



July 2021

**California
Bar
Examination**

**Performance Test
INSTRUCTIONS AND FILE**

INDUSTRIAL SANDBLASTING, INC. v. MORGAN

Instructions

FILE

Memorandum from Sylvia Baca to Applicant.....

Excerpt from Transcript of Testimony of Samuel Morgan

Excerpt from Transcript of Testimony of Roger Cole.....

Contract between Industrial Sandblasting, Inc.
and Samuel Morgan (Excerpt)

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.

Sylvia Baca and Associates, P.C.
2343 Whitetail Road
Columbia City, Columbia

MEMORANDUM

TO: Applicant
FROM: Sylvia Baca
DATE: July 27, 2021
RE: Industrial Sandblasting, Inc. v. Samuel Morgan

The firm represents Samuel Morgan, who works as a sandblaster and bid manager for Columbia Coatings Corporation. Until about three months ago, Morgan worked for a competitor named Industrial Sandblasting, Inc. (Industrial). Morgan had a contract with Industrial that contained a covenant not to compete if Morgan ever left Industrial.

Industrial has sued Morgan for breach of contract. Industrial wants to enjoin him from doing any work at all at Columbia Coatings for one year. We agreed to a bench trial and held a hearing three weeks ago. I attach transcripts of the relevant portions of testimony at that hearing. I also attach the relevant provisions of the contract between Morgan and Industrial, dated February 15, 2016.

The judge has scheduled us for closing argument on whether the covenants are valid. Please prepare a draft of the oral argument that I might present, using the attached cases as authority.

**Excerpt of Transcript from Hearing
Industrial Sandblasting, Inc. v. Samuel Morgan**

Held on July 6, 2021

Testimony of Samuel Morgan

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Att'y Baca: When did you start work at Industrial Sandblasting, Inc.?

Morgan: In February 2013.

Baca: What did you do for Industrial?

Morgan: I specialize in commercial sandblasting. For several years, I operated a crew and did estimates for my old employer, Industrial Sandblasting, Inc.

Baca: Describe what commercial sandblasting means.

Morgan: We take paint and rust off of buildings, industrial equipment, pipelines, that kind of thing. Then we recoat them with a more durable covering.

Baca: How much did Industrial pay you at the start?

Morgan: They offered me \$35,000 per year and I was glad to get it.

Baca: Did you have experience?

Morgan: No. It was entry-level, with no contract. They offered on-the-job training.

Baca: What happened after you got hired?

Morgan: They started me off with the simplest equipment. I figured that out pretty quickly and eventually learned how to operate all of the equipment. I got so good that different foremen would ask for me for the harder jobs.

Baca: How did your responsibilities change after those first few years?

Morgan: About five years ago. The company decided that it would help their business if they could advertise that they had people with certain kinds of certifications. So they paid me while I obtained certifications from the Society for Protective Coatings (SPC), starting six years ago. The SPC has different levels of certification, all labelled QP. In the end, I got a QP1 for external structures, a QP2 for removing hazardous coatings, a QP6 for applying metalized coatings, and a QP8 for coating concrete with polymer.

Baca: How long did that take you?

Morgan: A few months for each certification. I would find a course that introduced me to how to handle the particular task, then worked with the company to make sure that it had the equipment and management to meet SPC standards. Then we'd apply. An auditor would come and spend a week or so making sure of our capacity, and then we'd get the certification.

Baca: How did it help Industrial's business?

Morgan: We started to get a lot of different kinds of jobs, and a lot of different regular customers, mostly because we could handle a bigger range of work.

Baca: What other responsibilities did you take on?

Morgan: One year, I took over from the foreman of that crew who got sick and couldn't continue. So the company asked me to take over. I got it done early and under estimate. Both the town and the company were very satisfied. Industrial kept me with that team and promoted me to team manager.

Baca: What happened after that?

Morgan: My work was always on time and on budget and my people were always happy. One day, someone I knew in the home office asked me to help him put together a bid, as well as an estimate. He wanted to figure out how to make lower bids, and he knew that I had figured out how to do it.

Baca: How did that work out?

Morgan: It worked out well. Eventually the boss, Roger Cole, called me in and said that they couldn't promote me to the office, because they needed me in the field. But Cole also said that they wanted to keep me, so he offered me a raise and a contract. I accepted. It was good money.

Baca: Is that the contract they say you've broken?

Morgan: Yes. We signed it around 5 years ago.

Baca: What happened after you signed?

Morgan: Pretty much the same as before, except I was paid more. I kept bouncing between doing jobs and helping with estimates. Eventually, it became a strain.

Baca: Why?

Morgan: After the contract, I never got another raise. And he kept pushing me to take on more jobs. That was fine for my team; they got overtime. But I was on salary, which stopped going up.

Baca: At that point, what did you know about Columbia Coatings?

Morgan: Columbia Coatings started up about three years ago, but they were very aggressive about bidding, and often took jobs away from us – not always, but enough to notice. They never got one of my customers. Eventually, I got a call from them.

Baca: What did they say?

Morgan: They were up front. They said that they wanted to get more business, and they knew that I was valuable to Cole and Industrial. They asked whether I would come to work with them instead. I told them my problem with Cole, and they said no problem. They said that they would pay me \$20,000 more,

give me an office position, and let me work in the field as much or as little as I wanted.

Baca: When did this conversation occur?

Morgan: About three months ago. I thought it over, then let them know that I would accept. I gave Cole two weeks notice and left.

Baca: How did Cole take it?

Morgan: He was angry. He asked where I was going, and he got angrier. He made all kinds of threats and cursed me out. He said I'd regret making this decision and that I'd never work in the industry again.

Baca: Just a few more questions. When you worked for Industrial, you said you worked only in Columbia City. Is that right?

Morgan: I did one job in Sidalia, in the northeast part of the state. I did one job in Crescent, a suburb about 20 miles from Columbia City. Otherwise, all the work was in Columbia City, in the northwest corner of the state.

Baca: Where does Columbia Coatings want you to work?

Morgan: I have jobs in the south and southeast. And my office work deals with work all over the state.

Baca: How long will it take Industrial to replace you?

Morgan: They hired another foreman the week before I left. They already had someone doing the bidding – the man in the home office who asked me to help with bids and estimates. He knew pretty much what I knew.

Baca: What would happen if the court applies the non-compete clause to you?

Morgan: I won't have any work at all, after years of experience in the field.

Baca: No further questions.

Att'y Rice: Cross-examination, Your Honor?

Judge Yan: Go ahead.

Rice: You learned everything you knew about sandblasting at Industrial. Isn't that right, Mr. Morgan?

Morgan: Yes.

Rice: They invested a lot in getting you trained and qualified, didn't they?

Morgan: No. They didn't.

Rice: They paid you to get trained, didn't they?

Morgan: No. I paid for the QP certifications myself; all they did was let me do some of the coursework during work hours. It didn't cost much, but Cole sure didn't pay out for it.

Rice: Without you, Industrial won't be able to use those certificates, will it?

Morgan: Wrong again. By now, other foremen have gotten certified. Industrial won't miss me.

Rice: Columbia Coatings doesn't have any of these certifications?

Morgan: They do not. But they have foremen who do.

Rice: You learned how to estimate job costs at Industrial, didn't you?

Morgan: Yes, I did.

Rice: And now you want to use that to harm Industrial, isn't that right?

Morgan: I just want a job that pays me what I'm worth.

Rice: No further questions.

**Excerpt of Transcript from Hearing
Industrial Sandblasting Inc. v. Samuel Morgan**

Held on July 6, 2021

Testimony of Roger Cole

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Att’y Rice: What impact will Mr. Morgan’s working at Columbia Coatings have on your business?

Cole: A big impact. Morgan was a key employee, especially when it came to pricing out jobs. He’s bringing them expertise that we trained him to have. We can already see the effect it’s having.

Rice: What do you mean?

Cole: We have lost several bids to Columbia Coatings already – bids we wouldn’t have lost if Morgan weren’t there.

Rice: You say that you trained him to have his current expertise. What do you mean?

Cole: We paid him for the days that he attended the QP certification courses. We gave him the work that let him figure out how to price jobs. We provided him with the support and equipment to work his projects. He got all of that while working for us.

Rice: What do you want this court to do?

Cole: Enforce the contract, keep him from working in the industry for one year, anywhere in Columbia.

Rice: Is that all?

Cole: At a minimum, the court should keep him out of Columbia City, at least for long enough for us to train someone the way we trained him.

Rice: You would accept that change?

Cole: Yes. He agreed to what's in the contract, so he ought to accept less.

Rice: No further questions.

Baca: No cross-examination, Your Honor.

Employment Contract

The parties to this contract are Industrial Sandblasting, Inc. ("Employer") and Samuel Morgan ("Employee").

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11. For a period of one (1) year after the termination of Employee's employment for any reason, Employee will not own, operate, or work at any business in direct competition with Employer by providing sandblasting or similar industrial cleaning services to industries and businesses anywhere in the State of Columbia.

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Samuel Morgan, Employee

Michelle Abebe, President
Industrial Sandblasting, Inc.

February 15, 2016

Date

February 15, 2016

Date