industry.

**WILLIAMS:** So, when you say the ladder collapsed, what happened?

**MITCHELL:** It seems like the rung locks gave out for some reason. They were both all mangled and broken, and the top ladder slid down to the ground.

**WILLIAMS:** What did you do with the ladder after Mr. Jamison's accident?

**MITCHELL:** The ladder was still under warranty, since it was less than a year old. I called Sunrise Ladder Company – that's the manufacturer – and they instructed me to ship it back to them for repairs.

**WILLIAMS:** And did you do that?

**MITCHELL:** Yes. We packed it up and shipped it to them.

**WILLIAMS:** Did Sunrise repair the ladder?

**MITCHELL:** Yes. It was only about two weeks later that Sunrise shipped the ladder back to us. They replaced the rung locks with new ones, and they put a new rope on the pulley system too.

**WILLIAMS:** What happened to the broken rung locks? Do you know?

**MITCHELL:** No, I don't know. They didn't send them back to us. I was just happy to get my ladder repaired so I could get it back into service. It's one of my tallest ladders, and those are pretty expensive items.

**WILLIAMS:** I understand that Mrs. Jamison filed a workers' compensation case against your company in connection with Mr. Jamison's death. Is that correct?

**MITCHELL:** Yes, that's right.

**WILLIAMS:** When was that case filed?

**MITCHELL:** Just two weeks after the accident.

**WILLIAMS:** Okay. Thank you, Mr. Mitchell. Those are all the questions I have.

***HANSEN, YEE & SOOD, LLP***

46 Boulder Creek Road

Columbia City, Columbia

November 25, 2024

Julie A. Williams, Esq.
Williams & O'Bryant, LLP
121 Spring Valley Drive
Columbia City, Columbia

Re: Jamison v. Sunrise Ladder Co., Inc.

Dear Ms. Williams:

I am writing in response to your request that your expert witness, Professor Juan Hernandez, be permitted to inspect the metal rung locks that were in place on the extension ladder allegedly being used by Mr. Bruce Jamison at the time of his accident on February 25, 2024. As you already know, Reliable Roofing Company sent the ladder to our client, Sunrise Ladder Co., for warranty service on March 25, 2024. Sunrise replaced the rung locks on the ladder and promptly returned it to Reliable Roofing.

Sunrise then shipped the damaged rung locks to an outside testing lab, Advanced Testing, LLC, which conducted an inspection and further evaluation of the damaged rung locks. Unfortunately, several of the tests conducted by the lab were destructive in nature (including cross sections and chemical tests), and Advanced Testing disposed of the remnants of the rung locks after the tests were complete. The results of the testing were inconclusive, and Advanced Testing was unable to determine whether the condition of the rung locks might have contributed to Mr. Jamison's accident in any way.

As a result, Sunrise Ladder Co. is unable to produce the rung locks for inspection by Professor Hernandez. We apologize for any inconvenience this may cause you.

Very truly yours,

*Frederick R. Yee*

FREDERICK R. YEE

# DEPOSITION OF DR. SAMUEL STEIN

**December 24, 2024**

**JULIE WILLIAMS:** Good morning, Dr. Stein.

**SAMUEL STEIN:** Good morning.

**WILLIAMS:** I'm one of the attorneys representing Valerie Jamison in the action against Sunrise Ladder Company, arising out of the death of her husband, Bruce Jamison.

**STEIN:** Nice to meet you.

**WILLIAMS:** Dr. Stein, you're employed by Advanced Testing, LLC. Is that correct?

**STEIN:** Yes, that's right.

**WILLIAMS:** What is your position there?

**STEIN:** I'm the chief scientist in the Failure Analysis Group.

**WILLIAMS:** How long have you worked in that position?

**STEIN:** I've been the chief scientist for 10 years. Before that, I was a staff scientist in the department for over 12 years.

**WILLIAMS:** Were you asked to examine a pair of metal locking devices, called rung locks, from an extension ladder sent to you by Sunrise Ladder Company in March 25, 2024?

**STEIN:** Yes, I was.

**WILLIAMS:** Can you explain what your examination consisted of?

**STEIN:** First, I performed a visual examination of the rung locks and took several photographs of them.

**WILLIAMS:** How did the rung locks appear to you?

**STEIN:** Both devices were badly damaged. They were severely bent, and one was broken nearly in half.

**WILLIAMS:** And what did you do next?

**STEIN:** Next, I conducted several standard tests. I cut cross sections out of both rung locks for examination under the electron microscope, and I subjected other pieces of both rung locks to tensile strength testing and chemical tests.

**WILLIAMS:** Dr. Stein, what did you conclude as a result of those tests?

**STEIN:** My results were inconclusive. The rung locks were so badly damaged when we received them that I was unable to determine with any degree of certainty why they might have failed. I could not rule out the possibility that the ladder was being misused by its owner.

**WILLIAMS:** Where are the rung locks today?

**STEIN:** We disposed of them after our testing was complete.

**WILLIAMS:** You disposed of them?

**STEIN:** Yes.

**WILLIAMS:** Why didn't you keep the rung locks in case someone else wanted to see them?

**STEIN:** We weren't asked to do that by Sunrise. Besides, there wasn't much left of the items after I completed my testing.

**WILLIAMS:** Don't you normally keep samples of the materials you test, like the cross sections you said you took, to back up your report?

**STEIN:** No, not unless the client makes a special request. We can't keep everything. We don't have enough storage space at our facility.

**WILLIAMS:** And Sunrise didn't ask you to return the rung locks to them when you were finished with your evaluation?

**STEIN:** No, they did not. In fact, as I recall, they specifically instructed us *not* to return them, but to destroy them.

**WILLIAMS:** When Sunrise sent the rung locks to you for testing, did they tell you that a person died in a ladder accident when those rung locks failed?

**STEIN:** No, we were not informed of that. I didn't find out about the accident until much later.

**WILLIAMS:** Do you recall when you did learn about Mr. Jamison's accident?

**STEIN:** I only learned about it a few weeks ago, when I received a subpoena to appear for this deposition. I was sad to learn that the gentleman died.

**WILLIAMS:** Thank you, Dr. Stein. Those are all the questions I have for you right now.

# February 2025

# California Bar Examination

# Performance Test

# LIBRARY

# JAMISON v. SUNRISE LADDER CO., INC.

LIBRARY

*Brown v. Waldrop Truck Leasing Corp.*
Columbia Court of Appeal (2015).....

*Zubul v. Standard Motors Corporation*
Supreme Court of Columbia (2019) .....

# Sabrina Brown v. Waldrop Truck Leasing Corp.

## Columbia Court of Appeal (2015)

Plaintiff Sabrina Brown ("Brown") brought this action for the death of her husband, Andrew Brown, in an accident in which he was driving a tractor-trailer leased from Defendant Waldrop Truck Leasing Corp. ("Waldrop"). Brown filed a Motion for Entry of Default Judgment against Waldrop based on spoliation of evidence. In her motion, Brown argued that she was entitled to a default judgment because Waldrop disposed of the remains of Mr. Brown's truck before she or her experts could examine it. The trial court found that, while Brown may be entitled to some relief against Waldrop, a default judgment was inappropriate; instead, the court imposed the lesser sanction of instructing the jury that it may infer that the evidence at issue was unfavorable to Waldrop if it finds that Waldrop's decision to dispose of the evidence was made for an improper purpose. At the request of both parties, the order has been certified for appeal prior to trial.

### Background

On April 3, 2011, Andrew Brown picked up a 2010 Freightliner semi-truck from a Waldrop location in Ridgedale, Columbia. His employer, Corporate Logistics, Inc., had leased the truck for Mr. Brown while Corporate Logistics' own truck was being repaired. On April 5, Mr. Brown was driving the rented truck on Interstate 80 when he lost control of the truck and ran off the roadway. The truck burst into flames and Mr. Brown died at the scene.

Waldrop was notified of the accident the following day when it received a notice from the Columbia State Police, demanding that the truck be removed from the accident scene within 24 hours. On April 7, Waldrop had the burnt remains of the truck taken to a salvage yard. After paying storage fees for almost 20 months, Waldrop eventually had the truck cab and its trailer crushed and recycled in late December 2012.

On March 30, 2013, just less than two years after her husband's death, Mrs. Brown filed this action against Waldrop for negligent repair and maintenance, strict liability, and breach of implied warranty. She then requested that Waldrop allow her expert to examine the truck, whereupon she was informed that the truck had been salvaged a few months before the lawsuit commenced. Mrs. Brown subsequently filed her motion for a default judgment, resulting in the trial court's order giving rise to this appeal.

## Analysis

We have long acknowledged the broad discretion of trial courts to impose sanctions. This power derives from a court's inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases. Sanctions for discovery abuses are intended to prevent unfair prejudice to litigants and to ensure the integrity of the discovery process. Default represents the most severe sanction available to a court against a defendant, and therefore should only be exercised where there is a showing of bad faith and where lesser sanctions will not suffice.

According to Columbia law, spoliation of evidence may warrant the imposition of sanctions. In considering whether sanctions are warranted, the court must consider: (1) whether the party moving for sanctions was prejudiced as a result of the destruction, alteration, or non-preservation of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party responsible for the destruction, alteration, or non-preservation acted in good faith or bad faith; and (5) the potential for abuse if testimony about the evidence is not excluded. As sanctions for spoliation, courts may dismiss a case in its entirety against a plaintiff or enter a default against a defendant, exclude expert or other testimony concerning the evidence, or impose a jury instruction on spoliation of evidence that raises a presumption against the spoliator.

Here, based on its review of the circumstances and its balancing of the foregoing factors, the court imposed the least restrictive sanction: an adverse jury instruction. The trial court expressed little doubt that Brown was prejudiced as a result of the truck's destruction. She and her experts did not have an opportunity to examine the truck to evaluate its condition after the fire. They could not attempt to determine what caused Mr. Brown to lose control or why the truck immediately burst into flames. They could not examine any safety systems installed on the truck. For these reasons, direct examination of the truck's condition was critically important to this case. Spoliation of the vehicle will force Brown's experts to use less reliable evidence, including maintenance records; the accident report, including numerous photographs taken at the scene by the State Police; and eyewitness testimony regarding the accident.

Nevertheless, the court focused on the apparent lack of bad faith on the part of Waldrop. In particular, the court noted that the police gave Waldrop only 24 hours to remove the truck from the accident scene, forcing it to make a rushed decision about where to take the burnt remains of the truck. Waldrop then paid storage fees to the salvage yard for almost two years before finally allowing the truck to be destroyed. The court also noted that Brown had yet to express any plans to file an action when the truck was eventually crushed and recycled.

We cannot say that the lower court abused its discretion in reaching its decision to impose an adverse jury instruction as a sanction for spoliation.

AFFIRMED.

# Zubul v. Standard Motors Corporation

## Supreme Court of Columbia (2019)

Mark Zubul filed this products liability action claiming a manufacturing defect against Standard Motors Corporation, alleging that the braking system in a 2012 Zephyr automobile he was driving malfunctioned, causing him to crash into a utility pole and suffer severe injuries. The car, which was owned by Zubul's aunt, was repaired before Standard Motors had an opportunity to inspect it. After many months of protracted litigation, Standard Motors filed a motion for sanctions against Zubul based on the unavailability of the car. Standard Motors also sought sanctions against Zubul's aunt, Christine Simpson, based on her handling of the car; in the alternative, Standard Motors sought leave to bring an independent tort action for spoliation against Simpson. The trial court granted Standard Motors' motion for sanctions and dismissed Zubul's action against the company; however, it denied Standard Motors' request for relief against Simpson. The Court of Appeal affirmed. We granted review.

### Factual Background

On September 14, 2015, Mark Zubul was involved in a single vehicle crash in Rocky Point, Columbia. Zubul was driving his aunt's 2012 Zephyr automobile while intoxicated and was traveling at an excessive rate of speed. The vehicle crashed through a fence and continued onward for another 50 yards before striking a utility pole. Zubul sustained severe injuries to his face and both arms. He contends that, had the braking system operated properly, he would not have sustained these injuries. Zubul then filed his products liability action against Standard Motors based on a defective braking system on November 2, 2015.

Soon after the case commenced, Standard Motors served discovery requests on Zubul, demanding that he produce any photographs of the damaged car and all records relating to its repair. Standard Motors also requested to inspect

the car. Christine Simpson, the owner of the car, refused to produce it for inspection. During a deposition in Zubul's case, Simpson testified that she did not report the accident to her insurance company. Instead, she acknowledged that she hired a body shop to repair the damage to the front end of the car, and that she specifically requested that no photographs or other records be made of the damage to the vehicle. Simpson also admitted that she paid her mechanic to install new brake pads and rotors on the car's front and rear braking systems. She confirmed that the repairs were complete within three weeks after Zubul's accident, prior to the time he filed his civil action against Standard Motors.

Based on Simpson's testimony, the trial court declined to grant a motion by Standard Motors to compel the inspection of the car, since it was in the custody and control of a third person who was not a party to the underlying action. Standard Motors then filed its motion to dismiss Zubul's action due to its inability to inspect the car. The trial court granted that motion, having determined that the car was "an important piece of evidence in the case," which alleged a manufacturing defect, and finding dismissal to be the appropriate sanction for the spoliation of evidence, as a result of the undue prejudice to Standard Motors. Standard Motors also filed a motion against Simpson: It sought sanctions against her for spoliation, based on her allegedly surreptitious repairs to the vehicle and refusal to make it available for inspection; in the alternative, it sought leave to bring an independent tort action against her for spoliation. The trial court denied sanctions on the ground that Simpson was not a party to the suit, and denied leave to bring an independent tort action for spoliation on the ground that Columbia does not recognize such an action. The Court of Appeal affirmed the trial court on both counts.

## Standard Motors' Motion as to Zubul

"Spoliation" refers to the destruction, alteration, or non-preservation of evidence in pending or reasonably foreseeable litigation. A trial court has broad discretion to impose sanctions based on spoliation of evidence, as the Court of

Appeal stated in *Brown v. Waldrop Truck Leasing Corp.* (Col. Ct. App., 2015), based on its "inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases."

Courts are empowered to fashion appropriate sanctions for conduct that disrupts the judicial process, including dismissal of a plaintiff's action. However, the applicable sanction should be molded to serve the preventative, punitive, and remedial rationales underlying the spoliation doctrine. In addition—a point not expressed in *Brown*—a court must find some degree of fault to impose sanctions. We have recognized that when imposing sanctions, the trial court has discretion to pursue a wide range of responses, both for the purpose of leveling the evidentiary field and for the purpose of sanctioning the improper conduct. But dismissal should be avoided if a lesser sanction will perform the necessary function.

Here, although Zubul argued that he had no duty to preserve the car in its damaged condition and was not involved in its "surreptitious" repair, the court nevertheless dismissed his action against Standard Motors because it found undue prejudice to Standard Motors' ability to defend against the products liability claim.

We disagree with the Court of Appeal and believe that the trial court abused its discretion in imposing sanctions against Zubul. Crucially, at the very threshold, the court failed to consider whether Zubul was at fault for the destruction, alteration, or non-preservation of any evidence. In addition, the court failed to properly balance the relevant factors, including the importance of the evidence and any prejudice to Standard Motors resulting from its destruction. Although the court found that the car was an important piece of evidence, it also failed to consider numerous other potential sources of evidence such as testimony from the repair person, any forensic crash scene reconstruction conducted by the police, and the continued availability of the car.

Accordingly, we reverse the Court of Appeal's affirmance of the trial court's dismissal of Zubul's action and remand for further proceedings.

Standard Motors' Motion as to Simpson

The trial court denied Standard Motors' motion with respect to Simpson based on its determination that she was not subject to sanctions as a non-party to the action and because Columbia law does not authorize an independent tort action for spoliation of evidence. The Court of Appeal affirmed.

We agree that a third party like Simpson is not subject to sanctions for spoliation of evidence. By definition, a third party is not a party to the action within which sanctions are sought and, as such, cannot be made to shoulder its burdens.

In contrast, we disagree that Columbia law does not authorize an independent tort action for spoliation of evidence. We hold that it does. When a third party destroys, alters, or fails to preserve evidence, a party to an action who is injured by any wrongful conduct on its part does not have the benefit of remedies available within the action itself. The absence of an independent tort action would conflict with our policy of providing a remedy for every wrong and compensating victims of wrongful conduct.

It is generally agreed that recognizing an independent tort action for spoliation of evidence is problematic, absent some type of affirmative duty to preserve the evidence and not to destroy or alter it. However, there is no such general duty. An additional problem arises where the evidence in question is the property of the alleged third-party spoliator. A property owner normally has the right to control and dispose of his property as he sees fit. The owner may legitimately question whether a party to an action in which the owner is not involved has any right to direct control over the owner's property, and individual autonomy is a heavy factor in favor of the owner.

We therefore hold that a duty to preserve evidence and not to destroy or alter it may arise in a third party only where a party to an action can establish the existence of some special relationship or obligation arising by reason of a statute, rule, contract, voluntary action, or other similar circumstance. Further, the third party must have actual knowledge of the pending or potential action.

Accordingly, although we affirm the Court of Appeal's affirmance of the trial court's denial of sanctions against Simpson, we reverse its affirmance of the trial court's denial of leave to bring an independent tort action for spoliation of evidence against Simpson and remand for further proceedings.

REVERSED IN PART AND AFFIRMED IN PART.

# PT: SELECTED ANSWER 1

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Dear Mrs. Jamison,

You have asked Willams & O'Bryant, LLP (the "Firm") to evaluate potential claims against defendant Sunrise Ladder Co., Inc. ("Sunrise") and the testing company Sunrise hired to examine the ladder, Advance Testing, LLC ("Advance"), based on the destruction of the rung locks that are key evidence in the wrongful death and products liability suit you have brought against Sunrise. We have researched two possible avenues of relief: (1) default judgment or lesser sanctions against Sunrise in the *Jamison v. Sunrise* litigation and/or (2) an independent tort claim against Advance for spoliation of evidence. This letter addresses each in turn.

## (1) A Columbia Court Is Likely to Sanction Sunrise for the Destruction of the Rung Locks, but the Court Will Probably Impose a Lesser Sanction than Default Judgment

Columbia courts are "empowered to fashion appropriate sanctions for conduct that disrupts the judicial process," including, in appropriate cases, the termination of the matter in favor of the non-offending party. Zubul. This power is not unfettered, however, and Columbia courts apply a multi-factor test to determine whether sanctions are appropriate. Brown. Still too, if the sanction contemplated is the severe penalty of default judgment, then the courts must consider additional requirements, including whether the sanctioned party acted in bad faith and the availability of lesser sanctions. Brown. This letter first considers whether a Columbia court is likely to sanction Sunrise, and then whether we are likely to persuade a court that the most severe sanction, default judgment, is appropriate.

### a. The Multi-Factor Test for Spoliation Sanctions is Likely Met Because of the Critical Nature of the Rung Lock Evidence

In considering whether to impose a sanction for the spoliation of evidence, courts in this jurisdiction must consider: (1) whether the movant was prejudiced as a result of the destruction; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party responsible for the spoliation acted in good or bad faith; (5) the potential for abuse if testimony about the evidence is not excluded. Brown. The Columbia Supreme Court has also made clear that "a court must find some degree of fault to impose sanctions." Zubul. But these factors are a balancing test. Id.

As to the first and third, at least, this case is on all fours with Brown. In that case, a truck burst into flames, killing the driver; the driver's widow filed a complaint against the manufacturing company alleging under a variety of legal theories (including, as we do in this litigation, strict liability) that the manufacturing company was responsible for the incident. However, the truck had been salvaged at that point, precluding the widow from examining it.

The court in Brown, as the Court in our matter likely would, had "little doubt" in finding that Brown was prejudiced and the practical importance of the evidence. As in that case, our expert Prof. Hernandez has been denied the opportunity to examine the rung locks and ascertain the cause of the failure. Because of the nature of the allegations against Sunrise, our expert's ability to examine the rung locks are "critically important" to this case because the cause of their failure to central to the issues. This much is made clear by Mitchell's deposition testimony, in which he testified that when the ladder collapsed, "the rung locks gave out for some reason."

Sunrise might argue that, unlike in Brown, the prejudice can be cured because Sunrise did have the rung locks examined before their destruction. See Zubul (other potential sources of evidence a relevant consideration). Sunrise shared with us the results of that testing by letter on November 25, reporting that the tests were "inconclusive." However, a court is likely to be persuaded by the fact that these tests were performed by Sunrises's *own* experts, rather than a neutral, third-party expert. As such, we, the plaintiff, have been denied the opportunity to do own investigation and mount the requisite evidence in this case. Columbia courts have recognized that requiring a party to use "less reliable evidence," here the one-sided results of the opposing party's retained expert, weighs against the curability of the destruction and in favor of sanctions. Brown.

As to whether Sunrise acted in bad faith, Sunrise will likely argue that it did not based on the facts that it never asks Advance to preserve materials (per Dr. Stein's testimony) and reported the results of its destructive testing to plaintiff's counsel.

However, Dr. Stein testified that not only did Sunrise not request that Advance preserve the evidence, it affirmatively requested that Advance *destroy* the evidence. Sunrise may attempt to explain this testimony with a good faith reason, but a Columbia court will likely find the directive from Sunrise to Advance that it should destroy component parts that was recently involved in an accident involving the death of an experienced roofer (as you know, and as Mitchell testified, Mr. Jamison had worked with the roofing company for 10 years before the accident), is strongly suggestive of bad faith.

This evidence supports the required fault element as well. Zubul. There is evidence here that Sunrise, knowing that a user of its ladder died in an accident involving the ladder, promptly removed the parts that failed, sent them to Advance, and instructed Advance to destroy those parts when its work was complete. At minimum, Advance should have been on notice that these parts might have been the subject of litigation

in the future, given the severity of the injury (death) and the short amount of time that had passed. Indeed, unlike in Brown, where the company was forced to make a short-notice decision on removing the material from the scene and then incurred storage fees for years before destroying the truck, Sunrise acted within *weeks* of the accident to destroy the rung locks.

Finally, given the one-sidedness of the evidence about the rung locks--only Sunrise's own expert was able to examine, inspect, and test them--we can argue there is strong potential for abuse by being unable to present a countervailing narrative.

In sum, we believe we have strong arguments in favor of all of the factors required by Columbia courts to impose spoliation sanctions based on Sunrise's destruction of evidence, including the requirement that Sunrise be at fault. At the very least, on balance the factors weigh in our favor, even if

**b. A Columbia Court Is Unlikely to Award Severe Terminating Sanctions because Lesser Sanctions Are Available**

While we think the court will be inclined to award us spoliation sanctions in some form, it is less certain whether a default judgment would be appropriate. "Default represents the most severe sanction available to a court against a defendant," and as such, it is only appropriate where there is a showing of (1) bad faith and (2) unavailability of lesser sanctions. Brown.

As explained above, the fact that Sunrise affirmatively told Dr. Stein and Advance to destroy the rung locks supports a finding of bad faith. It is not dispositive, however, and Sunrise may attempt to marshal evidence supporting an innocent explanation for the directive (or impeaching Dr. Stein's recounting of the events).

But even assuming we persuade the court that Sunrise acted in bad faith, it still must be shown that no lesser sanction is available. Other available sanctions include the exclusion of adverse testimony concerning the evidence and an adverse jury instruction instructing the jury that the evidence, if it existed, would have supported plaintiff's case. Brown.

We might argue that none of these other sanctions would be adequate given the centrality of the rung locks to the issues in this action--the core question in this matter is whether the rung locks were themselves defective, which can only be answered by examining them, as is now impossible. However, given the extreme nature of default judgment, a Columbia court is more likely to find that a lesser sanction, such as an adverse jury instruction, will suffice under the circumstances.

**(2) An Independent Tort Action Against Advanced Testing Is Not Likely to Succeed because of Advanced Testing's Lack of Duty, Actual Knowledge, or Both**

We have also explored whether a tort action might be sustained against Advance, the third-party lab, for the spoliation of the evidence. However, while such an action is cognizable in Columbia courts, based on the evidence gathered to date, the possibility of success on such an action is low.

Non-parties to a lawsuit may not be made to "shoulder the burdens" of spoliation burdens in Columbia. *See Zubul*. However, the state does recognize an independent tort for spoliation of evidence. "When a third-party destroys, alters, or fails to preserve evidence," an injured party can pursue a tort claim against in order to further Columbia's policy of adequately "compensating victims of wrongful conduct." *Id.* The tort for spoliation of evidence requires that (1) the tortfeasor was, by virtue of a special relationship or obligation arising from statute, rule, contract, voluntary action, or other circumstance, to preserve or maintain the material and (2) the tortfeasor had actual knowledge of the pending or potential action. *Id.* In *Zubul*, the court recognized the possibility of this tort against a third-party property owner, the plaintiff's Aunt, who owned the car and destroyed the relevant evidence in making repairs to it, but the Zubul court remanded the matter for the lower courts to consider if the prongs were met.

Advance will likely be able to persuasively argue that neither prong is met here. First, as to Advance's duty, Zubul makes clear that there is no "general duty" to preserve evidence--such a duty must arise by some other source. Even though Advance did not own the ladder and thus did not have the same freedom to do as it pleased with it as the property owner in Zubul did, we do not see a compelling basis to argue that statute, law, contract, or voluntary conduct created a duty here. Dr. Samuel Stein testified that Advance does not normally keep samples of the materials they test, as they do not have sufficient storage space. This suggests that in the regular course of business, Advance is *not* subject to any general statutory or other legal obligation to keep the material. It also suggests that Advance's "voluntary conduct," *Zubul*, does not give rise to a duty, as they do not normally keep the material. Dr. Stein further testified that they normally only keep material if asked to do so by a client, which Sunrise did not ask of Advance here. Thus, it also appears that Advance's contract with Sunrise likewise does not give rise to a duty for Advance to keep or maintain the material it tests.

Second, even if there was a duty, Columbia courts require a showing that the tortfeasor in a spoliation of evidence tort action had actual knowledge of the pending litigation. Dr. Stein testified that he was unaware that the ladder had been involved in an accidental death at the time that Advance performed the testing. Indeed, he testified that he only learned about the action when he was subpoenaed to appear at his deposition. It could be argued that Advance should have known that, based on the mangled state of the ladder when it arrived in their care (Dr. Stein described the

rungs as "badly damaged"), the ladder had been involved *some* kind of accident, and thus, knowledge of "potential" litigation could be charged to Advance based on the state of the ladder alone. However, it is not clear that a Columbia court would ascribe to this argument, given that there were myriad possible ways the ladder could have been damaged, which may or may not result in litigation. Even though, again, the policy interests Zubul identified in favor of a third-party property owner are not present here (Advance did not own the ladder and thus did not have the same "right to control and dispose of his property as he sees fit" as the owner of the car did in *Zubul*) Drawing such a tenuous inference would likely be seen as contrary to Zubul's directive that the tortfeasor have "*actual* knowledge of pending or potential litigation."

# PT: SELECTED ANSWER 2

WILLIAMS & O'BRYANT, LLP
121 Spring Valley Drive
Columbia City, Columbia

Attorney-Client Privilege: Letter to Mrs. Jamison with updates on your lawsuit

TO: Mrs. Jamison
FROM: Applicant
DATE: February 25, 2025
RE: Jamison v. Sunrise Ladder Co., Inc.

Dear Mrs. Jamison,

I am a law clerk with Williams & O'Bryant, LLP, and we are representing you on a wrongful death and products liability suit against Sunrise Ladder Co., Inc. (Sunrise). In our lawsuit that we filed on your behalf against Sunrise, on April 25, 2024 (two months after your husband's death), we alleged that the rung locks contained a manufacturing defect, which caused them to malfunction on the day your husband died. Unfortunately, Advanced Testing, LLC, a testing company hired by Sunrise to examine the ladder have destroyed the rung locks before our expert, Professor Juan Hernandez, was able to examine them.

Here, I am providing you an update on the status of your lawsuit against Sunrise. As mentioned, I will be discussing (1) whether you can obtain a default judgment or other sanctions against Sunrise, based on their failure to preserve the allegedly defective rung locks and (2) whether you can bring an independent tort action against Advanced Testing based on its destruction of the rung locks.

**Concern #1:** Whether you can obtain a default judgment or other sanctions against Sunrise, based on their failure to preserve the allegedly defective rung locks.

The Columbia Court of Appeal have long held that trial courts have broad discretion to impose sanctions. Sabrina Brown v. Waldrop Truck Leasing Corp (Columbia Court of Appeal 2015). This is to allow a court to manage their own affairs and to achieve the orderly and expeditious disposition of cases. Id. Sanctions for discovery abuses are intended to prevent unfair prejudice to litigants and ensure the integrity of the discovery process. Id. Default represents the most severe sanctions available to a court against a defendant, and thus, should be exercised when there is a showing of bad faith and where lesser sanctions would not suffice. Id.

In Sabrina, it was determined that a default judgment was inappropriate, and instead, the court imposed a lesser sanction of instructing the jury that it may infer

that the evidence at issue was unfavorable to the defendant, if it finds that the defendant's decision to dispose of the evidence was made for an improper purpose. In Sabrina, Mr. Brown died after a rental truck burst into flames. When the defendant was notified of the accident, the city demanded the truck be removed and so the defendants took it to a salvage yard. Id. After 20 months of storing at the salvage yard, the defendant had the truck crushed and recycled. Id. The reason why the Court did not find that default judgment was appropriate was because the defendant was only given 24 hours to remove the burnt truck, paid nearly 2 years in storage fees at the salvage yard, and when the truck was crushed and destroyed, Sabrina had not decided to sue defendant yet. Id. The court had looked at the lack of apparent bad faith by the defendant when they made this determination. Id. So a lesser sanction is more appropriate when a lack of bad faith occurs.

The law is clear: According to Columbia law, spoliation of evidence may warrant the imposition of sanctions. In considering whether sanctions are warranted, the court must consider: (1) whether the party moving for sanctions was prejudiced as a result of the destruction, alteration, or non-preservation of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party responsible for the destruction, alteration, or non-preservation acted in good faith or bad faith; and (5) the potential for abuse if testimony about the evidence is not excluded. Sabrina. As sanctions for spoliation, courts may dismiss a case in its entirety against a plaintiff or enter a default against a defendant, exclude expert or other testimony concerning the evidence, or impose a jury instruction on spoliation of evidence that raises a presumption against the spoliator. Sabrina.

Here we will go through all the elements of spoliation of evidence as well as what happened in your lawsuit with the broken rung locks.

**Element (1)** whether the party moving for sanctions was prejudiced as a result of the destruction, alteration, or non-preservation of the evidence;

Yes, we, the party moving for sanctions was prejudiced as a result of the destruction of the evidence. The broken rung locks were destroyed by Advanced Testing, LLC, before we could examine them. They are important as we needed them to show manufacturing defect in your lawsuit to show that the rung locks malfunctions and the ladder did not work properly which caused your husband's death.

In DEPOSITION OF DR. SAMUEL STEIN, we learned that Dr. Stein was the one who examined the rung locks in question. Stein is an employee at Advanced Testing and he is the chief scientist for 10 years and with over 12 years as a staff scientist. After he examined the broken rung locks, he destroyed them. First, he physically examined the rung locks and took some photos. he stated "Both devices were badly damaged. They were severely bent, and one was broken nearly in half." Then he stated "I conducted several standard tests. I cut cross sections out of both rung locks for examination under the electron microscope, and I subjected other pieces of both rung locks to tensile strength testing and chemical tests." After this, he

disposed of the rung locks because it is not company policy to retain all the broken rung locks that are sent for testing. He also said Sunrise "In fact, as I recall, they specifically instructed us not to return them, but to destroy them". Stein was unaware that your husband had died from this incident and was unaware until he obtained the subpoena to the deposition. It does not appear that Stein maliciously destroyed evidence that could have helped your lawsuit.

**Element (2)** whether the prejudice could be cured;

This prejudice cannot be cured because the rung locks cannot be examined since they were destroyed by Advanced Testing, under the direction of Sunrise, who specifically told them to "not return them but to destroy them". Stein's testing was also inconclusive as to what happened.

**Element (3)** the practical importance of the evidence;

This evidence is important as the lawsuit is regarding the rung locks and their defective nature. Stein's testing was inconclusive "My results were inconclusive. The rung locks were so badly damaged when we received them that I was unable to determine with any degree of certainty why they might have failed. I could not rule out the possibility that the ladder was being misused by its owner." While Stein states that the ladder may have been misused by its owner, Mitchell informed us that your husband has been working at Reliable Roofing for over 10 years and one of his best employees. It would seem that your husband was using the ladder responsibly as he is a skilled worker for Mr. Mitchell and would not have misused the ladder.

**Element (4)** whether the party responsible for the destruction, alteration, or non-preservation acted in good faith or bad faith;

It is possible that sunrise acted in bad faith since they "they specifically instructed us not to return them, but to destroy them". Sunrise could have asked for the broken rung locks to be returned to them, as Stein indicated "No, not unless the client makes a special request. We can’t keep everything.

We don’t have enough storage space at our facility". So Sunrise could have made a special request to store the broken rung locks or return them to Sunrise. Sunrise should have also known that a lawsuit may be pending since they obtained the rung locks about a month after the accident occurred. They should have been on notice and should have preserved evidence. This is unlike Sabrina, who the defendant had waited 20 months and paid 20 months of storage fees before they destroyed the truck. In that case, they did not know Sabrina would sue them since they did not hear from her for over 20 months. Our case is different since we used them 2 months after the accident, a month after they shipped the rung locks to Advanced Testing.

**Element (5)** the potential for abuse if testimony about the evidence is not excluded.

There is potential for abuse if testimony about the evidence is not excluded. Since we do not have the rung locks themselves, we have to rely on other evidence which would be Stein's assessment that "My results were inconclusive. The rung locks were so badly damaged when we received them that I was unable to determine with any degree of certainty why they might have failed. I could not rule out the possibility that the ladder was being misused by its owner."

Based on Stein's deposition, it is possible that Sunrise acted in bad faith because the ladder accident occurred on February 25, 2024. The ladder was sent to Sunrise on March 25, 2024. Two weeks after the accident and before the ladder was sent to Sunrise, you filed a workers' compensation case against Reliable Roofing. Mr. Mitchell, the owner of Reliable Roofing sent the ladder to sunrise to be repaired since it was under 1 years old and still had a warranty. Sunrise returned the fixed ladder to Mr. Mitchell two weeks later.

It would seem that the tests by Advanced Testing were standard testing "I conducted several standard tests. I cut cross sections out of both rung locks for examination under the electron microscope, and I subjected other pieces of both rung locks to tensile strength testing and chemical tests" and corroborated by Mr. Yee's letter "Unfortunately, several of the tests conducted by the lab were destructive in nature (including cross sections and chemical tests". Mr. Yee also said that Advanced Testing destroyed the rung locks but failed to inform that it was Sunrise who told them to dispose of the broken rung locks.

If the Court finds that Sunrise acted in bad faith in destroying the rung locks after they were tested on, then it is possible that the court will find default judgment as the most severe result. if not, it is possible that a court will give lesser sanctions such as exclude expert or other testimony concerning the evidence, or impose a jury instruction on spoliation of evidence that raises a presumption against the spoliator. Like in Sabrina, they may indicate that default is not appropriate but may make a finding of instructing the jury that it may infer that the evidence at issue was unfavorable to the defendant, if it finds that the defendant's decision to dispose of the evidence was made for an improper purpose.

As in Zubal, in order to impose sanctions, the court needs to find some degree of fault. The trial court has discretion to pursue a wide range of responses, both for the purpose of leveling the evidentiary field and for the purpose of sanctioning the improper conduct. Id. But dismissal should be avoided if a lesser sanction will perform the necessary function. Id.

Unfortunately, a court in our case may not find that dismissal or default judgment would be appropriate since a lesser sanction can perform the necessary function. While the broken rung locks are important piece of evidence, Advanced Testing performed various tests on the broken rung locks. While not the physical rung locks

themselves, it is possible to use other sources of evidence to build a case against Sunrise. This is different from Sabrina because in that case, they were unable to conduct any experiment on the burst truck to determine the cause of the fire, whereas here, advanced testing did many different tests and our expert may still be able to use the tests. In Sabrina, while Defendant did not run any test on the truck, they had no reason to suspect any lawsuits since 20 months went by without any notice. Here, Sunrise knew earlier on that a lawsuit was pending and when they shipped out the rung locks, they should have known to preserve them.

**Concern #2**: Whether you can bring an independent tort action against Advanced Testing based on its destruction of the rung locks.

In Zubal, he was involved in a car crash while driving his aunt's car. Zubal v. Standard Motors Corporation (Supreme Court of Columbia 2019) The aunt then hired a body shop to repair the damage and did not allow any photos or records to be made of the damage to the car. Id. She also did not tell her insurance company of the accident. Id. She had also paid the mechanic to install new brake pads and rotor to the car's front and rear braking systems. Id. These were completed within three weeks after Zubal's accident and before he filed his civil action against Standard Motors. Id. In Zubal, the supreme court decided that an independent tort action for spoliation of evidence against Simpson is allowed while denial of sanctions against Simpson, a nonparty was affirmed. Id. Such that in Zubal, Standard motors cannot bring sanctions against Simpson as a nonparty, but they can bring an independent tort action against her for spoliation of evidence.

By definition, a third party is not a party to the action within which sanctions are sought and, as such, cannot be made to shoulder its burdens. Columbia law does authorize an independent tort action for spoliation of evidence. When a third party destroys, alters, or fails to preserve evidence, a party to an action who is injured by any wrongful conduct on its part does not have the benefit of remedies available within the action itself. The absence of an independent tort action would conflict with our policy of providing a remedy for every wrong and compensating victims of wrongful conduct.

It is generally agreed that recognizing an independent tort action for spoliation of evidence is problematic, absent some type of affirmative duty to preserve the evidence and not to destroy or alter it. However, there is no such general duty. An additional problem arises where the evidence in question is the property of the alleged third-party spoliator. A property owner normally has the right to control and dispose of his property as he sees fit. The owner may legitimately question whether a party to an action in which the owner is not involved has any right to direct control over the owner’s property, and individual autonomy is a heavy factor in favor of the owner.

The supreme court held that a duty to preserve evidence and not to destroy or alter it may arise in a third party only where a party to an action can establish the

existence of some special relationship or obligation arising by reason of a statute, rule, contract, voluntary action, or other similar circumstance. Further, the third party must have actual knowledge of the pending or potential action.

Here, since Advanced testing did not know about the pending or potential action, they did not have actual knowledge. In addition, the property belonged to Sunrise and Sunrise told Stein "they specifically instructed us not to return them, but to destroy them". This would show that the third-party, Advanced Testing, did not have the control over the property, and that it was Sunrise who had the final say in disposing of the broken rung locks. Sunrise had the power to take back the broken Rung locks and they did not do that. They specifically did the opposite. March 2024, Advanced testing received the rung locks and completed their testing. Since Sunrise told them to destroy them afterwards, that is what they did.

As such, it is unlikely that an independent tort action will be likely given that it was sunrise who asked Advanced testing to dispose of the Rung Locks after they tested them. Advanced testing normally disposes of things unless the client asks them not to. Sunrise did not do that in this situation. Advanced testing did not intentionally try to prevent this lawsuit from going forward.

In conclusion, we will be pursuing the sanctions against Sunrise for the destroyed rung locks. It would also seem that an independent tort action against Advanced Testing is unlikely, but we can discuss that more if you would like more information on this path. We hope this helps reassure you about our next steps in your lawsuit. As always, if you have any questions or concerns, please reach out to us.

Sincerely,
Applicant