# California Bar Examination

## Performance Test and Selected Answers

## February 2021

The State Bar of California

COMMITTEE OF BAR EXAMINERS
OFFICE OF ADMISSSIONS

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# PERFORMANCE TEST AND SELECTED ANSWERS
# FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

This publication contains the performance test from the February 2021 California Bar Examination and two selected answers.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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# Performance Test

# INSTRUCTIONS AND FILE

# MATTER OF I.B.I.

# MATTER OF I.B.I.

## 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 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. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

***Hodgeson and Hawkins, LLC***
53 Severance Ridge Road
Columbia City, Columbia

MEMORANDUM

To: Applicant
From: Sarah Hodgeson
Date: February 23, 2021
Re: Matter of I.B.I.

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Our firm represents Innovative Business Incubators (I.B.I.), a non-profit business that provides advice and support to new entreprenuers in Columbia City. I.B.I. offers a range of services to new startups, including advice, expert consulting, networking, and referrals to other professional services. I recently met with Frank Duquesne, the Executive Director of I.B.I.

One of I.B.I.'s main services is the arranging of mentoring relationship between new entrepreneurs and experienced mentors. As the attached interview notes and article explain, these mentors can provide value that I.B.I. cannot, including expertise tailored to the needs of particular kinds of business.

Recently, after a complaint about a mentor, Duquesne has decided that he needs to formalize the relationship between I.B.I. and its mentors. He provided me with an article that highlights the benefits and the risks of the mentoring relationship in an incubator context. He has also provided me with a draft contract that he has revised to include the basic parameters that he wants to set on the relationship.

I want you to write a memo assessing several legal issues arising out of the relationship between mentor and mentee. For each of the following questions, I want you

to assess the impact of the law on the draft contract and, without drafting new language, describe any changes you might recommend to address our client's concerns:

1. Whether the relationship between an I.B.I. mentor and mentee gives rise to fiduciary obligations owed by the mentor to the mentee;

2. Whether the draft contract between I.B.I. and a mentor creates contractual rights that an I.B.I. mentee can assert against the mentor.

***Hodgeson and Hawkins, LLC***
53 Severance Ridge Road
Columbia City, Columbia

MEMORANDUM

To: File

From: Sarah Hodgeson

Date: February 21, 2021

Re: Matter of I.B.I.: Initial Interview with Frank Duquesne

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I met with Frank Duquesne today. He's the Executive Director of Innovative Business Incubators (I.B.I.), a private non-profit that helps startup businesses with services and advice. Frank is an old acquaintance who, after several years working in business, started I.B.I. as a way of providing help to new entrepreneurs.

Frank told me that, for several years after starting I.B.I., he and his paid staff provided almost all of the support services to mentees: help with business basics; networking activities; internet access; advice on finding loans, managing accounts, and developing businesses.

Eventually, Frank told me, he realized that his mentees would benefit from working directly with established business people in areas where I.B.I. lacked expertise. He created several informal mentoring relationships between these "mentors" and his mentees. These relationships worked well, so he decided to make mentoring a regular and important part of I.B.I.'s service.

He recruited a team of over 30 mentors, all located in the capital city, representing a diversity of business structures and business types. I.B.I. now routinely offers to connect its mentees with mentors and Frank is aggressively seeking out new mentors for business models and services with which he is not familiar.

Recently, however, Frank received a complaint from one of his startup mentees. The mentee reported that one of I.B.I.'s mentors had pressured the mentee to use the mentor's business as a principal supplier, on terms less favorable than the mentee could obtain elsewhere. Moreover, this same mentor had also pressured the mentee to allow him to invest in the business, in exchange for a significant ownership share. The mentee resisted both advances and ended the relationship.

Frank stressed that this kind of problem had only occurred once. He believes that, in most circumstances, both mentor and mentee will act in good faith, that the mentees will seek independent advice before transacting with a mentor, and that strong reasons can exist for such transactions, involving benefits for both parties.

However, Frank wants to clarify the relationships between I.B.I., its mentors, and its mentees. He did some research and found some model mentoring agreements that he revised and proposes to ask his mentors to sign. He proposes to use such an agreement with all of his mentors. Before he does so, he wants us to review the agreements and advise him about the legal consequences for I.B.I.'s mentors.

Before our meeting ended, I spent time exploring what goals he wanted these agreements to serve. As I expected, Frank identified several conflicting concerns:

- Protecting I.B.I.'s Startup Mentees: Given the feedback from this one mentee, Frank wants to make sure that both he and his mentees have a way to protect the mentee legally if a mentor does succeed in taking advantage of the mentee.

- Avoiding the Discouragement of Mentors: At the same time, Frank does not want to expose his mentors to unnecessary liability. In most cases, mentors volunteer their time. He doesn't want the threat of lawsuits to chill that willingness to help.

- Informality: Frank is more than willing to ask mentors to contract with I.B.I., but he wants to preserve the informality and open-endedness of the relationships between mentors and mentee/mentees. He strongly

believes that these relationships work best if mentors and mentees work in good faith, without asking them to sign binding contracts defining the relationship.

I told Frank that we would research his questions and get back to him soon.

# Business Incubators and Business Mentors: Helpful or Harmful?

## Columbia Business Incubator Newsletter

A business incubator helps startup companies to grow by providing services such as management training or office space. Business incubators differ from industrial parks in their dedication to startup and early-stage companies. Incubators also differ from the Small Business Development Centers (and similar government sponsored business support programs) in that they serve only selected clients.

The formal concept of business incubation began in the USA in 1959 when Joseph Mancuso opened the Batavia Industrial Center in a Batavia, New York, warehouse. Since then, incubators have spread across the globe; by some estimates, as many as 7,000 business incubators exist world-wide.

Technology has increased this growth. New experiments like Virtual Business Incubators bring the resources of entrepreneurship hubs like Silicon Valley to remote locations all over the world. Virtual incubators allow startups to get the benefit of an incubator without actually being located at the incubator site.

Many incubators rely on business mentors to help as advisors and consultants for startup businesses. These mentors typically come from the same industry as the startup and include established individuals with substantial business experience.

A good mentor can be a huge plus. Mentors bring knowledge and perspective that allow startups to avoid hidden risks and to seize unseen opportunities. A mentor can provide entry into specialized business networks and can help new business people form relationships with suppliers, customers, and regulators.

At the same time, the mentoring relationship can have its downsides. Mentors sometimes take too little time to learn the new business. Mentors may fail to understand new or disruptive business models. Finally, some mentors have used their position of

influence to take an ownership position in the startup or to sign contracts that benefit the mentor’s own business.

Before using the services of an incubator or a business mentor, take time to understand how the incubator and the mentor work. Ask for copies of the mentoring agreement. If you do work with a mentor, make sure to seek a second opinion before entering into an investment or contractual relationship with your mentor.

# AGREEMENT WITH BUSINESS MENTORS

This Agreement is between Innovative Business Incubator (I.B.I.), a non-profit in the State of Columbia, and _____, an individual (Mentor), desiring to provide business and professional guidance to individuals and businesses using the services of I.B.I. (Mentee(s)).

With this Agreement, I.B.I. and the Mentor seek to accomplish the following goals:

— to protect the respective interests of I.B.I., the Mentor, and the Mentees;

— to clarify the relationships between I.B.I., the Mentor, and the Mentees; and

— to ensure the confidentiality of information disclosed in the context of counseling or technical assistance.

Accordingly, I.B.I. and the Mentor agree as follows:

1. The Mentor agrees:

    a) Not to charge a fee or accept a gift (or secure same or another) for counseling or other services provided to the Mentee;

    b) Not to service competing Mentees at the same time prior to notifying all competing Mentees that the Mentor is providing services to competing Mentees;

    c) Not to discuss Mentee information or the counseling relationship with anyone other than I.B.I. personnel; and

    d) Not to withdraw from a counseling assignment without first notifying I.B.I.

2. Duration: The Mentor agrees that this Agreement shall remain in force and in effect, from the date hereof, during the term of its relationship with any Mentee.

3. Remedies: In the event of any breach of this Agreement, I.B.I. is entitled to enforce the terms of this Agreement through actions that may include actions for damages or injunctive relief or other remedies.

IN WITNESS WHEREOF, the undersigned parties have duly executed this Agreement.

| | |
|---|---|
| I.B.I. | MENTOR: |
| _____ | _____ |
| (name) (title) | (name) (title) |
| Date: | Date: |

# February 2021

# California Bar Examination

# Performance Test LIBRARY

# MATTER OF I.B.I.

LIBRARY

# Togs for Tots, Inc. v. CCM

## Columbia Supreme Court (2011)

Jeremy Painter owns Togs for Tots, Inc., a Columbia corporation that markets children's clothing to retailers. Children's Clothing Manufacturer, or "CCM," manufactures children's clothing in Columbia.

In 2001, Painter approached Ronald Denito, owner of CCM, with a business proposition: Denito should create a company to manufacture children's clothing that Painter would then sell. As a result, Denito started up CCM. Painter and Denito agreed that CCM would manufacture products, that Painter would market those products to the retail trade, and that Painter would act as CCM's sole marketer.

Through his company, Togs for Tots, Painter then began to create a market for the products CCM manufactured and sold under its name. Togs for Tots paid all costs of the sales effort, including travel expenses and the maintenance of a showroom office in Columbia. Painter held himself out to the retail trade as a partner in CCM and carried a business card designating him as Vice President of CCM. From 2002 to 2008, Togs for Tots solely engaged in marketing products for CCM.

During this time, Painter and Denito made all business decisions together. CCM handled the manufacturing aspect, while Togs for Tots handled the marketing. At trial, Painter alleges that he and Denito shared "a confidential relationship." Painter and Denito shared the profits of CCM, with Painter receiving marketing profits in the form of commissions and Denito receiving manufacturing profit.

As a result of Painter's marketing efforts, by 2009, CCM grossed $15 million in annual sales. This included $12 million from Walmart, CCM's biggest customer. To obtain Walmart as a client, Painter helped design a unique line of clothes that CCM manufactured exclusively for sale under Walmart's private label.

In October 2009, CCM terminated their relationship with Togs for Tots. At that time, Denito informed Painter that defendants could no longer afford to share their revenues with plaintiffs.

Painter and Togs for Tots then filed suit, claiming that both Denito and CCM had breached a contract and, separately, that Denito and CCM had breached a duty arising out of a confidential relationship. Defendants moved to dismiss all claims. The trial court dismissed the claim as to breach of contract but did not dismiss the confidential relationship claim. The defendants appealed this decision; the Columbia Court of Appeals affirmed.

In this appeal, CCM contends that Painter and Togs for Tots have failed to establish the existence of a confidential relationship between them, and that this cause of action must also be dismissed.

To succeed on a claim for breach of fiduciary duty in Columbia, a plaintiff must prove three elements: (1) a fiduciary duty between the parties; (2) defendant's breach of that duty; and (3) damages that were proximately caused by the breach. If proven, such a claim can result in liability independent of any contract between the parties.

The first element requires proof of the existence of a fiduciary duty. In some cases, such a duty arises out of a relationship well recognized as such: agent and principal; trustee and beneficiary; or guardian and ward. In other cases, the duties may arise out of relationships outside the standard fiduciary models. In such cases, the plaintiff must prove the existence of a “confidential relationship” as a matter of fact.

The existence of a confidential relationship cannot be determined by recourse to rigid formulas. A confidential relationship may exist where one person relies on another because of a history of trust, older age, family connection, and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship. Reliance and dominance are the key

factors in such a relationship. In the relationship between a business advisor and client, the advisor may bring more knowledge, expertise, or financial resources than the advisee. The resulting inequality could impose duties on the advisor to refrain from self-dealing or from exacting inequitable terms.

For example, in *Shaw v. Benedetti Enterprises* (2007), defendant Benedetti hired Shaw as an advisor to help Benedetti create a business that would manufacture and market durable medical equipment. Shaw sued for unpaid commissions, and Benedetti counterclaimed for breach of a confidential relationship. On the facts of that case, we found no such relationship. The parties had entered into a bargained-for exchange, pursuant to which each party received some benefit. We refused to extend duties of a confidential relationship to everyday commercial activity. To do so would expose participants to unexpected liability and could erode the exacting standards applied to those in a true fiduciary relationship with each other.

In this case, the pleadings do not indicate that either Painter or Denito had substantially greater knowledge, expertise, or financial resources than the other. In fact, Painter initiated the relationship and provided his share of the capital required to start up the marketing relationship. Moreover, the pleadings indicate a history of bargained-for collaboration resulting in substantial profits for both parties.

The trial court erred in failing to dismiss the plaintiffs' claim based on an alleged confidential relationship.

Accordingly, we reverse.

# Norton v. Kramer

## Columbia Supreme Court (2007)

This case arises from a lawsuit filed by Josephine Norton and several others against Samuel Kramer. Norton and her co-plaintiffs claim to be third-party beneficiaries of a contract between Kramer, acting under the name of Joseph Morgan, and the Columbia Basin Retreat (Retreat). The plaintiffs alleged that Kramer breached this contract by concealing his identity and by fraudulently inducing the plaintiffs to reside at the Retreat for over ten years.

Samuel Kramer formed the Retreat in 1992 as a non-profit corporation. He appointed himself as the spiritual leader of the Retreat, using the name of Joseph Morgan. In so doing, Kramer concealed his background as a former art student at the Columbia College of Art and as a failed retail merchant.

The Retreat included approximately twenty resident members (Residents) and operated a small public center for teaching yoga. In 1995, the Retreat moved to a 150-acre site in Lenox County, Columbia, which contained several large facilities. Between 1995 and 2006, over 8,000 paying guests per year visited the Retreat “to relax, take yoga classes, meditate, have massages, and otherwise take a break from the routine of their daily lives.” The Residents operated the facility, working for room and board and a small monthly stipend in exchange for the opportunity to live at the Retreat as Morgan’s “disciples.”

The Residents allege that they, the paying guests, and donors were attracted to the facility precisely because of Morgan's presence. Morgan's picture hung throughout the facilities, his videos ran continuously in the public areas, and his books, tapes, and other items were offered for sale by the Retreat. Publicly, Morgan claimed to be an authentic teacher and object of veneration, one who attained his status through several forms of abstinence. Morgan outwardly professed “honesty, selfless devotion to the well-being of his followers,” and

“absolute personal trust” between teacher and disciples, as well as celibacy and a physically and financially simple lifestyle.

The Residents characterize Morgan as cultivating an intense emotional dependence on him. They were told to identify themselves and their well-being with Morgan and to regard him as the most important person in their lives. He frequently offered guidance on the most intimate aspects of the Residents’ personal lives. They state that, over many years, each of them developed a “close and deeply personal relationship” with Morgan. They state that they endeavored to be chaste, honest, selfless, and devoted to the well-being of others. At Morgan’s urging, many donated all of their possessions to the Retreat, in some cases as much as $100,000.

The Residents claim that, in fact, Morgan/Kramer was a fraud. Their complaint alleges that, from 1992 through 2005, the Retreat entered into a series of lucrative contractual relationships with Kramer, to induce him to remain physically present at the Retreat. Kramer received an annual fee, free housing, free transportation (both domestic and international), a percentage of the proceeds from literature, video, and audiotape sales, and free sponsorship of seminars throughout the world. He retained the revenue from these operations in an amount of many hundreds of thousands of dollars.

Kramer left the Retreat after the discovery of his background by an author hired to write his authorized biography. The Residents brought this lawsuit, claiming intentional infliction of emotional distress; breach of fiduciary duty; breach of contract on a third party beneficiary theory of recovery; fraud and misrepresentation; and unfair and deceptive trade practices.

Kramer moved to dismiss all claims. The trial court dismissed all but the fiduciary duty, fraud, and trade practices complaints. The Residents appealed the dismissal of their breach of contract claims to the Court of Appeals, which affirmed the dismissal. We also affirm.

The Residents' complaint alleges that the Retreat contracted with Kramer for his services and that they, as resident members of the Retreat, were the intended beneficiaries of such contracts. According to them, Kramer breached these contracts when he misrepresented his status as a "true and authentic teacher" for the purpose of amassing significant personal wealth.

To recover as third-party beneficiaries, the Residents must show that they were intended beneficiaries of a contract between the defendant and the Retreat. Only intended beneficiaries, not incidental beneficiaries, can enforce a contract. A party is an intended beneficiary if performance under the contract effectuates the intention of the parties, and if circumstances indicate that the beneficiary would receive the benefit of the promised performance. See Restatement (Second) of Contracts § 302(1)(b).

The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication. For example, if A and B enter into a contract whereby A agrees to pay B to construct a house for C, it is clear that C is an intended beneficiary. Similarly, if X and Y enter into a contract whereby Y will provide a service to C, C has the right to enforce the terms of that contract against Y.

The Residents allege that Kramer, for valuable consideration, contracted with the Retreat to provide services to the customers and Residents of the Retreat. Construed in a light favorable to the Residents, the terms of those contracts required Kramer to remain physically present at the Retreat, teach yoga courses, meet with guests and visitors, and serve as advisor, mentor and exemplar to the Residents, in addition to providing counseling services to his followers.

These allegations, if proven, would be sufficient to conclude that the Residents were intended beneficiaries of his agreement with the Retreat. They may maintain an action for breach of contract as third-party beneficiaries. However, this conclusion does not end the discussion; the facts as alleged by the

plaintiffs simply fail to state a claim for breach of the contract between Kramer and the Retreat.

The gist of the Residents' complaint is that, by secretly reaping substantial monetary compensation, Kramer was not providing the services of an "authentic" teacher. The required services included the development of a close mentoring relationship with the plaintiffs, as an exemplar of a particular lifestyle. But plaintiffs' own complaint indicates that Kramer satisfied those requirements: "Over many years, each of the plaintiffs developed a close and deeply personal relationship with Kramer."

To achieve the result sought by the Residents, the contract would have had to limit the financial benefits to Kramer or to require him either to act or refrain from acting in ways that complied with particular standards of behavior. But nothing in the complaint indicates that the contract specifically required Kramer to adhere to a particular code of conduct or abjure any specific behavior to maintain his status. Considering the liberal financial benefits obtained by Kramer, it is difficult to conclude that the contract intended such terms. Even taking all the Residents' allegations as true, Kramer's conduct does not constitute a breach of any specific terms of the contract between him and the Retreat.

In sum, although the Residents are third-party beneficiaries of the contract between the Retreat and Kramer, nothing in their complaint states a claim for breach of contract. Accordingly, we affirm the dismissal of this count of their complaint. We note that their claims for breach of fiduciary duty, for fraud, and for unfair and deceptive trade practices were not dismissed and are not affected by our decision. Plaintiffs may pursue those claims at trial.

Affirmed.

# PT: SELECTED ANSWER 1

***Hodgeson and Hawkins, LLC***

*53 Severance Road*

*Columbia City, Columbia*

MEMORANDUM

To: Sarah Hodgeson

From: Applicant

Date: February 23, 2021

Re: Matter of I.B.I.

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**1. INTRODUCTION**

Our client is Innovative Business Incubators (I.B.I.), a non-profit business that provides advice and support to new entrepreneurs in Columbia City. I.B.I. is arranging mentoring relationships between new entrepreneurs and experienced mentors, and I.B.I. would like to formalize the relationship between I.B.I. and its mentors through a contract.

You have asked me to assess the following two legal issues:

1. Whether the relationship between an I.B.I. mentor and mentee gives rise to fiduciary obligations owed by the mentor to the mentee; and

2. Whether the draft contract between I.B.I. and a mentor creates contractual rights that

an I.B.I. mentee can assert against the mentor.

Please find below my legal analysis of these two issues, their impact on I.B.I.'s draft contract, and changes that should be made to the draft contract to address our client's concerns.

## 2. LEGAL ANALYSIS

### a) Does the relationship between an I.B.I. mentor and mentee give rise to fiduciary obligations owed by the mentor to the mentee?

To succeed on a claim for breach of fiduciary duty in Columbia, a plaintiff must prove (i) a fiduciary duty between the parties; (ii) defendant's breach of that duty; and (iii) damages that were proximately caused by the breach. If proven, such a claim can result in liability independent of any contract between parties. *Togs for Tots.*

***Existence of a Fiduciary Duty***

The existence of a fiduciary duty may arise out of well-recognized relationships such as agent and principal, trustee and beneficiary, or guardian and ward. Outside of these established categories, a fiduciary can be found where a "confidential relationship" exists as a matter of fact. *Togs for Tots.* In looking into whether a confidential relationship exists, the Columbia Supreme Court in *Togs for Tots* has held that this cannot be determined by rigid formulas, but rather it depends on the facts and circumstances surrounding the relationship. For example, a confidential relationship may exist where one person relies on another because of a history of trust, older age, family connection, and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship.

The key factors in determining the existence of a confidential relationship are reliance and dominance. In the relationship between a business advisor and a client, the advisor may bring more knowledge, expertise, or financial resources than the advisee. This resulting inequality could impose duties on the advisor to refrain from self-dealing or from exacting inequitable terms. *Togs for Tots.*

In *Togs for Tots,* the plaintiff had initiated a business relationship with the defendant, whereby the plaintiff marketed and sold products manufactured by the defendant. In this case, they made all business decisions together and shared the profits. The court in this case found that there was no confidential relationship due to the fact that neither party had substantially greater knowledge, expertise or financial resources than the other, and that there was a history of bargained-for collaboration resulting in substantial profits for both parties. Similarly, in *Shaw v Benedetti* (as cited in *Togs for Tots*), the court found that there was a bargained-for exchange and therefore no confidential relationship between the defendant who had hired the advisor plaintiff to create a business. In coming to this decision, the court used public policy reasons, holding that fiduciary duties should not be extended to everyday commercial activity, as unexpected liability could erode the standards applied to a true fiduciary relationship.

***Impact of the Law on the Contract***

In our client's case, the mentors being recruited are more experienced than the mentees and are providing expertise tailored to the needs of the mentee's business. As stated in the Columbia Business Incubator Newsletter, mentors bring knowledge and perspectives to allow startups to avoid hidden risks and seize unseen opportunities, and

provide specialized business networks and help new business-people form relationships with suppliers, customers, and regulators. This relationship is very different from the case in *Togs for Tots*, where both parties were of relatively equal bargaining power and skill, and they shared profits. In the mentor-mentee relationship, the mentee is relying on the mentor, who is in a position of dominance in the relationship due to their super expertise, training, and knowledge.

Therefore, it is likely that the relationship between an I.B.I. mentor and mentee would give rise to fiduciary obligations owed by the mentor to the mentee. This is desirable given that I.B.I. has an interest in providing legal protection for a mentee in the case that a mentor does succeed in taking advantage of a mentee. As noted by Frank Duquesne, there has already been a worrisome case where a mentor took advantage of a mentee by pressuring the mentee to use the mentor's business as a principal supplier on less favorable terms than the mentee could obtain elsewhere. The mentor also pressured the mentee to allow him to invest in the business, resulting in the mentee resisting both advances and ending the relationship. While this kind of incident has only occurred once, such situations are likely to occur again as the mentorship program grows and continues. In addition, the Columbia Business Incubator Newsletter has flagged issues where mentors have used their position of influence to take an ownership position in the startup or to sign contracts that benefit the mentor's own business.

***Recommended Changes to the Contract***

It is important that the contract stipulate the role of the mentor and the mentee, so that if

a breach of fiduciary duty arises, a court is able to look at the contract and determine that there was a confidential relationship. For example, the contract could mention that the mentee is relying on the mentor's expertise and guidance. The draft contract already stipulates that the mentor agrees not to charge a fee or accept a gift for its services provided to the mentee, so the court will likely not find that there is a bargained for exchange, which would make it less likely that there is a fiduciary relationship.

I.B.I. is also concerned about preserving the open-endedness and informality of the relationship between mentors and mentees and wants them to work in good faith. I.B.I. also does not want to open mentors up to unnecessary liability and chill their willingness to help. Therefore, the contract could also add a covenant that the mentor will act in good faith. It should also spell out the kinds of activities that a mentor may not do, that may be an example of a breach of fiduciary duty, so that this relationship is defined, and the mentors know exactly what to expect. A mentor does not need to worry about opening themselves up to liability if they know exactly what they can and cannot do, and if they know how they can protect themselves legally. For example, in the case where a mentor took advantage of one of I.B.I.'s mentees, that may not have occurred had the mentor signed a contract explicitly prohibiting these activities. This would also have the benefit of providing I.B.I. mentees with legal protection should any mentor take advantage of them and breach their fiduciary duty.

**b) Does the draft contract between I.B.I. and a mentor create contractual rights that an I.B.I mentee can assert against the mentor?**

***i) Third-Party Beneficiaries***

Only intended beneficiaries, rather than incidental beneficiaries, can enforce a contract. A party is an intended beneficiary if performance under the contract effectuates the intention of the parties, and if circumstances indicate that the beneficiary would receive the benefit of the promised performance. *Restatement (Second) of Contracts, s. 302(1)(b).* The key question is the intent of the parties to the actual contract to confer a benefit on a third party. The intent must appear from the contract itself or be shown by necessary implication. For example, if X and Y enter into a contract whereby Y will provide a service to C, C has the right to enforce the terms of that contract against Y. *Norton v Kramer.*

In *Norton v Kramer,* the plaintiffs were resident members at the Retreat, where the defendant Kramer was their spiritual leader. The residents operated the facility in exchange for the opportunity to live as Kramer's "disciples". Kramer's contract with the Retreat provided that Kramer remain physically present at the Retreat, teach yoga classes, and provide counseling services to the residents. In this case, the court found that the residents were intended beneficiaries of Kramer's contract with the Retreat.

***Impact of the Law on the Contract***

In our client's case, I.B.I. mentees are clearly an intended beneficiary of the contract between I.B.I. and the mentor, as the contract stipulates that the mentor desires to provide business and professional guidance to mentees of I.B.I. As a result, the contract would create standing for an I.B.I. mentee to bring a breach of contract claim against a mentor. However, currently only I.B.I. may claim any remedies under the contract.

***Recommended Changes to the Contract***

While a mentee is likely to be able to claim that he or she is an intended beneficiary under the contract, it would be desirable to specifically specify the name of the mentee, so that the contract is explicit in naming such mentee as the intended beneficiary, as I.B.I. has many different mentees. In addition, Section 3 of the contract should be revised so that the mentee who is the intended beneficiary may also enforce the terms of the agreement and obtain remedies.

As one of I.B.I.'s concerns is to maintain informality and not ask mentors and mentees to sign binding contracts defining the relationship, having a contract between I.B.I. and the mentor would be sufficient, and no contract would be required between the mentor and mentee as the contract between I.B.I. and the mentor would provide a sufficient basis for the mentee to have standing should a mentee require any legal protections.

***ii) Breach of Contract***

Even if a plaintiff is able to ascertain that he or she is an intended beneficiary, there must be basis for a breach of contract. In *Norton v Kramer,* the court found that the residents had not proven a breach of contract, as Kramer had satisfied the requirements in the contract between himself and the Retreat. Had the contract limited the financial benefits to Kramer or required him to either act or refrain from acting in ways that complied with particular standards of behavior, the residents may have had a viable breach of contract claim.

***Impact of the Law on the Contract***

In addressing I.B.I.'s concern to provide legal protections to its mentees should a

mentor take advantage of a mentee, it is important that the contract limit the financial benefits available to the mentor, and require the mentor to act or refrain from acting in ways that comply with particular standards of behavior. Meeting these elements would make more likely that a mentee is able to ascertain a basis for breach of contract as an intended beneficiary, as outlined in *Norton v Kramer*.

***Recommended Changes to the Contract***

The draft contract currently says that the mentor agrees not to charge a fee or accept a gift. This is desirable as it limits the financial benefits available to the mentor. The contract could also explicitly stipulate that the mentor is not accepting any financial consideration from I.B.I.

The draft contract also stipulates several standards of behavior. For example, the mentor cannot service competing mentees at the same time without notifying the competing mentees, they cannot discuss mentee information or the counselling relationship with anyone outside of I.B.I., and they cannot withdraw from the counselling assignment without first notifying I.B.I.

Therefore, the contract likely already creates contractual rights that an I.B.I. mentee can assert against the mentor. However, the contract could be strengthened by adding additional standards of behavior so that the mentee has additional bases for claiming a breach of contract should the mentor take advantage of the mentee. For example, it could stipulate that a mentor may not ask a mentee to use the mentor's business (or a mentor's close contact) as a principal supplier or distributor, and that a mentor may not ask a mentee to allow the mentor to invest in the business. As already stated above, by

adding these clear stipulations, this also provides certainty to the mentor in defining the mentor-mentee relationship, so that they know their exact liabilities. Having this certainty would lessen any chilling effect that may reduce a mentor's willingness to help. By having these stipulations, it also allows enough flexibility and open-endedness for an informal relationship between the mentor and mentee.

## 3. CONCLUSION

As currently drafted, the contract likely gives rise to fiduciary obligations owed by the mentor to the mentee, and the draft contract likely creates contractual rights that an I.B.I. mentee can assert against the mentor. The contract could be strengthened by adding the additional language as outlined in my legal analysis.

Thank you for the opportunity to write this memorandum. Please let me know if I can provide any further research or assistance.

# PT: SELECTED ANSWER 2

**To:** Sarah Hodgeson

**From**: Applicant

**Date**: February 23, 2021

**Re**: Matter of I.B.I. and the Draft Mentor Agreement

## I. Introduction and Scope of Research

You asked me to review several questions regarding a draft mentorship agreement that Frank Duquesne, Executive Director of IBI, provided you. In particular, you asked me to evaluate whether the current mentor-mentee relationships that IBI facilitates give rise to fiduciary obligations on the part of the mentors, and whether the draft agreement between IBI and potential mentors would grant mentees contractual rights that an IBI mentee could assert. You further asked me to evaluate these questions and the draft contract in light of Mr. Duquesne's concerns of balancing protections for mentees against a desire to (a) avoid potentially large *[sic]* and deterring liability against mentors, and (b) avoid overly-formalizing the relationship between mentors and mentees.

I have reviewed the draft agreement and accompanying File and Library and have set out my assessment of the legal questions below.

## II. Fiduciary Obligations

### A. The mentor-mentee relationships at IBI will frequently give rise to fiduciary obligations owed by the mentor to the mentee

### (1) Relevant Caselaw (Togs for Tots)

In Togs for Tots, the Columbia Supreme Court explained the basic test for whether a fiduciary duty exists. The Court explained that fiduciary duties often arise out of long-standing and "well recognized" relationships such as "agent and principal; trustee and beneficiary; or guardian and ward" (Togs for Tots at 3). In addition, the Court explained that fiduciary duties can exist when two parties have a "confidential relationship," a legal status that the Court explained is dependent on the facts of each case and "cannot be determined by recourse to rigid formulas" (*id*.).

The Columbia Supreme Court listed several factors for when a confidential relationship exists that are relevant to the context of IBI-facilitated mentor-mentee relationships. The Court explained that a "confidential relationship may exist where one person relies on another because of a history of trust, older age . . . and/or superior training and knowledge, and where the person relied upon assumes a position of dominance in the relationship." The Court noted that "[r]eliance and dominance are the key factors in such a relationship" (Togs for Tots at 4).

### (2) Application to the IBI Context

A number of aspects of the mentor-mentee relationships involved in IBI's business will likely satisfy the factors for creating a confidential relationship, and thereby give rise to fiduciary duties. For example, IBI mentors are frequently older in age than their mentees and were chosen for their "superior training and knowledge" (*see* Columbia Business Incubator Network, Business Incubators and Business Mentors: Helpful or Harmful? at 8 (noting that mentors "bring knowledge and perspective")). In similar

fashion, mentees will likely frequently rely upon the knowledge and experience of mentors, who possess superior knowledge of the relevant industry and business practices. Finally, the fact that these mentors are vetted in part by IBI may lead to greater trust on the part of mentees, who believe that IBI has helped locate skilled and trustworthy mentors.

Furthermore, the Columbia Supreme Court in Togs for Tots noted that one of the factors that counsels against finding a fiduciary duty is whether the parties engaged in a typical, commercial, bargained-for transaction. That factor will frequently be absent in the context of IBI mentor-mentee relationships, as mentors are often expected to give advice without a commercial contract or explicit bargained-for consideration (as is Mr. Duquesne's wish).

While the existence of a fiduciary duty will be a fact-specific inquiry involving the unique circumstances of each relationship, it is likely that many of the mentor-mentee relationships that IBI facilitates will give rise to fiduciary obligations on the part of the mentor.

### B. Mr. Duquesne's Concerns

#### (1) Protection of Mentees

The existence of a fiduciary duty will generally provide protections for mentees. For example, a fiduciary relationship could oblige the mentor to avoid utilizing confidential information learned from the mentee for the mentor's exclusive benefit, if such a business opportunity could have fallen to the mentee instead.

Unlike the plaintiffs in Togs for Tots, the mentees will have a much stronger ability to

enforce violations of a fiduciary's obligations, irrespective of the draft contract, because the mentees will frequently be able to demonstrate that they have been in a position of reliance -- due to a trust in their mentor -- and that the mentor has abused her position of dominance (assuming a violation occurs).

However, even though mentees may be able to seek remedies for breaches of fiduciary duties, there is some possibility that the draft agreement that IBI has proposed will be counterproductive from the perspective of protecting mentees. The draft agreement currently lists a small set of duties that a mentor owes, and not every mentor may necessarily realize the scope of the fiduciary duties that they are taking on, which extend far beyond the few that are currently mentioned in the draft agreement (*see* Togs for Tots at 4 (noting the "exacting standards applied . . . in a true fiduciary relationship)).

It may be worth either expanding the list of duties mentioned, or including more general statements about the Mentor's duties -- beyond the important, but small number currently mentioned -- to avoid creating the misimpression that the mentor has only limited responsibilities with respect to a mentee.

**(2) Avoiding Discouragement of Mentors**

There is a risk that a fiduciary duty will expose mentors to significant liability, a fact the Columbia Supreme Court has recognized in cases like Togs for Tots where the Court has declined to extend fiduciary duties in part based on the significant liabilities that flow therefrom. However, the fiduciary obligations that arise are the flip side of the beneficial aspects of the mentor-mentee relationship -- trust and reliance upon the mentor's

advice are arguably essential to the mentor-mentee relationship.

Rather than limit fiduciary liability, IBI may wish -- perhaps through the draft agreement or through a handbook or associated policy -- to further disseminate best practices. For example, the Columbia Incubator Newsletter notes that mentees should be encouraged to seek out advice and counsel before engaging in transactions with mentors (which will often ultimately be in the mentee's best interest). IBI may wish to include a provision in the agreement that encourages or requires mentors to go over such best practices with their mentees on how to secure independent advice on transactions, a habit that may be dividends for mentees in subsequent relationships for years to come.

#### (3) Avoiding Formality

The case law indicates that the existence of a fiduciary duty between a mentee and mentor will not depend upon the two parties signing a contract. Indeed, signing a contract with bargained-for consideration may make the relationship seem more like a simple commercial contractual relationship, and not a full fiduciary relationship. Consequently, it does not appear that any revisions need to be made to the agreement in order to ensure, via greater formalization of the mentor-mentee relationship, that the mentor will owe a duty to the mentee.

## III. Mentee's Enforcement of Rights Under the IBI-Mentor Contract

### A. Mentees are Likely Intended Third-Party Beneficiaries

#### (1) Relevant Case Law

In Norton v Kramer (2007), the Columbia Supreme Court held that the plaintiffs -- a class of residents residing at a Retreat -- had alleged facts sufficient to show that the

residents were the intended third-party beneficiaries of a contract between the Retreat and Kramer, a self-described spiritual leader who provided services and counseling to the residents. The Court explained that even though the residents were not parties to the contract, they could enforce contractual obligations that Kramer owed to the Retreat because the residents were "intended beneficiaries of [the] contract between the defendant and the Retreat" (Norton at 7).

Among the elements the Court identified as significant for determining whether the residents were intended beneficiaries was the fact that Kramer's contract with the Retreat required Kramer to "serve as advisor, mentor, and exemplar to the Residents, in addition to providing counseling services to his followers" (*id*.).

**(2) Application to the IBI Mentor-Mentee Relationship**

The same factors cited in Norton indicate that mentees are likely intended third party beneficiaries of the contract between IBI and mentors. IBI is contracting with mentors to provide advice and counseling to the mentees, just as Kramer did.

**(3) The Contractual Language Provides Further Support for the Proposition that Mentees Are Intended Third-Party Beneficiaries**

Moreover, the language of the draft agreement includes several provisions that strongly indicate that mentees are intended third-party beneficiaries. For example, the draft agreement states that one of the purposes of the agreement is to "protect the respective interests of I.B.I, the Mentor, and the Mentees" (File at 10 (emphasis added)), and the substantive provisions that the mentor is agreeing to go on to provide various protections for the mentee.

#### (4) The Remedy Provision, as Currently Drafted, may Introduce some Ambiguity

There is some argument that because the draft agreement includes a remedies clause that only lists I.B.I as being entitled to enforce a breach of the agreement, a future mentor could argue that the parties intended that no one but IBI have the ability to enforce the agreement. This argument likely would not be sufficient to outweigh the other evidence that mentees are third-party beneficiaries -- the fact that IBI can enforce the agreement does not mean that it is the exclusive party that can do so. However, as noted below, some clarification on this point could be considered for the next round of revisions to the draft agreement.

### B. Duquesne's Concerns

#### (1) Protection of Mentees

As noted above, the fact that mentees are likely third-party beneficiaries is good from the perspective of enforcing their rights, should IBI not wish to do so for any reason. However, this fact could be made more explicit, if IBI wished to do so, by including in the "Remedies" section either an explicit mention of the mentee's ability to enforce its rights, or a disclaimer that enforcement by IBI will not preclude enforcement by any other party that may have rights under the contract.

In addition, and as discussed briefly in Part I above, the rights listed in the draft agreement, while enforceable, are few in number. IBI may wish to consider including a more general duty of good faith, loyalty, and competence towards the mentee, or else consider including a longer list or more specific requirements (e.g. a prohibition on

taking business opportunities from a mentee using confidential information learned from the mentee).

**(2) Concern for Mentor Liability**

Because mentees can enforce the contract, IBI may wish to reconsider the language of some of the specific provisions here, particularly in light of the fact that IBI will not in the future have the sole discretion about whether to initiate an enforcement action.

In particular, IBI may wish to consider modifying the prohibition on mentors discussing mentee information or the counseling relationship. While confidentiality is frequently meaningful and important, much of the value of these relationships is in the ability of a mentor to connect mentees to other people. Mentors who are worried about violating duties of confidentiality may not engage in the kind of free discussion and networking that could be deeply beneficial to mentees. Therefore, IBI may wish to consider something more flexible, for example noting that a mentor should not discuss "confidential information" or do so without the consent of a mentee.

In addition, the prohibition on charges or fees could be modified to account for the fact that mentors and mentees frequently do engage in business transactions of great benefit to both parties. The language currently in the draft agreement, prohibiting "fee[s] . . . for counseling or other services" may interfere with healthy development of business relationships.

**(3) Avoiding Too Much Formality**

Because mentees are likely intended third-party beneficiaries under the contract -- a legal status that could be solidified by making a few minor revisions, as noted above -- it

does not appear that any more formality would be required for mentees to have enforceable rights under the contract in the event that a mentor abuses their position.  However, some of the additions suggested above, such as the suggestion that a Mentor could divulge information about the relationship with the mentee provided they get the consent of the mentee, may introduce some additional formalities or compliance in the relationship, a consideration which will have to be balanced against the value of clear steps that may protect both the mentor and the mentee.