Celebration Bar Review

California Performance Exams

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INSTRUCTIONS

1. You will have 3 hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, which is one of the United States. Your firm represents plaintiff James Reynolds in a case against the ACME Construction Company.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare a Memorandum of Points and Authorities and an office memorandum.

4. The File contains factual information about your case in the form of six documents. The first document is a memorandum to you from your supervising partner, Mark Stone, containing the instructions for the memoranda you are to draft.

5. The Library includes four cases which are assumed to be decisions of jurisdictions other than Columbia. Some may be real cases; some may be cases in which a real opinion has been modified; some may be cases written solely for the purpose of this examination. Although some of the opinions may appear familiar to you, do not assume that they are precisely the same as cases you have read before. Some of them have been modified, so you should read each case thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown.

6. Your memoranda should be written in the answer book provided. In answering this part of the examination, you should concentrate on the materials provided, but you should 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. This part of the examination will be graded on the content and persuasiveness of the arguments you draft in your Memorandum of Points and Authorities, and the thoroughness and organization of the analysis in your office memorandum.

7. In citing cases from the Library, you may use plaintiffs' names (e.g., Bean) and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably devote at least 90 minutes to organizing and writing your memoranda.

FILE

Stone & Barnes
Attorneys
Golden City, Columbia

MEMORANDUM
February 28, 1985

To: Applicant
From: Mark Stone
Re: Reynolds v. ACME Construction Company

As I assume you recall, we are suing ACME for having caused our client's lung cancer by negligently exposing him to uncured epoxy resins, which we intend to prove are carcinogenic agents. The file contains some notes of an interview with the client, James Reynolds, which will give you further information on the case.

Our expert in this case is Edwin Hardy, an occupational safety consultant. We found him through an article he has published on occupational hazards. Copies of the article and Hardy's resume are in the file. We hope to have him testify about material in his article and the conclusions he has drawn. We want him to testify that, based on his article and Dr. Philip Rock's book, The Environment and Your Health, exposure to uncured epoxy resins can cause cancer.

We also want to admit into evidence Dr. Rock's book, or at least the following quotation: "While most cured epoxy resins have little or no toxic effect, if curing is incomplete, there may be residues of highly toxic curing agents such as organic amines which many scientists believe are carcinogens (or causes of cancer)." Dr. Rock has died since the publication of his book. I would like to use the Rock text to the maximum extent possible at trial.

During her deposition of Hardy, counsel for defendant went into his qualifications as an expert witness at length. A copy of the deposition is in the file. At the pre-trial conference in this case last week, counsel for defendant indicated her opposition to Hardy's testimony as an expert on the issue of causation. The judge has set the matter for hearing prior to trial, and each side is to file a Memorandum of Points and Authorities regarding whether Hardy can testify as an expert on the issue of causation.

What I need from you is the following:

1. Please draft a Memorandum of Points and Authorities supporting our argument that Hardy is qualified as an expert and should be allowed to testify as to his opinion on causation. Your Memorandum of Points and Authorities should present all the possible arguments in favor of admissibility, anticipate arguments from the defendant, and use all appropriate facts in the file to advance plaintiff's position. There is no need for a separate statement of facts.

2. Please prepare a separate, short memorandum to me analyzing the extent to which I can use Dr. Rock's text at trial. Can we get the entire text admitted? If not, can we at least get the quotation admitted in evidence?

Attached to the file, you will find Columbia Code sections and four cases from other jurisdictions which may be relevant; there are no Columbia cases on these issues.

I need your draft Memorandum of Points and Authorities and your memorandum to me as quickly as possible.

NOTES OF INTERVIEW WITH JAMES REYNOLDS

James Reynolds has been diagnosed as having lung cancer. He is a non-smoker. Prior to illness had worked as a painter. He has been an independent sub-contractor, doing interior painting on several construction jobs on which ACME Construction Company has been the general contractor. The pattern for the last two years on these jobs has been for Reynolds to come in and do the painting and staining the day after the wall boards and wood trim are installed. The sub-contractor doing such installation uses epoxy glue rather than nails to affix the trim to the wall boards.

Reynolds' treating physician has told him that exposure to the epoxy glue may have caused his cancer if the resins in the glue mixture had not been fully cured (dried). Reynolds brought in a can of the epoxy glue used on these jobs. The label on the can says: "A chemical action starts as soon as the catalytic agent in Can A is combined with the base in Can B. The putty remains workable for 45 minutes, is hard within one hour, and cures within 48 hours at 65 degrees Fahrenheit." Reynolds states that he usually started painting the morning after the walls and trim were installed - probably 14 to 16 hours after the epoxy was applied and almost never more than 24 hours later.

SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF GOLDEN

James B. Reynolds, Plaintiff, vs. ACME Construction Company, a Columbia corporation, Defendant	)	No. 84-C-1721 DEPOSITION

DEPOSITION OF EDWIN HARDY, a witness herein, taken by counsel for the Defendant, at the offices of Heath and Wise, 1981 Trolley Street, Golden City, Columbia, on Wednesday, December 12, 1984, commencing at 10 a.m. before David French, Notary Public.

APPEARANCES:

For Plaintiff: Stone & Barnes
By Mark Stone
17 Main Street
Golden City, Columbia

For Defendant: Heath and Wise
By Susan Heath
1981 Trolley Street
Golden City, Columbia

Golden City, Columbia
Wednesday, December 12, 1984 at 10 a.m.

EXAMINATION BY MS. HEATH:

Q. I am Susan Heath, attorney for ACME Construction Company, the defendant in this matter. I am going to ask you some questions and your answers will be taken down by the court reporter and typed up and put in booklet form. Mr. Stone, the attorney for the plaintiff, will also have an opportunity to examine you concerning any matter I have questioned you about. Do you understand this procedure?

A. I do.

Q. Will you state your name and current address for the record?

A. Edwin Hardy, 1234 Broadway, Golden City, Columbia.

Q. What is your occupation?

A. I am an occupational safety consultant and an adjunct professor at Golden City Community College.

Q. Can you explain what an occupational safety consultant is?

A. I consult with a variety of clients and agencies on safety in the work place, particularly regarding occupational or environmental hazards.

Q. What do you teach at the Community College?

A. Environmental Studies.

Q. What are "environmental studies"?

A. The study of the relationship between the individual and his social, cultural, and physical environment.

Q. How many courses?

A. One per semester.

Q. What is your education and training?

A. I have a B.S. degree in Environmental Studies from the University of Southern Columbia and a Ph.D. from the Golden West University of Environmental Studies. I spent two years as a research assistant with Dr. Philip Rock, who taught part-time at the University of Environmental Studies in New Mexico. Dr. Rock had an M.D. and a Ph.D. in Biochemistry.

Q. Do you hold an M.D.?

A. No.

Q. Do you hold any graduate degree in biology or chemistry?

A. No. Just the Ph.D. in Environmental Studies.

Q. Have you done research in toxicology, cellular biology, or biochemistry?

A. No.

Q. Have you written about toxicology, cellular biology, or biochemistry?

A. No.

Q. Have you conducted any medical study of cancer or carcinogens?

A. Not a medical study, no.

Q. Mr. Hardy, are you aware of any medical texts that assert a causal connection between epoxy resins and cancer?

A. Yes, Dr. Philip Rock, who, as I mentioned before, was a medical doctor as well as a Ph.D. in Biochemistry, wrote a textbook which reaches the same conclusion as I have.

Q. Is that book generally accepted as authoritative by the medical profession or any branch of it which specializes in cancer research or treatment?

A. Dr. Rock's book, The Environment and Your Health, is a standard text at the Golden West University of Environmental Studies.

Q. Is the University of Environmental Studies accredited by the American Medical Association or the State Medical Board?

A. No, but is is accredited by the Higher Education Board of the State of New Mexico and is a member of the International Association of Environmental Colleges and Universities.

Q. Now, Mr. Hardy, are you familiar with any long-term medical studies which have proven that exposure to epoxy resins causes cancer?

A. Dr. Rock refers to studies of rats that developed cancer after being exposed to organic amines, which are ammonia derivatives contained in epoxy resins.

Q. How about studies involving human beings?

A. I am not personally aware of any medical studies on human beings, but I conducted an anthropological study and published an article on the subject. Dr. Rock also refers to a number of anthropological studies in his book.

Q. What do you mean by anthropological study?

A. An anthropological study involves setting research goals and conducting structured interviews of an identified population to obtain data directly, as opposed to confining research to the laboratory. I published an article on the use of social science methodology in 1976. In my study on the relationship between work environment and cancer, I contacted as many cancer victims as possible to determine whether they had any prolonged exposure to environmental hazards. A large number of these persons worked on construction jobs or in industrial plants where epoxy glues were frequently used.

Q. Could it be that these individuals were smokers or exposed to other potential carcinogens?

A. Some of them were, but a significant number, maybe 50 persons out of the 1000 that I was in contact with personally, or through their families when they were deceased, were neither smokers nor exposed to any other known carcinogen on a regular basis.

Q. Are you aware of the article by Fred Wang, M.D., in which he asserts that so-called anthropological studies have no validity in determining causal connections between a cancer patient's environment and his disease?

A. Yes, but Dr. Wang is known for his dislike of social scientists, and Roger Lee, M.D., wrote an article recently that comes to a conclusion opposite to that of Dr. Wang.

Q. Are you aware of an article written by John Mendez, who has a Ph.D. in education, in which he analyzed so-called anthropological studies of people with learning disabilities and concluded that such studies have no scientific validity?

A. No.

Q. Is your study the evidence on which you base your conclusion that exposure to uncured epoxy resins causes cancer?

A. Yes, plus Dr. Rock's statements and studies.

Ms. HEATH: I have no further questions.

EXAMINATION BY MR. STONE:

Q. Mr. Hardy, during your studies or practice, have you become familiar with various cancer-causing agents known as carcinogens?

A. Yes, I have.

Q. Are you aware of whether epoxy resins are considered a carcinogen?

Ms. HEATH: I am going to have to object to that question. I do not believe that a sufficient foundation has been laid to permit testimony on the causal connection between epoxy resin and cancer.

Mr. STONE: Your objection is noted for the record but it is improper because it does not go to the form of the question. Will you answer the previous question, Mr. Hardy?

A. Yes, I am. In my opinion, uncured epoxy resins cause cancer.

Q. What do you mean by uncured?

A. When a catalytic agent for making epoxy glue is combined with base ingredients, a chemical action begins. When that chemical action is completed, the resin is cured.

Q. Does that mean the glue has completely dried?

A. That would not be the scientific explanation, but you could loosely call it that.

Q. How long does it take for an epoxy resin to cure?

A. That depends on the ingredients of the resin and the temperature. Some resins cure quite fast and others, particularly for industrial use, take longer; maybe 24 to 72 hours. People should be more careful about reading the labels on the glue they use. Too many do-it-yourselfers may be unknowingly exposing themselves to cancer.

Ms. HEATH: I must move to strike that answer. It is pure speculation and is non-responsive.

Mr. STONE: Your objection is noted. I have no further questions.

JOURNAL OF ENVIRONMENTAL STUDIES

Volume 4, Number 1 (1981)

"The Relationship Between Work Environment and Cancer"

Edwin Hardy, B.S., Ph.D.

Introduction

The purpose of this study was to draw preliminary data on the possible relationship between work environment and cancer. The study group consisted of 500 workers from four industrial settings: construction, steel plant, automobile assembly line, and a paper mill. A control group of 500 consisted of workers in non-industrial employment: musicians, truck drivers, food service workers, and office workers.

Study Procedures

Medical records were obtained for all 1000 cases. Work sites were inspected for the presence of chemicals, toxins, pesticides, industrial wastes, and other suspected carcinogens. The workers and their families were interviewed where possible. Data were collected over a five-year period.

Findings

1. A much higher percentage of those working in industrial environments contracted cancer than those in non-industrial work settings. Table 1 compares these data:

TABLE 1

Occupation	# Cancer Victims
Construction	40/125
Steel	30/125
Automobile	25/125
Paper	20/125
TOTAL INDUSTRIAL:	115/500 (23%)
Music	25/125
Trucking	20/125
Food Service	15/125
Office	10/125
TOTAL NON-INDUSTRIAL:	65/500 (13%)

2. When the data were retabulated to eliminate the variable of cigarette smoking, the difference was even more dramatic. Table 2 displays these data:

TABLE 2

Occupations	# Cancer Victims	# Non-smokers
Construction	40	30
Steel	30	20
Automobile	25	15
Paper	20	15
TOTAL INDUSTRIAL NON-SMOKERS:		80/500 (16%)
Music	25	0
Trucking	20	0
Food	15	5
Office	10	5
TOTAL NON-INDUSTRIAL NON-SMOKERS:		10/500 (2%)

3. Industrial work sites were contaminated with the following suspected carcinogenic agents: epoxy resins, asbestos, paper fibers, nitrous acid, sulfuric acid, and lead. Non-industrial work sites were largely free of these environmental hazards.

Conclusion

Of 500 industrial workers included in this study, 16% developed cancer that could not be linked to cigarette smoking. In the non-industsrial settings, only 2% of those who developed cancer were non-smokers.

While there has been significant research into the link between cigarette smoking and cancer, the medical profession has made insufficient study of carcinogenic agents in the environment and the relationship between cancer and industrial occupations.

Edwin Hardy
1234 Broadway
Golden City, Columbia

Present Employment:	Occupational Safety Consultant
Clients include:	Construction Union, Local 4 Golden City, Columbia
	Steel Workers Union, Local 3 Middletown, Columbia
	Union of Service Employees, Local 7 Farthington, Columbia
1982-present	Adjunct Professor Environmental Studies Golden City Community College
Prior Experience: 1979-81	Field Investigator Occupational Safety and Health Administration (OSHA) Washington, D.C.
1974-79	Research Consultant State of Columbia Office of Safety and Welfare Farthington, Columbia
1970-72	Research Assistant Philip Rock, Ph.D., M.D. Golden West University New City, New Mexico
	Publications: "The Use of Social Science Methodology in Evaluation of Scientific Data," Social Science Review, Volume 5, Number 2 (1976)
	"The Relationship Between Work Environment and Cancer," Journal of Environmental Studies, Volume 4, Number 1 (1981)
Education:	B.S., Environmental Studies University of Southern Columbia, 1969
	Ph.D., Environmental Studies Golden West University, 1974

References on request.

The Environment and Your Health
Philip Rock, Ph.D., M.D.
Golden West Publishers, 1969

> "While most cured epoxy resins have little or no toxic effect, if curing is incomplete, there may be residues of highly toxic curing agents such as organic amines which many scientists believe are carcinogens (or causes of cancer)."

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LIBRARY

EVIDENCE CODE OF COLUMBIA

§720. Qualification as an expert witness

(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

(b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

§721. Cross-examination of expert witness

(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the matter upon which his opinion is based and the reasons for his opinion.

(b) If a witness testifying as an expert testifies in the form of an opinion, he may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless:

(1) The witness referred to, considered, or relied upon such publication in arriving at or forming his opinion; or

(2) Such publication has been admitted in evidence

* * * *

§801. Opinion testimony by expert witness

If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

§802. Statement of basis of opinion

A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.

§803. Opinion based on improper matter

The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper.

§804. Opinion based on opinion or statement of another

(a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement.

(b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied.

(c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person.

(d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section.

§805. Opinion on ultimate issue

Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.

* * * *

§1200. The hearsay rule

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

* * * *

§1341. Publications concerning facts of general notoriety and interest

Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties, are not made inadmissible by the hearsay rule when offered to prove facts of general notoriety and interest.

§1342. Learned treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, are not excluded by the hearsay rule, even though the declarant is available as a witness. If admitted, the statements may be read into evidence but may not be received as exhibits.

Cavalier v. Commonwealth

Supreme Court of Pennsylvania (1925)

Counsel for appellant, prosecuting this appeal from a conviction of murder of the first degree, call to our attention the fact that at the time of the commission of the crime their client was a boy not quite six months past the age of fourteen years, and contend that he was not mentally responsible for his crime; also that the record discloses trial errors which should cause us to set the verdict aside.

The defense attempted to be made for appellant is that he was mentally incompetent and insane at the time of the killing. To meet this defense the commonwealth called, among other witnesses, Dr. Albert P. Knight, who, in answer to a hypothetical question, gave it as his professional opinion that the defendant knew the nature and quality of his act and could distinguish between right and wrong. It is urged that this doctor was not competent to express that opinion.

The witness was a practicing physician, a graduate of the University of Pennsylvania, and at the time of the trial had been engaged in the practice of his profession for some four or five years. He was at no time connected with an institution having for its main purpose the treatment of mental diseases and had not seen very many cases of insanity. He had as a part of his medical education studied the subject of insanity and would appear to have at least the general knowledge of the subject that the ordinary medical practitioner has.

The question of the competency of a witness to testify as an expert is usually for the discretion of the trial court, and we are not convinced that there was an abuse of discretion in receiving Dr. Knight's testimony. It is not necessary that one should be a professed psychiatrist in order that his expert opinion on sanity may be received. A physician and surgeon who has come in contact with a number of cases of insanity in his general practice may express an opinion as to the sanity of the defendant. A general family practitioner may be allowed to give an opinion, whatever may be its weight, as to whatever comes within the range of such practice. It would be an impracticable thing to lay down a hard and fast rule as to how much experience a practicing physician must have had with insane persons to qualify him to speak as an expert.

There was no error in admitting Dr. Knight's testimony.

Bean v. Diamond Alkali Company

Court of Appeals of Idaho (1969)

Respondent Gary Bean has for a number of years in his farming operations raised onion seed. He instituted this action as plaintiff, alleging in his amended complaint a breach of warranty of a chemical compound applied to 4.8 acres of onions, causing him $3,100 damages in loss of crops. Appellant Diamond Alkali Company manufactured the chemical, which appellant Twin Falls Feed sold to Bean. The case was tried before a jury, which returned a verdict in favor of Bean. The two corporate defendants appeal from the judgment entered following the verdict.

Briefly, the facts developed at the trial were that respondent Bean had discussed with an employee of Twin Falls Feed the use of a pre-emergence chemical herbicide produced by Diamond Alkali Company. Bean decided that this herbicide should be used on a field which he was preparing to plant to onions for the purpose of producing a crop of seed. In 1965 an employee of Twin Falls Feed applied the chemical to the field, which was then sown by Bean. A "very good stand" of onion plants emerged from the ground, but after a few weeks, portions of the plants discolored and later, within a month and a half, 85% of the plants died. Bean notified appellant Twin Falls Feed, but no action was taken regarding the damage.

The case was tried solely upon the theory of a breach of warranty, the controversy centering on the cause of the damage to respondent's onions. The appellants denied that the herbicide was the cause and called two expert witnesses, each of whom testified that in his opinion the herbicide probably did not cause the damage. The respondent, on the other hand, contended that the herbicide did cause the damage, and supported his contention with the testimony of several farmers with long experience in the cultivation of onions, each of whom testified that in his opinion the damage was caused by the chemical herbicide applied to the land.

One of respondent's witnesses, Robert Blass, whose property is located about two miles east of respondent's property, testified that he had thirteen years experience as a farmer and ten years experience raising onions, including the type of onions involved in this action. He testified that during the same years involved here, he had raised onions on his own farm under soil and climatic conditions comparable to those prevailing on respondent's farm, and that on a 7.7-acre field planted to onions, he used the herbicide in question on a large portion of it. He also left one strip in the field where no herbicide was used, and finally on the rest of the field he used another herbicide. He testified that about half of the plants died where the herbicide in question was used, but that in the rest of the field the plants matured normally.

The witness was then asked whether he had an opinion as to what caused the damage, at which point the appellants objected on the ground that the question called for a conclusion of the witness and that he had not been shown to be qualified to answer. After further examination regarding the witness's experience in raising onions, the trial court allowed the witness to answer. He testified that he did have an opinion as to the cause of the damage, stating that it was his opinion that it was caused by the chemical herbicide involved here.

As a general rule a witness may testify only as to concrete facts within the scope of his own observation, knowledge and recollection, as distinguished from his opinions,

conclusions or inferences drawn from those facts. There are, however, several exceptions to this rule, one of which relates to expert testimony. An expert is generally defined as someone possessing a certain skill or knowledge which is beyond the competence of the average layman or juror.

In the present case the witnesses called by the respondent were farmers with long experience in raising onions. Although none had formal education or training in plant pathology or herbicides, they were all familiar with the cultivation and harvest of onions and with the diseases to which onions are subject. It is settled that formal training or education is not essential to qualify a witness as an expert. Practical experience will suffice for such purpose.

In the case at bar the district court ruled that the respondent's witnesses were qualified as experts. We are unable to say that this determination was an abuse of discretion. Additionally the district court carefully admonished the jury each time it overruled the appellants' objection to opinion testimony and instructed the jury at the close of the case that the opinions would be admitted into evidence, but that in weighing the evidence the jury should take into consideration the background and qualifications of the witnesses. It is our opinion that the trial court did not err in overruling the appellants' objections to this evidence and submitting it to the jury for its consideration.

Judgment affirmed.

Martin v. State

Court of Appeals of Maryland (1978)

The issue in this criminal case is the admissibility of voice identification testimony based on the analysis of spectrograms, commonly described as "voiceprints."

In September 1974, a woman was raped late at night, outside her home. She immediately entered a hospital for treatment and reported the incident to the police. The following afternoon, she received a telephone call from a person who identified himself as her assailant. The victim notified the police, who attached a recording device to the telephone. During the next three days, the victim received and recorded seven telephone calls, all apparently placed by the original caller. Martin was subsequently arrested and indicted for rape.

In May 1975, Martin was compelled to submit voice exemplars to the State's Attorney. Martin was required to repeat, into a telephone connected to a recording device, the words spoken to the victim by her assailant in the September 1974 telephone calls. These tapes, together with a composite recording of the calls made by the assailant, were then sent to the Voice Identification Unit of the Michigan State Police Department for spectrographic analysis and comparison. This test resulted in an alleged positive identification of Martin as the speaker on four of the seven calls made by the rapist.

A pretrial suppression hearing on the admissibility into evidence of voice identification testimony based on spectrographic analysis was conducted in the Circuit Court. After hearing evidence on the general validity and reliability of the spectrographic method of identification, the trial court ruled that the State could introduce at Martin's criminal trial expert testimony based on spectrographic analysis for the purpose of voice identification.

It is recognized that prior to the admission of expert testimony based on the application of new scientific techniques, it must be established that the particular scientific method is reliable.

The question of the reliability of a scientific technique or process is unlike the question, for example, of the helpfulness of particular expert testimony to the trier of facts in a specific case because it does not vary according to the circumstances of each case. It is therefore inappropriate to view this threshold question of reliability as a matter within each trial judge's individual discretion. Instead, considerations of uniformity and consistency of decision-making require that a legal standard or test be articulated by which the reliability of a process may be established.

The test which has gained general acceptance throughout the United States for establishing the reliability of such scientific methods was first articulated in the leading case of Frye v. United States:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or

> discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (Emphasis supplied.)

That is to say, before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. Thus, according to the Frye standard, if a new scientific technique's validity is in controversy in the relevant scientific community, or if it is generally regarded as an experimental technique, then expert testimony based upon its validity cannot be admitted into evidence.

The identity of the relevant scientific community is, of course, a matter which depends upon the particular technique in question. In general, members of the relevant scientific community will include those whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about it. In unusual circumstances, a few courts have held that the experts thus qualified might properly be from a somewhat narrower field.

Our adoption of the Frye standard does not, of course, disturb the traditional discretion of the trial judge with respect to the admissibility of expert testimony. Frye sets forth only a legal standard which governs the trial judge's determination of a threshold issue. Testimony based on a technique which is found to have gained "general acceptance in the scientific community" may be admitted into evidence, but only if a trial judge also determines in the exercise of his discretion, as he must in all other instances of expert testimony, that the proposed testimony will be helpful to the jury, that the expert is properly qualified, etc. Obviously, however, if a technique does not meet the Frye standard, a trial judge will have no occasion to reach these further issues.

Turning to the admissibility of testimony based on the voiceprint process, the trial court, in holding voiceprint evidence admissible, construed the Frye test to require "general acceptance within the group actually engaged in the use of this technique and in the experimentation with this technique." We have serious doubts that voiceprint analysis meets even this reduced standard. Expert testimony indicates substantial division of opinion among those who have done work or performed experiments relating to the voiceprint process.

In any event, we find that the trial court's formulation is inconsistent with the proper standard of acceptance necessary for admissibility. The circumstances of the instant case suggest no basis for restricting the relevant field of experts to those who have performed voiceprint experiments, and eliminating from consideration the opinions of those scientists in the fields of speech and hearing, as well as related fields, who, by training and education, are competent to make professional judgments concerning experiments undertaken by others. The purpose of the Frye test is defeated by an approach which allows a court to ignore the informed opinions of a substantial segment of the scientific community which stands in opposition to the process in question.

Based on our examination of the record in the instant case, the judicial opinions which have considered this question, and the available legal and scientific commentaries, we do not believe that "voiceprint" analysis has achieved the general acceptance in the scientific community, at this time, which is required under Frye. We therefore hold that testimony based on "voiceprints" or spectrograms is, for the present, inadmissible in Maryland courts as evidence of voice identification.

Coppolino v. State

Court of Appeals of Florida (1980)

Defendant Coppolino appeals a conviction of first-degree murder of his wife. Defendant bases this appeal solely on alleged error in the admission of expert testimony of a witness for the State, Dr. Umberger.

Coppolino is an anesthesiologist. Although there was a needle injection tract in the left buttock of the deceased, his wife, an autopsy and general toxicological investigation did not disclose a possible cause of death. The cause of death was suspected to be an overdose of succinylcholine chloride, a muscle relaxant which may cause a cessation of breathing. It was thought that this drug could not be detected in a person's body after death.

A toxicologist named Umberger developed tests specifically for this case. Dr. Umberger attempted to establish a method whereby he could determine if unusual amounts of the component parts of succinylcholine chloride were present in the body tissue. Dr. Umberger testified that some of his tests and procedures were standard ones and that some were new. As a result of his tests, Dr. Umberger reached the conclusion, and so testified, that Carmela Coppolino received a fatal dose of succinylcholine chloride.

There was evidence that this was the first instance in which such procedures had been used. Several witnesses, including those called by the State, testified that, prior to the performance of the tests in question, it was believed impossible by medical scientists to demonstrate the presence of succinylcholine chloride or its component parts in the body.

Coppolino argues that the admission of Dr. Umberger's testimony is contrary to the frequently cited standard set forth in Frye v. United States. However, the standard enunciated in Frye for determining admissibility of scientific evidence has been criticized by a number of respected scholars. Some object to the test generally. Others point to its inapplicability in the type of case at bar. McCormick's textbook on the Law of Evidence states, "So far as it can be dated, the notion of a special rule of admissibility for scientific evidence seems to have arisen in 1923," referring to Frye. After pointing out that "no authority was cited" for the court's conclusion in Frye, the author states:

> General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of "general acceptance" not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances.

Up to the present time, courts have been nearly unanimous in rejecting testimony based on lie detectors or polygraphs. It can be concluded that the courts, in considering the admissibility of lie detector evidence, have not merely excluded the evidence but

have judged it by a different standard from the standard which is established for determining admissibility and applied to other scientific evidence.

This different standard originated with the first appellate decisions to consider the lie detector, Frye. The holding of that case, however, was grounded in the same principles that apply to other expert testimony; the appellate court merely refused to hold that the trial judge abused his discretion.

Not being subject to the special considerations which apply to the lie detector, other types of scientific evidence would appear to be properly admissible when relevant under the general rule, without regard to "general acceptance."

It is the rule in Florida that the trial judge enjoys wide discretion in areas concerning the admission of evidence, and his ruling on admissibility of evidence will not be disturbed unless an abuse of discretion is shown. The problem presented to the trial judge in the instant case was whether the scientific test performed by Umberger were so unreliable and scientifically unacceptable that their admission into evidence was error.

On appeal, it is incumbent upon defendant to show that the trial judge abused his discretion. This the defendant has failed to do, and the judgment of the trial court is affirmed.

MODEL ANSWER

> This "model" answer has been prepared and edited for the limited purpose of illustrating the writing style and one possible organization method. You should not rely on this answer for accurate black letter law nor are the writer's conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing Performance Test essay. Another passing answer could have a completely different analysis and conclusions.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Expert testimony is admissible under the Evidence Code of Columbia

Reynolds seeks to introduce the expert testimony of Edwin Hardy on the link between epoxy resins and cancer. Under the Evidence Code of Columbia § 801(a), opinion testimony by an expert witness is allowed when it is beyond common experience and would help the trier of fact. The technical aspects of epoxy glue are certainly beyond the competence of the average layperson. Since the issue of causation is central to the case, the jury would be assisted by expert testimony about any possible links between epoxy exposure and cancer. Therefore, so long as the expert met other requirements in the Evidence Code, opinion testimony by an expert witness on the issue of epoxy glue and cancer would be admissible at trial.

II. Hardy is an expert in the field of occupational hazards and can testify on the issue of causation

According to Evidence Code of Columbia § 720, in order to be qualified as an expert witness, one must have special knowledge, skill, experience, training or education in the relevant field. In Reynolds v. ACME, the relevant field is occupational safety and the particular issue about which Hardy seeks to testify is causation. Specifically, Hardy will use his special knowledge, experience, training, education, and work experience to testify about the connection between uncured epoxy glue and cancer.

A. Hardy has special knowledge, experience, training, and education in the relevant field of occupational safety

First, Hardy, a Ph.D. in Environmental Studies, possesses special knowledge about the relationship between toxins at work and cancer. He conducted a study that was published in the reputable Journal of Environmental Studies only a few years ago and he had another study published in 1976 in the Social Science Review as well. Hardy is an occupational safety consultant and a professor of Environmental Studies at Golden City Community College. In addition, Hardy worked as a research assistant to Dr. Rock, a leader in the environmental studies field, for two years at Golden West University, as a research consultant for the State of Columbia Office of Safety and Welfare, and as a field investigator for the Occupational Safety and Health Administration (OSHA).

Second, Hardy has experience in occupational safety and the issue of carcinogens in the workplace. Again, his Ph.D., publications, and work experience for Dr. Rock, as a college professor, and as an occupational safety consultant all speak to

Hardy's experience. Hardy also worked for OSHA, which deals directly with issues such as carcinogens in the workplace as well as other occupational safety issues.

Finally, Hardy also has training and education in the occupational safety field. He earned a B.S. in environmental studies from the University of Southern Columbia and a Ph.D. in environmental studies from Golden West University. While earning his Ph.D., Hardy worked as a research assistant for Dr. Rock, a Ph.D. and M.D. highly respected in the environmental studies field. All of these jobs and experiences combine to give Hardy special knowledge, experience, training, and education in the field of occupational safety and would be more than sufficient under Evidence Code § 720 to qualify him as an expert witness.

B. Hardy meets the standards for expert testimony set forth in *Bean* and *Cavalier*

ACME will likely assert that Hardy's extensive training, education and work experience is not specific enough to the study of carcinogens in the workplace and that therefore he should not be considered an expert who can testify as to causation. However, both Hardy's resume and the case law cut against this assertion. Hardy's education, jobs and publications all give him the expertise required to give an opinion on whether uncured epoxy resins can cause cancer. Given his extensive work in the occupational safety field, Hardy easily meets the standards employed by other courts in deciding such an issue. In *Bean*, the Court of Appeals of Idaho determined that an expert doesn't necessarily need even formal training or education. Rather, practical experience can count.

At issue in *Bean* was whether a trial court erred in allowing farmers to testify about causation as experts based only on their experience in farming. The Court of Appeals of Idaho affirmed the lower court's admission of the testimony. The farmers had no formal education or training on the issue of whether a certain chemical herbicide could cause onion crops to die. However, the court allowed them to testify about causation, the crux of the case, because they had experience growing onions. The state of Columbia should adopt Idaho's common sense approach and allow Hardy to testify on the issue of causation so long as he has personal experience on which to base his opinion.

Just like the holding in *Bean*, the holding of *Cavalier* provides guidance clearly in favor of admitting Hardy's expert opinion testimony. In *Cavalier*, the Supreme Court of Pennsylvania admitted an expert's testimony on the issue of sanity even though he was not a psychiatrist and had only a general knowledge of insanity, as much as any "ordinary medical practitioner" would have. Although the expert witness' training did not specialize in the particular field of insanity or the treatment of mental diseases, the court determined that his generalized medical knowledge was enough to bring questions of insanity within his expertise. Since there is no "hard and fast rule" about how much experience in a narrow practice is enough to make someone an expert, the court chose to err on the side of admitting the testimony. It indicated that the real question was how much weight to give such testimony—a question, of course, for the trier of fact. The Court of Appeals of Idaho focused on the same question in *Bean*. In affirming that the farmers' opinions could go to the jury, the court noted that the trial judge had instructed jurors to take the witnesses' background and qualifications into consideration when weighing the testimony.

Given the reasoning in *Bean* and *Cavalier*, even if the court finds that Hardy is not a specialist in the narrow field of causation, his training and education in the more general fields of occupational safety and environmental studies are enough to let his

testimony in at trial. Hardy certainly meets at least the low threshold necessary to testify and allow the trier of fact to decide how much weight to give his opinion. However, no matter what test the court employs, Hardy would still meet the standards for giving expert testimony. Not only does Hardy have formal training and education, he also has the necessary personal experience in the field through his study of 1,000 people to determine if there was any link between industrial work and cancer. He also has practical work experience like the farmer expert in *Bean*. Hardy's work as Dr. Rock's research assistant, as a professor in environmental studies, at OSHA, and as an occupational safety consultant have all provided him with enough practical experience to be qualified as an expert able to testify on the issue of causation.

III. Anthropological studies are reliable both under *Coppolino* and the more rigorous *Frye* standard

In his publication, Hardy used a method called an "anthropological study" rather than a medical study. Simply put, an anthropological study takes place in the field rather than artificially in a lab. Hardy is well versed in both the merits and potential drawbacks of anthropological studies, having used them in his research and authoring the study "The Use of Social Science Methodology in Evaluation of Scientific Data." The anthropological study methodology is reliable and should be allowed to form one basis of Hardy's expert opinion.

Under the *Frye* standard set out in *Martin*, a scientific discipline must be sufficiently established to have gained general acceptance in its field. However, *Coppolino*, the most recent case on point, rejected this standard. *Frye* arose in 1923, when the field of scientific advancement was significantly different and much more fixed than today. In *Coppolino*, the Court of Appeals of Florida rejected *Frye*, instead agreeing with McCormick's criticism and allowing the admission of expert testimony in a newer field. McCormick critiqued *Frye* first for creating a standard out of whole cloth and second for excluding scientific advances because of an impractical standard. McCormick argued that general acceptance in the scientific community might be a proper standard for taking judicial notice, but not for admitting expert witness testimony. Consistent with *Bean* and *Cavalier*, McCormick advocated allowing in such testimony so long as it meets the usual balancing test requiring probative value to outweigh any prejudicial effect.

Just as in *Coppolino*, the causation evidence in the case at bar comes from a highly educated scientist in the field using a newer research methodology to reach his conclusions. The court should be able to hear his evidence, as McCormick argues, in order to move forward along with scientific advances and not wait until they have existed for years, maybe decades, before accepting them. Columbia should adopt the more current *Coppolino* reasoning, which relies on McCormick's rational test to allow scientific advancement in the courts. As the Court of Appeals of Florida noted, trial judges' rulings on the admissibility of evidence are judged by an abuse of discretion standard, which gives them wide latitude to allow in expert testimony.

Even if the Columbia courts accept the *Frye* standard articulated in *Martin*, Hardy's anthropological studies would meet the requirements. First, Dr. Rock, a leader in the field, Hardy, and Dr. Lee all use anthropological studies. They have been published in respected journals and written books that rely on the method. Such publishers and publications in the field of environmental studies and occupational health would not accept these books and articles if their methodology were flawed. Also, before a scientific article is published it is peer reviewed. Second, the opinion of Dr. Mendez, who is opposed to the methodology, does not matter under the *Frye* standard because Dr. Mendez only wrote about the methodology in the context of education, and the

controversy must be in the relevant scientific community. That only leaves Dr. Wang who criticizes anthropological studies. Certainly if one scientist's opposition were enough to discount expert testimony there would be no scientific studies in courtrooms at all. In *Martin*, voiceprint analysis was opposed by a substantial amount of those who had used and studied the process. The court indicated that there was far more than one scientist with a negative professional judgment about the technique. Hardy's methods are reliable within the occupational safety discipline even under the *Frye* standard.

IV. Hardy's testimony is based on appropriate data

Hardy based his testimony on his own study as well as the study of Dr. Rock. Under Evidence Code of Columbia § 801(b), an expert's opinion testimony must be based on matter on which other reasonable experts would rely. Cases such as *Cavalier* and *Bean* also suggest courts should err on the side of admissibility when applying this standard. Hardy's reliance on Rock's book is certainly reasonable given that it is the standard text at a major, accredited university. It contains studies conducted by Dr. Rock as well as other scientists. Dr. Rock himself has an M.D. as well as a Ph.D. in Biochemistry and before his death he was an expert in his field. It is also reasonable for Hardy to rely on his own research since he has personal knowledge of it and its outcomes gained through conducting the investigations himself. Experts can generally be expected to reasonably rely on their own studies when forming scientific opinions. Evidence Code of Columbia § 802 allows an expert witness to testify about his own special knowledge that forms the basis of his opinion. Among other things, this would include Hardy's research and published studies that gave him reason to believe there is a link between uncured epoxy resins and cancer. It is therefore appropriate for Hardy to have relied on his own study and that of Dr. Rock. They are both materials that, in the same situation, another expert would reasonably rely on to form a basis for his or her conclusion, the standard under § 801(b).

V. The court should err on the side of admissibility for Hardy's testimony

Following *Bean* and *Cavalier*, the court should err on the side of admitting Hardy's expert opinion. The standard in the courts of appeals is an abuse of discretion. Given Hardy's large body of experience and work it would not be such an abuse to allow him to testify about the link between uncured epoxy resins and cancer at trial. He will, under § 721, be subject to cross-examination and then it will be up to the jury to determine how much weight to afford his testimony given Hardy's qualifications, methodologies, and experience. Hardy's testimony would aid the trier of fact and his qualifications bring him squarely within the discretion of the court to allow him to testify on the issue of causation.

MEMORANDUM

The statement from Dr. Rock's book, The Environment and Your Health, would be considered hearsay evidence under Evidence Code of Columbia § 1200 because it is an out of court statement made by someone other than Dr. Rock offered for the truth of the matter asserted. However, despite its nature as hearsay, there are two possible ways to get the excerpt from Dr. Rock's book admitted at trial. First, Hardy can testify as an expert and use Dr. Rock's book as the basis for his opinion. Second, an expert can testify and attempt to validate the book as a publication concerning facts of general notoriety. Of the two options, the first has a significantly higher chance of success and should be used to get Dr. Rock's quotation admitted into evidence.

The Environment and Your Health forms part of the basis for Hardy's expert testimony, and such reliance on the opinion of another is allowed under Evidence Code of Columbia § 804. The fact that Dr. Rock is deceased and therefore not subject to cross-examination does not invalidate Hardy's right to rely on the doctor's book at trial. So long as Hardy is qualified as an expert, he can testify about the contents of Dr. Rock's book even though it would be hearsay because there is an exception for learned treatises. Under § 1342, statements from a learned treatise may be read into evidence if an expert relies on them during direct examination or is cross-examined about them, the statements are contained in a published treatise, periodical, or pamphlet, they concern history, medicine, science or art, and they are established as a reliable authority by the witness or via judicial notice. Dr. Rock's book was published and is in a scientific field, one of the subjects specifically enumerated in the Code. Hardy also testified in his deposition that the book is the standard text at an accredited university and therefore if he were to testify as to the same at trial it would be considered a reliable authority. If Hardy were not qualified as an expert witness Reynolds could instead bring another expert to trial who would have the same ability as Hardy to introduce the book so long as he or she relied upon it in forming the basis of an expert opinion.

Another possible way around the hearsay rule with a much smaller chance of success is to try to classify the book as a publication concerning facts of general notoriety under § 1341. Such a work must be in the field of history, science or art, made by someone indifferent to the parties, and used to prove facts of general notoriety or interest. The Environment and Your Health would likely not be considered such a publication although it is a work of science made by someone indifferent between the parties (i.e., Dr. Rock didn't write it with the litigation in mind or to help either side make a stronger case). The problem with Hardy testifying about Dr. Rock's book is that uncured epoxy and its carcinogenic effects are not facts of general notoriety. Rather, they are highly technical, specialized facts and likely would not fall under this exception to the hearsay rule.

Finally, it is important to note that § 1342 explicitly allows the statement Hardy relies on to be read into evidence, but does not allow Dr. Rock's entire book to be admitted as an exhibit. Therefore, it is only possible to read the excerpt and not to allow the jury to access all of The Environment and Your Health. However, using that same Evidence Code section, Hardy should have no problem testifying about the excerpt from Dr. Rock's book.

IN RE SHARON DAVIS

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Your firm represents Sharon Davis, a dental student.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare a memorandum.

4. The File contains factual information about your case in the form of three documents. The first document is a memorandum to you from Ann Silver containing the instructions for the memorandum you are to prepare.

5. The Library includes federal regulations and three cases which are identified as decisions of the Supreme Court of the United States and the United States Courts of Appeal. They may be real cases; they may be cases in which a real opinion has been modified; they may be cases written solely for the purpose of the examination. Although the opinions may appear familiar to you, do not assume that they are precisely the same cases you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown.

6. Your memorandum must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should 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. In citing cases from the Library, you may use plaintiffs' names (e.g., Kamen) and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing your memorandum.

9. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of the memorandum you write. In grading the answers to this question, we anticipate that the following, approximate weights will be assigned to each part:

A: 25 - 30%

B.: 65 - 75%

FILE

Cortez & Silver
Attorneys at Law
Bloomfield, Columbia

MEMORANDUM
February 24, 1987

To: Applicant
From: Ann Silver
Re: Counseling Plan for Sharon Davis

I have accepted Sharon Davis as a new client of our firm and want your help in planning how to counsel her regarding the problems she has had as a student of the Middletown University School of Dentistry, a local private institution. Although a brilliant student for her whole life, having received numerous awards for academic achievement in college, Sharon developed an unusual learning disability early on in her first year of dental school. This disability interfered with her ability to read and write and consequently she had a disastrous first semester which led to her present difficulties with the school.

Our file contains a transcript of my interview with her. She is an impressive person in that she is quite determined not to let this disability prevent her from realizing her ambition to become a dentist. However, only if the school is willing or is required to make some changes in its program on her behalf is it possible for her to succeed. Our client is 23 years old, quite articulate, personable and poised. She grew up here in Bloomfield and has lived here throughout except for the four years she spent back east in college. I represented her father 7 years ago in a (successful) minor personal injury case and he referred her to our firm.

From what she told me in the interview it appears that the school has given her the run-around. My guess based on a quick reading of some cases is that they have obligations stemming from Section 504 of the Rehabilitation Act of 1973 (The Handicapped Civil Rights Act). I have assembled a library of federal cases and regulations for us to use in figuring out what those obligations are and how they might be enforced to help Sharon. (There are no reported cases from the 12th Federal Circuit Court of Appeals, the Circuit in which Columbia is located.)

I want to prepare to counsel her to assist her in making a decision about what action or actions to take to put her professional education back on track. I want to be able to explain carefully what alternatives are available and advise her as to the likelihood that each of the alternatives will meet her needs.

Please write a memo for me covering the following:

A. On the basis of the materials in the library, analyze briefly whether Sharon is covered by Section 504.

B. More important, prepare an evaluation of the options available to Sharon in which you do the following:

1. Based on your analysis of Sharon's goals, identify the various courses of action which can be pursued by Sharon or on her behalf. To the extent that there are choices other than commencing a lawsuit, be certain to describe them.

2. For each course of action you have identified, evaluate whether the probable outcome would accomplish what Sharon wants. Include in your evaluation a discussion of any desirable and undesirable consequences that will accompany each course of action.

3. For each course of action, indicate what additional factual or legal information is needed to complete the evaluation.

TRANSCRIPT OF INTERVIEW WITH SHARON DAVIS, FEBRUARY 17, 1987

(Note: The first several minutes of the interview involved small talk about how Sharon decided to go to dental school, on her work as an undergraduate and other background information.)

ANN SILVER: So, Sharon, why don't you tell me about the problem you have been having with the Middletown University Dental School.

A. The short of it is that I flunked all of my examinations at the end of my first semester of dental school and was dismissed from the school midway into the second semester. It turns out that I have a reading problem which stems from vision dyslexia that has happened only since I entered dental school. The school refuses to do anything to help me.

Q. Vision dyslexia? Can you tell me what that means?

A. Well, it means that I can read but that the reading I think I am doing is not absorbed by my brain. It is only when I try to repeat back what it is I think I have learned that I discover I haven't absorbed much of what I have read.

Q. That sounds like it would make dental school impossible.

A. Well I didn't realize I had this problem until I took my first exams at the dental school. When I got my grades back and they were all flunks, I was really amazed because I thought I did all right on them. In fact, I was told that some of what I wrote made little sense. I ended up going to an ophthalmologist for an eye examination and he confirmed that there was something wrong with my eyes. He said that I have a rare disorder similar to the learning disability from which many children suffer, dyslexia. What is rare about the form of the disorder that I have is that it surfaced for the first time in adulthood and he said that no one was certain exactly why that happens. The problem seems to be one of binocular coordination, that is, my two eyes are not working together and thus my brain is not receiving the proper stimulus to enable me to decode the letters on the page.

Q. That sounds frightening. Is there any hope that the situation will improve?

A. There are several things that we are trying. One is that I am doing the eye exercises that he prescribed but it will take some time before I know any results. Another thing is to experiment with corrective lenses. The first pair that was tried didn't help but I am optimistic. I really won't know for sure until I can test them in an academic setting. Even so, I'd better be prepared for the possibility that I may never be able to read or write normally. Luckily I didn't choose a career where reading and writing are the essence of the work.

Q. How does this all relate to your ability to function as a dentist?

A. There doesn't seem to be a problem with my ability to learn to diagnose dental problems, to learn to work with my hands, or to do things requiring fine motor coordination. My learning disability does not appear to be in any way related to dental work, only to dental school. Of course the clinical part of dental

school doesn't begin until after the second year and as things now stand I am not past my first year.

Q. Can you go back to the beginning and tell me what has happened between you and the school?

A. I started in the fall of 1985 and soon after the semester was underway I knew that I was having trouble. I found the work very difficult but was afraid to acknowledge that to myself. After all, it is supposed to be hard. Toward the end of that semester I approached a few of the professors, the ones who seemed vaguely sympathetic to students. I told them that I was confused about why I was finding it so hard to comprehend what I was being taught. In my conversations with them I began to notice that I knew well what was taught in class, the lectured material, but didn't seem to be able to retain the stuff that I read. One of them told me that perhaps I wasn't right for dentistry and that there was no shame in that. Another suggested that I get counseling. By then it was time to take the first semester's examinations and I convinced myself that because I was working so hard I surely would do okay. As I said, I didn't, and as far as the school was concerned that was enough for them. I saw a counselor at the end of last February and we met several times. She was very perceptive, as it turned out, and suggested that I see an eye doctor at the University's medical school.

Q. And that was the doctor who discovered your problem?

A. Yes. Dr. Jung diagnosed the eye problem and the connection between it and my learning difficulty. He referred me to the Columbia Center for Learning Disabilities and to the Columbia chapter of the National Dyslexia Association. The NDA has had a lot of experience with working with schools and getting them to help students with dyslexia. The Center for Learning Disabilities specializes in developing individualized programs for people with learning problems. Before the people at the Center could see me, however, the Academic Progress Committee met at the dental school and decided that I was a problem student who should be immediately flunked out of school. When I went to see the Academic Dean, William Bass, to tell him about my medical problem he listened but then delivered the bad news that I was thrown out of school. He did agree to go back to the APC if my medical condition could be substantiated and if there was some assurance that I could succeed in raising my level of performance. However, he would not permit me to continue in school until then and said that University rules prohibited the return of my tuition payment since six weeks of the spring semester had passed.

Q. What did you do next?

A. I asked Dr. Jung to contact Dean Bass. The result of that conversation was that Dean Bass agreed to recommend that I be given a medical leave for the spring semester which would make me eligible for return if, in his words, I could "correct the problem." Dr. Jung also suggested to Dean Bass that I probably could do well if I could take a reduced course load but the Dean said that there was a standard required curriculum.

Q. That doesn't sound too helpful. How did you react to it?

A. I was enraged but there didn't seem to be much I could do. There is a form at school called a "Request for Dean's Action." I filed one and asked that they

rescind the dismissal and permit me to complete the semester. I got a letter in response telling me that they wanted to wait until they knew precisely what my problems were and how they could be solved before they let me back in.

Q. It would be helpful if you get me a copy of that letter.

A. No problem. I'll bring you everything that I have. I know that Dr. Jung followed up his phone conversation with Dean Bass by sending him a letter which he told me provided a complete diagnosis of my problem. The last time I saw Dr. Jung, he said that Dean Bass never responded to his letter.

Q. Have you any sense of what changes would enable you to get through the program?

A. I do now. I have been working with the team at the Center for Learning Disabilities. Dr. Jane Snider is the leader of a team of medical doctors, educational psychologists and special educators. They conducted a lot of tests and confirmed that I had a learning disability incident to the vision problem and began to work on a treatment program. Ultimately they concluded that, unless my problem clears up, the only way I can succeed in school is if the school is willing to make some adjustments to the program for me. Dr. Snider is certain that if I can do the work if the pressure of time is removed to accommodate for the fact that I can comprehend written materials if I read slowly. She believes that if I can arrange to receive more information orally by using readers, I will benefit significantly. The team said that I need more time to take tests because I can do better without the time pressure and that I should be permitted to use a word processor to write responses because that would improve my ability to write. They also said that I should have a tutor or a reader when I study so that I can get through the assignments without having to read for so many hours. Also, because I can't take notes efficiently, they recommend that I tape-record the classroom lectures.

Q. Is Middletown willing to do any of this?

A. A big problem is the fact that I just don't know. They refuse to give me any assurances that if I return they will do anything for me. Dean Bass wrote me a letter saying that he would try to work something out. I brought it along. Here.

Q. Thanks.

A. I feel that it would be a big gamble to go back to MU and waste another year without any guarantee that they will make the changes that I need. Also, I do not think that it is fair for them to charge tuition again since I paid for a second semester of education which I did not receive. It costs $8,000 each semester to go there.

Q. That's a lot of money.

A. You're telling me! It costs twice as much as it did before all of the cutbacks in federal funds. They say that the school gets a lot less federal money than it used to. Also, federal grants to medical and dental students are hard to come by these days.

Q. How can you afford it?

A. During my first year the combination of loans plus help from my parents got me through. I can't continue unless I get a guaranteed student loan. The problem is that loans students can get through the school are available only to students in good standing. If my transcript still looks like it did the last time I saw it, I am definitely not in good standing.

Q. What did it say?

A. It listed a grade of "F" for every course that I took in the first semester and said that I had been dismissed for academic reasons.

Q. When did you see that?

A. In August, when I enrolled in an anatomy course at Patrick Medical College, I had to provide them with a transcript. When they got it they called me in to see if I really ought to take the course. They were nice enough to consider the reasons for the record and to let me take the course. They also had no problem letting me do the things suggested by Dr. Snider. I used a reader and they let me take the examination orally. The prof's secretary read it to me and I dictated the answer.

Q. So, how did you do?

A. I thought you'd never ask. I just got my grade yesterday and got a B+!

Q. Wonderful! Congratulations. That ought to impress the dental school, don't you think?

A. Who knows what will impress them.

Q. By the way, does Patrick Medical College have a dental school?

A. Yes, but as you probably know it is not as highly regarded as MU's. Maybe that's why they were so much more helpful than anything I have come to expect from my school. I thought about transferring but it's hard to decide. I really liked it but it's a 50-mile drive from here and I don't want to live in Waterbury. With the winters
being what they are here in Columbia it would be stupid to try to commute. Also, it's cheaper to live here at home with my family and I've recently become romantically involved with someone who works at the local zoo. The Admissions Director at Patrick did tell me that they have an unexpected vacancy in the class and that I could either go there for a semester or transfer there permanently. But the Director did say that admission to Patrick was granted on the assumption that I could get Middletown to expunge my first-year record.

Q. I understand your reluctance to transfer. The disruption would be no fun. I hope we can solve your problems with MU. I assume that's why you decided to come to a lawyer.

A. Yep. I want to know if I have legal rights which can help me through this. I am reluctant to sue anyone because I am not a contentious person but my entire future is at stake. I would be worried about the publicity and nervous about court . . . also I know that litigation is expensive.

Q. Don't worry, we won't sue anyone unless you decide that's what you want. I want to assure you that before we take any action I will review all of the options with you we will take as much time as necessary to enable you to consider all of the advantages and disadvantages of every option that interests you. We may have choices based on your legal rights that don't involve going to court. Direct negotiations with Middletown may be possible, and there may be other solutions I haven't thought of yet. What I want to do for you is to identify all of the alternative ways in which we can approach a solution and review with you the likelihood that they will produce the results that you want. You can then weigh their advantages and disadvantages so that you can choose the one with which you are most comfortable.

A. Do you think that I have a good case?

Q. I am sure that we can help you. I can't give you anything specific until I have a chance to do some legal research. Even though I am somewhat familiar with the law in this area, I want to be sure that my knowledge is up to date before I tell you what I think are your rights. I know that you are anxious to get back on the path to becoming a dentist so I am prepared to move quickly. If you would like to retain our firm to represent you we will do the necessary legal research within one week and we can get back together next week so that I can counsel you about your choices. At that meeting I will also ask one of our associates to join us so that we can brainstorm together about what should be done.

A. I would appreciate it if you would do that. Can you tell me what this will all cost?

[Discussion of fees omitted]

Middletown University School of Dentistry
Bloomfield, Columbia

February 10, 1987

Ms. Sharon Davis
143 Chesterfield Road
Bloomfield, CO

Dear Ms. Davis:

I have considered your request that I set aside the decision of the Academic Progress Committee.

After full consideration, including several conversations with your physician, Dr. Jung, I have decided to recommend that you be readmitted next academic year and given another chance to complete the first-year curriculum. This would be with the understanding that you have been sufficiently rehabilitated to complete all of the Dental School's program requirements.

We believe that all components of the School's educational program are essential to prepare one for practice. The Dental School's curriculum is the product of years of study by the faculty and profession of what is essential to prepare one to practice competently. It is our obligation to assure that graduates can meet the high standards of professional competency required in the public interest. I could not and will not recommend that our educational standards be lowered.

Furthermore, in order to be licensed, the Columbia Board of Dental Examiners (CBDE) requires passage of a timed, written examination under conditions similar to those which exist at Middletown.

This office will work with you in any reasonable efforts to assist you in completing the program requirements. Please let me know by March 30 whether you will be registering for next fall.

Sincerely,

/s/ William Bass

William Bass, Dean

LIBRARY

REHABILITATION ACT OF 1973

§504. No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

REGULATIONS INTERPRETING §504, NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A - GENERAL PROVISION

§80. Definitions. As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973.

(b) "Section 504" means section 504 of the Act.

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(d) "Department" means the Department of Health and Human Services.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, but excluding the ultimate beneficiary of the assistance.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in any form.

*****

(j) "Handicapped person."

(1) "Handicapped person" means any person who

(i) has a physical or mental impairment which substantially limits one or more major life activities,

(ii) has a record of such an impairment, or

(iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means

(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

(B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(k) "Qualified handicapped person" means:

* * * *

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

Subpart E - POSTSECONDARY EDUCATION

§84. Application Of This Subpart. Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§85. Admissions and Recruitment. Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

§86. Treatment of Students; General.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(c) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§87. Academic Adjustments.

(a) Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) Other rules. A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) Course examinations. In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) Auxiliary aids.

(1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to

discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§88. Procedure for Effecting Compliance. If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

Southeastern Community College v. Baker

Supreme Court of the United States (1979)

This case presents a matter of first impression for this Court: Whether §504 of the Rehabilitation Act of 1973, which prohibits discrimination against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap," forbids professional schools from imposing physical qualifications for admission to their clinical training programs.

I. Respondent, who suffers from a serious hearing disability, seeks to be trained as a registered nurse. During the 1973 - 1974 academic year she sought enrollment in the Associate Degree Nursing program of Southeastern Community College, a state institution that receives federal funds. While wearing a hearing aid, she is well aware of gross sounds occurring in the listening environment but her lipreading skills would remain necessary for effective communication: thus she can only be responsible for speech spoken to her, when the talker gets her attention and allows her to look directly at the talker.

Southeastern consulted the Executive Director of the North Carolina Board of Nursing who recommended that respondent not be admitted to the nursing program on the grounds that respondent's hearing disability made it unsafe for her to practice as a nurse. In addition, it would be impossible for respondent to participate safely in the normal clinical training program, and those modifications that would be necessary to enable safe participation would prevent her from realizing the benefits of the program: the Executive Director stated, "Her hearing disability could preclude her practicing safely as a Registered Nurse."

Southeastern denied her admission on the basis that the available evidence was that respondent "has hearing limitations which could interfere with her safely caring for patients." Respondent then filed suit in the United States District Court for the Eastern District of North Carolina, alleging a violation of §504 of the Rehabilitation Act of 1973. The District Court entered judgment in favor of Southeastern. It found: "[In] many situations such as an operation room, intensive care unit, or post-natal care unit, all doctors and nurses wear surgical masks which would make lipreading impossible. Additionally, in many situations a registered nurse would be required to instantly follow the physician's instructions concerning procurement of various types of instruments and drugs where the physician would be unable to get the nurse's attention by other than vocal means." Accordingly, the court concluded: "[Respondent's] handicap actually prevents her from safely performing in both her training program and her proposed profession. Of particular concern to the court in this case is the potential of danger to future patients in such situations."

Based on these findings, the District Court concluded that respondent was not an "otherwise qualified handicapped individual" protected against discrimination by §504. In its view, "[otherwise] qualified can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." Because respondent's disability would prevent her from functioning "sufficiently" in Southeastern's nursing program, the court held that the decision to exclude her was not discriminatory within the meaning of §504.

On appeal, the Court of Appeals for the Fourth Circuit reversed. It did not dispute the District Court's finding of fact, but held that the court had misconstrued §504. In light of administrative regulations that had been promulgated while the appeal was pending, the appellate court believed that §504 required Southeastern to "reconsider plaintiff's application for admission to the nursing program without regard to her hearing ability." It concluded that the District Court had erred in taking "otherwise qualified" for the program, rather than confining its inquiry to her "academic and technical qualifications." The Court of Appeals also suggested that §504 required "affirmative conduct" on the part of Southeastern to modify its program to accommodate the disabilities of applicants, "even when such modifications become expensive." We now reverse.[1]

As previously noted, this is the first case in which this Court has been called upon to interpret §504. Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context. A person who has a record of, or is regarded as having, an impairment may at present have no actual incapacity at all. Such a person would be exactly the kind of individual who could be "otherwise qualified" to participate in covered programs. And a person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him to meet the requirements of various programs. Thus, it is clear that Congress included among the class of "handicapped" persons covered by §504 a range of individuals who could be "otherwise qualified." The court below, however, believed that the "otherwise qualified" persons protected by §504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.

The regulations by the Department of HHS to interpret §504 reinforce, rather than contradict, this conclusion. According to these regulations, a "qualified handicapped person" is, "with respect to post-secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity." §80(k)(3). A note emphasizes that legitimate physical qualifications may be essential to participation in particular programs.

We think it clear, therefore, that HHS interprets the "other" qualifications which a handicapped person may be required to meet as including necessary physical qualifications. The note states:

> Paragraph (k) of §80 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their

> handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessinf all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

II. The remaining question is whether the physical qualifications Southeastern demanded of respondent might not be necessary for participation in its nursing program. It is not open to dispute that, as Southeastern's Associate Degree Nursing program currently is constituted, the ability to understand speech without reliance on lipreading is necessary for patient safety during the clinical phase of the program. Respondent contends nevertheless that §504, properly interpreted, compels Southeastern to undertake affirmative action that would dispense with the need for effective oral communication. First, it is suggested that respondent can be given individual supervision by faculty members whenever she attends patients directly. Moreover, certain required courses might be dispensed with altogether for respondent. It is not necessary, she argues, that Southeastern train her to undertake all the tasks a registered nurse is licensed to perform. Rather, it is sufficient to make §504 applicable if respondent might be able to perform satisfactorily some of the duties of a registered nurse or to hold some of the positions available to a registered nurse.

Respondent finds support for this argument in portions of the HHS regulations discussed above. In particular, a provision applicable to post-secondary educational programs requires covered institutions to make "modifications" in their programs to accommodate handicapped persons, and to provide "auxiliary aids" such as sign-language interpreters. Respondent argues that this regulation imposes an obligation to ensure full participation in covered programs by handicapped individuals and, in particular, requires Southeastern to make the kind of adjustments that would be necessary to permit her safe participation in the nursing program.

We note first that on the present record it appears unlikely respondent could benefit from any affirmative action that the regulation reasonably could be interpreted as requiring. Section 87(d)(2), for example, explicitly excludes "devices or services of a personal nature" from the kinds of auxiliary aids a school must provide a handicapped individual. Yet the only evidence in the record indicates that nothing less than close, individual attention by a nursing instructor would be sufficient to ensure patient safety if respondent took part in the clinical phase of the nursing program. Furthermore, it also is reasonably clear that §87(a) does not encompass the kind of curricular changes that would be necessary to accommodate respondent in the nursing program. In light of respondent's inability to function in clinical courses without close supervision, Southeastern, with prudence, could allow her to take only academic classes. Whatever benefits respondent might realize from such a course of study, she would not receive even a rough equivalent of the training a nursing program normally gives. Such a fundamental alteration in the nature of a program is far more than the "modification" the regulation requires.

Moreover, an interpretation of the regulations that required the extensive modifications necessary to include respondent in the nursing program would raise grave doubts about their validity. If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would constitute an unauthorized extension of the obligations imposed by that statute. Here neither the language, purpose, nor history of §504 reveals an intent to impose an affirmative-action obligation on all recipients of

federal funds. Accordingly, we hold that even if HHS has attempted to create such an obligation itself, it lacks the authority to do so.

III. We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HHS. In this case, however, it is clear that Southeastern's unwillingness to make major adjustments in its nursing program does not constitute such discrimination. The uncontroverted testimony of several members of Southeastern's staff and faculty established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. This type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most of the institutions that train persons to render professional service. It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.

IV. Accordingly, we reverse the judgment of the court below, and remand for proceedings consistent with this opinion. So ordered.

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[1]In addition to challenging the construction of §504 by the Court of Appeals, Southeastern also contends that respondent cannot seek judicial relief for violations of that statute in view of the absence of any express private right of action. In light of our disposition of this case on the merits, it is unnecessary to address these issues and we express no views on them.

Kamen v. University of Texas

U.S. Court of Appeals for the Seventh Circuit (1983)

Walter Kamen, a deaf graduate student at the University of Texas, filed a complaint and motion for a preliminary injunction on March 1, 1978. In that complaint, he alleged that the University had failed to provide him with sign language interpreter services in violation of Section 504 of the Rehabilitation Act of 1973, and that as a result, he would be unable to complete a master's degree by the end of the 1978 summer term. The plaintiff's completion of a master's degree that summer was a prerequisite to his maintaining employment as acting dean of students of the East Campus of the Texas School for the Deaf.

The University of Texas is a recipient of over $31,400,000 in federal assistance and has agreed to comply with Section 504 as a condition to continued receipt of federal funds. The HHS regulations require colleges to provide auxiliary aids, such as interpreters, for deaf students who cannot otherwise participate in college programs. However, the University denied Kamen his request for sign language interpreter services on the grounds that he did not meet the University's established criteria for financial assistance to graduate students. The University said he should therefore pay for his own interpreter.

In May 1978, the district court granted the plaintiff's motion for preliminary relief. While not reaching the merits of the claim, the court noted that every court of appeals which had considered the issue had found a private right of action under §504. The court further concluded that requiring the plaintiff to exhaust HHS administrative remedies before seeking relief would result in irreparable injury to him, and would defeat his rights under §504. The court therefore issued a preliminary injunction relying on this Court's standard for temporary relief, which is substantial likelihood that the plaintiff will prevail on the merits. The court also, however, required the plaintiff to post a $3,000 security bond pending the outcome of the litigation pursuant to Rule 65(c) F.R.C.P., conditioned its grant of relief on the plaintiff's filing an administrative complaint with HHS, and stayed the action pending an HHS administrative determination on the merits.

Despite the fact that Kamen has graduated, a justiciable issue remains: whose responsibility is it to pay for this interpreter?[1]

Turning to the merits, we find ourselves in complete agreement with the other Courts of Appeal that have decided this issue and found such a right of action. These Courts have each analyzed §504 and found an explicit congressional intent to create such a private right of action and found that such a right was consistent with the purposes of the legislation.

The appellant argues that the holding in Southeastern Community College v. Baker is applicable here. We disagree. The decision in Southeastern Community College was clearly not intended to bar relief under this statute for all handicapped people in the future. In Southeastern Community College, the Supreme Court said: "We do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear . . . . Identification of those instances where a refusal to accommodate the needs of a disabled person

amounts to discrimination against the handicapped continues to be an important responsibility of HHS."

In this case, HHS regulations require institutions to provide services in their academic programs to accommodate the handicapped, including the provision of such services as sign language interpreters. However, the HHS regulations did not require the sort of "individual attention" services that Mrs. Baker required to get through nursing school, an educational program that provided much more than simply academic training.

The Supreme Court's decision in Southeastern Community College says only that §504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training. While such a rule obviously needs more clarification,[2] it is clear that in this case, Kamen's claim can succeed on the merits, despite the holding in Southeastern Community College, since he can obviously perform well in his profession.

Our holding that private individual suits to enforce §504 rights can be brought without previous resort to administrative remedies is entirely consistent with HHS enforcement efforts under the statute. Nothing in §504 indicates that the administrative process is to be exclusive. Congress was presumably well aware of the delays and complexity inherent in the potentially drastic administrative remedy of grant termination. As the District Court noted here, the waiting time for a §504 enforcement is now up to three years. We think it makes good sense and was the Congressional intent that §504 rights be protected by grant termination through the administrative process or by private suits to eliminate the proscribed discrimination.

We therefore uphold the district court's order granting injunctive relief, but vacate that part of the order which conditioned the grant of relief on the filing of an administrative complaint with HHS. We also dissolve the stay of the action.

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[1]Because the issue is stated in this manner does not mean that this is a suit for damages. Kamen filed a claim for injunctive relief and the appeal is from an injunction. Therefore, this case concerns only a right of action for injunctive relief. The Courts are divided on the question of whether §504 permits an action for damages. In Vernon v. Green Valley School District (9th Cir. 1982) the Court held that a disabled applicant for a teaching position was entitled to recover damages for lost wages and mental anguish because the failure to hire him was the product of an unlawful discrimination. However, in another, Pushkin v. University of Texas, (7th Cir. 1983) the Court held that even though the University's decision not to admit Plaintiff to its psychiatric residency program was based solely upon the belief of the faculty that his multiple sclerosis made him unsuitable to be a psychiatrist, he was entitled only to injunctive relief and not to money damages.

[2]The Supreme Court discussed Southeastern Community College in a footnote to its recent opinion in Alexander v. Choate (1982): "In Southeastern Community College, we stated that §504 does not impose an affirmative-action obligation on all recipients of federal funds. Our use of the term affirmative action in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims for past discrimination, while the latter relates to the elimination of existing

obstacles against the handicapped. Regardless of the aptness of our choice of words in Southeastern Community College, it is clear from the context of Southeastern Community College that the term affirmative action referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," or that would constitute "fundamental alteration(s) in the nature of a program," rather than to those changes that would be reasonable accommodations."

Stutts v. TVA

U.S. Court of Appeals for the Fourth Circuit (1984)

The appellant, Mr. Stutts, contends that the defendant, Tennessee Valley Authority (TVA), violated Section 504 of the Rehabilitation Act of 1973 in refusing to allow him, as a TVA employee, to enter an apprenticeship program for the position of heavy equipment operator. Mr. Stutts argues that he is an "otherwise qualified handicapped individual" under the statute and that summary judgment was improper. While we do not decide the question whether Mr. Stutts was an "otherwise qualified handicapped individual," we agree that summary judgment should not have been granted in TVA's favor and reverse the denial of the Rule 59(e) motion.

The uncontroverted facts show that Mr. Stutts was hired by TVA as a laborer in 1973. In 1979, he applied or an opening in a training program to become a heavy equipment operator. His application was denied on the basis of a "low" score on the General Aptitude Test Battery (GATB), a test used by TVA to predict the probability of success of an applicant in the training program.

Mr. Stutts has been diagnosed as having the condition of dyslexia, which impairs his ability to read. The record indicates that this disability renders Mr. Stutts incapable of reading beyond the most elementary level and leads to an inability to perform well on written tests such as the GATB. There is evidence that Mr. Stutts was evaluated by doctors and tested with non-written tests after receiving results of his GATB test and was judged to have above average intelligence, coordination and aptitude for a position as a heavy equipment operator. Attempts to persuade the testing service to give Mr. Stutts an oral GATB were unsuccessful because scoring on the written GATB is based on standardized and uniform testing conditions and cannot be accurately translated from an oral test. Mr. Stutts' nonselection was based solely on his low score on the written GATB test.

Both parties agree that Mr. Stutts is a handicapped individual and that the main hiring criterion - the GATB test - could not accurately reflect Mr. Stutts' abilities. There is considerable evidence supporting Mr. Stutts' contention that he is fully capable of performing well as a heavy equipment operator and we find a genuine issue as to whether or not he could successfully complete the training program, either with the help of a reader or by other means.

We do not hold that Mr. Stutts must be given a position as a heavy equipment operator, nor do we hold that he must be admitted into the training program. We do hold that when TVA uses a test which cannot and does not accurately reflect the abilities of a handicapped person, as a matter of law they must do more to accommodate that individual than TVA has done in regard to Mr. Stutts. When an employer like TVA chooses a test that discriminates against handicapped persons as its sole hiring criterion, and makes no meaningful accommodation for a handicapped applicant, it violates the Rehabilitation Act of 1973.

MODEL ANSWER

> This "model" answer has been prepared and edited for the limited purpose of illustrating the writing style and one possible organization method. You should not rely on this answer for accurate black letter law nor are the writer's conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing Performance Test essay. Another passing answer could have a completely different analysis and conclusions.

MEMORANDUM

I. Is Sharon covered by Section 504 of the Rehabilitation Act of 1973?

A. Handicapped person

Sharon has been diagnosed with vision dyslexia, a physical disorder caused by her eyes that prevents her brain from absorbing the reading she does. The dyslexia surfaced shortly after Sharon began dental school and it caused her to fail all of her first semester courses. Additionally, the Columbia Center for Learning Disabilities also diagnosed Sharon with a "learning disability incident to the vision problem."

In order to come under the protection of § 504, Sharon must be a "handicapped individual" as defined by the regulations for the Rehabilitation Act of 1973. This means she must have a physical or mental impairment that substantially limits one or more major life activities, have a record of such impairment, or be regarded as having such an impairment. Sharon's vision dyslexia is a physical impairment. A doctor diagnosed her with the vision dyslexia and no medical professional has challenged that her eyes are not functioning properly and therefore causing her dyslexia. She has also been diagnosed with a learning disability, which is one of the categories specifically enumerated in the regulations as being a mental impairment (§ 80(j)(2)(i)(B)). Moving forward, we will need documentation from Dr. Jung and the Columbia Center for Learning Disabilities confirming Sharon's diagnoses.

Under § 80(j)(2)(ii), learning is considered a major life activity. According to the Center for Learning Disabilities, Sharon's physical impairment has caused her to develop a learning disability. This has substantially impaired her ability to learn as evidenced by Sharon's failing all of her first semester classes. As a direct result of the vision dyslexia, she is also not retaining anything she reads, which is preventing her from learning any of the material not lectured on in class. Unlike concepts delivered orally in class, material that Sharon only reads about cannot be saved or analyzed by her brain. Since Sharon is able to keep up with the material when she uses auditory processing rather than visual processing, Sharon's problems with learning are more likely attributable to the vision dyslexia rather than a lack of intelligence, ability or motivation.

Sharon's vision dyslexia is a physical impairment and her resulting learning disability is a mental impairment. They both have a substantial effect on the major life

activity of learning, as can be seen in Sharon's failure of all of her exams as well as her difficulty retaining anything she reads (as opposed to anything she hears in class lectures or in discussions). Sharon should therefore be considered a handicapped individual under Section 504 of the Rehabilitation Act and entitled to its protections.

B. Federal financial assistance recipient

Middletown University School of Dentistry receives federal funding and its students are eligible to apply for federal grants.

The final requirement for Sharon's claim to come under § 504 is that MU must receive federal financial assistance. Sharon discussed in her interview that MU was currently getting less federal money than in the past. However, so long as MU is still receiving any grant, loan, contract, or arrangement in which the federal government makes financial assistance available, MU will be responsible for upholding the requirements of § 504. We will need documentation regarding the existence of such federal assistance and the amount of federal funding MU receives.

Assuming what Sharon stated in her interview is true, MU receives some amount of federal financial assistance and therefore is bound to follow § 504.

II. What options are available to Sharon?

A. Informal resolution

Sharon initially attempted to resolve her issues with Middletown when she first learned of her disability. After her physician, Dr. Jung, spoke with Dean Bass, the Academic Dean at MU, the school agreed to grant her medical leave for the spring semester and the ability to return in the fall if the problem were corrected. She then filed a "Request for Dean's Action," but MU responded that they wanted to know what was wrong with Sharon and how those problems could be solved before they allowed her to reenroll. Dr. Jung then sent a complete diagnosis to the Dean. He had told Dean Bass earlier that Sharon could probably succeed at Middletown if they allowed her to reduce her class load. Dean Bass has not replied to Dr. Jung and MU has not readmitted Sharon.

The first option available to Sharon is to continue to pursue informal means of being reinstated at Middletown, this time with specific references to her legal rights and MU's legal obligations under § 504. After informing the university of her status as a handicapped person, Sharon could then request mediation in order to avoid a lawsuit. Although her initial attempts to negotiate with MU were unsuccessful, there have been several important developments since then. Not only is Sharon now equipped with legal arguments about the obligations MU has toward her under § 504, but she also has a positive academic record from last semester at Patrick Medical College. Despite her disability, Patrick Medical College allowed Sharon to take a course with accommodations such as using a reader and taking the final exam orally. Sharon earned a B+, which can be used during mediation as proof that given the proper accommodations she is capable of succeeding in dental school.

Perhaps one agreement Sharon could negotiate with MU would be a compromise in which she would attend Patrick Medical College for academic classes and then transfer back to MU to perform her clinical work and ultimately receive her dental degree. Patrick Medical College is willing to provide Sharon with the reasonable accommodations she seeks to fulfill her academic requirements and Sharon has already

shown that she is able to succeed there. Since Sharon doesn't appear to need any accommodations with her clinical work, unlike the nursing student plaintiff in *Southeastern Community College*, MU would be able to bring Sharon into that portion of the program without making any modifications. This should appease Dean Bass' concerns regarding lowering the standards at Middletown. Before admitting Sharon, Patrick Medical College only requires that MU expunge Sharon's first-year record. This should not be a contentious issue in negotiations.

Finally, one negotiation point with a significant amount of room for flexibility is the issue of what accommodations MU will provide to Sharon to enable her to stay in school. Medical professionals have suggested she needs special contacts, readers, untimed tests, use of a word processor and the ability to record lectures. Sharon could work with Dr. Jung to prioritize which accommodations are the most important and try to negotiate which things MU will pay for and which Sharon will cover. Although her finances are tight, if she is willing to take on one of the more costly accommodations such as a paying a reader or buying the word processor MU might be more willing to allow her back.

The informal negotiation option seems to be the one that best aligns with Sharon's stated goals while avoiding the pitfalls of expense and time. It has the most chance of getting her readmitted to Middletown without waiting too long, while avoiding unwanted publicity. It is still important to note, however, that mediation and negotiation may be unsuccessful. Sharon has already attempted to use informal procedures to convince MU to allow her back into the program, all of which have failed. She has spoken to several administrators and had her doctor do the same. Despite her doctor complying with Dean Bass' request to learn what is wrong with Sharon and how she can succeed despite the disability, the school has remained inflexible about actually changing anything. Sharon may need the intervention of a court or administrative body to prove that she is otherwise qualified and force the school to allow her reasonable accommodations.

B. Injunctive relief

Although the Supreme Court passed on the question of whether individuals with disabilities are entitled to a private right of action under § 504, all of the courts of appeal that have made a determination have decided in the affirmative. In *Kamen* the Seventh Circuit decided that such a right was part of Congress' explicit intent and consistent with the purposes of § 504. This means that Sharon will be able to petition the court for injunctive relief to prevent MU from denying her participation in the dental program.

As a first step to getting injunctive relief, Sharon would need to prove that she was a qualified handicapped individual under § 80(k)(3) and as interpreted by the courts. In order to be otherwise qualified under the meaning of § 504, Sharon must meet all of the academic and technical standards required for participation in MU's dental school. In *Southeastern*, the Supreme Court held that a nursing student was not otherwise qualified for her academic program because she was unable to effectively communicate without lip reading. Lip reading was not a feasible option for much of the nursing program or for the actual nursing profession. The student could therefore not meet the qualifications of the program in spite of her handicap. Although *Southeastern* is the only on-point case with binding precedent in Columbia, the effect of Sharon's disability on her future career is actually akin to that of the plaintiff in *Kamen* and not to Baker in *Southeastern*. In *Kamen*, the Seventh Circuit distinguished the Supreme Court's holding in *Southeastern* in part because the plaintiff with a disability could "obviously perform well in his profession." Although Kamen was deaf, he had been working as the acting dean of students at a school for the deaf. There was apparently nothing about this

profession, for which Kamen was working on his master's degree, that he could not successfully do because of his disability. Likewise, Sharon will be able to perform all of the normal functions of a dentist once she has completed dental school. Her vision dyslexia is only a problem in the classroom and will not hinder her in her future profession. Of course, we only have Sharon's testimony about the requirements of working in the dental field and therefore we will need to further investigate whether a dentist often needs to be able to read and digest written information quickly. If not, Sharon's circumstances should be easily distinguished from Baker's in *Southeastern* and, at a minimum, MU would not be excused from providing Sharon with a dental education because of the futility of such schooling.

The regulations for § 504 require MU to modify academic requirements not essential to the program of instruction or licensing requirements, to evaluate her in a way that reflects her achievement rather than her disability, and to provide necessary auxiliary aids. Sharon needs several accommodations to be able to access the education program at MU's dental school successfully. She will need readers when studying to receive information orally rather than visually, a word processor to take her exams, and a removal of time restrictions from her tests. Sharon would also like to tape record class lectures, which, under § 87(b), may not be barred. A potential snag for Sharon is Dean Bass' assertion that licensing requirements include a timed test. We will need to substantiate this claim and determine whether Sharon would be able to become licensed as a dentist without taking a timed examination.

A brief evaluation of Sharon's requested accommodations suggests she may find success in getting Middletown to make some adjustments. Accommodations such as using tape recorders to record a lecture and using a reader are specifically provided for in the statute and therefore it would be discriminatory for MU to deny them to Sharon and then use that denial to prove she isn't otherwise qualified for the dental program. With regard to extra time on the test, the regulations are clear and the Fourth Circuit held in *Stutts* that if a test doesn't accurately reflect the abilities of a handicapped person then the law requires accommodations. Under *Southeastern*, such accommodations simply cannot be substantial or constitute a fundamental alteration. Sharon has a good argument that the accommodations she seeks are either specifically covered under the law or not so costly, burdensome or large as to fundamentally change the dentistry program.

Sharon would likely be considered otherwise qualified to attend dental school in spite of her disability and therefore entitled to injunctive relief. Some of the other factors we would need to research are how difficult and costly it would be to implement her accommodations and which accommodations are necessary for Sharon to participate in the program. If the accommodations are reasonable (as the ones provided for by statute presumptively are), then Sharon should be entitled to reenroll at MU and receive aid to access her education. The largest obstacle to suing for injunctive relief is that Sharon has expressed legitimate concerns about the cost, publicity and delays inherent in litigation. However, if negotiations fail and the university refuses to relent on its position there may be no other way to get her back into MU's dental school. Alternatively, Sharon could certainly use the threat of litigation as a tool during mediation.

C. Administrative remedies

Another option available to Sharon is an administrative remedy. Health and Human Services (HHS) allows for enforcement of § 504 via administrative procedures. Since MU receives federal financial assistance as defined in the regulations for § 504,

HHS may revoke some or all of that money for MU's failure to use reasonable accommodations to educate an otherwise qualified handicapped individual.

One major drawback of an administrative remedy is that it would not necessarily allow Sharon to reenroll at MU. It would simply punish MU for its failure to follow §504. If MU were deemed to have discriminated against an otherwise qualified handicapped person then it could lose its federal funding since it was out of compliance with the law. Sharon's desire is not to punish the school, but instead to gain reentry into the dental program. An administrative remedy would not help her achieve that goal. Another drawback is that the grant termination process can take years and is quite complex. Of course, if Sharon wanted to pursue an administrative remedy against MU she has the option to enroll at Patrick Medical College instead, but due to factors such as the prestige of the degree and closeness to home, she has strong reasons for preferring to go back to MU. Another downside to seeking an administrative remedy through HHS against MU is that there could be a significant amount of publicity surrounding the case —particularly if she is successful in stripping federal funds from the university. This could ostracize her in the community and bring her negative attention related to her disability. Sharon has expressed a desire to avoid such publicity if possible.

Although it is possible Sharon could succeed in getting an administrative remedy, it would likely be a long time before anything would happen. In order to fully determine whether HHS would actually pull MU's funding we would need to research successful cases to determine how egregious the violations were, whether they involved a whole class of people or just one person with a disability, and how often such extreme punishments are doled out. Either way, this remedy would not help Sharon achieve her goal of being reinstated at MU and it would potentially subject her to a significant amount of publicity, so this option is not one I would recommend pursuing. However, it could be a successful bargaining tool during negotiations with Middletown. If the school receives a significant amount of funding from the federal government it may be more willing to compromise with Sharon in order to avoid a potential monetary loss.

D. Litigation for damages

The final option for Sharon to pursue is litigation for her monetary damages. Sharon is opposed to pursuing litigation as a strategy, so this would be the last alternative for her to consider. However, the option is laid out here so she can be informed of all of her available remedies.

Given that §504 creates a private right of action, litigation to recover actual and emotional damages would be an option available to Sharon if she chose to use it. The plaintiffs in *Vernon* and *Pushkin* both sued for monetary damages as well as injunctive relief. In *Vernon* the Ninth Circuit allowed lost wages and mental anguish along with injunctive relief for a disabled job applicant. In *Pushkin*, however, the Seventh Circuit only allowed for injunctive relief. This suggests that the availability of damages is uncertain, particularly because such a case has not yet been decided in the Twelfth Circuit. Sharon may have a claim for mental anguish like the plaintiff in *Vernon* because of her stress in dealing with the school administration, being kicked out of the program, and her emotional response upon receiving the Dean's letter. Perhaps more likely, however, is that she could recover the past tuition she paid for the spring semester and was subsequently forced to forfeit. The mental anguish claim may be difficult for Sharon to win. We would want to know if she had any physical manifestations of her emotions during that time. Perhaps if the counselor helped her treat her feelings regarding the expulsion as well as failing all of her classes some of the costs of those sessions could be recouped. Regarding the past tuition we should investigate if Sharon signed anything

stating that all tuition was non-refundable and if the school had a duty to inform her before accepting her tuition check that she was probably not going to be able to continue at Middletown.

Since Sharon doesn't want to pursue litigation this strategy shouldn't be the first presented to her. However, if she decides that suing for injunctive relief is her best option despite the costs, it would be smart to include monetary damages as well. It doesn't seem likely that she would be able to collect on mental anguish, but with a little research her tuition claims could be credible and it may be well worth it to Sharon to recoup her loss, perhaps to help pay for the litigation required to get injunctive relief.

STATE v. REED (This test is discussed in the PT Workshop)

INSTRUCTIONS

1. You will have 3 hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. You are an associate in the firm handling the defense of Tom Reed.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare two memoranda.

4. The File contains factual information about your case in the form of 7 documents. The first document is a memorandum to you from Alice Ito. The memorandum contains the instructions for the memoranda you are to draft.

5. The Library includes 4 cases which are assumed to be decisions of jurisdictions other than Columbia. Some may be real cases; some may be cases in which a real opinion has been modified; some may be cases written solely for the purpose of this examination. Although some of the opinions may appear familiar to you, do not assume that they are precisely the same as cases you have read before. Some of them may have been modified, so you should read each case thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown.

6. Your memoranda should be written in the answer book provided. In answering this part of the examination, you should concentrate on the materials provided, but you should 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. This part of the examination will be graded on the content, thoroughness, and organization of the memoranda you draft.

7. In citing cases from the Library, you may use defendants' names (e.g., Guest) and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably devote at least 90 minutes to organizing and writing your memoranda.

FILE

Mirto, Lawler & Ito
Attorneys at Law
Micro Valley, Columbia

MEMORANDUM
February 26, 1985

To: Applicant
From: Alice Ito
Re: Investigation in Reed case

As you know, Frank Reed, one of the founders and president of Veritex, Inc., is one of our best clients. Veritex, Inc. is a developer of sophisticated microcomputer software and is projected to become a Fortune 500 company in the next year. We have agreed to represent Frank's son, Tom, in a criminal matter.

Tom has been charged with statutory rape and possession of cocaine, two serious felonies. He just turned 22 last month and he's always been the classic "all-American" kid. A two-letter athlete, member of the National Honor Society and President of the Student Chamber of Commerce in high school, Tom has compiled an even more outstanding record at St. Brendan's College. Now a senior, Tom was captain of the championship football team, an NCAA Division III first team all-American, serves as President of Student Government and is expected to graduate summa cum laude. He is a finalist for a Rhodes Scholarship and he's been accepted at the Harvard Law School; both of these honors, however, are jeopardized by the pending criminal charges.

I've spoken with Tom and his father (an edited transcript of the interview is in the file), obtained copies of the information and the arrest warrant, and researched some recent applicable law. There are no Columbia cases on searches of motor homes. The only Columbia case on statutory rape, State v. Miller (1927), is a brief per curiam opinion of our intermediate appellate court, upholding the defendant's conviction and asserting without explanation or analysis that "Section 18-76 of the Columbia Criminal Code is a strict liability offense." I also hired Johnny Ripka of Confidential Inquiries, Inc., to conduct a field investigation in this matter.

I would like you to take over the investigation and preparation of Tom's defense.

1. Please prepare a memorandum for Johnny Ripka and me identifying the factual propositions that will be crucial to both the prosecution and defense of the statutory rape and cocaine charges. Itemize for Ripka the specific evidence from witnesses and the demonstrative and physical evidence you expect him to gather relating to these factual propositions. Be sure to indicate where and how he should look for this evidence. Don't write out your analysis or summary of the cases I have attached; I have read and understand them. The cases are included only to help you identify the factual propositions and understand the evidence Ripka needs to gather.

Ripka plans to interview Bonnie and her parents. Indicate to Ripka whether and how he should approach them regarding their intention to assist in the prosecution of Tom, whether they are inclined to refuse to testify, and what other help they might give us in this case.

2. Also, please give me a separate, short memorandum on additional legal research. A law student is doing exhaustive research of statutory rape cases similar to Guest and Goodrow and cases dealing specifically with the search of a motor home; therefore, do not spend any time discussing further research on those types of cases. Indicate, however, the nature and direction of any other areas of legal research we should do in this case.

After I've had the chance to digest your memo and we've had a report from Ripka, we'll get together to decide our next moves.

Thanks for your assistance!

TRANSCRIPT OF INTERVIEW WITH FRANK REED
AND HIS SON, THOMAS

Date: February 13, 1985
Time: 1:30 p.m.

(Note: first ten minutes of interview involves small talk between me and the Reeds in which I obtained the background information on Tom's high school and college record summarized in my memorandum.)

Attorney Alice Ito (Attorney): All right, Tom. Why don't you start at the beginning and tell me what led up to your arrest on these charges.

Tom Reed (Tom): Well, m'am, I guess it began during the Thanksgiving recess when I took a quick trip to the Green Mountain resorts to scout the prospects for doing this interviewing thing for Dad's business. You see . . .

Frank Reed (Frank): It's all my fault. If I hadn't come up with this crazy scheme to let him combine business and pleasure, this mess never would have happened.

Tom: Come on Dad, I'm a big boy now!

Attorney: He's right, Frank. Don't blame yourself. OK, Tom, you were saying you were up there around Thanksgiving. . .

Tom: Yes, well, that's when I first met Bonnie Krystal . . . actually, as I found out much later, Bonnie Kreider. Anyway, I stopped over at Snow Top and she waited on me in the cocktail lounge and then again at dinner. One thing led to another and I asked her to have a drink with me after she got off work. She's a real nice person and very attractive. So we had a couple of drinks . . . actually, I had some drinks; she said liquor was bad for you . . . "habit forming," she said jokingly. OK, anyway, we just talked and she told me she had gone to school at some college in the East but had dropped out after her first semester. Said she wasn't really ready to study hard. She then went to Europe for four or five months . . . it sounded like her folks were real well off 'cause they paid the bills . . . and that's where she studied stuff about art . . . "informal classes," she said. She sure knew enough about the subject, rattling off artists, paintings and museums that impressed the hell out of me! In any event, nothing happened then; we just had a nice time together, you know?

Attorney: Uh hum. Go on.

Tom: So, next morning I saw her before I left and told her I'd be back around Christmas for three or four weeks and would she still be around and could we get together and stuff. She said, "Great," and we gave each other addresses and numbers and such. I called her once before Christmas to say "Hi" and "I'll be up on such and such a date" and she seemed real excited to hear from me. So when I got up there, the first thing I . . .

Attorney: Hold it, Tom. Why don't you tell me a little about why you were going back there, what you were doing for Veritex and how the motor home fits in?

Frank: Alice, let me handle this part of it. You see, there's fierce competition in our industry for the best young talent. The only way to keep on top is to attract the brightest and most creative minds who'll come up with new ideas to harness this awesome new power, the microcomputer. My competitors and I recruit hard on the college campuses each fall term, fly the best ones here to Micro Valley, usually during the Christmas break, and we each try to dazzle them with our operation and the opportunities. But we end up dividing the crop of candidates; Veritex gets to see some, Multiputer sees others, SofPak entertains some more, and so on. Well, one thing I learned was a lot of these talented kids who get their way paid out here don't rush back home right after their interviews. Instead, they spend all or part of their Christmas break in the area, many of them at the Green Mountains ski resorts. So, I said to myself, "If I can find a way to send a talent scout up there during the break, one who'll be able to talk to these kids while they're relaxing, I'll be able to triple the talent I see and my competitors will have footed the bill for bringing them to me!"

Tom: That's where I came in, Ms. Ito. I know Veritex inside and out. I've worked there ever since I could sign my paycheck and I knew I'd have good rapport with them 'cause I'm one of them . . . their age, the same interests, I know what I'm talking about and I can reach them one-on-one!

Attorney: I see. That's a nifty idea you had, Frank. But how and why does the mobile home come into play?

Tom: Well, you see . . .

Frank: Son, let me. Alice, there are a dozen or more of those ski resorts spread all over those mountains, some of them over the state border to the north. You've got to travel among them on some kind of schedule if you expect to maximize your exposure to the candidates. So, we have this 32-foot Argus RV which is set up to go to these computer shows and fairs as a sort of traveling showroom of Veritex products and it was just perfect. It's an office to interview the talent, it gets you around where you have to go, and you can sleep in it; it has a bedroom, kitchen, shower, a john . . . you name it, it's there!

Tom: And that's where I came in. During the Thanksgiving break I traveled to each of the lodges and met the Activity Directors, telling them the idea. They loved it; it was novel and something that might benefit their guests. You see, each of them publishes like a daily activity sheet . . . a newsletter thing . . . and they agreed to put in stuff like "Attention All You Computer Freaks! Take a break from the slopes and take your last shot at landing a job with one of the leaders in the software field! Veritex will have a rep in an Argus RV in the south parking lot on such and such a day from X time to Y time. Sign up for an interview and drop off your last resume and, blah, blah, blah." Then I'd show up, review the resumes, interview the folks and make appointments for the best ones to stop in at our plant before heading back home or to college!

Frank: Despite all the trouble we're in now, the plan really worked. Tom interviewed, what was it, Tom, fifty-six of them?

Tom: Fifty-six, right.

Frank: Fifty-six. Twenty-three came back for interviews and we made offers to nine; three permanent and six summer interns and I think we'll get all or most of them.

Attorney: Now how did this Bonnie get involved, Tom, and what about this cocaine?

Tom: Look, Ms. Ito . . . you too, Dad . . . I don't know anything about that dope. I mean, I don't do that stuff. Never. Honest! It must have been Bonnie's, or maybe one of those people I interviewed. I never saw it before that cop pulled it out of the drawer in the little table that sits near the bedroom door. It shocked the hell out of me, I'll tell you!

Attorney: OK, let's not jump ahead too far in the chronology. Tell me about the girl.

Tom: Well, like I told you, we hit it off real well earlier and we picked it right up when I got back there. We saw a lot of each other before I came back home for a couple of days right at Christmas and . . .

Attorney: Did she go home for Christmas?

Tom: No, she said her parents were in Europe for the holidays. I invited her to our place but she said no.

Attorney: OK, go on.

Tom: Right. When I got back, we started talking and . . . well . . . we sort of decided she'd . . . you know, kind of like move into the Argus with me. I'd drive back to Snow Top Lodge each night . . . you see, I had arranged a hook-up situation with the Lodge in the back lot . . . and Bonnie moved a lot of her things out of the staff quarters and into the RV. Look, I thought she was 19 or 20, at least! She sure looked and acted mature enough!

Attorney: I understand. Now, Tom, were you and Bonnie intimate before she moved into the RV?

Tom: Well, yes.

Attorney: And you were afterwards?

Tom: Of course, sure!

Attorney: Now, in the time you were together, up until your arrest on January 15th, did you ever see her using narcotics?

Tom: Nothing hard. I mean, she did a little grass now and then, but everybody does that from time to time.

Frank: You don't, do you, Tom?

Tom: Look, Dad, I've tried it a few times, but nothing steady, you know what I mean. It really doesn't do anything for me.

Attorney: But in all this time, you never saw her use or have any cocaine?

Tom: No, never.

Attorney: OK. Let's get to the 15th. What happened that day?

Tom: Right. Bonnie went off to work . . . they all worked three meals and every other day in the lounge in the afternoon or evening. I took off early 'cause I was scheduled at Swift Run in the morning and Gray Mist, over the line, in the afternoon. I only had to see two at Swift Run, so I was done about 11:00 or 11:15. I decided to head toward Gray Mist, grab a bite on the way and then maybe have time for a run or two before my first appointment at 3:00. I stopped at a McDonald's outside of Clarion and then drove north of town to a pretty roadside rest area where I stopped to eat. I took my food back to the kitchen to warm it up in the oven and then went back to the driver's cab to lower the blinds on the windshield . . . it was a real bright day and the sun off the snow was almost blinding. Anyway, that's when I noticed this blue car going by the rest area heading north and going real slow . . . a guy in the passenger's seat was looking real intent over my way and I thought, "guess I took up all the room!" Then I went back, got the food out of the oven and sat down in the kitchen booth to eat. I was in a good mood, you know . . . things were going well with Bonnie, it was a great day, the interviewing was under control and I was going to get some skiing in . . . and I was relaxing with the stereo really blasting out Springsteen's "Born in the U.S.A." The Argus is equipped with a great JVC system and Pioneer 910 speakers that carry 180 watts of amplification per channel and it really puts out some sound and I had the volume at "7." Anyway, next thing I know there's some pounding on the door and I can't figure out what's going on. . . .

Attorney: Which door? On the driver's side or where?

Tom: No, the one on the passenger's side, and someone says something that sounds like "inspect" to me. And when I looked toward the front I can see some kind of twirling light through the blinds. So I turn off the stereo, unlock the door and start . . .

Attorney: Which door are we talking about now?

Tom: The back one, off the bedroom hall. So I open it up and climb down. And there's two guys in plainclothes by the front passenger's door and one comes back and shows me a badge in a billfold thing and says I'm under arrest for rape! Well, I go nuts! "What are you talking about? Are you crazy?" Then he tells me Bonnie's name isn't Krystal and she's a 17-year-old runaway and her parents just picked her up at Snow Top. Then they pat me down, right there in the middle of the rest area . . . for guns, they say. Then they put handcuffs on me and put me in the back of their car . . . and that's when I realized it was the same car I'd seen going by earlier but this time it's got one of those little hand lights they stick on top of the roof whirling, and it's pulled into the rest area so it blocks me. So now I'm in the back seat and they set those locks with no buttons on so I can't get out. The one guy . . . Bucheit's his name . . . says they're going to search the Argus for Bonnie's clothes and stuff. The next thing I know, he comes out with this small jar, you know, the kind baby food comes in, and he . . .

Attorney: How long were they in the motor home, approximately?

Tom: Ten . . . no longer than twelve or fifteen minutes, max.

Attorney: OK.

Tom: So, he holds up this jar that has rice in it and something else and says, "Where'd you get this" or something like that. And I said I never saw it before and where did it come from and he says in the drawer of the little table next to the sofa near the

bedroom door. Then he says he's sure it's coke. And I say, "I don't know anything about it." Then Bucheit gets in the police car and the other guy. . .

Attorney: Did they ever warn you of your right to remain. . .

Tom: Oh yes, they told me about being silent and getting a lawyer and that stuff. Just like on TV. They did it earlier, while they were patting me down. So the other guy drives the RV back to the State Police Barracks in Shillington, near Snow Top. And we don't see it again for another ten days when they released it to my Dad.

Frank: It was a real mess when I got it back. Stuff was scattered everywhere . . . but they didn't break or ruin anything.

Attorney: Did you ever make a statement . . . say anything, write or sign something?

Tom: Nothing. I called my Dad; he came up to bail me out and told me you said to keep quiet till I spoke with you.

Attorney: Just a few more questions, Tom, and we can call it quits. OK? Now, tell me about the layout of the Argus.

Frank: Alice, it's a normal RV except for portable display racks in the kitchen for our software descriptions and stuff, and a computer and printer set up on a desk in the living room against the wall along the driver's side. From the driving deck, it opens right into the kitchen and the main bath is off the kitchen. Then there's the living room area. That has a bed that pulls out of the top of the side wall and the sofa becomes a bed, too. Then there's a little hall with a second bath and then the full bedroom behind it. Oh, there's a side door to the outside in the hallway, across from the second bathroom. That's it. It's a standard model with all the features like sink and stove and refrigerator and stuff. Only we've outfitted it to double as an office.

Attorney: I've got a pretty a good idea of what it looks like. Now, about Bonnie; did you see her again or speak with her?

Tom: No, but I got this letter from her a couple of days ago. See, she's in some kind of girl's school downstate. You can see she's real upset about what happened.

Frank: Being upset now doesn't help! She should've thought about this earlier and had the decency to tell you the truth.

Attorney: Yes. Tom, may I keep this letter?

Tom: Sure, that's why I brought it along.

Attorney: You didn't answer this, did you?

Tom: No, no.

Attorney: Good! Don't answer it; leave it up to me to make contact with her. By the way, didn't you ever ask her how old she was?

Tom: You know, Ms. Ito, I don't think I ever did. I've racked my brain about it and I guess I never did. I know it's kind of dumb, but from the very beginning, you know, she

told me about college and Europe and stuff and I just assumed she was a couple of years younger than me.

Attorney: It's OK; don't worry about it. Let's turn to some final matters. Now, about the bail; Frank, you . . .

(Note: remainder of interview involved conditions and amount of bail, preliminary appearance and possible trial dates, authorization to employ a private investigator and notice to cooperate with the private investigator if they were contacted, establishment of the fee for representation and an admonition to Tom that he should not discuss the case with anyone other than a lawyer from the firm or the private investigator.)

STATE OF COLUMBIA
AFFIDAVIT IN SUPPORT OF ARREST WARRANT

I, the undersigned, do hereby state under oath:

1. My name is Detective Scott Bucheit
and I am employed by Columbia State Police, Shillington Barracks.

2. I accuse Thomas Reed
who lives at 1983 Argus Motor Home, Registration No. GHF197, Snow Top Lodge (back lot)
with violating the penal laws of the State of Columbia.

3. The date when the accused committed the offense was on or about January 14, 1985.

4. The place where the offense was committed was in the County of Northampton, at or near the Snow Top Lodge, Shillington.

5. Based on the information below, I have probable cause to believe the accused violated Columbia Penal Code, Section 18-76, Statutory Rape.

GIVE COMPLETE DETAILS. ATTACH ADDITIONAL SHEET IF NECESSARY.

On January 15, 1985, at 0800 hours, Mr. and Mrs. Michael Kreider, 6422 Morris Park Road, Abington, Columbia, reported their minor daughter, Bonnie Kreider, aka Bonnie Krystal, age 17 (D.O.B. 8/29/67), was presently living with an adult male, Thomas Reed, exact age unknown, in an Argus motor vehicle, Columbia Registration No. GHF197, parked in the back lot of the Snow Top Lodge, Shillington. Parents reported the daughter had run away from home on or about 9/2/84 following an angry family fight. Check with ChildLine records revealed a Bonnie Kreider, same address as given by parents, was reported missing on 9/10/84; no action noted in ChildLine files. Parents engaged Child Search, Inc., a private investigating firm specializing in finding missing children (Columbia License No. 0744), on or about 10/1/84. On 1/14/85 at about 1630, parents received verbal and written report from Patricia Houser, an investigator assigned by Child Search, that she had located their daughter. According to Investigator Houser (copy of written report in file), Ms. Kreider was working as a waitress at Snow Top Lodge and had been so employed since November, 1984. Houser stated Ms. Kreider was now and had been living with Thomas Reed, a 22- or 23-year-old adult male, in the Argus motor home since late December, 1984. Reed is employed by a computer firm to interview job prospects at various ski resorts in the area, according to Houser. Ms. Kreider and Reed have been observed on two different evenings entering the Argus vehicle late at night and not emerging until the next morning. Checking with the manufacturer, Houser ascertained the Argus vehicle has only one bedroom. A phone call to the chief of security at Snow Top Lodge confirmed (1) a Bonnie Krystal was employed as a waitress; (2) Thomas Reed was leasing space from the Lodge for a 1983 Argus vehicle, Registration GHF197; and (3) Krystal and Reed were living together in the Argus motor home. Based on this information I have probable cause to believe Thomas Reed has committed statutory rape.

6. I ask that a warrant of arrest be issued and that the accused be required to answer the charges I have made.

7. I swear to or affirm the within complaint upon my knowledge, and information and belief, and sign it on January 15, 1985 at 1030 hours, before Judge Harry Lopez, Columbia Superior Court.

	)	/s/ Det. Scott Bucheit
	)	Signature of Affiant
	)	
STATE OF COLUMBIA	) SS	
COUNTY OF NORTHAMPTON	)	

Personally appeared before me on January 15, 1985 the affiant above named who, being duly sworn according to law, signed the complaint in my presence and deposed and said the facts set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ Harry Lopez _____ SEAL
Issuing Authority

ARREST WARRANT

STATE OF COLUMBIA	)	SS
COUNTY OF NORTHAMPTON	)	

In the name of the State of Columbia, you are commanded to take into custody THOMAS REED of 1983 Argus Motor Home, Registration No. GHF197, Snow Top Lodge (back lot), if he be found in the said State, and bring him before us at 100 Court Street, Shillington, to answer the State upon the complaint or citation of Det. Scott Bucheit charging him with Statutory Rape, Columbia Criminal Code, Section 18-76, and further to be dealt with according to law, and for such purposes this shall be your sufficient warrant. Witness the hand and official seal of Judge Harry Lopez this date, January 15, 1985.

/s/ Harry Lopez
Judge of the Superior Court

RETURN WHERE DEFENDANT IS FOUND

By authority of this warrant on January 15, 1985, I took into custody the within named Thomas Reed, and he is now at liberty on bail of $10,000 posted before Sgt. M. Dinerstein, Columbia State Police, Shillington Barracks.

/s/ Det. Scott Bucheit
Officer or Deputy

COLUMBIA STATE POLICE

REPORT OF ARRESTING OFFICER

Name of Accused: Thomas Reed D.O.B.: 12/4/62
Address: 111 Sunshine Dr., Micro Valley 00020
Charges: 1. Statutory Rape 18-76
2. Poss. of Narcotics (Cocaine) 18-370 (D)
Date of Report: 1/17/85

DETAILS OF ARREST

Armed with an arrest warrant issued by Lopez, J., Det. C. Jones and undersigned officer proceeded to Snow Top Lodge, Shillington, in the company of Mr. and Mrs. Michael Kreider. We proceeded to the manager's office where we ascertained the Kreiders' daughter was on duty in the main dining room. Manager, Stanley Fink, agreed to bring daughter, Bonnie Kreider, aka Bonnie Krystal, to office to confront parents. Upon arrival, Ms. Kreider broke into tears. Parents could not comfort her. When asked the present location of the accused, Thomas Reed, Ms. Kreider refused to answer, screaming at the undersigned to "leave him alone." Manager volunteered he had copy of Reed's interviewing schedule at other resorts based on leasing agreement to provide space for the Argus vehicle. Schedule revealed Reed's location to be Swift Run resort at that time with a later appointment at Gray Mist over the State line in the afternoon. Parents took Ms. Kreider into their custody for transport back to their home. Det. Jones and undersigned proceeded immediately to Swift Run where we ascertained Reed had left about 30 minutes earlier on his way to Gray Mist. While proceeding north on Columbia State Route 304 approximately 2 miles this side of the state border, we observed an Argus vehicle, Columbia Registration GHF197, parked in a roadside rest area. Turning our vehicle around, we entered the rest area and knocked on the vehicle door and announced we had a warrant for Reed's arrest. A subject, later identified as the accused, Thomas Reed, exited the vehicle by a door located toward the rear of the vehicle. We placed the subject under arrest, read him his rights and placed him in a secure position in the rear of the police vehicle. Det. Jones and the undersigned then conducted a routine search of the vehicle for personal articles of Ms. Kreider, aka Krystal. We discovered numerous articles of clothing in bedroom dresser and closet later identified by the parents as belonging to victim. We also found personal articles belonging to the victim (monogrammed wallet and bracelet with initials "B.H.K." and a personal diary which included accounts of intimate relationships between victim and accused). In the course of the search for evidence of the Statutory Rape, we found a small glass jar (baby food type) filled with rice. We observed a folded, glossy magazine page. Upon opening the jar, said magazine page was found to contain a white substance. Jar was found in dreser of end table by sofa in living room of vehicle. A field test revealed the substance to be cocaine in an approximate quantity of 1 to 2 grams with a street value of between $100 and $300. Accused denied knowledge of victim's age and of presence of controlled substance.

/s/ Det. Scott Bucheit
Detective Scott Bucheit, CSP

ADDENDUM (1/24/85): A subsequent report from the State Toxicology Lab confirmed the substance to be 1.78 grams of cocaine.

IN THE SUPERIOR COURT
COUNTY OF NORTHAMPTON

STATE OF COLUMBIA	)
v.	)Criminal Action No. 85-294
THOMAS REED	)INFORMATION

The District Attorney of Northampton County by this Information charges that on (or about) January 14, 1985, in said County of Northampton, Thomas Reed did

1. Commit the crime of Statutory Rape in violation of Columbia Criminal Code 18-76, in that defendant, age 22, had sexual intercourse with Bonnie Kreider, a minor female of 17 years.

2. Commit the crime of Possession of a Narcotic Controlled Substance in violation of Columbia Criminal Code, Section 18-370, in that defendant possessed 1.78 grams of cocaine, a narcotic controlled substance.

All of which is against the Acts of the Legislature and the peace and dignity of the State of Columbia.

/s/ Jack McMain
Attorney for the State

February 7, 1985

Dear Tom,

I can't begin to tell you how upset I am about what's happened to you and it's all my fault! But I couldn't tell anyone, including you, about my situation. I had reached the end of the line with my parents and just couldn't risk being found by them and ending up (as I am now!) in a place just a degree above jail!

When I learned they charged you with "statutory rape" (ugh, it sounds so dirty!) and some narcotics stuff, I couldn't believe it! It's unreal and so unfair!

Please let me know what I can do to help. . . I'll do anything to make up for all the pain I've caused you to endure. Please write to me at:

The Archon School
P.O. Box 111
Bonne Terre, Columbia

It means so much . . . please let me help!

Love,
/s/ Bonnie

LIBRARY

COLUMBIA CRIMINAL CODE

§18-02. Minimum requirements of culpability. A person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

* * * * * * * *

§18-04.

A. Ignorance or mistake as to a matter of fact or law is a defense if:

(1) The ignorance or mistake negates the purpose, knowledge, recklessness or negligence required to establish a material element of the offense; or

(2) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

B. When ignorance or mistake affords a defense to the offense charged but the defendant would be guilty of another offense had the situation been as he supposed it was, he may be convicted of that other offense.

* * * * * * * *

§18-76. A person is guilty of criminal sexual conduct in the fourth degree and may be sentenced to imprisonment for not more than five years, if he engages in sexual conduct with another and if the complainant is at least 15 but less than 18 years of age and the actor is more than 48 months older than the complainant or in a position of authority over the complainant and uses this authority to coerce the complainant to submit.

COLUMBIA CODE OF PROFESSIONAL RESPONSIBILITY

Rule 3.4: A lawyer shall not:

A. falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

B. request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

State v. Guest

Alaska Supreme Court (1978)

The question presented in the State's petition for review is whether an honest and reasonable mistake of fact regarding a victim's age may serve as a defense to a charge of statutory rape.

Moses Guest was charged with the statutory rape of T.D.G., age fifteen, in violation of Alaska Statute 11.120.[1] Upon a motion made by the defendant as the trial opened, the court ruled it would instruct the jurors as follows:

> It is a defense to statutory rape that defendant reasonably and in good faith believed the female person was 16 years of age or older even though, in fact, she was under the age of 16 years. If from all the evidence you have a reasonable doubt whether defendant reasonably and in good faith believed she was 16 years of age or older, you must give defendant the benefit of that doubt and find him not guilty.

The state brings a petition for review of that order of the trial court.

We recognized in Speidel v. State (1969) that "conduct cannot be criminal unless it is shown that one charged with criminal conduct had an awareness or consciousness of some wrongdoing." In Alex v. State (1971), we noted the "necessity of basing serious crimes upon a general criminal intent as opposed to strict criminal liability which applies regardless of intention." The goal of the requirement of criminal intent is to avoid criminal liability for innocent or inadvertent conduct. We held in both cases it would be a due process violation to convict a person of a serious crime without the requirement of criminal intent.

There are exceptions to the general requirement of criminal intent which are categorized as "public welfare" offenses and which impose "more stringent duties on those connected with particular industries, trades or activities that affect public health, safety or welfare." Speidel, supra. The penalties for the infraction of these strict liability offenses are usually relatively small and conviction carries no great opprobrium. Statutory rape may not be classified as a public welfare offense. It is a serious felony.

Although §11.120 is silent as to any requirement of intent, this is true of many felony statutes. The requirement of criminal intent is then commonly inferred. Where the particular statute is not a public welfare offense, either a requirement of criminal intent must be read into the statute or it must be found unconstitutional. Kimoktoak v. State (1978). Since statutes should be construed where possible to avoid unconstitutionality, it is necessary here to infer a requirement of criminal intent.

It has been urged in other jurisdictions that where an offender is aware he is committing an act of fornication he therefore has sufficient criminal intent to justify a conviction for statutory rape because what was done would have been unlawful under the facts as he thought them to be. We reject this view.

While it is true under such circumstances a mistake of fact does not serve as a complete defense, we believe it should serve to reduce the offense to that of which the offender would have been guilty had he not been mistaken.[2]

Under the principles of Speidel, Alex and Kimoktoak, the charge of statutory rape is unsupportable unless the defense of reasonable mistake of fact is allowed. To refuse such a defense would be to impose serious and significant criminal liability without any criminal mental element. The order of the superior court is affirmed.

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[1]Alaska Statute 11.120 provides in pertinent part: "A person 16 years of age or older who carnally knows and abuses a person under 16 years of age is guilty of rape." The sanction portion of the statute provides if the offender is less than 19 years of age, he may be imprisoned for up to 20 years; if he is 19 or older, he may be imprisoned for any term of years.

[2]While the Alaska Statutes do not proscribe fornication and, therefore, it may not be considered an offense of a lesser degree, our criminal code does prohibit contributing to the delinquency of a minor under 18 years. Thus, the latter crime could be considered as a lesser included offense of statutory rape under the appropriate circumstances.

Goodrow v. Perrin

New Hampshire Supreme Court (1982)

LAMPRON, Chief Justice

In this petition for a writ of habeas corpus, plaintiff challenges the constitutionality of New Hampshire's statutory rape law.

Plaintiff was indicted by the Grand Jury which charged he "[d]id purposely have sexual relations with [B.R.], a minor child of 14 years when Goodrow was 23 years old." Plaintiff pleaded guilty and was sentenced to a term in the State Prison of not less than three nor more than six years, a sentence he is presently serving. Plaintiff did not appeal his conviction but subsequently filed this petition.

The statute in question reads in pertinent part: "A person is guilty of a Class B felony . . . if he engages in sexual penetration with a person who is 13 years or older and under 17 years." Plaintiff argues that statute infringes on his constitutionally protected privacy right to engage in consensual heterosexual intercourse, and the United States Constitution prohibits imposing criminal sanctions in the absence of culpability.

By employing substantive due process analysis, the United States Supreme Court has recognized a fundamental right of personal privacy. The independence in making certain kinds of important decisions is the aspect of privacy at issue in this case. While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.

Plaintiff argues these privacy principles mandate a holding that private consensual heterosexual intercourse between adults is an activity within the protected zone of privacy. We do not hold such a privacy right exists but, rather, we will proceed for the purpose of this opinion as if plaintiff's arguments were constitutionally valid.

Though a right may be "fundamental," it is not necessarily absolute. It "must be considered against important state interests in [its] regulation." Roe v. Wade (U.S. Sup. Ct. 1973). The State, by enacting a statutory rape law, has fixed the age at which a minor person may consent to sexual intercourse, prohibiting an adult, such as plaintiff, from engaging in sexual intercourse with a person below the fixed age of consent. It is well established the State "has an independent interest in the well-being of its youth." Ginsberg v. New York (U.S. Sup. Ct. 1968). One reason for this heightened interest is the vulnerability of children to harm. Another is the State's concern that minors below a certain age are unable to make mature judgments about important matters.

The State has broader authority in proscribing adults' privacy rights when they impinge on a child's welfare than it would if only adults were concerned. Indeed, government regulation involving minors may be permitted when the State can demonstrate a significant interest as opposed to the compelling interest needed to justify a restriction of privacy rights of adults. Planned Parenthood of Central Missouri v. Danforth (U.S. Sup. Ct. 1976). This State has a significant interest in protecting children from the sexual indiscretions of older teenagers and adults. State v. Coil (Iowa 1978). Therefore, even assuming plaintiff, as an adult, has a protected privacy right to engage

in consensual heterosexual intercourse with other adults, we hold he has no privacy right to engage in sexual intercourse with a person whom the legislature has determined is unable to give consent.

Plaintiff also argues the United States Constitution embodies a general principle of criminal responsibility and because the statute requires no mental culpability, the law is unconstitutional. With respect to statutory rape laws, the argument that a perpetrator's reasonable albeit mistaken belief of the victim's age should be a defense is not new. This argument, however, has been almost universally rejected. State v. Elton (Utah 1982); State v. Tague (Iowa 1981). Contra, State v. Guest (Alaska 1978); People v. Hernandez (California 1964). Our statutory rape statutes have always applied to those under the age of consent regardless of their maturity, and the fact a female's apparent maturity may mislead a man into believing she is older than seventeen has been no defense.

We are not concerned with the wisdom of the present law's policy in view of today's sexual mores. We are concerned only with whether the current law violates the Constitution by not allowing for a defense of honest or reasonable mistake. By enacting the statute, the legislature made the doing of an act a crime without mens rea. We believe the legislature had the power to do so. The United States Supreme Court "has never held that an honest mistake as to the age of the prosecutrix is a constitutional defense to statutory rape." Nelson v. Moriarty (1st Cir. 1973). The plaintiff intended to have intercourse with this child and the burden was upon him to determine her age or act at his peril. Accordingly, we reject the plaintiff's arguments and deny the writ of habeas corpus.

AVILES, Justice, dissenting.

Our statutory rape law does not require knowledge of the victim's minority, making it unique under the Criminal Code. There is no rational basis upon which to distinguish this crime from other similar crimes.

For example, our statutes provide that a person is guilty of bigamy if, "having a spouse and knowing he is not legally eligible to marry, he marries another"; a person is guilty of incest if he marries or has sexual intercourse . . . with a person he knows to be a relative"; fornication, exposure and gross lewdness are crimes if performed "under circumstances which [the actor] should know will likely cause affront or alarm." (Emphasis added.) These statutes require scienter for due process and equal protection reasons.

I cannot agree the legislature is permitted to make an act a serious crime without requiring proof of criminal intent. At common law, the general rule was a person cannot be convicted in a proceeding of a criminal nature unless it can be shown he had a guilty mind. It would be a violation of due process to depart from the fundamental mens rea requirement.

On equal protection grounds, the Criminal Code makes no distinction between crimes directed at minors or adults. It provides that a person is guilty of a crime "only if he acts purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense." The majority states the defendant "intended to have intercourse" with the victim. Nevertheless, the statute involved, unlike all other felonies in the code which require scienter, does not require he know her to be under the age of consent. Such legislation violates equal protection of the laws. I dissent.

United States v. Steele

Sixth Circuit (1984)

Appellants Steele, Echols and Warren were convicted of conspiracy to distribute more than 1,200 pounds of cocaine, street valued at $400 million. They appeal from the trial court's denial of their motion to suppress evidence.

In early July, 1982, appellant Steele asked James Trammel to transport a load of cocaine from Tennessee to Florida, directing Trammel to rendezvous with himself and others at the Primeway Inn near Knoxville to pick up the drugs. Trammel immediately notified Drug Enforcement Administration (DEA) agents in Atlanta.

Trammel met Steele and Echols at the Primeway Inn, where Echols, using scanning equipment, checked to see if Trammel was wearing a body bug. The three men then left in Steele's Cadillac with Echols driving. During the drive, Steele used a two-way radio to contact the "Red Baron," telling him to meet the others at the Coachman Inn, London, Tennessee. Trammel was told the "Red Baron" was appellant Warren who was driving a motor home after picking up "the stuff" from an airplane which had landed in the mountains.

Meanwhile, Atlanta DEA agents contacted their counterparts in Knoxville, telling the latter about the information supplied by special employee Trammel. Knoxville DEA agents subsequently established surveillance over the subjects at the Primeway Inn and followed them as they left the motel in the Cadillac. Agents observed the subject automobile stop on several occasions while Steele made a number of calls from pay phones. The agents then trailed the subjects to the Coachman Inn where Steele and Trammel registered in room 111 and Echols was assigned room 117. From a motel employee, the agents learned the subjects claimed to have driven from Ohio. At 12:50 a.m., Steele was seen leaving the motel, driving to a closed Aztec gas station, making a phone call from an outdoor booth and returning to the motel.

At 3:20 a.m., DEA agents watched as a GMC motor home arrived at the Coachman Inn. The driver, appellant Warren, a known drug smuggler, entered room 117. The three appellants and Trammel left their rooms at 7:30 a.m. and drove the Cadillac and the motor home to a small, secluded parking lot at the rear of the motel. There the agents saw the four men stand between the vehicles while talking. Warren then was seen entering the motor home, disappearing for a moment and then returning to the door of the vehicle dragging a bulging green plastic garbage bag. Warren removed a small wrapped package from the garbage bag and passed it to Steele who placed it in the trunk of the Cadillac. The agents overheard Steele tell Trammel he was to drive the motor home to Atlanta where "the load would be split up" and put in other vehicles. These vehicles, Trammel was told, would leave Atlanta at four-hour intervals for Ft. Pierce, Florida.

The two vehicles of appellants, led by the Cadillac and followed by several cars containing DEA agents, proceeded to the interstate highway toward Atlanta. When the caravan reached Bradley County, it pulled off exit 20 and stopped at the Pineview Superette where, after a brief conference between the appellants and Trammel, Steele and Echols attempted to drive off in the Cadillac. The DEA agents moved in, stopping the Cadillac and blocking the motor home. Trammel immediately identified himself to the agents and told them the drugs were in the motor home. At that point the motor home

was searched and twenty-six green garbage bags containing 1,254 pounds of cocaine were discovered. A subsequent search of the Cadillac produced two loaded .38 caliber pistols under the front seat and a small packet of cocaine in the trunk.

Appellants assert the DEA agents stopped their vehicles without probable cause. We disagree.

Probable cause is defined as facts and circumstances sufficient to warrant a reasonable and prudent police officer to believe a suspect has committed or is committing offense. Beck v. Ohio (U.S. Sup. Ct. 1964). There is more than sufficient evidence to establish probable cause for the arrest of appellants. Officers were aware from the beginning of this episode that Trammel was to meet people for the purpose of transporting a controlled substance. The agents observed the following: numerous calls from pay phones, including instances when the caller had access to a phone in the motel room; a false statement made to the motel clerk; the arrival of Warren, a known drug courier; movement of the two vehicles to a less public parking area; the bulging green garbage bag in the motor home; transfer of a portion of the garbage bag's contents to the Cadillac; overheard comments concerning the "split" of the "load" and its ultimate destination; and departure of the caravan toward Atlanta with Trammel who was hired to drive a load of controlled substances. These facts, taken in their totality, constitute more than sufficient evidence to support a finding of probable cause for the arrest of appellants.

The search of the vehicles without a warrant can be justified on at least two grounds. First, the Drug Abuse Prevention and Control Act[1] authorizes officers to seize a vehicle or other conveyance if there is probable cause to believe the vehicle facilitated the transportation of controlled substances. Once a vehicle is validly seized for forfeiture, a subsequent search of it is lawful. The search of the garbage bags in the motor home, the trunk of the Cadillac and under its seats is governed by United States v. Ross (U.S. Sup. Ct. 1982). Ross held where there is probable cause to conduct a warrantless search of a vehicle, the search properly includes containers and packages which may conceal the object of the search.

Second, the search of the motor home and the Cadillac is justified under the automobile exception to the warrant requirement. Carroll v. United States (U.S. Sup. Ct. 1925). Under this doctrine, an officer who legitimately stops a vehicle and has probable cause to believe it contains contraband or other evidence may conduct a warrantless search of the vehicle, including any closed compartments and containers. Appellants contend, however, the agents' search of the motor home cannot fall within the automobile exception because the vehicle was a living accommodation. This contention overlooks the distinction between mobile vehicles and fixed structures. A structure adapted for overnight use as a home is to be distinguished from a vehicle or other conveyance whose primary purpose is transportation of persons or property. The facts in this case demonstrate the vehicle was being used for the personal transportation of appellants and their contraband. The vehicle was being operated in a public rather than a private place. Finally, given an option of remaining in the motor home or staying in the motel, appellant Warren chose to spend the night in the fixed structure. While there is no evidence appellants were using the vehicle as a living accommodation, it is our view this factor would not alter the results, in light of all the other factors existing in this case. State v. Francoeur (Florida 1980).

Based on the preceding, the arrest of appellants and the search of their vehicles were supported by probable cause and did not violate the Fourth Amendment.

[1]21 U.S.C., Section 881: (a) The following shall be subject to forfeiture to the United States and no property rights shall exist in them: (* * * * * * * *) (4) All conveyances, including aircraft, vehicles or vessels which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of controlled substances.

State v. Quinley

Nevada Supreme Court (1984)

JARVIS, Justice

Defendant was charged with possession of marijuana for sale. After unsuccessful motions to suppress evidence seized from his motor home, defendant pleaded nolo contendere and was granted probation. He appeals from that order.

The major issue presented is whether the warrantless search of defendant's motor home was justified by an exception to the warrant requirement. The State seeks to justify the search on the automobile exception. We conclude the proposed justification is inapplicable under the facts of this case and hence the order must be reversed.

Agent Robert Williams of the Drug Enforcement Administration was on duty in the Horton Plaza in downtown Las Vegas. Williams noticed defendant because "he did not look like he fit in the area and he was approaching a Mexican boy and talking to him." Defendant and the youth walked to a nearby parking lot, entered a Dodge motor home parked there and closed the curtains. Williams noted the license number of the motor home and recalled having received uncorroborated information from an organization called "WeTip" (We Turn in Pushers), suggesting the motor home was associated with an individual who was reportedly exchanging marijuana for sex.

Additional officers arrived in response to a request by Williams. The motor home was kept under surveillance during the hour and a half defendant and the youth were inside. After the youth left the motor home the officers followed, stopped and questioned him. He told them the occupant of the motor home had given him marijuana in exchange for allowing the man to perform oral copulation on him.

The youth complied with the officers' request that he return to the motor home, knock on the door and ask defendant to come out. Defendant answered the door and, as he stepped out of the motor home, the agents identified themselves as law enforcement officers. Another agent entered the motor home; inside he observed marijuana, ziploc bags and a scale on the table. On the basis of these observations, Williams arrested the defendant, seized the motor home and drove it to the police station. A subsequent search of the motor home revealed additional marijuana in the cupboards and refrigerator.

Defendant's suppression motion in the superior court was denied on the grounds (1) there was sufficient probable cause to arrest defendant; and (2) the search of the motor home was authorized under the automobile exception. In response to defendant's challenge to the warrantless search of the living compartment of his motor home, the state must show the search falls within one of the few carefully circumscribed and jealously guarded exceptions to the warrant requirement.

In the present case the state seeks to justify the search under the so-called "automobile exception." The controlling principles of that doctrine are that officers are empowered to search an automobile as long as it can be demonstrated (1) exigent circumstances rendered the obtaining of a warrant an impossible or impractical alternative, and (2) probable cause existed for the search.

The "automobile exception" had its genesis in Carroll v. United States (U.S. Sup. Ct. 1925), where the underlying rationale for the constitutional distinction between

houses and cars was the inherent mobility of automobiles. Although subsequent decisions have purported to rely on the mobility justification, courts have recognized this reasoning alone fails to support the sustaining of "warrantless searches of vehicles . . . in cases in which the possibilities of the vehicle's being removed or the evidence in it destroyed were remote, if not nonexistent." Cady v. Dombrowski (U.S. Sup. Ct. 1973). Thus, courts have recognized mobility is not longer the prime justification for the automobile exception; rather, the "answer lies in the diminished expectation of privacy which surrounds the automobile." United States v. Chadwick (U.S. Sup. Ct. 1977). A variety of factors that reduce the expectation of privacy in vehicles has been identified by the courts. An automobile's "function is transportation and it seldom serves as one's residence or repository of personal effects and its occupants and its contents are in plain view." Cardwell v. Lewis (U.S. Sup. Ct. 1974). "[T]he obviously public nature of automobile travel" and the "pervasive and continuing government regulation and controls" over automobiles lessens any expectation of privacy. South Dakota v. Opperman (U.S. Sup. Ct. 1976).

In the present case, we are called upon to apply this reasoning to a hybrid - a motor home - which has the mobility attribute of an automobile combined with most of the privacy characteristics of a house. Defendant maintains the factors discussed above that dilute the expectation of privacy in automobiles do not so affect the privacy interests in the motor home. We agree.

Unlike an automobile, the primary function of a motor home is not transportation. Designed and used as residences, their essential purpose is to provide the occupant with living quarters, whether on a temporary or permanent basis. Both the Vehicle Code and the Health and Safety Code refer to a mobile home not as a vehicle but as a transportable "structure." The motor home at issue here was equipped with at least a bed, a refrigerator, a table, chairs, curtains and storage cabinets. Thus the contents of the motor home created a setting which could accommodate most private activities normally conducted in a fixed home. The configuration of the furnishings, together with the use of the motor home for all manner of strictly personal purposes, strongly suggests the structure at issue is more properly treated as a residence than a mere automobile.

While motor homes are commonly used as temporary living quarters for short-term visits away from one's primary residence, those who stay temporarily in hotels or motels while away from their permanent residence are protected from intrusions into the privacy of such quarters. No pervasive reason has been suggested why persons who rely on motor homes for such shelter should be penalized by depriving them of similar protections.

Unlike a car, the interior and contents of a motor home are not generally exposed to the public, nor are the occupants, furnishings or any personal effects in plain view. The interior of a motor home is often shielded from view by its design; its windows are small or placed so little or none of the interior can be seen by a person standing outside; or window coverings such as shades or blinds may block whatever view exists. Regardless of its configuration, however, in the case of a motor home as with a fixed house the issue is whether the occupant manifests an objectively reasonable expectation of privacy in the interior. Defendant's expectation of privacy in the motor home here was clearly justifiable.

Because of the high expectation of privacy, homes are afforded the maximum protection from warrantless searches and seizures. The fact a motor home is not affixed to real property does not demean its protected status as a house; a home resting on wheels is no less a home than one resting on a concrete foundation. The outward

appearance of the motor home here should have alerted a reasonable person it was likely to be serving as at least a temporary residence. Thus, it was entitled to the protections traditionally given to a home.

Accordingly, we conclude a motor home is fully protected by the Fourth Amendment and is not subject to the "automobile exception".[1] In light of the foregoing, the order of probation is reversed and the case is remanded to the trial court to permit defendant to withdraw his plea.

LIGGET, Justice, dissenting.

The majority holds "a motor home . . . is not subject to the çautomobile exception'." But the majority fails to define its terms. What precisely are "motor homes"? They are almost infinitely variable in size, shape, access and visibility. Some are attached as trailers while others have direct access from the driver's cab. Is a camper or recreational vehicle a "motor home"? What about a large van or truck? Moreover, the majority implies any motorized vehicle which also serves as a "residence" would be afforded constitutional protection as a "motor home." But how are police officers to determine a protectible "residential" use exists without first entering the vehicle?

I am persuaded by the reasoning of State v. Lepley (Minnesota 1983), where it was held "it would be wholly impractical to impose on police the burden of assigning a constitutionally significant value to a person's expectation of privacy according to the shape, make and present use of a motor vehicle." In my view, if the facts reasonably indicate to officers the vehicle is currently being used primarily as a residence rather than for transportation purposes, then the "automobile exception" would be inapplicable. Such residential use might be indicated by the attachment to exterior utility services, for example. On the other hand, if the facts reasonably disclose no such residential use, or if they disclose such use is secondary or collateral to transportation purposes, then the exception should apply.

In the present case, defendant's "motor home" was parked on a weekday afternoon in a downtown vehicular public parking lot near commercial enterprises, rather than in a neighborhood mobile home park or other facility indicating residential use. Given the time of day and the location of defendant's vehicle, the officers reasonably could assume it was then being used principally, primarily and predominantly for transportation uses. Accordingly, the search was valid and I would affirm the judgment.

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[1]There is no cognizable claim of "exigent circumstances" independent of the automobile exception since the incident occurred on a weekday afternoon while the motor home was parked within a few blocks of the courthouse. It would have been quite simple for the officers to seek a warrant from a magistrate. The "plain view" exception is inapplicable since the evidence of illegal activity was observed only after the officers had intruded upon defendant's constitutionally protected area. Officers were not entitled to conduct a "protective sweep search" because the facts do not demonstrate the officers had a reasonable belief confederates were present in the motor home. The motor home was under surveillance for 90 minutes and the youth on whom the officers relied did not give any indication others were present. The search cannot be justified as "incident to an arrest" because defendant was arrested outside the motor home and, thus, the search was outside the permissible scope of a search incident to an arrest. Moreover,

the search preceded the defendant's arrest and cannot qualify under the "search incident" exception.

MODEL ANSWER

> This "model" answer has been prepared and edited for the limited purpose of illustrating the writing style and one possible organization method. You should not rely on this answer for accurate black letter law nor are the writer's conclusions necessarily correct. Keep in mind that this does not represent a perfect answer, but an acceptable passing Performance Test essay. Another passing answer could have a completely different analysis and conclusions.

MEMORANDUM

To: Johnny Ripka and Alice Ito
From: Applicant
Re: Investigation in Reed case

I. Factual Propositions Regarding Statutory Rape Charge

In order to successfully prosecute Tom for statutory rape under the Columbia Criminal Code, the State must prove beyond a reasonable doubt that he and Bonnie engaged in sexual conduct together, that Bonnie is under 18, and that Tom is more than 48 months her senior. Therefore, there are two potential lines of attack for us: first, casting reasonable doubt about whether Tom and Bonnie were ever intimate and second, striking at the lack of a mens rea requirement in the statute as to the age of the minor.

A. Evidence to aid in preventing the State from proving beyond a reasonable doubt that Tom and Bonnie were intimate

Although we know that Tom and Bonnie did indeed have a sexual relationship, the burden is on the State of Columbia to prove that element of statutory rape (found in Columbia Criminal Code § 18-76) beyond a reasonable doubt. Therefore, I need you to collect documentary evidence about the motor home that would cast doubt on the police's inference that because the motor home only had one bedroom Tom and Bonnie must have been sleeping together.

First, I need information on the layout of the mobile home. Since Veritex owns it, they should have brochures and paperwork that came with the RV. They may have photographs of it as well, which would be useful in getting a clearer understanding of where everything is situated. The motor home's manufacturer should have the specs, brochures, and other documentation about the 32-foot Argus RV as well. Finally, Tom may have taken pictures of the motor home or possess photographs with the interior of the RV in the background after he drove it up to the Green Mountain ski resorts. Any photographs he has of the motor home in various configurations may be helpful in illustrating how two people could live in it comfortably without being intimate with one another.

More specifically, we will have to gather documentary evidence about how one bed in the motor home pulls out of the top of the side wall in the living room area and the couch turns into a bed. This will show that contrary to what the affidavit in support of the

arrest warrant states, there is more than one place to sleep in the motor home and therefore it is possible that Bonnie did not sleep in the same bed as Tom.

I'd also like to know whether Bonnie had to pay any rent to live in the staff quarters at the Snow Top Lodge, what the living conditions were like there, and if she had any roommate issues. If any of these caused her inconvenience or stress, perhaps we can use them as potential reasons why she would move out of the Lodge and into Tom's motor home besides a sexual relationship.

Lastly, we need a copy of Investigator Houser's report made in the course of her work for Child Search, Inc. Detective Bucheit relied heavily on this report in his official affidavit in support of a warrant for Tom's arrest. Since this is where the police received the information that caused them to believe Bonnie and Tom were having sex, we need to read the actual report to see their evidence. Although we likely know the most condemning information in the report because it was included in the arrest warrant affidavit, there may be something in Investigator Houser's statement that is helpful to Tom.

B. Evidence related to whether Tom made a reasonable mistake of fact as to Bonnie's age

The statute setting forth the elements of statutory rape doesn't include any mens rea requirement for Tom regarding Bonnie's age. There may be an argument we can make under Columbia Criminal Code § 18-02 and *Guest*, however, that there should be such a requirement. Therefore, we will need evidence regarding whether or not it was reasonable for Tom to make a mistake about how old Bonnie was.

First, I need you to procure copies of Tom and Bonnie's official birth certificates. Even though the affidavit in support of the arrest warrant states Bonnie's birth date as August 29, 1967, we need to verify that date and not simply take her parents' word for it. Although unlikely, it is possible that, upset about Bonnie running away, Mr. and Ms. Kreider are seeking to punish someone criminally who even unknowingly aided her. We also need Tom's birth certificate along with Bonnie's just to verify that the two truly are more than 48 months apart in age.

I would also like to have Bonnie's employment records from Snow Top. These might be difficult for you to procure if Snow Top is worried that by hiring a 17-year-old to work in a cocktail lounge they could find themselves in legal trouble. We may have to threaten to get a subpoena for the records in order to convince them that there will be less publicity if you quietly copy them and look into them rather than us going to the courts to explain why we need access to them.

Related to the employment records, please also track down copies of any records on which Bonnie may have given information about herself while she was in the Green Mountain resort area. Examples may include rental agreements and bank accounts she opened to deposit her paychecks.

And finally on the subject of whether it was reasonable for Tom to think Bonnie was older than 17, I would like you to investigate whether there are other people Bonnie lied to about her past. Is there anyone she worked with or served at the Snow Top Lodge to whom she told her story about going to college for a semester and spending time in Europe? At a minimum, these coworkers or customers could bolster Tom's claims that Bonnie lied to him about being older than she really was. The same is true if you can find

anyone else Bonnie successfully fooled into thinking she was older than she was. Note that it doesn't have to be in the context of a sexual relationship.

II. Factual Propositions Regarding the Cocaine Possession Charge

The second charge Tom is facing is one for cocaine possession. We will need to either get the drugs found during the mobile home search suppressed or cast reasonable doubt about whether they were even Tom's at all. Thus, the following potential evidence I need you to acquire is meant to aid us in achieving those goals.

A. Evidence related to whether the search of the motor home was constitutional

The main purpose of the evidence we are looking to collect regarding the search of the motor home and seizure of the cocaine is to prove that the motor home should be considered a residence and not a vehicle. This would have prevented the police from using the automobile exception to the warrant requirement. The court would then have to grant our motion to suppress the cocaine at trial and the possession charge would be dropped.

With that in mind, I will need you to collect evidence about the layout of the motor home. Unlike the RV layout evidence discussed above, the focus of this search should be on whether the motor home is more like a residence or more like a vehicle. This could include specifications from the manufacturer, photographs, and documents from Veritex that they acquired when they bought the motor home. Specifically, I would like details about the residential amenities that were important to the Nevada Supreme Court in *Quinley* in finding an RV not subject to the motor vehicle exception: the bed, refrigerator, table, chairs, curtains, and storage cabinets.

We will also need documentary evidence about the layout of the motor home when the arrest took place, if any exists. I want to know, for instance, if the police had to fold up furniture, put things away, and/or raise blinds before it was safe for them to drive the motor home back to the State Police Barracks. The report of the arresting officer doesn't include any information from after they found the cocaine, but perhaps Detective Jones also filed a report that is more thorough. Tom would also likely have some information about the time that passed between finding the cocaine and when the motor home was driven away. There may also be witnesses since it was a public rest stop area.

I'm interested as well in any evidence we can find to back up Tom's claims about how he was using the motor home at the time the officers knocked on his door. Anything proving he had warmed his food in the oven and was sitting down eating and listening to music at a kitchen table could help establish that he was using the motor home as a residence and not a vehicle at the time of the arrest. Again, perhaps Detective Jones' report of the search will indicate that the oven was on, that there were dishes on the table, or other details suggesting the motor home was being used in a very residential way even though it was not hooked up at the Snow Top Lodge.

Regarding the hook-up, I would like documentation such as bills and contracts from the Snow Top Lodge evidencing the agreement between the Lodge and Tom for the motor home to stay in the back lot. Any bills or contracts for utilities such as gas, water, electricity, sewage, and trash would be helpful as well. I want evidence that Tom was paying regular bills for services that a tenant normally pays when he rents a place to live. I would also like to have documentation about how the motor home was hooked up at the Snow Top Lodge. Was it a fairly permanent set up? How long did it take to leave the

back lot after sleeping in the motor home? All of these facts could help further build the case that the motor home was more like a residence and less like a vehicle.

As a final note, Detective Bucheit's arrest report asserts that he and Detective Jones arrested Tom two miles south of the state line. I would like evidence about where exactly this arrest took place in relationship to the border. Ideally, you should go back to Gray Mist with Tom and have him retrace his steps by driving north until he finds the rest area where the police arrested him and searched the motor home. Then we can determine whether or not it is within the state of Columbia and consequently whether or not the arrest warrant was validly executed.

B. Evidence related to whether Tom possessed the cocaine beyond a reasonable doubt

Finally, I need the following evidence in order to cast doubt on whether the cocaine found in the motor home belonged to Tom and whether Tom knew it was there.

I will need any official and unofficial records from Veritex and Tom that document who interviewed with Tom at the Green Mountain resorts. Specifically, I would like to have access to their names, résumés, and dates and times they interviewed. These should be something that Veritex kept records on as a matter of course. Also ask Tom where in the motor home he conducted the interviews. If Tom has any documentation of who was alone for any period of time in the motor home we need that as well. Please ask Tom to review his interview records for anything that would indicate a candidate would have had an opportunity to access the end table without his knowledge. For instance, did Tom take any notes that indicate someone asked to use the restroom during the interview or that Tom was running late or escorting out another candidate and asked someone to wait in the motor home for him?

Using the information supplied by Tom and Veritex, please conduct background checks on each of the interviewees. Do any of them have prior arrests or convictions for drug-related incidents? Have any of them been to a drug rehabilitation center? Please look up their Facebook pages and pictures to see if there is any evidence of drug use there as well. Anywhere you can legally and ethically find information about cocaine use in the past or present should be investigated. You should also dig into Bonnie's background in the same manner to determine whether she has any history of cocaine use.

III. Professional Responsibility Considerations

Although you are an investigator and not an attorney, it is important while you are working for our firm that you follow the Columbia Code of Professional Responsibility. Since you are conducting the investigation at our direction we may not use you to circumvent the Rules to do anything the lawyers in the firm of Mirto, Lawler & Ito would be barred from doing.

Although it might seem like a logical step, please do not contact Bonnie's parents. There is no real help they can give us in our investigation. They don't have any evidence that could potentially be admissible in court that Bonnie and Tom had intercourse and they obviously have no idea whether Tom made a reasonable mistake as to Bonnie's age. Talking to Mr. and Ms. Kreider could also lead to some potential ethical problems that are worth avoiding completely. There is a possibility that something you say to them could be interpreted or spun as counseling or threatening them in violation of Columbia Code of Professional Responsibility Rule 3.4. Under that rule, it

would not be ethically proper for you to suggest the Kreiders not testify at trial or not cooperate with the police investigation and we would like to avoid even the appearance of impropriety in dealing with Bonnie's parents.

As for Bonnie, ideally, you should not be the one to talk to her. Instead, we may speak to Tom about approaching Bonnie since he is not an agent or extension of Mirto, Lawler & Ito. However, it must be noted that in counseling Tom to talk to Bonnie, we need to act in good faith. We may not tell Tom to induce Bonnie to leave the state or lie on the stand, for instance. In short, we cannot use Tom as an arm of the law firm to pass along information to Bonnie that we as lawyers and you as our investigator are barred from telling her.

Tom may be able to suggest to Bonnie that she hire independent counsel. Although Bonnie is a protected party regarding the statutory rape claim and may not be prosecuted for having sex with Tom, she has potentially opened herself up to criminal liability for lying about her age and name to gain employment and lodging. It is important that Tom not suggest to Bonnie that she hire Mirto, Lawler & Ito because her interests may be divergent from Tom's. For instance, Tom may end up suggesting that the cocaine belonged to Bonnie, who also had access to the entire motor home. Our firm should take care not to create a potential conflict of interest.

MEMORANDUM

To: Alice Ito
From: Applicant
Re: Additional research for the Reed case

As Ripka gathers evidence for Tom's defense, there are several legal issues that we need to investigate further both to ensure we can represent Tom zealously and stay within ethical boundaries.

First, there are several facts critical to the case that only Tom can or should testify about. For instance, we would like Tom to be able to state under oath that he has never used cocaine and that it is incompatible with his athletic and high-achieving lifestyle. We would also like him to testify about his reasonable belief that Bonnie was college-aged. However, there is certainly a large potential problem with Tom taking the stand. Namely, can Tom take the stand and then later claim the privilege against self-incrimination when he is inevitably asked on cross-examination about whether he had sex with Bonnie? Because we know the truthful answer is yes, we are barred under Columbia Code of Professional Responsibility Rule 3.4 from counseling or assisting Tom to say that they were never intimate. Are there any evidentiary rules or is there any constitutional law that would allow Tom to testify about, for instance, just the cocaine charge and then plead the fifth if asked about being intimate with Bonnie? Likewise, are there any legal methods by which Bonnie could refuse to answer questions about whether she and Tom had a sexual relationship? We cannot counsel her to not testify or to lie on the stand, so just like Tom, we should attempt to find some way she can avoid answering any questions about the statutory rape charge.

The second issue for further legal research concerns any future conversations between Tom and Bonnie. We need to know what Tom is legally allowed to say to Bonnie and what is out of bounds ethically. Can he tell her to get independent counsel and suggest that the lawyer advise her to plead the fifth if she is required to take the stand? Does the recommendation of how a lawyer should counsel her go too far? Would

there be a conflict of interest considering that the advice is really coming from our firm with only the interests of our client, Tom, in mind? This also brings up the question of whether it is ethical for the firm to be involved in Tom's conversation with Bonnie at all. We should determine before suggesting to Tom that he contact Bonnie exactly where the boundaries are regarding our involvement.

In order to strengthen our argument that a statutory rape statute must require some mens rea as to the age of the minor or be found unconstitutional, we need to research the legislative history of Columbia Criminal Code §§ 18-02 and 18-04. Specifically, I would like to know whether they were written and passed before or after *Miller*, which found without comment that statutory rape in Columbia was a strict liability offense. If these Columbia Criminal Code statutes were enacted after 1927 (when *Miller* was decided) then perhaps we can argue that despite *Miller*, Columbia's legislature does not support criminal laws with no mens rea element. Even stronger would be if there were any legislative history that suggested lawmakers actually specifically meant §§ 18-02 and 18-04 to override *Miller* and ensure statutory rape was no longer a strict liability crime.

Regarding the cocaine possession charge, we need to determine what possession means under Columbia's Criminal Code. If we lose the motion to suppress the cocaine found during the motor home search, we will have to plant enough reasonable doubt in the trier of fact's mind that the drugs weren't Tom's and that he didn't actually have possession of them. In order to do that we will need to know precisely what the requirements for possession actually are. For instance, is the cocaine considered to be in Tom's possession simply because it was in the motor home he was driving? Does it matter that the motor home didn't belong to Tom, but to Veritex? Is it important that Bonnie was living in the motor home as well, or is it only relevant who was in the RV at the time the drugs were found?

Finally, there are two ethical considerations that need to be researched briefly before we move further in this case. First, this is a criminal matter and Mirto, Lawler & Ito is a corporate law firm. I would suggest at least a cursory inquiry into professional responsibility rules to make sure we meet the minimum requirements for taking on this representation. The second ethical consideration involves the motor home, which belongs to our firm's client, Veritex. In attempting to cast doubt about the origin of the cocaine in the motor home, it is possible that we may end up implicating another Veritex employee or the corporation generally. Although there is probably not enough of a chance of this happening for us to decline to represent Tom, it does warrant some investigation into the Rules of Professional Responsibility to determine whose consent, if anyone's, the firm needs to secure at least as a precautionary measure. Both of these concerns should be easily alleviated, but they are important enough to merit some research at the outset to avoid later problems.

Application of The National Gazette, Inc.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Your firm represents The National Gazette, Inc. (TNG, Inc.) in its efforts to buy a Canadian publishing company.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare a personal statement and a memorandum.

4. The File contains factual information about your case in the form of nine documents. The first document is a memorandum to you from Ann Hodges containing the instructions for the two tasks you are to perform.

5. The Library consists of a Canadian statute and two cases. The materials may be real, modified, or written solely for the purpose of this examination. Although the materials may appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in Columbia on the dates shown.

6. Your documents must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should 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. In citing cases from the Library, you may use abbreviations and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing documents.

9. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, organization, and persuasiveness of the documents you write. In grading the answers to this question, we anticipate that the following, approximate weights will be assigned to each part:

A: 50%
B: 50%

KESTIN, DARK & HODGES, PC
555 Chesterfield Drive
Capitol City, Columbia

MEMORANDUM

July 25, 1989

To: Applicant

From: Ann Hodges

Re: Application of The National Gazette, Inc. (TNG, Inc.) Under Investment Canada Act

We represent TNG, Inc., a closely held corporation organized under Columbia law. TNG, Inc. publishes The National Gazette, a weekly newspaper distributed throughout the United States. TNG, Inc. plans to buy a Canadian publishing company and to print and distribute a Canadian edition of the Gazette. As a non-Canadian, TNG, Inc.'s purchase must comply with the review provisions of the Investment Canada Act.

TNG Inc.'s counsel in Canada has filed the necessary application with the Canadian Government. Counsel has informed us that Ms. Kathleen Rideau, the Gazette's editor and principal stockholder of TNG, Inc., must file a personal statement indicating the company's position on the review requirements of the Act.

The matter of the personal statement is complicated by the demands of a minority stockholder in TNG, Inc., Professor David Brinker. Brinker, one of the three original investors, a former director of the company, and a former Gazette columnist claims that he is being "frozen out" of the corporation by Rideau. Brinker's attorney has demanded, among other things, that TNG, Inc. abandon its Canadian plans or purchase his stock for a price that Rideau calculates at more than 20% above fair market value. If TNG, Inc. fails to accept one of these two choices, Brinker threatens a law suit alleging a breach of the majority stockholders' fiduciary duty to him, as the owner of a minority interest.

I need your help with two tasks.

A. Prepare a draft of Ms. Rideau's personal statement as required under the Investment Canada Act. The statement must persuade Canadian officials that The National Gazette will comply with the review provisions of the Act. Please note that TNG's Canadian counsel has already drafted the introductory portion of the statement.

B. Prepare a memorandum recommending how I should respond to the demands made by Professor Brinker's attorney and explaining the reasons for your recommendations.

KESTIN, DARK & HODGES, PC
555 Chesterfield Drive
Capitol City, Columbia

MEMORANDUM

July 17, 1989

To: TNG, Inc. File

From: Ann Hodges

Re: Notes of Interview of K. Rideau

Rideau says that the deal in Canada is too good for TNG, Inc. to pass up. The purchase price of Ontario Publishing, Ltd. is $5 million (U.S.), at least $1 million below what her people have valued the business. Ontario Publishing has modern print and office facilities to house the Canadian version of the Gazette (Rideau expects to employ an editorial and support staff of fifty in Toronto headquarters). Moreover, TNG, Inc. market research indicated sales and advertising potential that "go off the projection charts." Therefore, says Rideau, everything must be done to obtain Canadian Government approval of the purchase.

Rideau is confident that she can give a personal statement that will reassure Canadian officials. Canada, she points out, has a "freedom of the press" tradition that is similar to the U.S. version (except in cases of government security where the Canadians clamp down more on the press than is allowed under U.S. law). And Canadians already read the Gazette in large numbers. Of an average 9.2 million sales of the Gazette per week, about 750,000 (8.2%) are in Canada. Gazette sales are high despite the fact that the newspaper's stories at present are primarily about U.S. personalities and institutions. When Canadians have the chance to buy a Gazette that also focuses on Canadian political, sports, entertainment and social figures, she is sure that readership will quadruple in two years.

Early advertising solicitations indicate that powerful Canadian business interests will support Rideau's petition to buy Ontario Publishing. A significant number of Canadian companies (banks, breweries, major retail outlets, high tech companies, etc.) have committed to advertising purchases. In fact, 90% of the available advertising space for the first thirteen issues (three-month block) of the Canadian Gazette has been pre-sold to Canadian advertisers.

Rideau admits that she is a "journalistic iconoclast pledged to attack the conventional and the established, in both people and institutions." The Gazette was founded on and has flourished because of that principle. She's "not about to change a winning formula." Besides, she says, "I believe in it and it's fun." Nonetheless, she claims that she's a responsible journalist, "no matter what those jerks who run the journalism schools and publish the major dailies say." Rideau concedes that she is sued for libel more than virtually any U.S. newspaper or news periodical. But, she says, she wins "almost all" of the cases. Our firm has handled all twenty-seven libel cases filed against Gazette in the

past four years; we won four of five trials; settled fifteen (nine for truly nominal amounts); the remainder were dismissed or withdrawn.

It is not surprising, according to Rideau, that the Gazette is sued so often. "When you challenge well-known and respected persons (as the Gazette does), those folks have more to lose and are sometimes forced to try to use the courts to counter our charges." But she asserts that she and the writers and researchers who work for the Gazette are "responsible journalists who concentrate on seeking sensational stories rather than the usual ordinary news."

Rideau says that TNG will "respect Canada's bi-cultural history and heritage." However, "leaders of all types and institutions of all kinds will come under the Gazette's microscope. We pledge to report the truth as we believe it to be, no matter who or what it helps or hurts. Our reporting will be based on detailed and complete research by a dedicated professional staff we will recruit especially for our Canadian division."

Rideau emphasized that the "Brinker problem must be solved or controlled because he can kill the Canadian deal." The bank financing for the deal could be jeopardized if Brinker's demands are publicized and would definitely be scuttled if Brinker files suit. She said that the reason the Gazette stopped running Brinker's column was his libel record (seven suits in four years, including the jury loss and two very substantial settlements). Rideau is so adamant about the problems Brinker caused that she is willing to tell the Canadians that he is out as a columnist and a director if we think that it would help.

According to Rideau, it's one thing to be committed to sensational-type journalism, but it's another thing to make the kind of bitter, unsubstantiated attacks that have marked Brinker's writing in the last two years. "Times have changed in the twenty-five years the Gazette's been in business." Rideau claims the Gazette is "as tough as ever" but that "the reader's acceptance level has changed." Although the paper's tone has softened slightly, it's "still the toughest newspaper in the country."

Rideau concedes that one important reason Brinker invested in the company twenty-five years ago was his belief in her muckraking approach to journalism. She also gave him the chance to "work at the fringes of a newspaper's management." Indeed, although Brinker was a director from the beginning until a short time ago, he never was involved in the "real business of running a national newspaper." Even though Rideau and Michael Goodman (the third owner) were, in fact, the managers of the company, they "tried to make Brinker feel like he was important." About a year ago, Brinker began "trying to run the show." He criticized business decisions (he opposed the purchase of Ontario Publishing from the beginning because he feared that it would compromise TNG's editorial philosophy); made proposals like expanding into paperback books and taking the company public that were strongly objected to by the other directors; demanded a tougher, more confrontational editorial policy; and refused to moderate at all his unsubstantiated assaults on individuals who were the targets of his columns. Because Brinker opposed "virtually everything Mike Goodman and I wanted to do with the paper," he was not re-elected as a director and replaced by a member of the Gazette's staff. Brinker's $24,000 per year director's retainer was terminated.

Rideau hastens to add that Brinker is still paid a lot even though "he no longer does any work that is of benefit to the corporation." As is typical in close corporations, most of the "profit" is distributed to the three shareholders in the form of salary, bonuses or consultant's fees. Thus, this past year (ending two months ago), each of the three shareholders received salary (in the case of Brinker, a consultant's fee) for work

performed for the corporation. The "salary" was commensurate with the stock holdings. Under this scheme, Rideau received $300,000; Goodman $100,000; and Brinker $200,000. Rideau plans to change that in the future because Brinker's column no longer appears. Thus, she expects $50,000 will be shifted from Brinker to Goodman.

TNG, Inc., a business that began with a combined investment of $20,000 from the three parties ($10,000 from Brinker), has grown to a value of $9,000,000 according to a recent evaluation. Based on this analysis, Brinker's stock is worth about $3,000,000.

Rideau wants us to negotiate a deal to keep the lid on Brinker's challenge. She's prepared to go quite far if he's willing to be "reasonable." If Brinker is willing to abide by majority votes of the directors, without disrupting the meetings, Rideau would return Brinker to his directorship. Brinker can even have his editorials published if he is willing to submit them for legal review and accepts a modest adjustment of editorial policy.

If Brinker won't agree to conditions such as those set out above, she is willing to have TNG buy him out, but at far less than his demand. (There is no agreement among the shareholders or between the shareholders and the Company for the repurchase of stock.) TNG, Inc. can't pay Brinker even the $3,000,000 his stock may be worth because it would destroy their cash position at a time when the funds are needed for the Ontario Publishing purchase. (Rideau has rejected our advice to have TNG, Inc. become a public company as an effective way to produce capital. She says that they might consider a public stock offering after the Brinker matter is settled.) The company as presently capitalized can't afford more than $2,000,000 over a five-year period. She thinks Brinker might go for that because it would just about coincide with his normal retirement age (he's about sixty-two now). Rideau is convinced that Brinker will take less than $3,000,000 and she's not anxious to give away more than is legally necessary.

THE NATIONAL GAZETTE, INC.
1650 Milton Drive
Capitol City, Columbia

MEMORANDUM

May 26, 1989

To: K. Rideau

From: M. Goodman

Re: Canadian Edition of TNG

This will confirm our discussions at the recent staff meeting concerning the Canadian edition.

Organizationally, Ontario Publishing, Ltd. of Toronto will become the Canadian Division of TNG, Inc., under the overall control of the Publisher and Business Manager, but with a Canadian Division Chief in charge of day-to-day operations and the Canadian news bureau.

Practical concerns exist with respect to starting up the Canadian edition. In particular, we must expand its circulation without eroding the existing Canadian readership base. In early years we estimate at least 80% of news space will be material appearing in the U.S. edition. It is important, however, that the editorial page be written by the Canadian Division. Also to attract readership, a French edition will be added.

This 80%/20% division in advertisements, coupled with Canadian division control of editorial writing, should allow sufficient space devoted exclusively to Canada. To insure the success of the 20%, we should increase the number of Canadian reporters by 50% more than presently employed by Ontario Publishing. The personnel department will begin looking for aggressive Canadian investigative reporters who would be comfortable within the TNG family.

The increased cost in reporters should be more than offset by savings in moving the accounting and advertising operations to the U.S. Additional savings should be gained through reduction of support staff. Further, my review of financial data suggests much of the Ontario Publishing's operating losses in the last five years are attributed to its purchase of paper from the Gheman Co., in Detroit, Michigan. Significant savings will be realized by buying all paper from Canadian suppliers.

The Advertising Department has already contacted our major accounts and projects significant revenues from U.S. manufacturers seeking a larger share of the Canadian market. Although presubscriptions to Canadian advertisers will limit U.S. companies' access to the Canadian version, a U.S. insert will be used until the ad-space can be expanded.

Toronto News-Times, June 26, 1989

News and Commentary

U.S. PUBLISHER TO TEST CULTURAL PROTECTION PROVISIONS OF LAW

The announcement yesterday by Kathleen Rideau, the flamboyant publisher of The National Gazette, that she has agreed to purchase the financially troubled Ontario Publishing, Ltd. of Toronto, presents an interesting challenge to Canadian officials who oversee investments in the nation's communications industry. Rideau, the acknowledged queen of yellow journalism in the United States, promises to bring her formula for sensationalism to a weekly tabloid in Canada. The Investment Canada bureaucrats who must approve the purchase of Canadian newspapers may demand that Rideau restrain the pen that damaged more U.S. politicians, public figures and popular causes than any other in the last twenty-five years.

Rideau is almost bigger than life and one of the most colorful publishers in the world. As a young twenty-six-year-old reporter, Rideau begged and borrowed $20,000 to purchase a dying weekly newspaper operation. With the help of her partners, the brilliant business manager, Michael Goodman, and the caustic columnist-professor, David Brinker, she launched The National Gazette. Rideau was an almost instant success as she served up a weekly dose of scandal, sex and crime. No public figure - whether in sports, art, theatre, religion - and no institution or association - the universities, charities, professional organizations - escaped her review. Soon millions of readers were lined up regularly to buy the weekly issue of the Gazette.

Rideau's detractors assert that The National Gazette is pure sensationalism. According to Dr. James White, dean of the Franklin University Journalism School, one of her outspoken critics, "Her paper presents a foolish, distorted and destructive view of our society, its leaders and its culture." Even her strongest supporters don't claim Rideau has serious literary pretentions. "When you're putting out a cross between a supermarket checkout counter tabloid and the fast-paced, quick-read USA Today, you're not going to be an annual contender for a Pulitzer Prize," notes Ben Gazzaro, president of the Canadian Newswriters Association.

But Rideau points out that The National Gazette did win a Pulitzer (in 1975 for exposing corruption at the top of the Columbia State Police Department), and she claims credit for toppling numerous public figures and the collapse of a number of apparently respectable organizations. Opponents counter that Rideau is bound to be right some of the time. Contends Rev. Stanley Burber of the Fundamental Church Society, a favorite target of Rideau's numerous attacks on religious leaders, "If you're constantly and capriciously throwing mud at people, once in a while the dirt will stick. But you've got to remember all the good people and good causes that get splattered in the process. They're the innocent victims of her evil muckraking."

Rideau staunchly defends her editorial policy. In a speech to the National Press Club last year, Rideau said, "The Gazette was founded on the principle that the only good newspaper is one that's free to attack the individuals and institutions who make up society's establishment. Our success over the years is convincing evidence that a free people in an open, democratic nation are receptive to, indeed demand, a newspaper such as the Gazette."

Some observers note that Rideau's yellow journalism has lost some of its brilliant color recently, that her fiery rhetoric and strident attacks have been toned down a notch. The absence of Professor Brinker's shrill words and harsh criticisms from the columns of the Gazette in recent months has journalists' tongues wagging. Some believe that Rideau and her mentor-partner have come to a parting of the ways. They speculate that Rideau is fed up with defending the many libel suits prompted by Brinker's columns. On the other hand, professional onlookers theorize that Rideau's softer style has angered Brinker, a staunch believer in the muckraking approach to news.

Rideau's entry into Canadian journalism virtually guarantees a battle with the Government. A spokesperson for the Minister's office refused to comment specifically on Rideau's plans. He did say, however, that "a non-Canadian planning to enter the publishing field will have its editorial philosophy reviewed under the provisions of the [Investment] Act. When 77% of all newsstand papers and periodicals in Canada originate from foreign countries, primarily the United States, a takeover of a Canadian publishing house by a neighbor to the south triggers concern."

For her part, Rideau is confident that she can convince the Government that the Gazette is good for Canada. "There is a great market in Canada for a Canadian edition of The National Gazette. Our market research indicates that Canadian readers are anxious for us to focus on Canadian leaders and institutions, instead of news that deals almost exclusively with U.S. personalities."

Sneed and Edwards
Attorneys at Law
300 University Bank Bldg.
Collegeville, Columbia

Harrison Sneed, Esq.
Thomas Edwards, Esq.

July 14, 1989

Ann Hodges, Esquire
Kestin, Dark & Hodges, PC
555 Chesterfield Drive
Capitol City, Columbia

Dear Ms. Hodges:

Our firm has been retained by Professor David Brinker, an owner of one-third of the stock and a former director of The National Gazette, Inc., a closely held corporation organized under the laws of Columbia. It is our understanding that your firm represents the corporation and its principal stockholder, Kathleen Rideau.

Professor Brinker believes that The National Gazette, Inc. has and is about to take action in violation of his rights as a minority shareholder as protected by Columbia law. See Wilkes v. Springside Nursing Home, Inc., (1976). These past and contemplated actions, in our judgment, are designed to freeze Professor Brinker out of his economic and management interests in the corporation. In particular, Professor Brinker complains of the following actions.

1. Not re-electing him as a director of the corporation in December 1988, after he protested about a radical change in the editorial policy of The National Gazette. This ouster, after twenty-five years of service on the board, has caused a significant reduction in his income and the loss of management opportunities in this closely held business.

2. Refusal to print his column, "The Listening Post," since January 1989 despite regular submissions by him.

3. Plans to purchase Ontario Publishing, Ltd. of Toronto and to publish a Canadian edition of The National Gazette. In order to receive permission of the Canadian Government to purchase and publish a Canadian edition, Ms. Kathleen Rideau, publisher and editor of The National Gazette, and principal stockholder in the corporation, plans to acquiesce in the demands of the Government to limit, control and restrain the newspaper's freedom of the press. Such acquiescence by Rideau contravenes the specific agreement of Rideau, made at the time of the creation of the corporation (see copies of attached letters), an agreement on her part that was the inducement to Brinker to make his initial investment in the corporation.

In light of these actions, we make the following demands on the corporation and Ms. Rideau.

1. Withdraw the offer to purchase Ontario Publishing, Ltd. and withdraw the application to the Canadian Government under the Investment Canada Act.

2. Renew printing of Professor Brinker's column.

3. Restore Brinker to his position of director of the corporation and restore his unpaid retainer as a director, including interest.

As an alternative to the above actions, Professor Brinker is willing to sell his one-third minority interest in the corporation to the corporation or the other shareholders for a fair and reasonable price under the circumstances. According to our experts, the fair market value of the corporation is $9,900,000. Because he is being forced to abandon his business management opportunities and the benefits from future growth of the business and compelled to sell his stock in an untimely manner, Professor Brinker demands a 10% premium on the present fair market value. Therefore, he will sell his interest in The National Gazette, Inc. for $3,630,000 in cash.

Please let us know within two weeks which of the above options the corporation and Ms. Rideau are willing to accept. Refusal to comply with or respond to these alternatives will force us to file suit on behalf of Professor Brinker to halt the purchase of Ontario Publishing, Ltd. and to seek appropriate monetary and equitable relief.

Sincerely,

Harrison Sneed

Harrison Sneed, Esq.

CAPITOL CITY PRESS

"Serving Columbia since 1886"
Capitol City, Columbia

August 29, 1964

Professor David Brinker
University of Columbia
School of Journalism
Collegeville, Columbia

Dear David:

Thank you for spending the time last weekend discussing my plans to purchase Drake Publishing. As usual, you and Marge made me feel so welcome in your home.

I'm even more convinced after speaking with you that the time is ripe for a national weekly paper that concentrates on the sensational stories that occur every day, all over the country. Drake is the perfect vehicle for launching The National Gazette. With existing outlets in the Tri-State area, we have a regional base on which to build a national newspaper. And its outmoded printing plant can be converted to state-of-the-art offset technology. When that's accomplished, we'll have the ability to meet short deadlines and accommodate late-breaking news, facilitating our distribution of an up-to-the-minute nationwide paper.

I hope you will give serious consideration to my investment proposal. Of course, I need the $10,000 you could bring to nail down my purchase of Drake Publishing. But more than the money, I want and need your advice and your talent. You've been my mentor, guiding my career these last five years since graduation. You've also inspired me to publish a completely free and unhindered paper committed to exposing the flaws in public figures and the fallacies in cherished beliefs.

Let me review the principal points of my offer. Although we will work as a team, the lawyers have told me we ought to form a corporation to limit our liability and our taxes. Therefore, in return for a $10,000 investment, you will receive one-third of the shares in the new publishing company. In addition, you will serve as a director of the corporation and as the Senior Editor of The National Gazette. In the latter capacity, you will have the opportunity to write a featured column on whatever topic you choose on an irregular schedule dictated by your academic duties. If and when we make enough money, you will be paid a reasonable consultant's fee for your editorial efforts.

The other two directors of the company will be Michael Goodman and me. Michael is putting up $4,000 in return for a one-sixth interest in the corporation. He also will serve as the full-time business manager of the Gazette. I am investing $6,000, every dime I can get my hands on. I will retain one-half of the stock in the company and will be the publisher and editor of the Gazette.

I also have given you my pledge that the editorial policy of The National Gazette will be unremittingly iconoclastic. No public figure, no conventional doctrine and no revered institution will escape our scrutiny. No force, private or public, will control our pen. It promises to be a marvelous adventure. I hope you will join us.

Sincerely,

Kathleen Rideau

University of Columbia

School of Journalism

Collegeville, Columbia

September 10, 1964

Miss Kathleen Rideau
Capitol City Press
Capitol City, Columbia

Dear Kathleen:

I have given a great deal of thought to your proposal and have decided to invest the capital you need to purchase the Drake Publishing Company. I agree with you that there couldn't be a more opportune time to launch a professionally run newspaper like The National Gazette devoted to exposing the weaknesses of those who pretend to be our leaders.

The conditions set forth in your letter of August 29th are acceptable to me. I'm excited to be part of the management team and look forward to the opportunity of escaping the confines of academe by writing a muckraking column from time to time. I do hope the venture does well enough to pay me the promised consultant's stipend. Marge and I are stripping our retirement fund to invest the $10,000.

Kathleen, you are the most talented, determined and dedicated journalist I have ever taught, one who can shake up this tired and conservative newspaper business. I'm willing to gamble so much because I believe you are resolved to publish a paper that is not beholden to anyone or anything. We both hold firm to the eloquent expression that "a free press can be good or bad, but most certainly, without freedom it will never be anything but bad." Be sure The National Gazette is good.

When the lawyers have the documents ready, let me know. I'll wire the funds immediately. My regards to Mike Goodman and best of luck to all of us!

Sincerely,

David Brinker
Professor of Journalism

Stevens, Shepherd & Bacigal

1000 Queen Anne Blvd.
Toronto, Canada

July 21, 1989

Ann Hodges, Esquire
Kestin, Dark & Hodges, PC
555 Chesterfield Drive
Capitol City, Columbia

Dear Ann:

Today we received the anticipated letter from the Office of the Minister of Communications requesting a personal statement from Ms. Rideau.

In the past, our U.S. clients have successfully filed statements which acknowledged support for the goals of preserving Canada's cultural heritage and national identity. I have enclosed the form statement used to accomplish this. The client, or its U.S. counsel, must add the facts establishing the net benefits to Canada of the specific acquisition under review. Given your long-term association with her, you should prepare the pertinent facts of Ms. Rideau's statement. Please send me the draft for review before obtaining her endorsement. I will look it over in light of the practice under the Investment Canada regulations.

Let me emphasize that Ms. Rideau's statement will be the most important document before the Minister when he makes his decision. As you know from Canadian press coverage, the proposed purchase has generated local controversy and interest. Therefor, Ms. Rideau's statement should be as strong as possible.

Remember we have a filing deadline for the statement. I'll send my comments on the draft within twenty-four hours of receipt. Warmest regards to Ms. Rideau and to your partners.

Sincerely,

Sinclair Stevens

Enclosure

OFFICE OF MINISTER OF COMMUNICATIONS
DRAFT

Personal Statement of

[Name of declarant]

Under Investment Canada Act

The applicant pledges that the acquisition of [Name of Canadian company] will preserve Canada's cultural heritage or national identity.

The applicant submits that its acquisition of [Name of Canadian company] will be of net benefit to Canada for the following reasons:

LIBRARY

33-34 Elizabeth II
Chapter 20
INVESTMENT CANADA ACT

* * * * *

2. Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities, preserves the cultural heritage and national identity of Canada, and provides for the review of significant investments in Canada by non-Canadians in order to ensure such benefit to Canada.

* * * * *

11. The following investments by non-Canadians are subject to review:

(a) an investment to establish a new Canadian business;

(b) an investment to acquire control of a Canadian business if the value of the assets of the entity carrying on the Canadian business, and of all other entities in Canada, the control of which is acquired, directly or indirectly, is one million dollars or more.

* * * * *

16 (1) A non-Canadian shall not implement a reviewable investment unless it has been reviewed by the Minister and the Minister is satisfied that the investment is likely to preserve Canada's cultural heritage and national identity, contribute to economic growth, provide employment opportunities, and be of net benefit to Canada.

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Wilkes v. Springside Nursing Home, Inc.

Columbia Supreme Court (1976)

The plaintiff in this action is John Wilkes, a minority shareholder in Springside Nursing Home, Inc., a closely held corporation. Wilkes brought suit against Springside claiming that Springside breached its fiduciary duty to him as a minority shareholder when Wilkes' salary was terminated and he was voted out as an officer and director of Springside. The District Court granted the defendant's motion for summary judgment on this claim and the plaintiff appealed. We reverse the judgment of the District Court and remand for further proceedings consistent with this opinion.

In 1951, Wilkes, Quinn, Riche and Pipkin decided to participate jointly in the purchase of property which they later determined to operate as a nursing home. Wilkes consulted his attorney, who advised him that if the four men were to operate the contemplated nursing home as planned, they would be partners and would be liable for debts incurred by the partnership and by each other in behalf of the partnership. On the attorney's suggestion, and after consultation among themselves, ownership of the property was vested in Springside, a newly created corporation organized by them under Columbia law. Each of the four men invested $1,000 and subscribed to ten shares of $100 par value stock in Springside.

At the time of incorporation, it was understood by all parties that each would be a director of Springside and each would participate actively in the management and decision-making processes. In was, further, the understanding and intention of the parties that, corporate resources permitting, each would receive money from the corporation in equal amounts as long as each assumed an active and ongoing responsibility for the management and operations of the business.

The work involved in establishing and operating a nursing home was roughly apportioned, and each of the four men undertook his respective tasks. Wilkes was assigned the repair, upkeep and maintenance of the physical plant and grounds; Riche assumed supervision over kitchen facilities, dietary and food aspects of the home; Pipkin, a physician, was to make himself available if and when medical problems arose; and Quinn was responsible for the personnel and administrative aspects of the nursing home, serving informally as a managing director. Quinn further coordinated the activities of the other parties and served as a communication link among them when matters had to be discussed and decisions had to be made without a formal meeting.

At some time in 1952, it became apparent that the operational income and cash flow from the business were sufficient to permit the four shareholders to draw money from the corporation on a regular basis. Each of the four initially received $35 a week from the corporation. As time went on, the weekly return to each was increased.

In 1965, the shareholders decided to sell an unused portion of the corporate property to Quinn who, in addition to being a shareholder in Springside, owned an interest in another corporation which desired to operate a rest home on the property. Wilkes was successful in prevailing on the other two shareholders to demand a higher sale price for the property than Quinn anticipated paying or desired to pay. After the sale was consummated at the higher price, the relationship between Quinn and Wilkes deteriorated and this affected the attitudes of both Riche and Pipkin. As a consequence

of these strained relationships, Wilkes, in January 1967, gave notice of his intention to sell his shares for an amount based on an appraisal of their value. In February 1967, a directors' meeting was held and the board exercised its right to formally establish salaries for its officers and employees.[1] A schedule of payments was established whereby Quinn, Riche and Pipkin were to receive $100 a week. Wilkes, however, was left off the list of those to whom a salary was to be paid. The directors also set the annual meeting of the shareholders for March 1967.

At the annual shareholder meeting in March, Wilkes was not re-elected as either a director or an officer of the corporation. He was further informed that neither his services nor his presence at the nursing him was wanted by his associates. Pipkin, acting in behalf of the other shareholders, offered to purchase Wilkes' shares at a price for which, Pipkin admitted, he would not have sold his shares.

The meetings of directors and shareholders in early 1967, the trial court found, were used as a vehicle to force Wilkes out of active participation in the management and operation of the corporation and to cut off all corporate payments to him. The trial court also found that the severance of Wilkes from the payroll resulted not from misconduct or neglect of duties but because of the personal desire of Quinn, Riche and Pipkin to prevent Wilkes from continuing to receive money from the corporation. Despite a continuing deterioration in his personal relationship with his associates, Wilkes had consistently endeavored to carry on his responsibilities to the corporation in the same satisfactory manner and with the same degree of competence he had previously shown. Wilkes was at all times willing to carry on his responsibilities and participation if permitted so to do, provided that he receive his weekly stipend.

Wilkes' claim for damages is based on a breach of fiduciary duty owed him by the other participants in this venture. Springside was, at all times relevant to this action, a close corporation as we have recently defined such an entity in Donahue v. Rodd Electrotype Co. (1974).

In Donahue we held that "shareholders in a close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another." As determined in previous decisions of this court, the standard of duty owed by partners to one another is one of "utmost good faith and loyalty." Thus, we concluded in Donahue, with regard to "actions relative to the operations of the enterprise and the effects of that operation on the rights and investments of other shareholders in close corporations, each shareholder must discharge his management and shareholder responsibilities in conformity with this strict good faith standard. Shareholders, individually and collectively, may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to other shareholders or to the corporation."

In the Donahue case we recognized that one peculiar aspect of close corporations was the opportunity afforded to majority shareholders to oppress, disadvantage or "freeze-

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[11] The by-laws of the corporation provided that the directors, subject to the approval of the shareholders, had the power to fix the salaries of all officers and employees. This power, however, up until February 1967, had not been exercised formally; all payments made to the four participants in the venture had resulted from informal but unanimous approval of the parties concerned.

out" minority shareholders.[2] In Donahue itself, for example, the majority refused the minority an equal opportunity to sell a ratable number of shares to the corporation at the same price available to the majority. The net result of this refusal, we said, was the minority could be forced to "sell out at less than fair value," since there is generally no ready market for minority stock in a close corporation.

"Freeze-outs," however, may be accomplished by the use of other devices. One such device which has proved to be particularly effective in accomplishing the purpose of the majority is to deprive minority shareholders of corporate offices and of employment with the corporation. A guaranty of employment with the corporation may have been one of the basic reasons why a minority owner has invested capital in the firm. The minority shareholder typically depends on his salary as the principal return on his investment, since the earnings of a close corporation are distributed in major part in salaries, bonuses and retirement benefits. By terminating a minority shareholder's employment or by severing him from a position as an officer or director, the majority may effectively frustrate the minority shareholder's purposes in entering on the corporate venture and also deny him an equal return on his investment.

The Donahue decision acknowledged a strict obligation on the part of majority shareholders in a close corporation to deal with the minority with the utmost good faith and loyalty. Nevertheless, we are concerned that untempered application of the strict good faith standard enunciated in Donahue to cases such as the one before us will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned.

The majority, concededly, have certain legitimate "selfish ownership" rights in the corporation which must be balanced against their fiduciary obligation to the minority. When minority shareholders bring suit against the majority alleging a breach of the strict good faith duty owed them by the majority, we must carefully analyze the action taken by the controlling shareholders in the individual case. It must be asked whether the controlling group can demonstrate a legitimate business purpose for its action. In asking this question, we acknowledge the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. It must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees.

When an asserted business purpose for their action is advanced by the majority, we think it is incumbent upon minority shareholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority interests. If called on to settle a dispute, our courts must weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative.

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[22] 2 By definition, freeze-outs are coercive: minority shareholders may be bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they receive may be less than the value they assign to these shares. Of course, this alone does not necessarily render freeze-outs objectionable. While we recognized in Donahue that courts must avoid an automatic stamp of approval of that which is manifestly inequitable, it is not enough for those challenging majority action merely to label it a "freeze-out."

Applying this approach to the instant case it is apparent that the majority shareholders in Springside have not shown a legitimate business purpose for severing Wilkes from the payroll of the corporation or for refusing to re-elect him as a salaried officer and director. There was no showing of misconduct on Wilkes's part as a director, officer or employee of the corporation which would lead us to approve the majority action as a legitimate response to the disruptive nature of an undesirable individual bent on injuring or destroying the corporation. On the contrary, the undisputed evidence shows that Wilkes had sought to preserve the asset value of the corporation, had always accomplished his assigned share of the duties competently, and had never indicated an unwillingness to continue to do so.

It is an inescapable conclusion from all the evidence that the action of the majority shareholders was a designed "freeze-out" for which no legitimate business purpose has been suggested. Furthermore, we may infer that a design to pressure Wilkes into selling his shares to the corporation at a price below their value well may have been at the heart of the majority's plan.

The case is remanded to the trial court for entry of a judgment declaring that Quinn, Riche and Pipkin breached their fiduciary duty to Wilkes as a minority shareholder in Springside, and awarding money damages therefor. Wilkes shall be allowed to recover from each of the other shareholders ratably, according to the inequitable enrichment of each, the salary he would have received had he remained an officer and director of Springside.

Goode v. Ryan

Columbia Supreme Court (1986)

HENNESSEY, C.J. The plaintiff seeks a declaration that the fiduciary obligation which shareholders of a close corporation owe one another requires that majority shareholders purchase, or cause the corporation to purchase, the shares of a minority shareholder on his/her death. The trial judge allowed the defendants' motion for summary judgment on this claim and the plaintiff appealed. We granted the plaintiff's application for direct appellate review and now affirm the judgment.

The plaintiff, Thomas E. Goode, is the administrator of the estate of Alice M. Marr, a deceased shareholder of the Gloucester Ice & Cold Storage Co. (Gloucester). The estate owned 800 shares of the 11,340 shares outstanding of common stock of Gloucester. The defendants are shareholders of Gloucester, a company engaged in the manufacture and sale of ice to fishing industry customers. The corporation has the requisite characteristics of a close corporation. The number of shareholders is small, no ready market exists for the Gloucester stock, and majority shareholder participation in the management of the corporation is substantial. The parties agree that no provisions restricting the transfer of stock or requiring the corporation or remaining shareholders to redeem its stock on the death of a shareholder or otherwise appear in the corporation's articles of organization or by-laws, or in any agreement among the shareholders.

In 1977, Goode and his counsel informed the management of Gloucester of his desire to sell, or to have redeemed, the 800 shares of Gloucester stock owned by the Marr estate. Gloucester offered to purchase the 800 shares from the Marr estate at $12.50 a share. The unaudited financial statement of Gloucester for the year ending December 31, 1977, indicated that the book value of the stock was $38.87 a share.[1] The plaintiff did not accept the Gloucester offer and, after a short time, the offer was withdrawn.

At the Gloucester annual meeting held on August 25, 1982, Goode requested that his stock be redeemed. In response, Goode received a letter dated September 22, 1982, from Gloucester president John W. Ryan, denying any legal obligation on the part of the Gloucester directors to redeem the Marr estate's shares, but agreeing to present to the directors any price and payment terms Goode might accept. Goode replied in a letter dated October 15, 1982, that he did not have sufficient information to formulate a proposal and that the officers and directors of Gloucester were obligated to furnish such information to him.

Following this exchange of correspondence, Goode initiated this action. The complaint alleged essentially the factual circumstances described here and claimed that these facts gave rise to a duty on the part of Gloucester, or its controlling shareholders, or both, to purchase the stock owned by the estate Goode represented.

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[11] Plaintiff argues that this "patently unreasonably low" offer is conclusive evidence of a "freeze-out" by defendants and sufficient to support a finding of a breach of a fiduciary duty. To be sure, we recently have held that "an offer of a grossly inadequate price" for a minority stockholder's shares in a close corporation is viewed as an important component in a freeze-out plan. Sugarman v. Sugarman (Columbia Supreme Court, 1986). However, in light of our determination in this case, we need not visit this issue.

In Donahue v. Rodd Electrotype Co., we held that a controlling shareholder selling a close corporation its own shares must cause the corporation to offer to purchase shares ratably from all other shareholders. Subsequently, we applied the rule to provide relief to a minority shareholder in a close corporation, whose employment and income from the corporation were terminated without cause by the majority shareholders. Wilkes v. Springside Nursing Home, Inc. The plaintiff in the instant case asks us to apply the fiduciary principles established in those cases to hold that, on the death of a minority shareholder, majority shareholders are obligated to purchase, or to cause the corporation to purchase, the shares owned by the minority shareholder.

A shareholder wishing to convert an investment in a close corporation to cash for personal financial reasons or because of unhappiness with the management of the enterprise will have only a limited number of opportunities for disposing of the asset. Similarly, the executor or administrator of the estate of a deceased shareholder in a close corporation will be confronted with an illiquid asset that may have a high value in the estate, but have little, if any, dividend value for the beneficiaries. In both situations, the only prospective purchasers for the stock may be the remaining shareholders in the corporation or the corporation itself.

Investors in other types of firms have easier mechanism available for disposing of their interests. A shareholder in a large, public-issue corporation can sell the stock on the financial markets at no price disadvantage relative to other sellers of that stock. A member of a partnership can convert the investment to cash by exercising the right to dissolve the partnership.

The shareholder who owns less than a majority interest in a close corporation does not have any of these options.[2] In the absence of an agreement among shareholders or between the corporation and the shareholder, or a provision in the corporation's articles of organization or by-laws, neither the corporation nor a majority of shareholders is under any obligation to purchase the shares of minority shareholders when minority shareholders wish to dispose of their interest in the corporation.

The minority shareholder in a close corporation is susceptible to oppression by the majority or controlling shareholders. Wilkes, supra. In the instant case, there is no evidence of any oppressive conduct on the part of defendants directed at excluding the shares Goode represented from participation in the affairs of the corporation. In fact, the deceased shareholder, Alice Marr, never held corporate office, or served on the board of directors, or received any salary from Gloucester, and there is no indication that she or her estate was aggrieved by the absence of involvement in corporate management. The majority shareholders made no effort to curtail, or interfere with, any benefits to which Marr or her estate was entitled as a minority shareholder in Gloucester. The majority shareholders simply refused to purchase the Marr estate stock. This refusal violated no agreement or corporate governance provision and did not violate any fiduciary obligation they owed to the plaintiff. Nor are any facts present to permit us to conclude that the majority used assets of the corporation to enrich themselves at the expense of minority shareholders.

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[22] A shareholder with a majority interest in a corporation may petition for the dissolution of the corporation for any reason. CBCL section 99 (a) (1984 ed.). Forty percent of a corporation's shareholders may bring a petition for the dissolution of a corporation if directors or shareholders are deadlocked. CBCL section 99(b) (1984 ed.).

While the plaintiff's predicament in not being able to dispose of the Gloucester stock to facilitate prompt settlement of the Marr estate is unfortunate, the situation was not caused by the defendants but is merely one of the risks of ownership of stock in a close corporation. It is not the proper function of this court to reallocate the risks inherent in the ownership of corporate stock in the absence of corporate or majority shareholder misconduct.

Judgment affirmed.

MODEL ANSWER

Task A: Draft of Personal Statement of Kathleen Rideau

Note to Ms. Rideau: Please review this draft of your "Personal Statement" carefully. I have posed specific questions to you (set off from the main text by brackets) when the information provided was either unclear or incomplete. Obviously, these notes will be eliminated, and the accompanying text changed when necessary, depending on your answers.

The applicant, the editor and principal shareholder of TNG, Inc., submits that TNG's acquisition of Ontario Publishing Ltd. will be of net benefit to Canada for the following reasons:

1. The Acquisition Will Help Preserve Canada's Cultural Heritage and National Identity.

As Paragraph 2 of the Investment Canada Act (33-34 Elizabeth II, Chapter 20) indicates, the government of Canada puts great value on the preservation of Canada's cultural heritage and national identity. If this acquisition is approved, the applicant will conduct its Canadian operations in a manner that will clearly foster this fundamental public policy, thus benefiting Canada and its people.

While the Canadian government is rightfully concerned that foreign publications already have a significant share of the Canadian newspaper and periodical market, it need not fear the applicant's acquisition of Ontario Publishing. I have stated publicly, and repeat here as well, that TNG will use the facilities of Ontario Publishing to publish a true "Canadian" newspaper.

Even at the outset, we expect that up to 20 percent of the Canadian version of The Gazette will focus on Canadian affairs. [Ms. Rideau: Can we add that you are committed to substantially increasing this proportion? If so, can you outline your plans?] We will establish a Canadian Division headquartered in Toronto; the head of this division will be in charge of the day-to-day operations, the Canadian news bureau, and the entire editorial page of the Canadian edition. [Ms. Rideau: Can I add that this division will be headed by a Canadian?] In addition, we will hire a number of Canadian reporters to provide focus on Canadian politics, Canadian sports, Canadian entertainment, and Canadian social figures. Finally, we have already received commitments for virtually all of the available advertising space from many of Canada's finest companies [Ms. Rideau: We should consider attaching a list]; there is little question that these advertisers will insist on a Canadian focus. [Ms. Rideau: What proportion of advertising do you expect to come from Canadian companies? Mr. Goodman's memo implies that it is 20 percent, but Ms. Hodges's notes make it appear that it may be greater; if the latter is true, we could strengthen this argument.]

Approximately 750,000 Canadians, a significant proportion of the population, currently purchase The National Gazette. It seems logical to assume that the vast majority of these readers would buy the Canadian edition; since this version will have

greatly increased coverage of Canadian affairs, Canada's national identity will be strongly reinforced in those readers. Furthermore, we anticipate a fourfold increase in our Canadian readership. If this is the case, more than two million other Canadians, many of whom currently read foreign publications, will begin reading our Canadian newspaper. Obviously, this additional focus on Canadian matters will help to enhance Canada's culture and national identity.

Finally, we recognize and respect Canada's bicultural and bilingual tradition. We plan on fostering this tradition by also publishing our Canadian edition in French as soon as it is practical to do so. [Ms. Rideau: Can you provide a specific timetable?]

2. The Acquisition Will Contribute to Canada's Economic Growth

At present, Ontario Publishing is struggling. If TNG is not permitted to buy it now, there is a risk that this business will close, thus injuring its employees, its suppliers, and, ultimately, the Canadian economy. Conversely, we anticipate tremendous growth should we be allowed to utilize Ontario Publishing's assets for our Canadian newspaper. This would require us to increase our own staff substantially and benefit our distributors, suppliers, and advertisers. Taking the "ripple effect" into account, the economic benefit to Canada would be enormous. [Ms. Rideau: If you can tell me how much TNG would be spending, we will find an economist to quantify this.] While I recognize that this increase is not certain, our projections are corroborated by the fact that Canadian advertisers have already made commitments to buy 90 percent of our available ad space for our first three months of publication.

Finally, it should be noted that Ontario Publishing had purchased its paper from a Michigan supplier, whereas we intend to buy all of our paper from Canadian companies. [Ms. Rideau: Is this true for only the Canadian subsidiary or for the entire company?] This could amount to a direct benefit to the Canadian economy of ?? dollars all by itself. [Ms. Rideau: Can you provide a dollar figure?]

3. The Acquisition Will Provide Employment Opportunities in Canada

We immediately intend to hire 50 percent more Canadian reporters than Ontario Publishing now employs. In addition, we will maintain an editorial and support staff of 50 persons in our Toronto headquarters plus ?? employees in other parts of Canada. [Ms. Rideau: I'd like to be as specific here as possible. Can you tell me how many employees Ontario Publishing has (listing separately persons in jobs that will be shifted to the U.S.) and how many people would work in Canada for the Canadian Gazette?] These numbers will undoubtedly increase with the growth of our circulation. And the ripple effect that our growth will have on our suppliers and advertisers will undoubtedly generate additional new jobs.

4. The Acquisition Will Otherwise Benefit Canada

In addition to all of the above, the acquisition of Ontario Publishing by TNG will benefit Canada's sociopolitical interests.

Canada has long recognized that freedom of expression is the best protection against tyranny. Indeed, an investigative newspaper like The Gazette is especially vital to maintaining a free society. Our aggressive investigations have uncovered corruption on numerous occasions, and the threat of exposure has been a strong deterrent to other potential wrongdoers. Thus, our publication has significantly benefited the people of the

United States. If we are allowed to proceed with our planned Canadian newspaper, the citizens of Canada will undoubtedly reap similar benefits.

(I understand that some persons have called upon you to deny our application on the grounds that we are somehow "unworthy" to publish a Canadian newspaper. As "evidence," they point to the fact that we have had to defend several lawsuits over the years. While The Gazette has been sued on many occasions, this is hardly grounds for Canada, a country which reveres free speech, to deny our application. The fact that the vast majority of these suits have proven to be without merit makes this is especially true. TNG has always hired only highly ethical and responsible journalists and the quality of their work has been recognized by the awarding of a Pulitzer prize for excellence in investigative journalism. Furthermore, we have taken, and will continue to take, significant steps to ensure that our articles will be even fairer and more accurate in the future.)

Conclusion:

In summary, the acquisition of Ontario Publishing by TNG, Inc. will benefit Canada and its citizens in many ways. It will help enhance Canada's cultural heritage and national identity, create employment opportunities, provide a boost to the Canadian economy, and serve Canada's social and political interests. As such, this purchase would provide a significant benefit to Canada and should be approved.

Task B: Memo Re Brinker's Threatened Lawsuit

MEMORANDUM

To: Ann Hodges

From: Applicant
Date: Today
Re: Demands of Brinker to TNG, Inc.

I believe that we have two separate matters to consider: (1) Would a refusal of Brinker's demands be legally supportable? and (2) to what extent should we comply with these demands even if we are not required to do so?

Legal Validity of Brinker's Demands

Brinker's attorney indicates that his demands are based on the fiduciary duties imposed on shareholders in a close corporation. He specifically cited the case of Wilkes v. Springside Nursing Home, Inc., and I agree that this case gives Brinker his strongest arguments. As a result, I have carefully reviewed Wilkes and the related cases.

While no Columbia case specifically defines a close corporation, Goode v. Ryan states that such an entity is characterized by three factors: "The number of shareholders is small, no ready market exists for the [company's] stock, and majority shareholder participation in the management of the corporation is substantial." Since it seems clear that TNG fits these criteria, Rideau and Goodman owe Brinker a duty of "utmost good faith and loyalty" [Donahue v. Rodd Electrotype] and may not "freeze him out" [Wilkes].

The mere existence of this duty does not, however, mean that Rideau and Goodman must accede to Brinker's demands. As Wilkes specifically indicated, each action must be weighed on its own facts. As a result, I have separately analyzed the three activities complained of.

1. Decision to Acquire Ontario Publishing

The decision to acquire Ontario Publishing would be a matter of "ordinary business." As such, it can be made by a majority of the board of directors despite the objections of a minority shareholder, even in a close corporation. As the court said in Wilkes: "[U]ntempered application of the strict good faith standard . . . will result in the imposition of limitations . . . which will unduly hamper [the controlling group's] effectiveness in managing the corporation in the best interests of all concerned." Furthermore, Wilkes pointed out that, when the controlling group's decision is attacked, "it is incumbent upon minority shareholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority interests." Since there is no showing that the acquisition would cause harm to any generally recognized corporate or personal interest, Brinker could not meet this burden.

I would expect, however, that Brinker would challenge this action as a breach of a contractual commitment created by Rideau's letter of August 29, 1964. In the last paragraph of that letter, Rideau said, "I have also given you my pledge that . . . [n]o

force, private or public, will control our pen." I doubt, however, that this agreement is sufficiently definite to bind Rideau, let alone TNG. Furthermore, even if this statement was enforceable, the mere fact that Rideau might alter the content or tone of The Gazette to obtain the approval of the Canadian government would not appear to be a breach of the agreement. Given Canada's strong free speech tradition and Ms. Rideau's public and private statements that she will not change a winning format or kowtow to pressure to impose self-censorship, any threat to The Gazette's independence appears to be illusory.

Thus, I am confident that Brinker has no legal right to stop the acquisition.

2. Discharge of Brinker as a Columnist

Discharging Brinker as a columnist seems similar to the conduct prohibited by Wilkes, but that case is clearly distinguishable.

In Wilkes, the plaintiff was fired without any legitimate justification; he was discharged solely because of disagreements that were tangential to the management of the business. In our case, however, Rideau and Goodman seem to have had more than adequate grounds to fire Brinker as a columnist. According to Rideau, Brinker's "bitter, unsubstantiated attacks" have injured The Gazette's reputation, resulted in numerous lawsuits (some of which cost the company considerable sums), and have threatened the company's ability to acquire a highly beneficial business opportunity (Ontario Publishing). In addition, Rideau believes that the public's taste has changed and that Brinker's columns now alienate more readers than they attract, an opinion that the court may not freely ignore. Under these circumstances, it is unlikely that Brinker can prove that his dismissal was motivated by "avarice, expediency or self interest" (which is expressly prohibited by Donahue [as cited in Wilkes]) or that it otherwise violated Rideau and Goodman's duty of loyalty.

3. Return of Brinker as a Director

Normally, the refusal to reelect Brinker as a director would be impervious to attack. There are three exceptions to this rule: (a) when directors are selected under cumulative voting, (b) when the act violates the fiduciary duties of the shareholders of a close corporation, and (c) when there is a valid agreement between the shareholders concerning the selection of directors.

Brinker, as the owner of one third of TNG's shares, owns more than enough stock to guarantee his election to TNG's three-person board under cumulative voting. Thus, if such a scheme exists here, TNG would have no choice but to allow Brinker to sit on its board. I have assumed, however, that you have checked the Columbia Corporations Code and TNG's articles and determined that neither requires that TNG's directors be chosen by cumulative voting. (Let me know if you had not, and I will immediately do so.)

With regard to the fiduciary duty limitation, Rideau and Goodman would be held to the "utmost loyalty" standard discussed above. While I could not find any Columbia cases specifically on point, the general rule is that one director's refusal to cooperate with the others does not constitute "cause" for his removal. Thus, the fact that Brinker has vehemently argued with the other directors would not be considered sufficient cause to vote him out. Alternatively, we might justify Brinker's removal by showing that he has violated his fiduciary duty as a director to exercise appropriate care and diligence since he has never been actively involved in TNG's affairs. The validity of this argument is far from clear in this case and is undercut by the fact that Rideau and Goodman knew of

this but continually reelected him anyway. Thus, I fear that Brinker could sustain the burden of proving a lack of good faith by Rideau and Goodman when they did not elect him to the board.

Finally, Rideau's August 1964 letter might be construed as a promise by her to vote for Brinker as a director. If this is the case, this letter (along with Brinker's reply) would be the functional equivalent of a shareholder agreement concerning the election of directors. If such an agreement is found, it would be enforceable unless Brinker has acted improperly toward the corporation; as discussed above, proving cause here would be difficult.

In conclusion, I'm afraid that TNG would have to comply with this demand.

4. Alternative Demand: Buy Him Out

Brinker would probably assert that his alternative demand, that TNG (and/or Rideau and Goodman) buy his stock, is supported by Donahue. In that case, the court ruled that a close corporation could not redeem the share of one shareholder without giving the other shareholders similar rights. Here, however, TNG has not bought any of its stock from any of its shareholders and thus this part of the Donahue decision is inapplicable. Instead, our case would fall within the general rule stated by Goode: "In the absence of an agreement . . . neither the corporation nor a majority of shareholders is under any obligation to purchase the shares of minority shareholders . . .."

Practical Considerations

Even if litigation would result in our favor, you have indicated that a lawsuit would effectively kill TNG's chance to acquire Ontario Publishing. Since it is obvious that this deal is of great value to our client, we should vigorously strive to find a way to avoid this. As I see it, we have the following options:

Alternative 1: Partial Acceptance of Demands

If the Ontario Publishing deal is as important to TNG as I think it is, it might be worth it to submit to Demands 2 and/or 3 in exchange for Brinker's withdrawal of his objection to this acquisition. Obviously, Brinker is very anxious to get back his directorship (and the accompanying tangible and intangible benefits that flow therefrom) and to regain a forum for his personal views (i.e., the right to publish his column). If, as I suspect, these interests are more important to him than his objection to the Canadian Gazette, especially since he may recognize that his objections are as unfounded as they seem to be, he might accept this resolution of the dispute.

Of course, Rideau is legitimately concerned over the tone and content of Brinker's column; as a result, every effort should be made to find a way to reach an agreement which will protect TNG without causing Brinker to feel that he is being censored. Similarly, the views that Brinker expresses as a director appear to be a major irritant, and we should try to find some way to alleviate this tension.

The viability of this alternative ultimately depends on who is willing to bend on which points and how much aggravation Rideau is willing to tolerate from Brinker. There is no way to know until we talk to both parties.

Alternative 2: Buy Brinker Out

Even though TNG has no obligation to do so, this might be the wisest course in the long run. If, as I suspect, the relationship between Brinker and Rideau is beyond repair, a complete disassociation would be best for all concerned.

Insofar as the buyout price is concerned, this is simply a matter of negotiation. Since Brinker has no right to require a buyout at all, TNG is obviously not required to accept Brinker's evaluation, let alone his demand for a 10 percent "premium." Furthermore, there is every reason to believe that $3,630,000 is just a "haggling figure" and that Brinker would be willing to accept far less.

Even if Brinker is not willing to budge, it might still be worthwhile to pay his price. The parties are "only" $630,000 apart (Rideau values Brinker's share at $3,000,000). If the Ontario Publishing transaction can be completed, TNG will recognize an immediate "profit" of $1,000,000 since the asking price is, according to Rideau, that much under market value. Given that one-third of that amount would ultimately (though indirectly) go to Brinker if the deal is consummated, the parties are, in fact, less than $300,000 apart. Furthermore, the buyout would free TNG of the obligation to pay Brinker his annual salary as a director and consultant; even accepting the reduced salary of $150,000 per year as approved by Rideau and Goodman, the $300,000 would be made up in two years (and, from then on, TNG would be saving that amount in perpetuity). Furthermore, Rideau expects to reap huge future profits from the Canadian Gazette, and none of these profits would have to be shared with Brinker. In short, it does not seem that the $630,000 difference is enough to justify the loss of Ontario Publishing.

I do understand, however, that TNG simply does not have the ability to pay this amount (you indicated that it could not afford to pay more than $2,000,000 over the next five years). Nevertheless, it is possible that Rideau and/or Goodman have sufficient personal assets to make up the difference. Alternatively, they may be able to find a new investor (although, if they follow this route, they would have to be careful to avoid setting up the kind of problem that they are now having with Brinker). Given the short- and long-term benefits that would be lost if the Ontario Publishing deal is killed, we should be as creative as possible here.

Of course, a short-term inability to meet Brinker's price need not be fatal if payment could be spread out over a longer period. If, as it appears, Brinker is approaching retirement age, $2,000,000 paid out over five years might easily take care of all of his personal needs; if this is the case, any excess would end up going to his heirs or other intended beneficiaries anyway and he might well allow the interests of these persons to be deferred (so long as they are sufficiently guaranteed). Conversely, he might not be able to afford to have this matter tied up for the years that litigation could take. These are just some of the points that could be raised in negotiation.

Finally, you should be aware that Sugarman v. Sugarman (cited in Goode) held that "an offer of a grossly inadequate price" is itself evidence of an improper intent to freeze-out the minority shareholder. As such, we must be careful not to offer an unjustifiably low price or other unreasonable terms. Similarly, we should be careful when asserting the "you can't afford to wait" argument. If we cannot settle the case, Brinker could use such conduct as evidence of Rideau and Goodman's breach of their fiduciary duty of loyalty.

Alternative 3: A Combination of Alternatives 1 and 2

If neither of the above alternatives is completely feasible, we could try to combine features of both. For example, Brinker might agree to sell his stock for a price that TNG

can afford if he can get his column back and/or regain his seat on TNG's board. Unless one or both parties proves to be totally inflexible, we should be able to resolve the dispute without litigation or jeopardizing the Ontario Publishing deal.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional states of Columbia and Franklin, two of the United States. You are an associate in the firm representing the Southwest Health Center.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare a memorandum.

4. The File contains factual information about your case in the form of six documents. The first document is a memorandum to you from Jim Hagelund containing the instructions for the memorandum you are to draft.

5. The Library consists of portions of Articles 1 and 2 of the Uniform Commercial Code (1978 Official Text), adopted in both Columbia and Franklin.

6. Your memorandum should be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing your memorandum.

8. This performance test will be graded on the content, thoroughness, and organization of the memorandum you draft. Your answer will be graded on the basis of your ability to identify a client's needs and your ability to assess the extent to which a proposed contract meets those needs.

FILE

Symanski & Hagelund
Attorneys at Law
15 First National Bank Plaza
Florence, Columbia

MEMORANDUM July 29, 1986

To: Applicant
From: Jim Hagelund
Re: Southwest Health Center - Computech Agreement

I met last week with Laura Sauer, Administrative Director of Southwest Health Center, a new corporation which is to start operations on December 1, 1986. Southwest contemplates buying a computer system from Computer Technology Corp. (Computech), an East coast manufacturer located in Orem, Franklin.

Laura contacted Computech after seeing its ad in the Columbia Medical Journal. Subsequently she met with Gene Minard, Computech's Pacific coast sales representative, to discuss Southwest's needs and what Computech could offer. Laura and Minard negotiated and tentatively agreed upon purchase rather than lease, models and options, price, and discounts. Thereafter, she received a proposal letter and form Purchase Agreement from Computech. These are in the file, as well as are copies of other correspondence and memoranda that Laura gave me. Apparently Computech now wants Southwest to "sign on the line" and proceed with the deal. Laura has asked us to review the proposal and purchase agreement.

Laura tells me she knows a considerable amount about computers and is satisfied that the price is fair and that the system has the capacity to meet Southwest's business needs. However, she would like our advice in assuring that under this Agreement Southwest gets what it wants.

One critical point that did come up in my discussion was Laura's concern the computer system be in operation before Southwest opens on December 1. She told me Minard had assured her that the system would be in and ready by November 1, giving Southwest a month to input its records and so on.

In any event, Laura and I are set to meet tomorrow morning to discuss the terms of the proposed Agreement. I would like your help in preparing for the meeting. We will not be able to attack every provision in the Agreement as unacceptable; Computech will not simply go along with our converting its standard seller-oriented agreement into what could be a buyer-oriented agreement. There will have to be negotiation and compromise on various points.

Laura has provided me with correspondence between herself and Computech which, taken with the conversations with Laura I have summarized for you, indicate what Southwest seeks to achieve in purchasing the computer system. In general our client is satisfied with the equipment and price and wants to enter into the agreement as soon as

possible to assure an operational system when the Center opens. We obviously want Southwest to get what it desires.

Please read the correspondence and review the Agreement and then write me a memo in which you analyze and evaluate the Agreement in light of Southwest's goals. Focus your discussion on those provisions that must be revised or added to meet Southwest's most critical needs. For each provision that should be revised or added, briefly discuss why there is a problem and indicate how it can be resolved. In your memo, please evaluate the importance of the changes you are proposing and identify the revisions or additions we should insist upon, explaining why they are critical to meeting Southwest's goals. Some provisions achieve Southwest's goals and need no discussion; some fail to meet Southwest's goals and must be revised; some provisions must be added in order to meet Southwest's goals. You needn't propose specific language for revisions or additions. You also need not address tax issues that might be raised; I've sent a copy of the Agreement to the tax department for review.

Franklin has adopted the 1978 official text of the Uniform Commercial Code (just as Columbia has). While your general background in this area may be sufficient, I have asked the paralegal to copy some provisions of Articles I and II for you to use as reference in reviewing the Agreement. If you are familiar with Articles I and II, you may not need to read the provisions attached. Also, most of them may not be relevant to your review, but where they are the basis for your recommendations, please cite to specific UCC Sections.

Southwest Health Center, P.S.C.
P.O. Box 250
Concord, Columbia

MEMORANDUM June 9, 1986

To: Computer File
From: Laura Sauer
Re: Notes on Things to Consider

Article in recent issue of Medical Center Monthly made some important points we should keep in mind when deciding on Center's computer system.

- Price: make sure to bargain on price; most vendors give 5% to 15% discounts on systems costing $25,000 and above.

- Single v. multiple system: consider possibility of several independent, small computers rather than single integrated system. Latter is cheaper, more powerful, but breakdowns can be more catastrophic to operations.

- Lease v. Purchase: consider leasing system in beginning; consider Investment Tax Credit implications.

- Warranty: be sure vendor warrants its own software and applications programs.

- Getting system operational: provide sufficient lead time; need 3 to 6 months to make sure system meets all requirements; to "debug" operational problems requires sufficient time to identify precise problem and cause.

- Multiple vendors: be wary of vendor who insists on selling only its own products; but be cautious about warranties with non-vendor hardware and software.

- Software compatibility: present availability of software necessary for our exact needs; system must be compatible with software packages produced by other vendors.

- Record Keeping: back-up and other software packages for medical record keeping are available for fail-safe features.

- Vendor specs: vendor's specifications deal only with machine speed, voltage, memory, etc.

- Operator fatigue: green or amber monitors to reduce operator fatigue.

- Language: should be compatible with employees' previous experience.

- Training and "trouble-shooting": check cost and availability of initial and future training of staff on present and new equipment; telephone "hotline" for assistance; manuals and documentation for all operators.

- Location: for maximum flexibility, system should be centrally located and easy to reach from most work stations.

Southwest Health Center, P.S.C.
P.O. Box 250
Concord, Columbia

MEMORANDUM June 16, 1986

To: Laura Sauer
From: Ed Pinkney, Head Nurse
Re: Proposed Computerization of Records

Before we jump into a computer system, please keep in mind some special problems that we'll face as a medical center.

We need to maintain sufficient open space for patients and support machines. Can't have big computers or cables blocking quick access in emergencies. Please don't clutter up those new nurses' stations we've just selected.

What do we do with a clinic full of patients when the computer is "down" and we can't get anyone's medical records? We must be assured of immediate servicing at the Center. What happens if we have to send everybody home? If something malfunctions, do we get replacement equipment? Will we have a back-up system for access to essential records?

I pray it never happens, but what if some computer hack gets into the computer and jumbles the records; or what if the computer malfunctions and improper treatment or an inappropriate procedure results because a record gets misfiled, e.g., the wrong blood test goes into someone's file? Is this our responsibility, or the computer company's? Is it covered by our malpractice insurance?

Also, I've some concerns regarding the Nurses Licensing Board regulations. Rule 101.31 states that "The registered nurse shall maintain the patient's medical record." Although this has been interpreted to mean that someone else may keep and make the entries, the Board insists that the nurse must remain in charge of this process. How will this new system satisfy Rule 101.31?

Lastly, we'll need to be sure that the system works properly, not just during the installation and set-up period, but when we're actually operating. What I care most about is a system that fits in with our operation in actual practice.

Southwest Health Center, P.S.C.
P.O. Box 250
Concord, Columbia

June 23, 1986

Customer Information
Computer Technology Corp.
1700 First Avenue
Orem, Franklin

Gentlemen:

I am the administrative director for the Southwest Health Center, a newly established professional service corporation in Concord, Columbia, which will open for business on December 1, 1986. We are interested in the possible purchase of a computer system for our offices. I recently saw your advertisement in the May 1986 issue of the Columbia Medical Journal and am interested in further information about the systems and services you offer.

Some background information regarding the Health Center may be of some assistance to you. Southwest's offices, which are currently under construction, are located on South Hospital Drive, adjacent to Concord Memorial Hospital. Southwest's staff is made up of four medical doctors, a psychologist specializing in family counseling, a dentist, a physical therapist, and a full staff of physician and dental assistants, nurses and clerical help. The focus of Southwest's practice will be family oriented. The four doctors and the dentist all have established professional practices and will thus bring to Southwest approximately 7,500 active patients with accompanying records. We anticipate in the first year gross revenues of approximately $2.6 million.

The Concord area is a growing one. It is envisioned Southwest's business will expand rapidly over the next several years. A 25 percent increase in the total number of patients is projected during Southwest's first two years of operation. Further, additional medical and clerical staff will likely be added in the near future.

We are interested in purchasing a computer system that will meet our initial and expected needs. We will need an efficient system, with adequate power and storage capacity, that can utilize a variety of software and programs that will handle our billing, accounting and record keeping needs. We will also need a system designed for easy expansion and enhancement as Southwest's practice grows. Finally, we will need full support services including training and prompt repair and maintenance for any system we purchase. We will definitely need to have the system installed and fully operational by November 1 so we will be ready for the opening of Southwest on December 1, 1986.

Your advertisement suggests you may be able to offer us the kind of equipment, software and services we need. I would appreciate hearing from one of your sales representatives at the earliest possible time. Thank you for your kind consideration.

Very truly yours,

/s/ Laura Sauer
Laura Sauer

Administrative Director

COMPUTECH

The Computer Company for Today - and Tomorrow
Computer Technology Corp.
1700 First Avenue
Orem, Franklin

Gene Minard
2400 Elm Street
Pacific Sales Representative
Seattle, Washington

July 15, 1986

Ms. Laura Sauer
Administrative Director
Southwest Health Center
P.O. Box 250
Concord, Columbia

Re: Proposal - Southwest Health Center
Job No. 86-7185

Dear Ms. Sauer:

It was a pleasure meeting with you on July 3 to discuss the computer needs of your firm. I must say, after discussing Southwest and reviewing the plans and specifications for it with you, I was most impressed with your facilities. Your planned location for the computer seems more than adequate.

Following our meeting I spoke with Mark Lee, our sales manager. Together, we have put together a computer package we're confident will be just what you need. Thus, COMPUTECH is happy to propose for your consideration the following computer equipment and software for under $33,000.

The proposed system includes the COMPUTECH Model 5000 microcomputer together with the COMPUTECH CSM/99 "systems software" package. In plain language, this means the basic computer unit together with the internal software or programming needed to make it run. Together, these should provide full power and storage capacity for your needs as we discussed them. Further, they will permit you to utilize the widest possible array of "applications software" - that is the separate software or programming needed to use your computer to perform various types of tasks for you. Thus your system will handle easily and efficiently all of your needs, from maintaining patient records to preparing billing statements and correspondence.

With the COMPUTECH 5000 microcomputer is our MTU-4 magnetic tape cartridge backup unit to allow you to make back-up copies off all of your files. Included in the package as well are five (5) Vista CRT Model 950 video monitors made by Vista Corp. with detached keyboards for use at work stations by your staff for information input, data

retrieval, and word processing. Thus, simultaneously one person can be checking a patient's records, another preparing patient billing, and another typing correspondence. Finally, included is a McAllen 3300 series letter-quality laser printer manufactured by McAllen Electronics. With a wide variety of features, the printer will allow you to print quickly and clearly patient data, bills, letters, and so on. Both Vista and McAllen produce computer equipment of the highest quality available today. That's why we sell it with our own products.

As we discussed, COMPUTECH has available a variety of reasonably priced application software packages for use with this system, several of which I think would be suited to your business. More importantly, because COMPUTECH is one of the major names in the field today, there is currently on the market a broad selection of application software packages from independent software makers and dealers for use with the equipment. Many of these are designed specifically for use in medical practice for accounting records, office management, and so on. Many more can be expected in the future. I'll be happy to discuss with you the sorts of application software packages available from COMPUTECH and others that would be best for your firm.

The proposed system will fit as well with your future needs as it does with your current needs. As our slogan states, COMPUTECH systems are designed for today and tomorrow. They are designed with future enhancement and expansion specifically in mind. They can support and operate compatibly with a wide array of the major brand printers, modems (phone hookups) and other peripheral equipment. Further, updates are constantly being made with respect to our computer products. As they become available, we will be glad to supply them to you.

COMPUTECH does not sell a product to you. It sells its guaranty, its services, and its expertise. Included in the quoted price are our usual installation services at your office. We'll get your system up and running for you. Thereafter, COMPUTECH stands behind all of the equipment it manufactures with a ninety (90) day warranty that's one of the best in the business. In the rare event your system does not function up to par during this time, you can anticipate one of our skilled maintenance technicians will be there promptly to handle the problem and get your system up again. We'll also provide full and prompt maintenance for your system after the warranty period ends under our standard Maintenance Agreement. I'll be happy to send you a copy of this Agreement for your consideration. Finally, we provide easily understood manuals and complete training for every product we sell at no additional charge to you. One of our skilled training specialists will come to your offices to run a complete one-day training session for all of your employees. After that, you can contact a training specialist by telephone at one of our service facilities during our normal hours for further help and information at only a modest charge. Of course, we'll be glad to send a training specialist to your offices for further training at our usual rates any time you'd like.

I've enclosed our standard Purchase Agreement for your review. After you've had a chance to look it over, give me a call so we can discuss this further and so I can answer any questions you might have.

Assuming we conclude the matter promptly, we can begin delivery of the various items of equipment starting on September 1. Installation will take place as soon as everything has been delivered. I see no problem in having your system ready to go by November 1, well in advance of your December 1 opening date.

Again, I enjoyed meeting you. I look forward to hearing from you soon.

Very truly yours,

/s/ Gene Minard
Gene Minard
Pacific Sales Representative

Enclosure

Contract No. AA4365
Job No. 86-7185

COMPUTER PURCHASE AGREEMENT

THIS AGREEMENT made and entered into as of the _____ day of ___, 198__, by and between (a) COMPUTER TECHNOLOGY CORP, a Franklin corporation, with offices at 1700 First Avenue, Orem, Franklin ("COMPUTECH") and (b) Southwest Health Center, a[n] Columbia Professional Service Corporation with offices at South Hospital Drive Concord, Columbia ("Customer").

* * * *

In consideration of the mutual promises and covenants contained herein, COMPUTECH and Customer hereby agree as follows:

1. PURCHASE AND SALE

1.1 The Customer agrees to purchase and COMPUTECH agrees to sell, in accordance with the terms of this Agreement, the following items which are sometimes collectively referred to herein as "Computer Products": (a) The computer equipment and machinery listed on Schedule A attached hereto (the "Equipment"); and (b) The systems software listed on Schedule B attached hereto the ("Systems Software"). The term "Systems Software" includes the software COMPUTECH generally makes available for Equipment of the type ordered by Customer and required for its operation.

1.2 The customer agrees to accept the Computer Products and other services under the terms and conditions of this Agreement. The Customer further agrees, with respect to the Computer Products, to accept responsibility for: (a) their selection to achieve the Customer's intended results; (b) their use; and (c) the results obtained therefrom. The Customer also has the responsibility for the selection and use of, and results obtained from, any other equipment, software or services used with the Computer Products.

2. PRICES, PAYMENT AND SECURITY TERMS

2.1 Prices for the Equipment and Systems Software, F.O.B. COMPUTECH's plant, are as stated on the attached Schedules and do not include any applicable transportation charges or taxes. Each shipment will include an invoice dated as of the date of shipment. Payment in full for each item of Equipment and Systems Software shall be due within twenty (20) days from the date of invoice.

2.2 Should Customer become delinquent in the payment of any sum due COMPUTECH, after ten (10) days' written notice to Customer, COMPUTECH shall not be obligated to continue performance under any agreement with Customer.

2.3 Customer hereby grants and COMPUTECH reserves a purchase money security interest in each of the Computer Products purchased hereunder, and in any proceeds thereof for the amount of its purchase price. Upon request by COMPUTECH, Customer shall sign any document required to perfect such security interest. Payment in full of the purchase price of any Computer Product purchased hereunder shall release the security interest on that product.

3. PRICE PROTECTION PERIOD

Prices for the Computer Products are COMPUTECH's generally available prices and shall be subject to all price increases, except that increases which become effective during the twenty (20) days immediately prior to the date of shipment shall not be applicable. In the event that a price increase is applicable to any of the various Computer Products, the Customer may cancel the order for that item upon written notice to COMPUTECH within five (5) days of notification of the price increase; otherwise, the higher price shall be effective.

4. TAXES

Customer agrees to pay all taxes (except taxes levied on COMPUTECH's income) resulting from the sale of the Computer Products including state and local sales, use, property and similar taxes. When applicable such taxes shall appear as separate items on COMPUTECH's invoices.

5. SHIPMENT TERMS AND CHARGES

5.1 Shipment of the Computer Products shall be F.O.B. COMPUTECH's plant. Customer shall pay all transportation and insurance charges. At the Customer's request, COMPUTECH may prepay shipping charges and include them on the Customer's invoice.

5.2 Shipment of the various Computer Products shall be made by COMPUTECH from time to time as COMPUTECH's availability schedule permits. COMPUTECH will make every reasonable effort to meet any quoted shipment or delivery date.

6. TITLE AND RISK OF LOSS

COMPUTECH ships all Computer Products F.O.B. its plants directly to the specified Customer location. Title to the various Computer Products and responsibility for all risks of loss or damage pass from COMPUTECH to the Customer at the time of shipment. The Customer assumes the responsibility for filing claims for damage against the carriers and other agents involved; however, COMPUTECH will assist in all reasonable ways.

7. INSTALLATION

7.1 The Customer agrees to provide a suitable installation site for the Computer Products as specified in the COMPUTECH Installation Manual, meeting all applicable electrical, environmental and other requirements. The installation site must be approved by COMPUTECH prior to installation of any Computer Products.

7.2 Standard installation services are provided by COMPUTECH for all Equipment purchased hereunder in accordance with the COMPUTECH Installation Manual. COMPUTECH will begin installation of the Customer's Equipment at a mutually agreed upon time following notification that all the items of Equipment have been received at the site and approval of the site. Customer agrees to furnish all labor required for unpacking and positioning the Equipment and to assume at its expense the other installation responsibilities specified for it in the COMPUTECH Installation Manual.

7.3 Standard installation services are also provided by COMPUTECH for all Systems Software purchased hereunder in accordance with the COMPUTECH Installation Manual. Such services include loading of the Systems Software in the computer system and executing verification tests.

7.4 The Customer is responsible for the installation and operation of any equipment or software not supplied by COMPUTECH.

8. ACCEPTANCE OF COMPUTER PRODUCTS

Acceptance of Computer Products by Customer shall occur at the installation site when COMPUTECH demonstrates that the applicable diagnostic or verification tests and programs established by COMPUTECH work properly and the Computer Products are determined by COMPUTECH to be in normal operating condition in accordance with COMPUTECH's official published specifications.

9. MANUALS AND DOCUMENTATION

COMPUTECH will supply to Customer such manuals and documentation for use with the Computer Products as it customarily provides with such Computer Products. Additional copies of any such manuals and documentation may be purchased from COMPUTECH by Customer at COMPUTECH's regular charges then in effect.

10. UPGRADE POLICY

From time to time, at its discretion, COMPUTECH may advise Customer of enhancements and upgrades with respect to the Computer Products and/or the manuals and documentation provided with the Computer Products. Such upgrades may be purchased from COMPUTECH by Customer at COMPUTECH's regular charges then in effect.

11. COPYRIGHTED MATERIALS

COMPUTECH holds the copyright on some or all of the software, manuals and documentation provided hereunder. Customer agrees not to reproduce any such copyrighted software, manuals or documentation for its use or the use of others without the express written consent of COMPUTECH.

12. WARRANTIES

12.1 COMPUTECH warrants that the items of Equipment manufactured by it and purchased hereunder will be free from defects in materials and workmanship and will conform to COMPUTECH's official published specifications for such Equipment for a period of ninety (90) days from the date of invoice of such Equipment to Customer.

12.2 COMPUTECH warrants that the Systems Software manufactured by it and purchased hereunder will not fail to execute its programming instructions due to defects in materials or workmanship and will conform to COMPUTECH's official published specifications for such Systems Software for a period of ninety (90) days following the date of installation of such software as specified by COMPUTECH.

12.3 If, during the warranty period, Customer discovers a covered defect in the warranted Computer Products, Customer shall promptly notify COMPUTECH of such defect in writing. Upon receipt of such notice during the warranty period, COMPUTECH

will, at its option, repair or replace such Computer Products. If COMPUTECH is unable, within a reasonable time, to repair or replace any defective Computer Products to a warranted condition, Customer shall be entitled to a refund of the purchase price of such item upon its return to COMPUTECH.

12.4 Warranty service will be provided as follows: (a) Within COMPUTECH's five (5) established Service Travel Areas, warranty services will be performed as follows: 1) at no additional charge upon return of any item to a designated COMPUTECH Service Facility at Customer's expense; or 2) upon customer request COMPUTECH will provide on-site service for which customer will pay COMPUTECH's round-trip travel and time expenses for such services at COMPUTECH's regular charges then in effect.

12.5 COMPUTECH does not warrant that the operation of the Equipment or Systems Software will be uninterrupted or error free. As to any Computer Products not manufactured by COMPUTECH, the only warranty, if any, is that provided by the manufacturer of such products. In the event of any attachment or modification to the Equipment by Customer or in the event that Customer uses any software not supplied by COMPUTECH, COMPUTECH assumes no responsibility for: (a) the proper functioning of any of the Computer Products; or (b) the compatibility of any of the Computer Products with such attachment, modification, or Customer-supplied software.

12.6 The warranty set forth above shall not apply to defects resulting from: (a) improper or inadequate maintenance by Customer; (b) Customer-supplied software; (c) modification or misuse; (d) operation outside of environmental specifications for the product; or (e) improper site preparation and maintenance.

12.7 THE WARRANTY SET FORTH ABOVE IS EXCLUSIVE AND NO OTHER WARRANTY, WHETHER WRITTEN OR ORAL, IS EXPRESSED OR IMPLIED. COMPUTECH SPECIFICALLY DISCLAIMS THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

13. LIMITATION OF REMEDIES AND LIABILITY

13.1 Customer's remedy with respect to the functioning of the Computer Products shall be as provided for in the section hereof entitled "Warranties." For all other claims concerning performance or non-performance by COMPUTECH hereunder Customer's remedy shall be the recovery of actual damages sustained not to exceed amounts paid by Customer to COMPUTECH hereunder.

13.2 THE FOREGOING REMEDIES ARE CUSTOMER'S SOLE AND EXCLUSIVE REMEDIES. IN NO EVENT SHALL COMPUTECH BE LIABLE FOR INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND, INCLUDING FOR LOSS OF PROFITS, USE, OR DATA, WHETHER BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE) OR ANY OTHER LEGAL THEORY.

13.3 No action, whether in contract, tort (including negligence) or otherwise, arising out of or in connection with this Agreement may be brought by either party against the other more than twelve (12) months after the cause of action has accrued, except that an action for nonpayment may be brought within twelve (12) months of the date of the last payment.

14. DELAYS IN PERFORMANCE

COMPUTECH shall not be liable for any delay in performance of any obligation hereunder due to unforeseen circumstances or due to causes beyond its control, including, but not limited to, acts of nature, acts of government, labor disputes, delays in transportation, and delays in delivery or inability to deliver by COMPUTECH's suppliers.

15. MAINTENANCE SERVICE AND PARTS

Following expiration of the applicable warranty period, COMPUTECH, if it so agrees, will provide, at COMPUTECH's charges and terms then generally in effect, maintenance service and maintenance parts for the Computer Products, as long as such service and parts are generally available.

16. GOVERNING LAW AND JURISDICTION

This Agreement shall be governed by, construed, and enforced in accordance with the laws of Franklin. The parties expressly agree that any lawsuits arising out of the subject matter of this Agreement must be filed and prosecuted in the Circuit Court for the County of Jefferson, State of Franklin.

17. MISCELLANEOUS

17.1 Customer may not assign this Agreement without the prior written consent of COMPUTECH, and any purported attempt to do so shall be void.

17.2 This Agreement together with the attached schedules and any documentation specifically referred to herein represents the final, entire and exclusive understanding of the parties hereto with respect to its subject, superceding all proposals or prior agreements, written or oral. The parties expressly agree that there are no promises, representations, or understandings of any kind pertaining to this Agreement other than as stated herein. No amendment or modification of this Agreement shall be valid unless in writing and signed by each of the parties.

17.3 COMPUTECH's failure to exercise any of its rights hereunder shall not constitute or be deemed a waiver or forfeiture of such rights.

17.4 Any required notice shall be given in writing at the address for each party set forth above.

17.5 If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

This agreement has been executed by the parties' duly authorized officers effective on the date stated above.

COMPUTER TECHNOLOGY CORP.	Southwest Health Center, P.S.C.
By:_____	By:_____
Title:_____	Title:_____
("COMPUTECH")	("Customer")

SCHEDULE A
(EQUIPMENT)

Item	Unit Price	Quantity	Amount
COMPUTECH Model 5000 16-bit	15,595.00	1	15,595.00
multi-user, multi-tasking micro-computer which supports the following system software: COMPUTECH CSM/99 Version 3.0, and which is designed for multi-tasking, multi-user configuration. Includes 512K RAM memory, expand-able to 1 megabyte, 1 floppy disk drive 5 1/4 inch doubled-sided disks), 40 megabyte Winchester-type storage hard disk 6 ports for 5 users and 1 printer hook-up.			
COMPUTECH MTU- 40 megabyte	3,400.00	1	3,400.00
Magnetic tape cartridge backup unit compatible with COMPUTECH's Model 5000 (to make backup copies of the files created).			
VISTA CRT Model 950	1,200.00	5	6,000.00
(video monitor manufactured by Vista Corp. with 22 programmable function keys, green nonglare tilt screen, detached keyboard, 128 ASCII graphic character sets, advanced editing with wraparound protected field, buffered print port, 50 to 9600 baud.			
COMPUTECH Model 35 connecting	299.00	6	1,794.00
cables (to connect 5 CRT's and printer to storage unit).			
McALLEN 3300 series letter-	4,000.00	1	4,000.00

quality laser printer manufactured by McAllen Electronics Corp., with the following features: two-directional printing, two-color printing, automatic underlining, super- and sub-script, proportional spacing, cut sheet feeder (for office letterhead) and tractor feed option.

_____

TOTAL

$30,789.00

SCHEDULE B
(SYSTEM SOFTWARE)

Item	Unit Price	Quantity	Amount
COMPUTECH System Software	1,295.00	1	1,295.00
package CSM/99 Version 3.0 including the following utilities: calendar, automatic pre-set on/off, format for new disk usage, copydisk (for making backup copies), and two versions of BASIC programming language for programmers' use. Specially designed to be used on the COMPUTECH Model 5000, 6,000, or 9,000.			
		TOTAL	$1,295.00

LIBRARY

ARTICLE 1: GENERAL PROVISIONS

PART 1: SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE ACT

* * *

Section 1-103. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

* * *

Section 1-105. Territorial Application of the Act; Parties' Power to Choose Applicable Law.

When a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

Section 1-106. Remedies to Be Liberally Administered.

(1) The remedies provided by this Act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this Act or by other rule of law.

(2) Any right or obligation declared by this Act is enforceable by action unless the provision declaring it specifies a different and limited effect.

* * *

ARTICLE 2: SALES

PART 2: FORM, FORMATION AND READJUSTMENT OF CONTRACT

* * *

Section 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

* * *

PART 3: GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT

Section 2-301. General Obligations of Parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

Section 2-302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Section 2-303. Allocation or Division of Risks.

Where this Article allocates a risk or a burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk or burden.

* * *

Section 2-305. Open Price Term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

* * *

Section 2-307. Delivery in Single Lot or Several Lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

* * *

Section 2-310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Unless otherwise agreed

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

Section 2-311. Options and Cooperation Respecting Performance.

(1) An agreement for sale which is otherwise sufficiently definite (sub-section (3) of Section 2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of Section 2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such a specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

* * *

Section 2-313. Express Warranties by Affirmation, Promise, Description, Sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Section 2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Section 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Section 2-316. Exclusion or Modification of Warranties.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all

implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Section 2-317. Cumulation and Conflict of Warranties Express or Implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Section 2-318. Third Party Beneficiaries of Warranties Express or Implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Section 2-319. F.O.B. and F.A.S. Terms.

Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

* * *

PART 5: PERFORMANCE

* * *

Section 2-509. Risk of Loss in the Absence of Breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).

* * *

PART 6: BREACH, REPUDIATION AND EXCUSE

Section 2-601. Buyer's Rights on Improper Delivery.

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Section 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

* * *

Section 2-606. What Constitutes Acceptance of Goods.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

Section 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the non-conformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this Article for non-conformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312 and the buyer is sued as a result of such a breach he must notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2-312).

Section 2-608. Revocation of Acceptance in Whole or in Part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

* * *

PART 7: REMEDIES

* * *

Section 2-711. Buyer's Remedies in General; Buyer's Security Interest in Rejected Goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for non-delivery as provided in this Article (Section 2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this Article (Section 2-502); or

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706).

Section 2-712. "Cover"; Buyer's Procurement of Substitute Goods.

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

Section 2-713. Buyer's Damages for Non-Delivery or Repudiation.

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

Section 2-714. Buyer's Damages for Breach in Regard to Accepted Goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Section 2-715. Buyer's Incidental and Consequential Damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

* * *

Section 2-718. Liquidation or Limitation of Damages.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Section 2-719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

* * *

Section 2-725. Statute of Limitations in Contract for Sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. You are an associate in a firm representing Andrew Cook.

3. You will have three sets of materials with which to work: a File, a Library, and a set of Draft Instruments. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare two memoranda: one regarding an interview plan and a second regarding the draft instruments.

4. The File contains factual information about your case in the form of six documents. The first document is a memorandum to you from Kathleen Grove containing the instructions for the memoranda you are to draft.

5. The Library includes two cases which are assumed to be decisions of the Supreme Court of Columbia. They may be real cases; they may be cases in which a real opinion has been modified; they may be cases written solely for the purpose of this examination. Although the opinions may appear familiar to you, do not assume that they are precisely the same cases you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in Columbia, on the dates shown.

6. Your memoranda should be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should 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, Library, and Draft Instruments provide the specific materials with which you must work.

7. In citing cases from the Library, you may use plaintiffs' names (e.g., Montagu) and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing your memoranda.

9. This performance test will be graded on the content, thoroughness, and organization of the memoranda you draft. In grading the answers to this question, we anticipate that each memorandum will be weighted approximately equally.

FILE

Ridder, Wahl & Schrage
One Market Plaza
DeVane, Columbia 00211

MEMORANDUM
July 31, 1986

To: Applicant
From: Kathleen Grove, Associate
Re: Cook Trust Problem

I really appreciate your offer to review the Cook file and my interviewing outline. Since this is the first big case I've brought into the firm since joining it last year, I want to be sure I've prepared adequately for the initial face-to-face interview with the client.

Let me summarize the situation as I understand it. The materials I've attached provide the important details and relevant law.

Andy Cook is the now celebrated winner of the State of Columbia's $7 million "MegaMoney Lotto." Since winning Columbia's largest ever lottery a few weeks ago, Andy and his family have been in a whirlwind, surrounded by the press, friends, strangers seeking handouts and "get rich(er) quick" artists. Now that things have calmed down a bit, Andy is in the process of making important financial planning decisions for himself and his family. His niece, Jean Hemphill, a young account manager with the R.C. Morris Company, is handling the basic investment and tax aspects for Cook.

Because you have had more client interviewing experience than I and have worked on some estate planning cases, I would be grateful if you would do the following two things for me:

1. Please review my interview plan and draft a memo commenting on my interviewing decisions. My interview goals are to understand the client's desires, to gather the facts necessary to accomplish them, and to establish the type of relationship that will best facilitate both the interview and the long-term relationship I optimistically anticipate with this client. Please be specific. Indicate which approaches you agree with and, where appropriate, suggest specific alternatives, additions, deletions or modifications and state the reasons for your suggestions. Please be sure to give me your thoughts on each of my proposed interviewing tactics, the specific language I plan to use, as well as follow-up topics I intend to pursue. I've had the interview plan typed on line-numbered paper for ease of reference.

2. In a second memo, please critique the key dispositive provisions of the various trust instruments I have drafted. Please suggest specific additions, deletions, and modifications and briefly explain the reasons for your suggestions. I want to insure these documents conform to Columbia law and will accomplish Cook's goals as I understand them. The relevant administrative provisions will be added later; don't concern yourself with them. You also can ignore the tax consequences when reviewing these documents. Again, I've had the documents typed on line-numbered paper for ease of reference.

I have scheduled a meeting with Mr. Cook early next week, so I would appreciate receiving your memos as quickly as possible. Please be completely candid when analyzing my plans. I'm eager to do a good job and welcome criticism.

NOTES TO FILE

7/1/86: Opening new file following phone calls from my dad last night and from Andrew Cook this morning. Dad's fellow worker and carpool rider, Andy Cook, won the $7 million "MegaMoney Lotto" prize drawn Saturday night. Known Mr. Cook for years, although our families are not particularly close. When I passed the bar last year he sent me a congratulations card and a nice note saying if he ever needed a lawyer he'd "be in touch." He called my dad yesterday saying he thinks he'll be needing one! Cook called this morning but could talk only for a few moments. On his way to the State Lottery Office to verify his ticket and collect check for $262,500. Doesn't know exactly what he wants to do, but knows he will have to make "some important decisions now that I'm a millionaire!" Said he'd be back in touch when "things have calmed down." Cut out the "MegaMoney" article from Sunday's newspaper for background information on the Cook family.

7/8/86: Cook called; life still too hectic to schedule an interview to review his situation. Told me to call his niece, Jean Hemphill, an investment/tax advisor with R.C. Morris Company, who will be handling the final aspects for him. Spoke with Hemphill. Too early for any definite decisions, but she did say "be prepared to draft some trust instruments" covering the kids and some unnamed charity - a hospital operated by a Dr. Finkle. Will send me letter outlining tentative financial plan once she and Cook have talked more.

7/14/86: Received letter from Hemphill. Investment plan seems complex but it appears Cook needs inter vivos trusts. Asked Accounting Department to prepare some kind of chart to estimate how large a principal will accumulate over 20 years given various annual deposits into the trusts and various rates of return. Called Hemphill for more info on the "confidential matter" mentioned in her letter, but she had nothing more she could tell me. Perhaps my dad can get some details from Cook for me. Will call him tonight. Also, find out more about Dr. Finkle and his hospital.

7/15/86: Collected primary sources on Columbia trust law relating to minors and charities. Given this information, will have to "cut and paste" Fromm's Columbia Legal Forms on trusts to come up with appropriate trusts provisions. Checked Columbia law on status of Andy's winnings; they're clearly his separate property. Spoke with Dad who thought he knew what "confidential matter" might be, but he wanted to check with Cook before saying anything more.

7/16/86: Dad spoke with Cook who told him to tell me about "confidential matter." About six or seven years ago, Cook attended a long conference in Florida. While there, he contacted his old high school sweetheart. One thing led to another, they became intimate, and the woman (divorced, no children) became pregnant. She didn't want to create problems for Cook and declined to have an abortion. Child born (a girl, Nancy) and raised by her mother, who remained a single parent. Child's mother was killed in auto accident last year. Child being cared for by her aunt and uncle (mother's sister and brother-in-law) in Baltimore. Before death of child's mother, Cook voluntarily sent $100 per month as support, all he could afford without his wife learning what he was doing. Since then has sent nothing for fear of revealing his identity. He's never heard from the aunt or

uncle. Cook sought Dad's advice through all this. According to Dad, Cook feels very guilty but has never told his wife and children and has no intention of doing so. Dad is sure Cook wants to provide for the little girl now that he's won the lottery but doesn't want anyone to know where money is coming from. I'll need to look into if/how this can be accomplished. Dad says Cook will be "embarrassed" talking about this with me.

7/17/86: Have heard rumors Dr. Finkle may be in trouble. Columbia Revenue Department investigating him concerning tax fraud. Hospital could be on the verge of bankruptcy. How to protect Cook's charitable gift?

7/18/86: Cook called; appointment set for 8/4/86. Didn't mention what I'd learned about Finkle.

7/21/86: Spent weekend creating my interviewing outline. Reviewed law and Fromm's Forms and have drafted key trust provisions to cover Cook's kids and the charity. Will present them to Cook during interview. Sent copy of Hemphill's letter and draft trust provisions to Bob Jones, our senior tax partner, for review of tax implications.

7/24/86: Received memo from Accounting Department with 20-year charts at three different rates of interest. These charts certainly demonstrate what a difference a couple of percentage points can make! There is more than $400,000 difference between 11% and 13% after 20 years of accumulating the principal and all interest income on an investment of $20,000 a year. The right investments can change the outcome! Of course, Mr. Cook doesn't intend to accumulate income and add it to principal in each of his trusts. I should make variations of these charts available to Mr. Cook during the interview to demonstrate my facility with investment options.

7/25/86: Received call from Bob Jones. Preliminary review will take five hours (at $175/hour).

DeVane Daily News, Sunday, June 29, 1986

$7 MILLION MEGAMONEY TO LOCAL MAN

The usual quiet of a Saturday night on Lapsley Lane was shattered and a spontaneous neighborhood party erupted when Andrew Cook, 41, ran from his home shouting he was the winner of the $7 million MegaMoney jackpot announced yesterday. "I couldn't believe it," said Cook, a technician with Harley Industries who returned to work two weeks ago following a six-month layoff.

The father of three was spending a quiet evening at home with his wife Joy, 40, and his two daughters, Elizabeth, 12, and Denise, 18, who is retarded and partially paralyzed. When the winning numbers were announced on television, Cook "simply stared" at his ticket. "He was frozen and he started to shake," said his wife, a part-time real estate salesperson. "When Joy said, "what's the matter," I just handed her the ticket," Cook added. When his wife verified the winning numbers, Cook dashed out to his front yard yelling, "I won! I'm a millionaire!"

Bonnie Bazilian, Cook's neighbor on the street of modest single family homes, rushed outside because she "thought something terrible had happened to Denise." "There was Andy, running around, jumping like a madman, shouting and crying and laughing all at once," said Bazilian. Within minutes, most of the neighbors were crowded into Cook's small, three-bedroom home. Someone went to a local package store for "champagne and beer, cheese and chips," said Tony Angelo, owner of Tony's Liquors on Chase Street. "I had to come back with them to the party," said Angelo. "Nothing like this has ever happened and I wanted to be part of it," he added.

Meanwhile, Cook called Channel 13 news to find out "what I was supposed to do." Columbia lottery official John Burns was still in the studio "waiting to get such a call if we had a winner." Burns told Cook to "come to the lottery office Monday and we'll have your check for $262,500." According to Burns, Cook "kept shouting, repeating the figure, and there was a roar in the background from the other people there."

Burns explained Cook will receive a check for that amount annually for the next 20 years. Columbia lottery officials retain 25 percent of the winning for taxes and pay the balance in yearly installments.

Cook "got scared I would lose the ticket" so he called Marcia Johnson, a teller at Calvert Savings Bank. Johnson got in touch with Daniel Noon, a Calvert vice-president, who met Cook at the Broad Street branch later Saturday evening and they placed the winning ticket in the bank's vault for safekeeping.

Cook's winning six numbers were: 9, 17, 22, 23, 31 and 40. They were picked randomly by the computer when he bought the $1 ticket at the Homewood Deli. Cook said he got into the habit of buying one ticket a week when he was laid off, "hoping lightning would strike." "It did, and I can hardly believe it," he said with a huge smile.

When asked what he planned to do with the money, Cook said he was "not sure, take care of Denise, pay off our medical bills, send the kids to college, invest it, I guess." He added some money would be set aside for the Charles Village Hospital, a private facility in Ardmore, operated by Dr. Martin Finkle, which conducts research on birth defects such as those afflicting Cook's daughter, Denise. "Dr. Finkle has taken care of Denise all these years and we never could afford to pay full price," said Mrs. Cook. "Now we're able to return a part of what we owe him."

As the TV crews began packing up their gear at 11:30, the Cook's son, Michael, 14, arrived home from a movie. "There were so many cars and stuff on the street, I got scared," said Michael. Upon learning what had happened, "Mike went nuts," said Cook, "and the party started all over again." One neighbor guessed "we'll be going on like this tomorrow afternoon."

R.C. MORRIS COMPANY

Financial and Investment Advisors

100 South Lake Drive
Telephone: 021-555-1000
DeVane, Columbia 00210
Cable: RCMORR

July 11, 1986

Kathleen Grove, Esquire
Ridder, Wahl & Schrage
One Market Plaza
DeVane, Columbia 00211

Dear Attorney Grove:

Uncle Andy has asked me to share with you my tentative suggestions for investing his lottery winnings. I realize not all of the following is necessary for your work in drafting the various trusts, but I thought it important for you to have the benefit of my present thinking since I expect to be managing Uncle Andy's investments. Uncle Andy has two objectives in mind. First, he wants to plan for his three children. Second, he needs to develop a long term program to provide for Aunt Joy and himself.

The needs of the children can be divided into three categories: education, lifetime security and the special demands of Denise's condition. Although the two younger children will not begin college for four and six years respectively, the cost of private higher education at a good school is soaring. I estimate it will cost $52,700 and $63,000 to educate the two kids. The Cooks must take advantage of the $10,000 per parent per year federal gift tax exemption and transfer $20,000 per year to each child. Most of this money should be invested in a high-yield mutual fund, paying 15 to 16 percent interest, which would be taxable to the children, whose tax brackets will be low. A portion of the annual gifts for the younger children should be placed in zero-coupon bonds, such as Prudential Realty issues, rated AAA for safety, maturing in 1989 and 1991, with effective annual yields of about 12 percent.

Once the children's education has been guaranteed, we need to develop life security growth. Uncle Andy wants to restrict the ability of the younger children to interfere with the development of their assets until they reach age thirty. Therefore, our goal is to accumulate principal through annual parental gifts, investing it in mixed speculative and secure growth models, limiting income payouts to the least amount necessary for the support of the beneficiaries. I am thinking of a mixed portfolio of quality growth stocks (such as USAir, Chessie Systems and Yellow Freight, which are likely to benefit from lower inflation, fuel prices and interest rates, and higher productivity), solid utility stocks with a history of dividend increases (say, PEPCO and Kansas Power and Light), along with some more aggressive issues, such as Hartwell Leverage Fund, GT Pacific

(a mutual that buys stock of overseas companies), and Technology Funding Partners I (a partnership investing in venture-capital situations in advance of their going public). When we've seen how the principal grows, we can begin looking for some key tax shelters, such as tax-free municipals and real estate trusts or limited partnerships.

Denise presents some unique problems. The present indebtedness of the Cooks is attributable primarily to her medical needs, which are unpredictable and likely to increase in the future. Therefore, our goals must be safety and liquidity consistent with the maximum allowable growth. I'm still working on her package, debating whether her parents should provide a larger front-load, paying the gift tax on the annual amount over $20,000, or to pay all her medical expenses from heir own funds, thereby reducing their tax liability. While Uncle Andy would like Denise's care to be in a private institution (in part, the reason for the charitable fund mentioned later), he realizes that sometime in the future a public institution may provide her the best care. Given the amount of taxes he will pay, he would like to reduce or eliminate the government's ability to invade Denise's trust to cover the cost of such public care. Uncle Andy is also concerned some "gigolo" might marry Denise for her money and, if children were produced out of this union, Denise's congenital defect would be perpetuated.

Even if we assume about one-third of the yearly lottery winnings are devoted to the children and the charity, the Cooks have a tidy annual sum to deal with over the next twenty years. Uncle Andy wants to set aside an as yet unspecified amount for comfortable upper-middle income living, something for Aunt Joy to expand her real estate interests, and the remainder devoted to growth to insure, when the lottery well runs dry in their early sixties, there is adequate retirement income so they don't need to radically adjust their lifestyle. At the same time, we must find some tax shelters to insulate this windfall. I'm still playing around with some options, but I'm thinking about having them look for some generous tax write-offs with opportunities for long-term capital gains. Historic rehabilitation real estate projects also are desirable because it would allow them two dollars in deductions for every dollar invested. Beyond real estate, I'm checking out oil and gas drilling projects for high deferred-tax shelters (drilling costs are down more than the price of oil), and timberland investments (perhaps Wagner Southern Forest Investment, Inc.), for predictable, timed returns and an excellent inflation hedge. A substantial portion of their funds should be placed in a combination portfolio of municipal tax-frees, stock and bond mutuals and other growth issues. Some money ought to be set aside in a money market, perhaps Liquid Green Trust which is linked with a computerized account system to monitor monthly spending by categories.

While the proposed charitable trust has positive tax advantages, Uncle Andy is more concerned with repaying the past generosity of Dr. Martin Finkle and insuring adequate care for Denise in the future. He'd like to provide a substantial annual gift to a trust named for Denise so long as the hospital continues its research and treatment of those afflicted with Denise's condition and so long as the hospital will guarantee it will continue to treat Denise if her parents decide that is the best place for her.

Finally, Uncle Andy has a confidential matter he needs to discuss with you. He has advised me I should be prepared to set aside an undetermined amount each year for a project he cannot disclose at the moment.

Of course, much of the preceding is tentative and I will keep you posted as plans change.

Sincerely,

/s/ Jean Hemphill

Jean Hemphill
Account Manager

cc: Andrew Cook

INTERVIEW PLAN

Note: Indented materials in brackets are my decisions concerning interviewing tactics. I intend to follow the quoted language as closely as possible. The indented items after quoted language are follow-up topics I plan to pursue. Please give me your advice on all three categories of material; be sure to comment on both those with which you do agree and those with which you don't agree.

[Have receptionist escort Cook to my office after buzzing me. Greet him at door and seat him at small conference table so we may more easily review the drafts of the various trust documents. Begin interview in very professional manner to impress Cook. I have prepared for the interview and know what I am doing. Attempt to do so by omitting any small talk and by presenting draft of documents.]

"I've studied the material provided by your niece and developed a strategy for implementing your decisions. I think we should proceed by reviewing the goals you hope to achieve for your children, the special problems posed by Denise's condition, the gift to Dr. Finkle's hospital and the matter of the youngster in Baltimore. Let's begin with the two younger children. I've made a copy of the key provisions of the trust instrument we should use to set up the program for Michael and Elizabeth. Why don't you look this over [Hand copy to Cook] while I explain what it's designed to do."

- Explain that first paragraph of trust would include the $20,000 gifts for Michael and Elizabeth from Mr. and Mrs. Cook (a total of $40,000 in the first year) which qualify for federal gift tax exception.

- Second and third paragraphs retain funds within control of Trustee until children reach 30 years of age. Trustee given discretion of how much money to give to children each year, but education is one of discretionary standards.

- If either Michael or Elizabeth dies before age 30, fourth paragraph requires distribution of trust assets to children of beneficiary or, if no children, the other child of Trustor will get all the money.

- Fifth paragraph is just the standard "spendthrift" provision which protects against dissipation of trust funds by beneficiaries before their 30th birthdays.

[Show Cook charts prepared by Accounting Department and show him how trust estate would grow under various interest alternatives, emphasizing sufficient money would be available from Income to pay for education of Michael and Elizabeth.]

[I am not going to point out at this meeting that the draft documents name me as Trustee rather than Cook's niece. Being Trustee will give me the opportunity to continue the attorney/

client relationship with someone who is likely to have more legal business in the future. Cook's interests will be served best by a lawyer as Trustee. Besides, the statutory trustee fees are not inconsiderable.]

"Do you have any questions about the trust for Michael and Elizabeth? No? OK, let's talk about the special needs of Denise. I've read the information in Ms. Hemphill's letter and I was wondering if you could tell me a little more about Denise's condition, her prognosis and what you'd like to accomplish for her?"

- After getting overview from Cook, probe for the following information but don't forget to follow-up any items he mentions which aren't on the list.

* Is she likely to be able to manage own affairs? Estimated annual medical costs? How much now owed for her care? Limit payments to income or dip into principal? Duration of trust? Life expectancy? Where should remainder go if she dies?

"Now that I have more information I can revise the trust document I drafted for Denise. Before I do, however, I'd like to review that draft with you and show you where I'm thinking about making the changes and what effect those changes will have."

[Hand draft of Denise's trust to Cook, review present provisions and point out where changes will be made based on new information.]

"Now that you know how I'll rework this document, let's turn to the matter of the charitable trust for the Charles Village Hospital and Dr. Finkle. Are you aware Dr. Finkle is being investigated by the Columbia Revenue Department concerning tax fraud and that the Hospital may be in severe financial circumstances?"

[Assuming Cook is unaware of these facts, will explain what I've learned and try to counsel him to abandon his plans. If he still insists on "repaying" Finkle for past kindnesses, urge him to make an outright, one-time gift instead of establishing trust. If he is adamant about benefiting Hospital and Finkle, advise him proposed charitable trust is the only feasible way to accomplish his goal and review the draft document with him.]

"The final matter we should consider at this session is the little girl living in Baltimore. I realize this may be a difficult subject for you to discuss, but it's important for me to understand the facts and what you're interested in accomplishing. Let me tell you what I know about this matter and you can add any other facts which are important."

[Summarize information in File entry (7/16/86), being careful to be totally non-judgmental. Allow Cook every opportunity to explain how he feels about this issue. Move on unless Cook wants to do something about the child; I don't intend to initiate discussion of whether or how Cook wants to provide for the child.]

"That's about all I think we can accomplish this session. I've gained a lot more information which I'll use to make changes in the various documents. One of the partners in the firm's Tax Department is reviewing the documents to make sure we are maximizing all of the tax advantages available to you. When I've received a report on the tax implications we'll get back together to finalize and execute the several trusts."

"Our firm charges $75 an hour for the work of associates, such as me. Because I assume we will have a continuing relationship regarding these trusts, I suggest we use the hourly fee schedule. If, on the other hand, you would prefer a flat rate charge for establishing these trusts, I could get my supervising partner to set the fee."

[Get Cook to decide fee arrangement, preferably hourly rate. Have him sign firm's Retention Agreement and ask him to send retainer check of $1,000.]

MEMORANDUM

July 22, 1986
TO: Kathleen Grove
FROM: Accounting Department
RE: INTEREST CALCULATIONS - COOK TRUSTS

Per your request, we have prepared the following tables assuming interest rates of 11%, 12% and 13%. These tables assume $20,000 would be invested in principal in the first and each succeeding year for 20 years. Finally, these tables also assume Income is added to principal each year. NOTE: All figures are in thousands of dollars, rounded to nearest hundredth.

Year	0	1	2	3	4
	5	6	7		
% Rate	11%				
Value	20	42.2	66.8	95.2	124.5
	158.3	195.7	237.2		
Year	8	9	10	11	12
	13	14	15		
% Rate	11%				
Value	283.3	334.4	391.2	454.3	524.2
	601.9	688.1	783.8		
Year	16	17	18	19	20
% Rate	11%				
Value	890.0	1007.9	1138.8	1284.1	1445.3

****

Year	0	1	2	3	4
	5	6	7		
% Rate	12%				
Value	20	42.4	67.5	95.6	127.1
	162.3	201.8	246.0		
Year	8	9	10	11	12
	13	14	15		
% Rate	12%				
Value	295.5	351.0	413.1	482.7	560.6
	647.9	745.6	855.1		
Year	16	17	18	19	20
% Rate	12%				
Value	977.7	1115.0	1268.8	1441.1	1634.0

****

Year	0	1	2	3	4
	5	6	7		
% Rate	13%				
Value	20	42.6	68.1	97.0	129.6
	166.5	208.1	255.1		
Year	8	9	10	11	12
	13	14	15		
% Rate	13%				
Value	308.3	368.4	436.3	513.0	599.7
	697.7	808.7	933.4		
Year	16	17	18	19	20
% Rate	13%				
Value	1074.8	1234.5	1415.0	1618.9	1848.4

****

If you need any additional information, please contact the Accounting Department.

LIBRARY

Columbia Code of Estates and Trusts

§2227. Investments; Degree of Care and Skill

When investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall act with the care, skill, prudence and diligence under the circumstances then prevailing, specifically including the general economic conditions and the anticipated needs of the trust and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, to obtain the goals of the trustor as determined from the trust instrument.

§2228. Discretionary Powers

A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but shall be exercised reasonably. Where a trust instrument confers absolute, sole or uncontrolled discretion upon a trustee, the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust. The exercise of a discretionary power is subject to the review by a court of competent jurisdiction.

§2229. Compensation

If the declaration of trust contains provisions for a trustee's compensation, the trustee shall be entitled to be compensated in accordance therewith. If a declaration of trust does not specify the trustee's compensation, the trustee shall be entitled to such compensation as may be reasonable under the circumstances. The superior court shall have jurisdiction to determine any compensation provided by this section and may establish a schedule of compensation for those trusts where the trustee's compensation is not declared in the trust instrument.

§2230. Trusts Distinguished

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(3) A "charitable trust" is one for the benefit of a class of persons for the relief of poverty, the advancement of education, religion, health, or other purposes beneficial to the community.

****

(5) A "private trust" is every other trust, agency, fiduciary relationship, or representative capacity.

§2257. Private Trust; Disclosure of Information

A trustee shall not disclose any information to any person concerning the existence, condition, management and administration of any private trust confided to him, except where: (1) Disclosure is specifically authorized by the terms of the trust; (2) Disclosure is determined by the trustee to be necessary to the administration of the trust; (3) Disclosure is required by a court of competent jurisdiction; (4) Disclosure is made to, or upon the instructions of, any party executing the trust instrument; or (5) Disclosure refers to an irrevocable trust, to, or upon the instructions of, any beneficiary thereunder whether or not presently entitled to receive benefits therefrom.

§2282. Spendthrift Provision Allowed

By express or implied provision in the trust instrument, a trustor may limit or extinguish the right of a beneficiary to transfer income or principal to the use of or payment to any person by assignment or otherwise.

Valley National Bank v. Taylor

Columbia Supreme Court (1951)

Charles Henry died testate in April 1949. Testator's entire estate, valued at $106,000, was left to the Valley National Bank, in trust, for the following use and purpose:

> On the last school day of each calendar year before Christmas, Trustee shall divide the net income into as many equal parts as there are children in the first, second and third grades of the John Kerr Elementary School of Winchester, Columbia, and shall pay one of such equal parts to each child in such grades, to be used by such child in the furtherance of his or her education.

Another paragraph of the will provides that "if the John Kerr School is ever discontinued for any reason, the payments shall be made to the children of the same grades of the school or schools that take its place." The John Kerr School is a public primary school with an enrollment of 229 children in grades one through three, so that number or thereabouts would share in the distribution of the income.

It appears testator lost his only child, a daughter in the second grade at Kerr School, a number of years before his death. Testator left no near relatives. In case of intestacy, his heirs would be first cousins and others more remotely related, one of whom filed suit challenging the provisions of the will which undertook to create a charitable trust.

If testator's dominant intent was charitable, the trust should be sustained. On the other hand, if testator's intent is merely benevolent, though meritorious and evincing traits of generosity, the trust must be declared invalid because it violates the Rule against Perpetuities.

In the law of trusts there is a real and fundamental distinction between a charitable trust and one devoted to mere benevolence. See §2230, Estates & Trusts Code. The former is public in nature and valid; the latter is private and if it offends the Rule against Perpetuities, it is void. "[T]rusts which are devoted to mere benevolence or liberality, or generosity, cannot be upheld as charities. Benevolent objects include acts dictated by mere kindness, good will or a disposition to do good." Zollman on Charities. We are reminded, however, that charitable trusts are favored creatures of the law and a liberal interpretation is employed to uphold them. 2 Bogert on Trusts. Appellant trustee contends the gift should be liberally construed to satisfy two specific statutory charitable standards: "the advancement of education" and "other purposes beneficial to the community."

As to the claim of educational advancement, the occasion specified in the will for payment of the funds to the children is a time when it is obvious their minds and interests would be far removed from studies or other school activities. Though the testator commanded the funds be used "by such child in the furtherance of his or her education," it is significant the trustee is given no power, control or discretion over funds received by the child. Complete execution of the

mandate imposed on the trustee accomplishes no educational purpose. It merely places the income irretrievably beyond the range of the trust. We cannot indulge in the belief testator intended or thought he could change childhood nature and set at naught childhood impulses and desires.

Given our conclusion that the will fails to create a charitable trust for educational purposes, trustee earnestly insists the payments to the children produce "a desirable social effect" and are "promotive of public convenience and needs, happiness and contentment" and thus the fund constitutes a charitable trust. 2 Bogert on Trusts.[1]

Trust income paid at stated intervals to a designated segment of the public, without regard to whether the recipients are poor or in need, is not for the relief of poverty, nor is it a social benefit to the community. Restatement of Trusts, Second, §374.

Payment to the children would bring them pleasure and happiness and no doubt cause them to remember their benefactor with gratitude and thanksgiving. That was, we think, Charles Henry's intent. Laudable, generous and praiseworthy though it may be, it is not for the relief of the poor and needy, nor does it otherwise so benefit or advance the social interests of the community as to justify its continuance in perpetuity as a charitable trust.[2]

The judgment of the lower court that the will created a valid charitable trust is reversed.

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[1]Trustee points generally to the Columbia Business Corporations Law, §131, on charitable corporations in further support of its position. Trustee claims the language of that section, to wit, that charitable corporations may be established "exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals," suggests testator would have been able to achieve his goals through a charitable corporation and, therefore, should be allowed to do the same by way of a testamentary trust. Without deciding the issue, we are of the opinion a charitable corporation established for testator's same purposes would suffer from the legal deficiencies described in this opinion.

[2]An alternative contention of the plaintiff below was that the will created a mixed trust for the benefit of both private individuals and charitable purposes. As such, she claimed, it was void. Although there is some authority a mixed trust is void, Columbia and most states hold a mixed trust is not objectionable per se. Only if either portion of the trust is invalid for some reason, and the two portions cannot be separated, will a mixed trust fail. The most common reason for the private portion to fail is the Rule against Perpetuities, another claim of the plaintiff below. It should be noted that charitable trusts are not subject to the Rule against Perpetuities and may endure forever. We have no need to reach the first contention and the second is inextricably bound to our decision in this case.

In re Montagu's Trust

Columbia Supreme Court (1984)

Drogo Montagu died testate in 1975. His will, executed in 1972, established a trust for his incompetent son, William, now 38 years old. The will provided in pertinent part as follows:

> Trustee shall pay the net income and so much of the principal as it, in its absolute and uncontrolled discretion, may determine, to my son, William Montagu, or, in its absolute and uncontrolled discretion, may apply the same for his maintenance, comfort and support.

Upon the death of William, the will directed the trustee to deliver the trust estate to testator's younger son, Angus. In the event Angus had died, the trustee was to pay the income of the trust to the children of Angus for their "maintenance, education, comfort and support" until the youngest child reached twenty-one years, whereupon the trust would terminate and the trust estate would be distributed to Angus' children, per stirpes. The will also contained a valid spendthrift provision restricting the alienation of William's interest in trust proceeds.

Prior to the death of testator, William was involuntarily committed to Spring Grove State Hospital where he remains today. There is some evidence William may be discharged from the hospital within the next two years. Before his death, testator paid the cost of William's care in the State institution, amounting to $14,500 in 1975, the year of testator's death. Since 1975, the trustee, the Manchester National Bank, has continued to pay these costs, increased to $22,750 in 1982, out of trust income which amounted to $29,000 in the same year. Trustee bank has indicated its intention to continue paying the cost of the beneficiary's care in the State hospital so long as trust income is sufficient. The record indicated State medical care has increased at the rate of ten percent in each of the past few years.

Trustee bank filed a declaratory judgment action to ascertain its responsibility to continue to pay the beneficiary's medical costs at the State hospital. Appearances were field by the Attorney General on behalf of the State and Angus Montagu on behalf of himself. The court below ruled trustee was obligated to pay the costs of medical care even if that meant invading the trust principal. Trustee sought review of that ruling in this Court.

The answer to the question posed depends on which of the two commonly recognized types of trusts testator intended to create; that is, whether by the language quoted above he intended to establish a support or a discretionary trust. We have held that when a supplier of necessaries has a claim against the beneficiary of a support trust, the beneficiary's interest in the trust can be reached to compel payment for the required items or services, even in the face of a spendthrift provision. Safe Deposit Co. v. Robertson. On the other hand, we have held where the trustee can totally withhold trust assets from the beneficiary, a discretionary trust is created. In such case, payment cannot be compelled

unless it is shown trustee has acted arbitrarily, dishonestly or from an improper motive in denying beneficiary the funds sought. In re Gruber's Will.

We begin with the four corners of the trust instrument. The first portion of the quoted provision appears to grant uncontrolled discretion to trustee. The spendthrift provision lends some support to the view testator wished to grant trustee wide latitude in preserving the corpus of the trust.

The Attorney General argues the second portion of the quoted provision uses the traditional language of a support trust and that by mixing language, testator qualified the earlier grant of absolute discretion and mandated trustee to act consistent with the more limited discretion connected with a support trust when dealing with matters involving his son's maintenance. This position is buttressed by the fact testator paid for the cost of beneficiary's care in the State hospital before his death and that trustee has assumed those costs thereafter. We note at no time was there an expression by testator that beneficiary's interests in the trust were to be supplementary to benefits provided by the State.

We are not unmindful of §38 of the Minors & Incompetents Code and §19 of the Welfare & Institutions Code.[1] Read together, these provisions compel us to conclude an estate of an incompetent can be reached by suppliers of necessaries - the State in this case. So long as the incompetent has control over or is entitled to support assets, those assets must be available to those who provide the incompetent with necessities as opposed to luxuries. The benefits of State hospital care must be deemed necessities and are available only to those who are "needy and distressed." In accord: Department of Mental Health v. First National Bank (Illinois); Lackmann v. Department of Mental Hygiene (California). But see: In re Gross (New York).

We conclude the evidence of testator's payments to the hospital prior to his death, the trustee's later actions, and the trustee's commitment to continue payments out of trust income support the conclusion testator created a support trust.

Affirmed.

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[1]Minors & Incompetents Code §38 states:

> Contracts by Incompetents and Persons of Unsound Mind; Liability for Necessaries. An incompetent person has no power to make a contract of any kind. Any contract made by a person of unsound mind, but not entirely without understanding, before his incapacity has been judicially determined, is subject to recission. An incompetent person or a person of unsound mind is liable for the reasonable value of things furnished to him necessary for his support or the support of his family.

Welfare & Institutions Code §19 states:

> State Hospitals and Institutions; Purpose

The purpose of the system of state hospitals and institutions is to provide medical and other care of people in need thereof and to provide assistance to the needy and distressed.

DRAFT INSTRUMENTS

TRUST A
TRUST FOR MICHAEL AND ELIZABETH

Andrew Cook, of DeVane, Columbia, as the Trustor, and Kathleen Grove, Esquire, of DeVane, Columbia, as the Trustee, hereby agree as follows:

1. The Trustor hereby transfers and delivers to the Trustee the property listed in Schedule "A" attached hereto, together with all his interest therein. The trustee shall hold said property, together with any additions thereto as hereinafter provided, as a Trust Estate, shall invest and reinvest the same and shall distribute the net income (hereinafter called "Income") and principal for the benefit of Trustor's children, except Trustor's daughter, Denise Cook, as set forth in the following provisions.

2. Until the thirtieth (30th) birthday for the Trustor's children, the Trustee shall expend both Income and principal to such extent and in such manner as she in her sole discretion deems advisable for said beneficiaries' welfare, comfortable support, maintenance and education, and shall add any excess Income to principal and invest it as such.

3. Upon a beneficiary's thirtieth (30th) birthday, the Trust for said beneficiary shall terminate, and the principal and any accrued or undistributed Income shall be transferred and delivered to said beneficiary free of trust.

4. In the event of the death of a beneficiary prior to the time said beneficiary is entitled to receive distribution of the entire Trust Estate, the remainder shall be distributed to beneficiary's then living children, in equal shares, or if no child of beneficiary shall then be living, in equal shares to beneficiary's brothers and sisters, excluding each of them theretofore deceased leaving no issue then living but including, by right of representation, the then living lawful issue of each deceased brother and sister.

5. Neither the principal nor Income of the Trust Estate held by the Trustee shall be subject to assignment or other anticipation by a beneficiary for whom the same is intended, nor be subject to any attachment by garnishment or by any other legal proceeding or action for any debt or other obligation of a beneficiary to receive the same hereunder in any manner whatsoever. If, for any reason, the principal or Income becomes payable or likely to become payable to any person other than a beneficiary for whom the same is intended, then, in any such case, Trustee, in her discretion, may pay to the spouse of the then living issue of such beneficiary, or to any other beneficiary of such Trust Estate, in such shares and proportions as Trustee may, from time to time deem advisable, the share of principal or Income which, but for the provisions of this clause, would be payable to such beneficiary, and such payment by Trustee shall be in full discharge of her responsibilities.

6. This Trust shall be irrevocable and shall not be revoked or terminated by Trustor of any other person, nor shall it be amended or altered by Trustor or any other person.

TRUST B
TRUST FOR DENISE

Andrew Cook, of DeVane, Columbia, as the Trustor, and Kathleen Grove, Esquire, of DeVane, Columbia, as the Trustee, hereby agree as follows:

1. The Trustor hereby transfers and delivers to the Trustee the property listed in Schedule "A" attached hereto, together with all interest therein. The Trustee shall hold said property, together with any additions thereto as hereinafter provided, as a Trust Estate, shall invest and reinvest the same and shall distribute the net income (hereinafter called "Income") and principal for the benefit of Trustor's daughter, Denise Cook, for life, as set forth in the following provisions.

2. The Trustee shall expend both Income and principal to such extent and in such manner as she in her sole discretion deems advisable for said beneficiary's welfare, comfortable support, maintenance and education, and shall add any excess Income to principal and invest it as such.

3. In the event beneficiary shall marry, the Trustee shall limit expenditure of both Income and principal to those necessary, in Trustee's sole discretion, for maintenance of beneficiary's health. All such expenditures by Trustee for the maintenance of beneficiary's health shall be supplementary to those benefits provided at public expense.

4. Upon beneficiary's death, the remainder shall be distributed in equal shares to beneficiary's brothers and sisters, excluding each of them theretofore deceased leaving no issue then living but including, by right of representation, the then living lawful issue of each deceased brother and sister.

5. Neither the principal nor Income of the Trust Estate held by the Trustee shall be subject to assignment or other anticipation by a beneficiary for whom the same is intended, nor be subject to any attachment by garnishment or by any other legal proceeding or action for any debt or other obligation of a beneficiary to receive the same hereunder in any manner whatsoever. If, for any reason, the principal or Income becomes payable or likely to become payable to any person other than a beneficiary for whom the same is intended, then, and in any such case, Trustee, in her discretion, may pay to the spouse or the then living issue of such beneficiary, or to any other beneficiary of such Trust Estate, in such shares and proportions as Trustee may, from time to time deem advisable, the share of principal or Income which, but for the provisions of this clause, would be payable to such beneficiary, and such payment by Trustee shall be in full discharge of her responsibilities.

6. This Trust shall be irrevocable and shall not be revoked or terminated by Trustor or any other person, nor shall it be amended or altered by Trustor or any other person.

TRUST C
CHARITABLE TRUST

Andrew Cook, of DeVane, Columbia, as the Trustor, and Kathleen Grove, Esquire, of DeVane, Columbia as the Trustee, hereby agree as follows:

1. The Trustor hereby transfers and delivers to the Trustee the property listed in Schedule "A" attached hereto, together with all his interest therein. The Trustee shall hold said property, together with any additions thereto as hereinafter provided, as a Trust Estate known as "The Denise Cook Charitable Trust," shall invest and reinvest the same and shall distribute the net income (hereinafter called "Income") and principal for the benefit of the charitable purposes set forth in the following provisions.

2. So long as the Charles Village Hospital (hereinafter called "Hospital") agrees to provide, without cost, the medical care and attention required by Trustor's daughter, Denise Cook, and any of her issue who may be similarly handicapped, and continues to conduct research into congenital birth defects, such as those afflicting Trustor's daughter, Denise Cook, the Hospital and Dr. Martin Finkle shall be the beneficiaries of the Income and whatever principal is necessary, in the sole judgment of the Trustee, to accomplish the medical purposes of the Hospital.

3. If the Hospital refuses to provide the above-mentioned medical care and attention, then the Trustee shall distribute the Income to Trustor's daughter, Denise Cook, for life, and upon her death, to her issue, for life, and upon the death of all her issue, distribute the remainder of the Trust Estate to the then living children of Trustor, in equal shares, or if no child of Trustor shall then be living, in equal shares to the then living grandchildren of Trustor.

4. This Trust shall be irrevocable and shall not be revoked or terminated by Trustor or any other person, nor shall it be amended or altered by Trustor or any other person.

INSTRUCTIONS

1. You will have 3 hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Liberty, one of the United States. Your firm represents plaintiff, Stephanie Hale, in an action filed against Joseph Delbert, an attorney.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare a memorandum describing a discovery plan.

4. The File contains factual information about your case in the form of five documents. The first document in the File is a memorandum to you from Jess Elliott containing the instructions for the memorandum you are to draft.

5. The Library includes three cases which are identified as decisions of the Supreme Court of Liberty. Some may be real cases; some may be cases in which a real opinion has been modified; some may be cases written solely for the purpose of this examination. Although some of the opinions may appear familiar to you, do not assume that they are precisely the same cases you have read before. Read them thoroughly, as if they were new to you. You should assume that the cases were decided in Liberty, on the dates shown.

6. Your memorandum should be written in the answer book provided. In answering this part of the examination, you should concentrate on the materials provided, but you should 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. In citing cases from the Library, you may use plaintiff's names (e.g., Yee) and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably devote at least 90 minutes to organizing and writing your memorandum.

9. This part of the examination will be graded on the content, thoroughness, and organization of the memorandum you draft. In grading the answers to this question, we anticipate that the following, approximate weights will be assigned to each part:

A: 20-30%

B: 70-80%

Posner and Ali
Lawyers
Santa Flora, Liberty

MEMORANDUM August 1, 1985

TO: Applicant

FROM: Jess Elliott

RE: Hale file

We have agreed to represent Stephanie Hale in a legal malpractice action against Joseph Delbert, an attorney who practices in nearby Myersville. Delbert represented Hale in a personal injury action against the estate of Seymour Roth, the deceased driver of the car which collided with Hale's car two years ago. Hale was severely injured and is still paralyzed below the waist.

While Delbert successfully settled with Roth's insurance carrier for $25,000, the full amount of the policy, he did not file any action against the State of Liberty or the police officers involved in the case. I think there was a good cause of action against the police or the government, but Hale is now precluded from pursuing that because the two-year statute of limitations, Liberty Civil Code §597, has run.

You'll find a file of Delbert's letters to Hale, a copy of the police accident reports, a memo regarding a meeting I had with Hale, and a memo on a phone conversation I had with Esther Smith, the passenger in Roth's car. You'll see from Delbert's letters just how little he did in this case. If he had spoken to Smith, he would have understood that the facts are on our client's side.

The police reports reveal that Smith was driving Roth's car and was stopped for speeding shortly before the accident. The officer, Richard Foster, did not cite Smith for driving under the influence, but Roth ended up behind the wheel. Both Roth and Smith had alcohol blood levels well above .10 at the time of the accident, creating a presumption of intoxication for purposes of the Liberty statute proscribing driving while intoxicated.

It looks like Delbert misunderstood the law and thought there was no chance of winning against the State. I can't figure out why he didn't tell Hale that he was not going to file the action for her before the statute of limitations ran so she could have found a lawyer who would have helped her. In any event, I am convinced Delbert blew her case and that we should file an action against him right away.

Before we draft a complaint, I need your thoughts on the factual side of the case. I imagine we're going to have to engage in extensive investigation, and I want you to write me a memo describing a plan to guide us in conducting our discovery. The law clerk has gathered pertinent statutes and a few cases. I've read the cases, so don't bother summarizing them in your memo to me.

A. Before you start the main task I am requesting, write a short statement of the legal theory or theories upon which Hale can prevail against Delbert.

B. My main concern is how we are going to obtain evidence needed to prove our case. I want you to list the critical facts that we will need to prove to win our suit and the facts Delbert will rely upon. Under each fact, specify the individuals or entities who should be subjected to discovery and what discovery methods we should use to prove or disprove those facts. We obviously don't know all the facts yet, so don't limit yourself to proving the facts we now have or to sources of evidence we have already discovered.

Posner and Ali
Lawyers
Santa Flora, Liberty

MEMORANDUM July 1, 1985

To: Hale File
From: Jess Elliott
Re: Meeting with Stephanie Hale

Met with new client today. Wants to sue previous attorney for failing to pursue her personal injury action. Client is paralyzed as result of drunk driving accident; only recovered $25,000 less attorney's fees. Accident in May of 1983.

Was referred to attorney Joseph Delbert by a close friend. Spoke with Delbert while still in hospital - two weeks after accident. Signed a retainer agreement: 25% if case settled; 35% if tried. Delbert talked in terms of "six-figure recovery" against Roth estate.

Met with Delbert two months later. Delbert reviewed police reports with her; she was upset about Foster incident because she realized "the accident would never have happened if the cops hadn't pushed Roth to drive." Delbert agreed to pursue liability of police department.

In June of 1984, Delbert told her the maximum collectible was $25,000 - less his 25% - and that it was fortunate he had learned of the problems regarding recovery before he "invested large sums of (her) money in expensive discovery proceedings."

She claims that for a long period after that, Delbert became more difficult to reach by phone, as she was told time and again that he was in trial. When he would call back, he was always in a hurry, so did not give her much detail as to what was happening on her case. He would reassure her and tell her not to worry, that the legal system worked slowly.

Hale will send copies of correspondence from Delbert.

Posner and Ali
Lawyers
Santa Flora, Liberty

MEMORANDUM July 9, 1985

To: Hale File

From: Jess Elliott

Re: Telephone Conversation with Esther Smith

I called Esther Smith today to find out about the accident between Roth and our client. I was not surprised to discover that she was reluctant to talk.

I asked her if she would tell me what happened when she was stopped for speeding. She was quite hostile and said, "Listen, dammit. If it hadn't been for that cop, the accident would never have happened. He stopped me for speeding and practically ordered me to turn the wheel over to Seymour. He said I had been drinking and that if I wanted to get home that I should let the man drive. I was blown away because Seymour had been drinking all weekend, but the cop didn't get close enough to find out. I switched places with Seymour and you know the rest. I don't remember the accident, but I sure remember the pain and the 3 months in the hospital."

She told me that she had a lawsuit pending against Roth's insurance company but that it had not yet been settled and that she had not heard from her lawyer, Fred Lau of Myersville, Liberty, recently. She then hung up on me.

LIBERTY STATE POLICE

Date: May 18, 1983

Investigating Officer: Nancy Cook, Liberty State Police

Vehicle #1: Liberty Registration tag #337-998, registered to Seymour Roth, 196-B Magnolia Street, Vineland, Liberty. 1979 Pontiac Grand Prix, 2-door coupe, color: burgundy

Vehicle #2: Liberty Registration tag #ESM-511, registered to Stephanie Hale, 2173 Brightwood Lane, Pleasantville, Liberty, 1981 Toyota Corona, 4-door sedan, color: yellow

NARRATIVE REPORT

On 17 May 83 at 2215 hours, this officer responded to call for assistance at scene of collision on Hwy 17, 2 miles north of Myersville. Head-on collision, one fatality, two serious injuries.

Investigation revealed that Vehicle #1 was driven by the deceased, Seymour Roth. Veh. #1 was traveling north on two-lane road and crossed the median line, entering the southbound lane and colliding with Vehicle #2, driven by Stephanie Hale. Veh. #1 was traveling at high rate of speed, judging from skid marks; estimated 50 mph. Veh. #2 had been traveling 35 mph.

All injured parties taken by ambulance to Myersville General Hospital by Speedy Ambulance Service. Injured include Hale and Roth and passenger in Veh. #1, Esther Smith. Roth pronounced DOA at hospital. This officer ordered blood alcohol tests for all injured.

Preliminary examination of Veh. #1 at the scene showed one white ice chest in plain view on the front floor passenger side containing 3 cans of beer. An opened can of beer was between the two front bucket seats and it had spilled its contents onto the floor of the vehicle. There were 4 (four) empty beer cans on the back floor. All of the beer was Budweiser. Police photographer took photographs of the car and the entire scene at 2300 hours. All of the said beer cans and the ice chest were marked by me with my initials and turned into the Evidence Room at headquarters.

Also on the front seat was a traffic ticket, #1790B90B27, issued by Officer Richard Foster, badge #2288 of the Liberty State Police Department. Ticket was issued to Smith, identified as the passenger in Veh. #1. Speeding ticket had been issued only minutes before the accident.

Contacted Officer Foster through police dispatcher. Foster reported to scene at 2345 hours. He told the undersigned that he stopped Veh. #1 for speeding at 2150 hours approximately 10 miles from the accident scene. He said that the vehicle passed through his radar at 65 mph (50 mph zone). He said that he noticed alcohol on the

breath of the driver, Smith. She told him that she had had one beer, but that she was not intoxicated. He ordered her to take the field sobriety test, including having her walk a straight line, touch her finger to her nose, and count backwards from 100. He said that she was able to perform the test and that he felt that he did not have probable cause to charge her with driving under the influence of alcohol. He says he did advise her that she should not drink and drive and that, accordingly, she switched places with the passenger. He says he had no reason to check the passenger for anything since there was nothing to indicate any suspicious activity. He also understood that the passenger was the owner of the car, since he earlier had produced the registration.

At 2355 hours the Britzke Towing Company took both vehicles to its lot in Myersville. At 0100 on May 18 the investigation at the scene was completed. Awaiting results of blood alcohol tests on the deceased.

ADDENDUM

1400 hours. Received telephone call from Dr. H. Pierce, Myersville General Hospital, Chief of Laboratory Services. He reports blood alcohol content analysis for above subjects as follows:

Seymour Roth - .20
Esther Smith - .14

JOSEPH DELBERT
Attorney-at-Law
213 Main Street
Myersville, Liberty

June 5, 1984

Ms. Stephanie Hale
2173 Brightwood Lane
Pleasantville, Liberty 99773

Dear Stephanie:

I have learned some unfortunate facts about the financial condition of Seymour Roth that affect the amount we are able to recover in your case. I have investigated the situation thoroughly and can find no assets that he left upon his death. During the past year he was drinking and gambling and essentially spending every penny he could get his hands on. As you know, he was on his way back from a gambling weekend when he collided with you.

This means that the limit of his insurance policy, $25,000, is the maximum that we can recover in this case. The insurance company has offered to settle the case for that amount.

While we could refuse to settle and take this case to trial on the faint hope that some more money will appear, I suggest that you take the $25,000. After deducting the 25% owed to me for legal fees, you will get a net recovery of $18,750.

I realize that this settlement will not fully cover your medical bills, nor will it replace any of your lost earnings. I am continuing my investigation into the facts regarding the confrontation between a state police officer and the Roth vehicle only minutes before the collision to see if the police were at fault in any way for this tragic accident. If I can find any basis for suing the State, the Police Department, or the officer involved, I will surely do so. It seems as if that is the only way in which you can recover for the full amount of your injuries.

Very truly yours,

Joseph Delbert

Attorney-at-Law

JOSEPH DELBERT
Attorney-at-Law
213 Main Street
Myersville, Liberty

July 30, 1984

Ms. Stephanie Hale
2173 Brightwood Lane
Pleasantville, Liberty 99773

Dear Stephanie:

I am happy to enclose the check from the insurance company in settlement of your claim against the estate of Seymour Roth. It is in the amount of $25,000 and is made out to both of us. Please endorse it and send it back to me. I will then deposit it in my client's security fund, deduct my fee of 25% ($6,250), and promptly send you $18,750 as agreed.

If you have any questions about any of this, please feel free to call.

Very truly yours,

Joseph Delbert

Attorney-at-Law

JD/pe

JOSEPH DELBERT
Attorney-at-Law
213 Main Street
Myersville, Liberty

August 20, 1984

Ms. Stephanie Hale
2173 Brightwood Lane
Pleasantville, Liberty 99773

Dear Stephanie:

Attached is my check made out to you in the amount of $18,750, which represents the proceeds of what we have been able to recover so far for the injuries you suffered in the automobile accident.

I am hopeful that we can recover more. I finally was able to contact Sergeant Nancy Cook of the Liberty State Police. You may recall that she was at the scene of the accident and conducted the investigation of it. She has agreed to meet with me after her vacation to discuss what she knows. She has gone away for a month and I will see her in mid-September.

Very truly yours,

Joseph Delbert

Attorney-at-Law

JD/pe

JOSEPH DELBERT
Attorney-at-Law
213 Main Street
Myersville, Liberty

October 4, 1984

Ms. Stephanie Hale
2173 Brightwood Lane
Pleasantville, Liberty 99773

Dear Stephanie:

I have spoken with Nancy Cook, the police officer who investigated the accident. I tried to get information from her regarding the conduct of Officer Richard Foster, the trooper who had earlier stopped the Roth vehicle.

She was very generous with information regarding the people whom she saw as being at fault in the accident - Roth and his passenger. She reiterated that they both had been drinking and that Roth had been drinking heavily. She told me that Roth's driver's license was under suspension for a previous conviction of driving while intoxicated. In short, had we taken this case to trial, she would have been a terrific witness. However, when it came to saying anything negative about the conduct of Foster, she was not forthcoming.

Essentially, she said that every homicide is thoroughly investigated. She reread the reports, and she saw nothing culpable in Foster's failure to prevent Roth from driving. She said that it was possible that he was not even drunk at the time of the stop and that it was possible that the beer was not visible at that time. She agreed that it was unfortunate that Foster had not noticed that Roth's license was under suspension, but that sometimes things like that happen.

I am going to have to try to find evidence stronger than this before we can file this law suit. I will continue to investigate and keep you posted.

Very truly yours,

Joseph Delbert

Attorney at-Law

JOSEPH DELBERT
Attorney-at-Law
213 Main Street
Myersville, Liberty

March 12, 1985

Ms. Stephanie Hale
2173 Brightwood Lane
Pleasantville, Liberty 99773

Dear Stephanie:

I am sorry that you have not heard from me for such a long time and that you have had such difficulty reaching me by telephone. I have just completed a trial of unusual complexity and length and, unfortunately for my other clients, it took all of my energy and time.

I am now ready to turn my attention back to your case and find out if there is any way to recover damages against the police department for you.

I'll be back in touch with you soon.

Very truly yours,

Joseph Delbert

Attorney-at-Law

JD/pe

JOSEPH DELBERT
Attorney-at-Law
213 Main Street
Myersville, Liberty

June 22, 1985

Ms. Stephanie Hale
2173 Brightwood Lane
Pleasantville, Liberty 99773

Dear Stephanie:

Of course I am upset that you are so angry with me after our phone conversation last week. I feel as if I have combed the earth for evidence to support your claim. I can understand why you are disappointed that we will be unable to recover money from the government for the failure of the police to prevent the accident, and I hate being the bearer of such bad news. I only hope that upon reflection you will realize that I did my best under the circumstances.

Given how you feel about me at this point, I do not see how we can continue to work together on this. I suggest that if you are determined to pursue this action against the police department that you find a new attorney. If you do not know another attorney, I am certain the Lawyer Referral Service of the Liberty Bar Association can be of assistance.

Very truly yours,

Joseph Delbert

Attorney-at-Law

JD/pe

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Liberty Rules of Civil Procedure

Rule 101. Depositions pending action

(a) Time for taking; subpoena. Any party may take the testimony of any person, including a party, by deposition upon oral examination for the purpose of discovery or for use as evidence in the action or for both purposes. Such depositions may be taken in an action at any time after the service of process or after the appearance of the defendant or the respondent. The attendance of witnesses or the production of books, documents, or other things at depositions may be compelled by the use of subpoena.

(b) Scope of examination; privilege. Unless otherwise ordered by the court, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) Attorney work product. The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

Rule 201. Written interrogatories

(a) Service; answers; motion for further response; copies; retention of original. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, or body politic, by any officer or agent, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve the answers on the party submitting the interrogatories within 30 days after the service of the interrogatories. Such answers shall respond to the written interrogatories; or, if any interrogatory be deemed objectionable, the objections thereto may be stated by the party addressed in lieu of response. If the party who has submitted the interrogatories deems that further response is required, he may move the court for an order requiring further response. Otherwise, the party submitting the interrogatories shall be deemed to have waived the right to compel answers pursuant to this section.

(b) Scope; number; protective orders. Interrogatories may relate to any matters which can be inquired into under subdivision (b) of Rule 101 of this code. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the

deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as above provided and except as justice requires to protect the party from annoyance, expense, embarrassment or oppression.

Rule 301. Identification and production of documents and things for inspection, measuring, copying or photographing; response; objections; service

Any party may serve on any other party a request:

(1) to identify such documents, papers, books, accounts, letters, photographs, objects or tangible things, of a category specified with reasonable particularity in the request, which are relevant to the subject matter of the action, or are reasonably calculated to discover admissible evidence relating to any matters within the scope of the examination permitted by subdivision (b) of Rule 101 of this code and which are in the possession, custody, or control of the party upon whom the request is served, and to produce and permit the inspection and copying or photographing of the same, by or on behalf of the party making the request; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting, measuring, surveying, photographing or sampling the property or any designated object or operation thereon within the scope of the examination permitted by subdivision (b) of Rule 101 of this code. The request shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 401. Physical, mental or blood examinations

(a) Order for examination. In an action in which the mental or physical condition or the blood relationship of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of findings. If requested by the party against whom an order is made under subdivision (a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery, the party causing the examination to be made shall be entitled upon request to receive from the party or persons examined a like report of any examination, previously or thereafter made, of the same condition.

(c) Waiver of privilege. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party against whom an order is made under subdivision (a) of this section or the person examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same condition.

Rule 501. Requests for admission of genuineness of documents or truth of facts.

(a) Copies of documents; statement or written objections; denials; motion for further response. After service of summons or the appearance of a party, any other party who has appeared in the action may serve upon any party who has been served or who has appeared a written request for the admission by the latter of the genuineness of any relevant documents described in the request or of the truth of any relevant matters of fact set forth in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless, within the period designated in the request, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(b) Effect of admissions. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may be used against the party in any other action.

Liberty Civil Code

§597. Limitation of Action Against Public Entities and Public Employees. Notwithstanding the provisions of any other statute, no action may be commenced or maintained against the State, any city, any county or any other public entity or any officer or employee of any of the foregoing for action in their official capacity unless the complaint is filed and summons issued not later than two years after the injury or damage.

Yee v. Carrington

Supreme Court of Liberty (1974)

Plaintiff, Cora Yee, appeals from a judgment of nonsuit in a malpractice action against defendant, Herbert M. Carrington.

In the latter part of 1968, plaintiff lived in a rented house in the City of Rockville. The house was located on a small hill which sloped to the street. During this period sidewalks were being installed on the street. Plaintiff's front steps leading to the street were removed as part of the construction work, and as a consequence, plaintiff used the driveway as a means of ingress and egress from her house. On the evening of December 3, 1968, plaintiff, en route to her neighbor's house to borrow a flashlight, walked down the driveway and fell into an unmarked trench of which she had no notice. As a consequence, she injured her left leg and hit her head on a piece of concrete. After approximately one-half hour of calling for help, a little boy came to her assistance and helped her out of the trench. She crawled into her living room and called an ambulance. Since the accident, she has not been able to work because of swelling of her leg and periodic muscle spasms.

Following the accident, plaintiff contacted representatives of the City of Rockville and was told that the accident occurred in the County's area of responsibility. Thereafter, she had a conversation with a representative from the County, who told her that the accident was the contractor's fault and advised her to contact the contractor. She also talked to a representative of her landlord's insurance company, who told her that the accident was the contractor's fault. The contractor advised her that the accident was the landlord's fault.

On January 22, 1969, plaintiff advised defendant of the facts as above outlined. He told her she had a very good case and that he would sue the contractor, the landlord, and the County. At defendant's request, plaintiff executed a written retainer contract. Concurrently, defendant arranged for plaintiff to see two physicians in Beverly about her injuries and instructed her not to discuss the accident with anyone, but to refer all inquiries to him. She followed his instructions.

Plaintiff did not hear from defendant. After a year had elapsed, she called his office. Defendant told her he would pull her file and let her know the next day how her case was going. She called the next day and was informed by defendant's secretary "my case supposedly had been gone into over a year ago, and the girl he had working on the case - he had fired her, and therefore, I had no case no more." She asked the secretary to have defendant call her. Defendant did not call or return any of her calls. When plaintiff called, she was told to "quit calling down there." This action followed.

It appears from the record that scheduled depositions of defendant in respect of his handling of plaintiff's case were twice cancelled by him at the last minute, and when on the third occasion he failed to appear, the court found his failure to appear to be willful and ordered him to pay attorney's fees in the sum of $100 and costs of $35 and to appear for a deposition within 60 days. It also appears that when a mandatory settlement conference was scheduled, defendant failed to appear, and the court imposed sanctions on him personally in the amount of $250.

The record makes clear that the trial court granted the nonsuit because plaintiff had not proved which one of the three parties, the County, the landlord, or the contractor, was at fault, and therefore she had not met her burden of proof.[1] The burden on plaintiff, it is true, was a heavy one; she not only had to prove that her original cause of action was meritorious but, in addition, that through the negligent actions of defendant that cause of action had been lost.

The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.

If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm - not yet realized - does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice.

Thus, Yee had to prove two actions of negligence. As to the first, the underlying facts surrounding the accident followed by her conference with defendant proved, in our opinion, a prima facie case that one or more of the three potential defendants involved was legally responsible for the accident; for the second cause of action, defendant's negligence permitting the statute of limitations to run presented her with a prima facie case.

The trial court erroneously imposed upon plaintiff the further burden of showing precisely which one of the three was the negligent party. Plaintiff was not required to meet this additional burden. It might be that all three or one or two of the three were responsible.

In an action such as the one at bench, plaintiff must prove that if a judgment had been obtained in an action against the three potential defendants, or any of them, it would have been collectible. In passing, we note that plaintiff alleged collectibility in her complaint. She should be given the opportunity to prove it. Implicitly, it appears from the bare allegation that County is solvent; County would be assumed to do business with a solvent contractor and, even as to plaintiff's landlord, a complexion of some solvency is suggested.

The judgment of nonsuit is reversed.

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[11] The trial court at one point indicated that plaintiff also had to show that she had actually sued the three parties after she had learned of defendant's failure to sue on her behalf and that the affirmative defense of the statute of limitations had been raised. There is no such requirement.

Black v. City of Windsor

Supreme Court of Liberty (1981)

Plaintiffs, the surviving husband and children of Marcelina Black, appeal from a judgment sustaining without leave to amend the City of Windsor's (City) demurrer to their second amended complaint for wrongful death and personal injuries.

Viewing the facts in the light most favorable to the plaintiffs, as we must, the following facts appear: On August 11, 1977, several City police officers, acting in their official capacities as employees of the City, stopped a Ford automobile belonging to Jones and Hardgraves. All three occupants of the car, Jones, Hardgraves, and Noble, were intoxicated. Hardgraves was driving the vehicle along public roads in the City. The officers arrested Hardgraves for drunk driving and resisting arrest and took him into custody. At the time of his arrest, Hardgraves did not have possession of the car keys. However, the officers did not arrest either Jones or Noble and left them with the Ford without disabling or impounding it. The officers also did not remove any keys from the Ford. Shortly thereafter, Jones drove the Ford and struck the Black automobile, seriously injuring the plaintiffs and killing Marcelina. Subsequently, Jones was charged with drunk driving, and a high alcoholic content was discovered in his blood.

The complaint alleges as follows: "Under the statutory and decisional law of the State of Liberty, together with the enactments, regulations, and customs of the City and of the Police Department, defendant officers were under a mandatory duty to use due care to take precautions to prevent Jones and Noble from driving the automobile."

The trial court sustained the City's demurrer on two grounds: 1) the Government Code provides complete immunity to the City[1] ; and 2) the mandatory duty alleged does not exist.

We first consider whether the statutes provide complete immunity. In Lerner v. State of Liberty (1977), this court rejected the immunity defense as to a police officer who stopped to investigate a car stranded in a speed change lane of a busy freeway. After a tow truck arrived, the officer left the scene without advising any of the individuals involved. Moments later, an oncoming motorist struck one of the cars involved and some of the people standing around it. We held that since the immunity statutes were designed only to prevent political decisions of policy-making officials from being second-guessed in personal injury litigation, the Government Code did not provide immunity where the officer was negligent in the performance of his investigation. We pointed out that the officer's decision "regarding whether to investigate or not may have been a discretionary decision . . ., but once he decided to investigate, any negligence on his part in his ministerial performance of the investigation was clearly beyond the protection of the statutory discretionary immunity."

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[11] The Government Code provides that a public entity is not liable for failing to provide police protection, either at all or in an insufficient amount. It further provides that a public entity is liable for injury proximately caused by an act or omission of one of its employees acting within the scope of his employment, if the act or omission would give rise to a cause of action against that employee. The Code immunizes the employee from injury resulting from an act which was the result of the exercise of his discretion.

Similarly here, once the officers stopped the Ford, they assumed action on behalf of the public and, therefore, were held to the same standard of care as a private person or organization. Furthermore, under current theories of liability sanctioned by the Restatement of Torts and other authorities, a public entity may be liable for the nonfeasance of its employees as the immunity statutes have been applied only to protection against crime and from budgetary neglect.

Also in accord is the recent decision of this court in Castro v. City of Bloomfield (1980),[2] which recognized that in situations such as the instant one, officers had a duty of care toward innocent third parties like the plaintiffs here. On the duty issue, we cannot distinguish the instant case from Castro and Lerner. The officers had observed and questioned each of the passengers and had ascertained that Noble did not have a valid license. Given the high alcohol content of Jones, there would be a question of fact as to whether, under the circumstances, it was reasonable for the officers not to take some steps, such as removing the keys to prevent the Ford's being driven by Noble (who had no valid license), and Jones (who apparently was at least as drunk as Hardgraves). The instant allegations do not involve the discretion of the officers in deciding whether to conduct an investigation, but instead, only their negligence in the conduct of the discretionary investigation. Thus, the trial court here erroneously sustained the City's demurrer on the grounds of the immunity provided by the statutes.

However, aside from the immunity issue, the question remains whether the trial court's order was proper as to the second ground, no mandatory duty. Plaintiffs pursue their cause of action under section 815 *A[3] and allege that under "the statutory and decisional law of the State of Liberty, together with the enactments, regulations, and customs of the city and of the police department," there is a "mandatory duty to disable the automobile, to impound the automobile, or to remove the keys from the automobile." Plaintiffs rely primarily on City of Windsor Ordinance 100:

> Arrest or Incapacitation of Driver. Upon the arrest or incapacitation of the driver of a vehicle on a public highway, the vehicle shall be removed from the highway to a safe and secure location if it creates a danger to the public. Any expenses incurred must be paid by the driver or owner of the vehicle.

The officers' duty to arrest, or to take some protective action less drastic than arrest, is an exercise of discretion for which a peace officer may not be held liable in tort. However, the officers were negligent when, after they stopped the vehicle and arrested Hardgraves, they took no steps to remove the keys from the vehicle. Whether the keys

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[22] In Castro, the officers stopped an intoxicated driver and left him unattended and alone in the police vehicle. The drunk driver promptly sped off in the police vehicle and collided with Castro, who sued for the personal injuries sustained. This court emphasized the great injustice in denying recovery to innocent third parties where a police officer, once exercising his discretion to act, proceeds to discharge his duties in a careless manner. We emphasized that due care as an element of negligence presents a question of fact.

[33] Section 815 provides: "where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

in the Ford parked on the street was a dangerous condition of public property is properly a question of fact to be determined by a jury. We can only conclude that the court also erred in sustaining the demurrer on the ground of no mandatory duty.

The judgment of dismissal is reversed.

Allen v. Dover County

Supreme Court of Liberty (1983)

Plaintiff Allen appeals from a judgment of dismissal entered after the trial court granted defendant's motion for nonsuit. We affirm.

On the evening of October 21, 1978, Matthew Miller was traveling west on Highway 50. After determining he was proceeding at a speed of 72 miles per hour and that the car was weaving from lane to lane, Dover County Deputy Sheriff David Tracy stopped the vehicle. Officer Tracy issued a ticket to Miller for speeding. He noticed several unopened cans of beer on the front passenger seat. Although Officer Tracy was on the lookout for drunk drivers, he did not detect an odor of alcohol on Miller's breath. Miller had no difficulty showing his driver's license to Tracy, and his speech was clear. He had no difficulty exiting his vehicle for the ticketing procedure nor in entering after completion. In the Officer's recollection, Miller's eyes were clear and normal, but the officer did not notice his pupils. Tracy believed he had no reason to suspect that Miller had been drinking. Nine minutes after the stop, Tracy allowed Miller to proceed home without any further tests, warning him to slow down.

About twenty minutes later, while attempting to pass another vehicle in a no-passing area, Miller's vehicle collided head-on with a vehicle driven by plaintiff. Miller died in the collision, and plaintiff Allen sustained major head injuries, resulting in brain damage. Miller's blood alcohol level was .18.

David Kaman, a traffic collision consultant and former Liberty Highway Patrolman, testified Officer Tracy should have administered field sobriety tests because of the beer cans in the front seat and the erratic driving. A physician with a subspecialty in toxicology criticized some of the procedures undertaken and suggested authorities should check the pupils of a possible drunk driver. Miller's girlfriend told the jury he consumed at least a six-pack of beer on a daily basis.

Plaintiff filed an action against Dover County, the owner of the vehicle, and Miller's estate. The County moved for a nonsuit, claiming the evidence was insufficient for a finding of negligence by Officer Tracy, and that there was no liability in the absence of a relationship between plaintiff and either Officer Tracy or Miller. The trial court granted the motion, ruling Tracy had no legal duty and was immune from liability. Judgment of dismissal was entered accordingly.

Plaintiff contends Officer Tracy had an affirmative duty to plaintiff, after he commenced an investigation of Miller's sobriety, to exercise reasonable care in the performance of his investigation. Moreover, according to plaintiff, under the circumstances of this case, Dover County is not entitled to the protection of the immunity statutes. Defendant urges Tracy had no such duty and that, in any event, liability is barred by the applicable statutory immunities. The immunity issue does not even arise unless it is established a defendant owes a duty to the plaintiff and would be liable absent any immunity. Absence of duty is a particularly useful and conceptually more satisfactory rationale where, absent any "special relationship" between the officers and the plaintiff, the alleged tort consists merely in police nonfeasance. Here, the negligence claim against Tracy was based on nonfeasance in his alleged failure to prevent Miller from driving while intoxicated. Accordingly, we first consider the threshold question of duty.

One element of a negligence theory required for recovery of damages is the legal duty to use due care. It is axiomatic that one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is a relationship between them which gives rise to such a duty. However, the "good Samaritan" who elects to come to the aid of another is under a duty to exercise due care and is liable if his failure to exercise such care increases the risk of harm, or the harm is suffered because of the other's reliance on the undertaking.

In Williams v. State of Liberty (1982), the plaintiff was seriously injured when a piece of heated brake drum from a passing truck was propelled through the windshield of the automobile in which she was riding, striking her in the face. Her complaint against the state alleged negligence in the form of nonfeasance: failure of the highway patrol officers who investigated the accident to examine the brake drum part to determine if it was still hot, to identify other witnesses at the scene, or to attempt any investigation or pursuit of the owner or operator of the truck whose brake pad broke and caused plaintiff's injuries. Plaintiff alleged that the failure to properly investigate the accident destroyed her opportunity to obtain compensation from the unidentified person who injured her. The Williams court concluded the plaintiff had not stated a cause of action because she failed to establish a duty of care owed by the state. To establish such a duty, the plaintiff must show an affirmative act which placed her in peril or increased the risk of harm, an omission or failure to act after a promise was made, or a special relationship in which she relied to her detriment on official conduct in a situation of dependency.

Here, as in Williams, none of those factors was present. Officer Tracy did not create the peril to plaintiff; he took no affirmative action which contributed to, increased or changed the risk that otherwise existed; he did not voluntarily assume any responsibility to protect plaintiff; and he made no statement or promise to induce plaintiff's reliance. Assuming, arguendo, plaintiff or any other member of the motoring public was a reasonably foreseeable victim, that fact alone is not enough to establish a special relationship with Officer Tracy imposing on him a duty to use due care.

Most of the authorities relied on by plaintiff are distinguishable either by the element of reliance or by the defendant's actions in some manner increasing the risk of harm to the plaintiff. For example, in Lerner v. State of Liberty (1977), a probationary highway patrol officer, coming to the aid of stranded motorists, placed his car with flashing light behind two other cars stalled on the freeway. The officer called a tow truck but then withdrew without warning. He did not wait for the tow truck to line up behind the stalled cars and failed to provide protective flares. Moments later, one of the stalled cars was hit, causing injury to persons standing nearby. The officer's affirmative action increased the risk which otherwise existed, and lulled the injured parties, dependent on the officer, into a false sense of security.

In Castro v. City of Bloomfield (1980), a police officer had stopped a vehicle and arrested the driver for driving under the influence of alcohol. He placed the arrested driver without handcuffs in the back seat of the police vehicle and left the motor running while he went to help another officer move the arrest driver's car. The arrested driver sped off in the police car and was pursued by authorities. The chase ended when the arrested driver ran off the road and struck the plaintiff, who was mowing the lawn in his front yard. We held a police officer's duty to operate his police vehicle with due care includes a duty to third persons not to leave that vehicle unattended under the circumstances of that case. Contrary to plaintiff's suggestion, more is required to

establish a duty than mere contact between police and the wrongdoer. Cases such as Lerner and Castro involved situations in which the police either created the peril or increased the risk which otherwise existed. As we have said, there is no evidence in the instant case that police conduct either increased plaintiff's risk of harm or induced plaintiff's reliance to her detriment.

Plaintiff also relies on Black v. City of Windsor (1981). In Black, police had stopped a vehicle with three occupants, all of whom were drunk. Authorities arrested the driver but took no action to prevent the others from driving the car. One of them drove the car, resulting in an accident causing injury and death to innocent third persons. We held once the officers undertook their investigation, they had a duty of care toward the plaintiffs and were no longer immune from liability for their negligence. However, Black is distinguishable. The plaintiffs there pleaded that enactments of the city and its police department imposed a mandatory duty to disable the automobile, impound it, or remove the keys from the automobile. Because the officer's duty to remove the keys was founded on an enactment imposing a mandatory duty pursuant to Government Code section 815, the Black plaintiffs did not have to plead the existence of any special relationship in order to create a duty of care. To the extent Black predicated a duty of care to the public at large on general tort theory, apart from the enactment, we conclude that Williams implicitly overruled its analysis.

However, the facts of Harold v. City of Westerley (1981) demonstrate that a police officer does not act affirmatively to increase the risk of harm simply by failing to stop a citizen from acting dangerously. There, police had solid information that a suspect in a laundromat was dangerous. They failed to intercede or to warn another citizen in the laundromat, whom the suspect later stabbed. This court found no special relationship, no duty of care toward the victim, and no negligence. We said, "The officers' conduct did not change the risk which would have existed in their absence: there is simply no reason to speculate that anyone - victim or assailant - would have acted differently had the officers not placed the laundromat under surveillance."

In the instant case, the conduct of Officer Tracy did not alter any risk which already was present. We discern only a tenuous connection between the officer's conduct and plaintiff's injury. Tracy testified, without challenge, that he lacked probable cause to arrest Miller after the latter appeared sober and coherent. Expert testimony at trial conceded the subjectivity of determining how many field sobriety tests to give and acknowledged intoxicated persons frequently manage to pass such tests. Nor do we believe any grave moral blame may be attached to the officer's conduct. There was no suggestion of any deficiency in the manner of the investigation, other than testimony Tracy should have performed some tests. Moreover, to require a police officer to perform an unknown number of tests on suspected drunk drivers would not necessarily effectuate the policy of preventing future harm. On the contrary, in our estimation such a burden would hamper law enforcement in effectively carrying out its duties and impinge on the rights of innocent citizens. Similarly, in the instant case, plaintiff has failed to establish any relationship between Officer Tracy and herself or any conduct on his part creating a duty to use due care in the course of his investigation.

It is a matter of great urgency and the public policy of this state to prevent drunk driving. However, there is no authority for the recognition of a cause of action against Officer Tracy in the circumstances of this case. As this court noted in refusing to impose a duty on police officers to warn potential victims, recognition of such a cause of action would raise difficult problems of causation and public policy. Harold v. City of Westerly, supra. Because we conclude officer Tracy neither created a peril, increased plaintiff's

risk of harm, nor created a special relationship that would establish a duty of care, we do not consider the issue of statutory immunity.

The judgment is affirmed.

INSTRUCTIONS

1. You will have three hours to complete this performance test. This session of the examination 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. Columbia is located within the jurisdiction of the fictional United States Court of Appeals for the Fifteenth Circuit.
3. You will have two sets of materials with which to work: A **File** and a **Library**. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
4. 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 the cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page numbers.
5. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear 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.
6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.
7. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization. Grading of the two tasks will be weighted as follows:

Task 1 — 70%
Task 2 — 30%

SCHELLY & KATZ, LLP
2800 BLAKE STREET
FAIRVIEW, COLUMBIA 55515

MEMORANDUM

To: **Applicant**
From: **Judith M. Schelly**
Date: **July 30, 2002**
Subject: **In re Thomas Outdoor Advertising**

The Benton City Council today placed on the agenda for its August 6, 2002 meeting a proposed ordinance relating to outdoor advertising in the form of billboards. The proposed ordinance is quite controversial. It would effect a change from the currently unregulated state of affairs, and impose, for the first time, various restrictions and even outright prohibitions.

We represent Stephen Thomas, the sole proprietor of Thomas Outdoor Advertising, a relatively new but fast growing business. Thomas objects to the proposed ordinance because he believes that, if enacted, it would threaten the general well-being of Benton and his profitability as well.

I have an appointment with the City Attorney to discuss the proposed ordinance. To help me prepare for that meeting, please draft a memorandum for me that:

1. Analyzes the constitutionality of the proposed ordinance, being sure to identify and evaluate the arguments that I can make to the City Attorney in support of the position that it is in fact unconstitutional; and

2. Identifies and discusses specific modifications that can be made to the proposed ordinance that will meet both Thomas's stated goals and the city's expressed concerns and still be constitutional. Do not redraft the proposed ordinance.

BENTON *EXPRESS*

July 15, 2002

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Billboards? In Benton?

By Elizabeth D'Orazio, *Express* Staff Writer

You wouldn't think that billboards could have raised such a ruckus — unless, that is, you live in Avalon County and, especially, the City of Benton.

For just about as long a time as most folks can remember, Patrick Curtan has been the "King of Billboards" in this rural county and its oldest city.

Most of Curtan's billboards are like others you see throughout the state, and, indeed, throughout the country, advertising major brands of gasoline, familiar soft drinks, and ubiquitous fast food restaurants.

But some of Curtan's billboards are altogether unique, advertising nothing more or less than his own idiosyncratic views on matters that the public is concerned about — or matters that he thinks the public *should* be concerned about.

Crusty, but somehow endearing in an odd sort of way, Curtan has found it hard to alienate anyone, even though practically no one has ever agreed with him. That's probably because his views have never been either liberal or conservative, progressive or reactionary, left or right. As one long-time friend, Al Waters, puts it, "Pat's a contrarian. He licks his finger, puts it up to see which way the wind is blowing — and then sets himself right into its blast." For example, at the height of the oil embargo in the early 1970's, he waged a campaign on his billboards urging county officials to buy only the most gas-guzzling of cars, ostensibly to put pressure on the federal government to allow wide-scale oil exploration throughout Alaska. But in the late 1990's, appearing on his billboards in a neon purple and pink costume as "SUVerman," he incited teenagers to "liberate" sports utility vehicles from their parents and turn them over to him for transformation into roadside planters.

Although Curtan has found it hard to alienate anyone, he has succeeded so far as one person is concerned — Benton City Council Member Sonia Hemphill. Hemphill is the architect of Benton's remarkable renaissance. About five years ago, with little support, she persuaded the City Council to establish Benton's Historical District. What was formerly a dilapidated collection of ramshackle shops with hardly any merchandise to speak of, and even fewer buyers, is now becoming a trendy mecca for the upscale visitor who has lots of money to spend on such essentials of the good life as free-range ostrich, heirloom fruits and vegetables, and boutique wines. "Curtan's billboards," says Hemphill, "might

put off the very people we want to attract. At the very least, they cast an unflattering light on the community, presenting the residents as unsophisticated bumpkins." She told Benton City Attorney Theodore J. Stroll, "Do whatever you can to deal with the problem."

This leaves Curtan, one might suspect, exactly where he wants to be — in the middle of the biggest ruckus his billboards have ever raised.

CITY OF BENTON
PROPOSED ORDINANCE RELATING TO OUTDOOR ADVERTISING

Section 1. Legislative Findings.

A. Aside from this ordinance, outdoor advertising in the form of billboards, as herein defined, is not regulated by any ordinance.

B. The lack of regulation of billboards has led in the past, and may lead in the future, to aesthetic blight because of visual clutter.

C. The lack of regulation of billboards has created in the past, and may create in the future, traffic safety hazards because of visual distraction.

D. The regulation of billboards specified herein is necessary to prevent aesthetic blight and traffic safety hazards.

Section 2. Definitions.

A. "Billboard" is any structure, object, device, or part thereof, situated outdoors that advertises, identifies, displays, or otherwise relates to a person, thing, institution, organization, activity, condition, business, good, service, event, or location by any means, including words, letters, numerals, figures, designs, symbols, fixtures, colors, motion, illumination, or projected images.

B. "On-site/commercial" billboard is any billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any business conducted on the parcel on which it is located and/or any good or service produced by such business or made available by such business for purchase thereon.

C. "Off-site/commercial-or-noncommercial" billboard is any billboard, as defined herein, other than an on-site/commercial billboard, as defined herein, advertising, identifying, displaying, or otherwise relating to any person, thing, institution, organization, activity, condition, business, good, service, event, or location.

D. "Historical District" is that area of the city so established by the City of Benton Historical District Ordinance enacted on July 14, 1997.

Section 3. Regulation.

A. Any person may erect and maintain an on-site/commercial billboard in the Historical District.

B. No person shall erect or maintain any off-site/commercial-or-noncommercial billboard in the Historical District, with the exception of off-site/commercial-or-noncommercial billboards with commemorative historical signs, service club signs, or signs depicting time, temperature, and news.

Section 4. Declaration of Public Nuisance and Removal.

A. Any billboard erected or maintained in violation of any of the provisions herein is declared a public nuisance.

B. Any billboard declared a public nuisance hereunder may immediately be removed by the Director of Public Works.

Section 5. Expenses and Fine.

A. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is jointly and severally liable for any and all expenses incurred by the Director of Public Works in its removal.

B. Each and every person who is responsible for erecting and/or maintaining any billboard declared a public nuisance hereunder is subject to a fine not exceeding $10,000.

OFFICE OF THE CITY ATTORNEY
July 19, 2002

COLUMBIA OUTDOOR ADVERTISING ASSOCIATION
FACT SHEET

In 2001, individuals and entities in the United States spent about 2% of their advertising budget on outdoor advertising by means of billboards.

Over the years, individuals and entities have increasingly spent more money on billboards, and have increasingly made greater use of this medium.

Billboards have been shown to possess various strengths. For example, they quickly build awareness; create continuity of a brand or message; are adaptable, applying national or regional strategies within a local context; and provide geographic and demographic flexibility.

Judged by the cost of reaching their audience, billboards are more affordable than other media.

The appearance of billboards has changed in recent times, largely through the use of computer-painted vinyl, which provides high quality and consistent images; three-dimensional and moving displays; and innovative lighting.

Billboards provide significant direct economic contributions in wages and benefits to employees, in payments to vendors of goods and services, in lease payments to real property owners, and in commissions to advertising agencies, especially in rural areas and small cities.

Billboards also play a substantial role for businesses and other activities that are small, local, or tourist-related, especially, again, in rural areas and small cities.

TRANSCRIPT OF STEPHEN THOMAS INTERVIEW
July 25, 2002

Judith M. Schelly: Mr. Thomas, thank you for coming in. We're recording this session on audiotape with your permission, right?

Stephen Thomas: Yes.

Schelly: Could you tell me a bit about the outdoor advertising business in the County of Avalon and the City of Benton?

Thomas: Sure. For years, the business has been dominated by Patrick Curtan. Still is. The county is rural, and there's lots of space for billboards. He's tied up most of the best sites outside of the city and just within its fringes, with generous payments to the property owners. Over the years, he's made a great deal of money. Even when times were tough, he devoted space to his personal agenda. Now, when he's made more money than he could spend in three lifetimes, there's no stopping him. He's quite a character, that's for sure. But beneath all his flamboyance, he's a solid businessperson and a solid citizen. In any event, when the Benton Historical District Ordinance was under consideration about five years ago, I decided to get into outdoor advertising, not like Curtan with his national advertisers and his conventional billboards, but in a niche that would anticipate where I thought Benton would go.

Schelly: What do you mean?

Thomas: Benton's Historical District had a number of sites that could be used for billboards. All of them were available for lease. No one had tried to secure any of them.

Schelly: Why not?

Thomas: Benton was a city that time had passed by. There was hardly anyone there. And those who were there had little to sell and little to buy. But I thought that would change. It did. Well, I leased many of the best sites in the Historical District that could be used for billboards. The leases were generally for 25 years. I guaranteed the lessors a fixed minimum payment and provided for increased payments as my revenues increased. I manufactured the billboard structures myself to last at least 25 years — two and one-half times as long as the best billboards in the state. That kind of manufacturing makes my costs two or three times higher than those for conventional structures.

Schelly: You mentioned a niche?

Thomas: Yes. I figured that conventional billboards would look out of place in an historical district, even, and especially, the computer-painted vinyl ones with their sharp images. So I came up with a notion for something different. The displays on structures would conform to their surroundings — bricks and wood and stucco, as the case may be, and not paper or plastic. They would not change monthly, as is typical. Rather, they would vary with the seasons, and with local festivities within each season. Thus, there would be autumn displays, with appropriate adjustments for Harvest Time, Halloween, and

Thanksgiving. Most important, to my mind, would be their character. They would not advertise only the goods or services on sale at the location in question.

Schelly: You mean that a billboard at my antique store — let's say I owned an antique store — would advertise other antique stores?

Thomas: In a way. The billboard would advertise a group of antique stores. No, better, it would actually help create an antiques district.

Schelly: Doesn't that cut against the interests of the owner of the individual antique store?

Thomas: Not at all. You're acquainted with the "Diamond District" in midtown Manhattan in New York City?

Schelly: Of course.

Thomas: Well, it's a fact of economic life that when a vibrant area like the Diamond District is created, each business gets more customers, in spite of the competition it faces from other businesses, than it would have gotten otherwise — indeed, it gets more customers because of the competition.

Schelly: We see that phenomenon closer to home in the various "Auto Rows" throughout Columbia, don't we?

Thomas: Right.

Schelly: Have you put any displays up?

Thomas: Not yet, but we're not far off.

Schelly: Now, turning to the proposed ordinance —

Thomas: It's simply bad news all the way around. The Historical District as a whole depends on its various subdistricts — antiques, as we mentioned, gourmet, arts, etc. It needs ambience. Without ambience, you're not going to get enough people to come to buy the upscale commodities that it specializes in, certainly not enough people with the money to buy them. To be frank, the ordinance would be devastating to my business. I've invested about $2.5 million. Under the ordinance, I would lose most of it. I would probably have to shut down and let my employees go.

Schelly: How many employees do you have?

Thomas: I have a permanent staff of 10, plus 15 others who will stay with me until we finish manufacturing the structures.

Schelly: Why does the city want the proposed ordinance?

Thomas: It claims that it wants to avoid aesthetic and traffic problems. But billboards have never been regulated in the city. I've never heard any complaints about unsightliness. Then again, there haven't been many billboards. As for traffic, what traffic? The Historical District is basically a pedestrian mall. Everybody knows what's driving this — Hemphill's fight with Curtan. But Curtan's billboards are nowhere near the Historical District. I recognize that cities commonly regulate the appearance of

billboards. I wouldn't have a problem with that. How could I? That's what I'm selling. But what the city's proposing? No.

Schelly: So, what would you like to see happen?

Thomas: I just want to be able to run my business as planned.

Schelly: So, no ordinance would be best?

Thomas: No, some kind of design review and approval would be appropriate. Conventional billboards like Curtan's would be out of place in the Historical District. But they might prove tempting to some merchants because they would probably be much less expensive than mine.

Schelly: I think you've given me enough information to proceed. I'll keep you informed as things develop. Thanks for coming by.

Thomas: You're welcome.

OFFICE OF THE CITY ATTORNEY
CITY OF BENTON
1000 GROVE STREET
BENTON, COLUMBIA 55155

July 26, 2002

Judith M. Schelly
Schelly & Katz, LLP
2800 Blake Street
Fairview, Columbia 55515

Re: Proposed Ordinance Relating to Outdoor Advertising

Dear Ms. Schelly:

I am writing to memorialize our telephone conversation concerning the City of Benton's proposed ordinance relating to outdoor advertising in the form of billboards.

You stated that your client, Stephen Thomas of Thomas Outdoor Advertising, objects to the proposed ordinance on the ground that, if enacted, it would threaten the general well-being of Benton.

I responded that outdoor advertising ordinances are now as common as outside advertising itself, and that the proposed ordinance is hardly out of the mainstream.

I noted the background to the proposed ordinance, which was well known to you: Together with its residents and businesses, the city, as a small municipality in a rural county, had long been affected by the general decline that has plagued this area of the state; residents and businesses were quite poor, and city government was all but bankrupt. In 1997, the City of Benton Historical District Ordinance established the Historical District. In the years that have followed, the city has experienced a remarkable turnaround, attracting many visitors, including many quite affluent, to its crafts shops, antique stores, art galleries, artisanal bakeries and creameries, and inns and restaurants.

I further noted that outdoor advertising of even the common variety might negatively affect aesthetic values and traffic flow in the Historical District. Moreover, outdoor advertising of a controversial character might offend some visitors or at least cause some discomfort. To avoid any such problems, City Council Member Sonia Hemphill asked us to draft a proposed ordinance. We have done so. Although we are of the view that an ordinance may lawfully prohibit all outdoor advertising in

the Historical District, we have not taken that approach. Rather, the proposed ordinance would allow on-site/commercial billboards, which promote the goods or services on sale at the location in question, and certain off-site/commercial-or-noncommercial billboards. We think that this approach is a reasonable one, permitting steady economic growth for our residents and businesses and, consequently, financial stability for city government itself.

Let me observe, in conclusion, that the City Council will soon schedule a hearing on the proposed ordinance. You and your client are, of course, welcome to participate.

Should you wish to communicate with me in advance of the hearing, I remain available, as always, to consider any and all constructive suggestions.

Very truly yours,

Theodore J. Stroll
City Attorney

LIBRARY

City of Benton Historical District Ordinance.....

Metromedia, Inc. v. City of San Diego (U.S. Supreme Ct. 1981).....

City Council v. Taxpayers for Vincent (U.S. Supreme Ct. 1984).....

National Advertising Company v. City of Orange (U.S. Ct. App. 9th Cir. 1988)....

Desert Outdoor Advertising, Inc. v. City of Moreno Valley (U.S. Ct. App. 9th Cir. 1996).....

CITY OF BENTON
HISTORICAL DISTRICT ORDINANCE

Section 1. Legislative Findings.

A. The area of the city bounded by Lincoln Avenue, Bliss Street, Flushing Avenue, and Lowery Street, hereinafter the "Historical District," has in recent years been so adversely affected by blight as to diminish the economic base of the city.

B. A master plan for the rehabilitation of the Historical District was recently adopted.

C. It is essential to the preservation of the aesthetic integrity of all buildings in the Historical District, and to the preservation of the ambience of the Historical District itself, that all such buildings be regulated to ensure consistency with surroundings in size, shape, color, and placement.

Section 2. Regulation.

* * * * *

C. Before erecting, modifying, or removing any building in the Historical District of whatever sort, all owners of real property, tenants, contractors, and others shall submit plans to the Director of Public Works for design review and approval for consistency with surroundings in size, shape, color, and placement.

* * * * *

F. Only pedestrian traffic shall be allowed in the Historical District, except as indicated in subsection G, below.

G. With the exception of police, fire, and similar governmental services, vehicular traffic shall be allowed in the Historical District only between the hours of 2:00 a.m. and 7:00 a.m., and then only as necessary for mercantile pick-ups and deliveries. Vehicular traffic for police, fire, and similar governmental services shall be allowed in the Historical District at all times.

* * * * *

ENACTED JULY 14, 1997

Metromedia, Inc. v. City of San Diego
United States Supreme Court (1981)

The City of San Diego enacted an ordinance that imposes substantial prohibitions on the erection of outdoor advertising displays in the form of billboards. The stated purpose of the ordinance is "to eliminate hazards to pedestrians and motorists brought about by distracting displays" and "to preserve and improve" the city's "appearance." The ordinance permits on-site commercial billboards, which generally advertise goods or services available on the property on which they are located, but forbids off-site billboards, which generally advertise or otherwise relate to goods or services or activities available or conducted elsewhere, unless permitted by one of several exceptions specified, such as for commemorative historical signs, service club signs, for-sale and for-lease signs, signs depicting time, temperature, and news, and temporary political campaign signs.

Metromedia, a company that was engaged in the outdoor advertising business in San Diego when the ordinance was passed, obtained an injunction in a state trial court, which concluded that the ordinance was facially invalid under the First Amendment's free speech clause as applied to the states and their cities through the Fourteenth Amendment's due process clause.

The state supreme court, however, set aside the injunction, holding that the ordinance was not facially invalid.

Holding to the contrary, we shall reverse and remand.

As with other media of communication, the government has legitimate interests in controlling the noncommunicative aspects of billboards, but the First Amendment forecloses similar interests in controlling their communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, the courts must reconcile the government's regulatory interests with the individual's right to expression.

Insofar as it regulates commercial speech — that is, speech that does no more than propose a commercial transaction, or at least relates solely to the economic interests of the speaker and his audience — the ordinance is not facially unconstitutional. It meets the requirements articulated in our cases, which consider whether the regulation of such speech (1) serves a substantial governmental interest, (2) directly advances such interest, and (3) is no more extensive than necessary.

First, the ordinance's stated purpose to improve traffic safety and the beauty of the surroundings comprises substantial governmental interests. It is far too late to contend otherwise with respect to either objective.

Second, the ordinance directly serves the substantial governmental interests in traffic safety and beauty. We hesitate to disagree with the accumulated, common-sense judgments of local lawmakers that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that

these judgments are unreasonable. Nor do we find it speculative to recognize that billboards by their very nature, wherever located, can be perceived as an aesthetic harm. San Diego, like many other cities, has chosen to minimize the presence of such signs. Aesthetic judgments of this sort are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose. But there is no claim in this case that San Diego has as an ulterior motive of the suppression of speech, and the judgment involved here is not so unusual as to raise suspicions in itself.

Metromedia nevertheless argues that San Diego denigrates its interests in traffic safety and beauty and defeats its own case by permitting on-site commercial billboards. The ordinance permits the occupant of property to use billboards located thereon, even if distracting and unattractive, to advertise goods and services there offered; similar billboards, even if attractive and not distracting, that advertise goods or services available elsewhere are prohibited. But, whether on-site commercial billboards are permitted or not, the prohibition of off-site billboards is directly related to the stated objectives of traffic safety and beauty. This is not altered by the fact that the ordinance is underinclusive because it permits on-site commercial billboards. In addition, the city has obviously chosen to value one kind of commercial speech — that on on-site billboards — more highly than another kind of commercial speech — that on off-site billboards. It has evidently decided that the private interest in on-site commercial speech, but not the private interest in off-site commercial speech, is stronger than its own interests in traffic safety and beauty. Hence, it has effectively decided that in a limited instance — on-site commercial billboards — its interests should yield. We do not reject that judgment. As we see it, the city could reasonably conclude that a commercial enterprise — as well as the interested public — has a stronger interest in identifying its place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere. It does not follow from the fact that the city has concluded that some commercial interests outweigh its interests in this context that it must give similar weight to all other commercial interests. Thus, off-site commercial billboards may be prohibited while on-site commercial billboards are permitted.

Third, the ordinance is no broader than necessary to accomplish the substantial governmental interests in traffic safety and beauty. Since San Diego has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously its most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. It has gone no further than necessary in seeking to meet its ends. Indeed, it has stopped short of full accomplishment: It has not prohibited all billboards, but allows on-site commercial billboards and some others specifically excepted.

But, insofar as it bans noncommercial speech — including political speech, which deals with governmental affairs, and ideological speech, which concerns itself with philosophical, social, artistic, economic, literary, ethical, and similar matters — the ordinance is indeed facially unconstitutional.

The fact that San Diego may value commercial speech relating to on-site goods and services more highly than it values such speech relating to off-site goods and services does not justify prohibiting an occupant from displaying his own ideas or those of others. The First Amendment affords noncommercial speech a greater degree of protection than commercial speech. San Diego would effectively invert this state of affairs. The ordinance allows on-site commercial speech, but not noncommercial speech. The use of on-site billboards to carry commercial messages related to the commercial use of the premises is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited. The city does not explain how or why billboards with noncommercial messages would be more threatening to safe driving or would detract more from the beauty of the surroundings than billboards with commercial messages. Insofar as it tolerates billboards at all, it cannot choose to limit their content to commercial messages; it may not conclude that the communication of commercial messages concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages.

Furthermore, because under the ordinance's specified exceptions San Diego allows some noncommercial messages on billboards, it must allow others. Although it may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech. With respect to noncommercial speech, it simply may not choose the appropriate subjects for public discourse. To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for truth.

San Diego argues that the ordinance can be characterized as a time, place, and manner restriction that is reasonable and hence does not run afoul of the First Amendment. We disagree. The ordinance does not generally ban the use of billboards as an unacceptable "manner" of communicating information; rather, it permits various kinds of signs. Signs that are banned are banned everywhere and at all times. Time, place, and manner restrictions are reasonable if they (1) are justified without reference to the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication. Here, it cannot be assumed that alternative channels are available. Although, in theory, advertisers remain free to employ various alternatives, in practice they might find each such alternative either too costly or too ineffective or both.

Government restrictions on noncommercial speech are not permissible merely because the government does not favor one side over another on a subject of public controversy. Nor can a prohibition of all such speech carried by a particular mode of communication be upheld merely because the prohibition is rationally related to a nonspeech interest. Courts must protect First Amendment

interests against legislative intrusion, rather than defer to merely rational legislative judgments in this area. Since San Diego has concluded that its own interests are not as strong as private interests in the use of on-site commercial billboards, it may not claim that those same interests outweigh private interests in the use of noncommercial billboards.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

City Council v. Taxpayers for Vincent

United States Supreme Court (1984)

An ordinance of the City of Los Angeles prohibits the posting of signs on public property. Taxpayers for Vincent (Taxpayers), a group of supporters of Roland Vincent, a candidate for election to the Los Angeles City Council, entered into a contract with Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs bearing Vincent's name. COGS produced such signs and attached them to utility poles at various locations. Acting under the ordinance, city employees routinely removed all signs, including COGS' for Vincent, attached to utility poles and similar objects covered by the ordinance.

Taxpayers and COGS then filed suit in Federal District Court against the City of Los Angeles, alleging that the ordinance abridged their freedom of speech within the meaning of the First Amendment, and seeking damages and injunctive relief.

The District Court entered findings of fact, concluded that the ordinance was constitutional, and granted a motion for summary judgment submitted by Los Angeles.

The Court of Appeals reversed, reasoning that the ordinance was presumptively unconstitutional on its face because significant First Amendment interests were involved, and that Los Angeles had not justified its total ban on all signs on the basis of its asserted interests in preventing visual clutter, minimizing traffic hazards, and preventing interference with the intended use of public property.

After careful consideration, we are of the opinion that the ordinance is not unconstitutional on its face. We are likewise of the opinion that it is not unconstitutional as applied to Taxpayers and COGS.

The First Amendment forbids the government to regulate speech in order to punish the speaker. This principle, however, is not applicable here, for there is not even a hint of punitiveness.

In sum and substance, the ordinance is a time, place, and manner restriction.
A time, place, and manner restriction is reasonable under the First Amendment if it (1) is justified without reference to the content of the regulated speech, (2) is narrowly tailored to serve a significant governmental interest, and (3) leaves open ample alternative channels for communication.

It is plain to us that the ordinance is indeed reasonable.

First, the ordinance is justified without reference to the content of the regulated speech. It has nothing to do with the content of any speech on any sign. It has everything to do with an attempt by Los Angeles to improve its appearance. Taxpayers and COGS concede as much.

Second, the ordinance is narrowly tailored to serve a significant governmental interest. Los Angeles has a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression. Its interest, as Taxpayers and COGS again concede, is basically unrelated to the

suppression of ideas. The problem addressed by the ordinance — the visual assault on residents presented by an accumulation of signs posted on public property — constitutes a significant substantive evil within the city's power to prohibit. Indeed, we so held in *Metromedia, Inc. v. City of San Diego* with respect to billboards on private property. The validity of Los Angeles' aesthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment. There is no basis for any conclusion that the prohibition against the posting of the signs of Taxpayers and COGS fails to advance the city's aesthetic interest. The ordinance curtails no more expressive activity than is necessary to accomplish its purpose of eliminating visual clutter. By banning posted signs, the city did no more than eliminate the exact source of the evil it sought to remedy.

Third, the ordinance leaves open ample alternative channels for communication. Indeed, the District Court so found, with substantial evidence in support. While a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate, the ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited.

Although plausible policy arguments might well be made in support of the suggestion by Taxpayers and COGS that Los Angeles could have enacted an ordinance that would have had a less severe effect on expressive activity like theirs — such as by providing an exception for political campaign signs — it does not follow that such an exception is constitutionally mandated. Nor is it clear that such an exception would even be constitutionally permissible. To except political speech like that of Taxpayers and COGS and not other types of speech might create a risk of engaging in constitutionally forbidden content discrimination. The city may properly decide that the aesthetic interest in avoiding visual clutter justifies a removal of all signs creating or increasing that clutter.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

National Advertising Company v. City of Orange

United States Court of Appeals for the Ninth Circuit (1988)

Aiming at traffic safety and aesthetics, an ordinance of the City of Orange, California, bars off-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *elsewhere than on the premises upon which such sign is located*." (Italics added.) It excepts certain governmental signs, memorial signs, recreational signs, and temporary political, real estate, construction, and advertising signs. By contrast, it permits on-site billboards, defined as "signs which direct attention to a business, commodity, industry or other activity which is sold, offered or conducted *on the premises upon which such sign is located*." (Italics added.)

National Advertising ("National") applied for a permit to erect off-site billboards in Orange. Under compulsion of the ordinance, the city denied its application.

National filed suit in district court against Orange alleging that the ordinance was unconstitutional on its face and seeking declaratory and injunctive relief. It moved for summary judgment. The district court granted its motion. It declared the ordinance unconstitutional, and ordered the city to process National's application without regard thereto. The city appeals.

Orange interprets the ordinance to prohibit only off-site billboards relating to commercial activity. The plain language of the ordinance precludes this interpretation. The ordinance bans off-site billboards relating to a "business, commodity, industry *or other activity* which is sold, offered or conducted elsewhere than on the premises . . . ." The city interprets "activity" to mean only *commercial* activity. It is settled, however, that, in ordinances of this sort, "activity" is not so limited. The exceptions to the ban allowed in the ordinance reveal the lack of such a limitation. Indeed, many involve noncommercial activity. They would be rendered meaningless by the city's interpretation. We construe the ordinance as prohibiting *all* off-site billboards relating to activity not on the premises on which the sign is located, with the exceptions specified, and permitting *all* on-site billboards relating to activity on the premises. Whether the message on the billboards is commercial or noncommercial is irrelevant: both commercial and noncommercial messages are permitted if they relate to activity on the premises and prohibited if they do not.

Standards for assessing the constitutionality of billboard restrictions are found in the Supreme Court's opinions in *Metromedia, Inc. v. City of San Diego* and *City Council v. Taxpayers for Vincent*.

Under these standards, Orange's ordinance is valid as applied to billboards with commercial messages. The city may prohibit such billboards entirely in the interest of traffic safety and aesthetics, *Metromedia, Inc. v. City of San Diego*; *City Council v. Taxpayers for Vincent*; and may also

prohibit them except where they relate to activity on the premises on which they are located, *Metromedia, Inc. v. City of San Diego*.

Stricter standards apply to the restriction of billboards with noncommercial messages. Under *Metromedia, Inc. v. City of San Diego*, an ordinance is invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages, or if it regulates billboards with noncommercial messages based on their content. We need not decide whether the ordinance passes the first test, because it clearly fails the second.

Merely treating billboards with noncommercial messages and billboards with commercial messages equally is not constitutionally sufficient. The First Amendment affords greater protection to noncommercial speech than to commercial, *Metromedia, Inc. v. City of San Diego.* Regulations valid as to commercial speech may be unconstitutional as to noncommercial. *Ibid.*

Thus, under *Metromedia, Inc. v. City of San Diego*, although Orange may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests. The ordinance breaches this basic principle.

The exceptions to the ordinance's restrictions, like those before the *Metromedia* Court, require examination of the content of noncommercial messages. In most instances, whether off-site billboards with noncommercial messages are allowed turns on whether they convey messages approved by the ordinance.

The First Amendment forbids the regulation of noncommercial speech based on its content. Because the exceptions to the ordinance's restriction on noncommercial speech are based on content, the restriction itself is based on content.

The First Amendment might tolerate the regulation of noncommercial speech based on its content if the government were to establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. Orange cannot do so. Its allowance of some off-site billboards with noncommercial messages is evidence that its interests in traffic safety and aesthetics, while substantial, fall shy of compelling.

Orange is not powerless to regulate off-site billboards with noncommercial messages. It remains free to redraft its ordinance to conform to the First Amendment by avoiding content-based distinctions in its treatment thereof.

The judgment is affirmed.

Desert Outdoor Advertising, Inc. v. City of Moreno Valley

United States Court of Appeals for the Ninth Circuit (1996)

The City of Moreno Valley has enacted an ordinance regulating billboards. The ordinance regulates both "off-site" and "on-site" billboards. Off-site billboards may include commercial or noncommercial messages. On-site billboards may contain only commercial messages. The ordinance imposes different restrictions on off-site and on-site billboards. As a general matter, an off-site billboard may be erected and maintained only if the Director of Public Works issues a permit after finding that the billboard will not have a harmful effect upon the health or welfare of the general public, will not be detrimental to the welfare of the general public, and will not be detrimental to the aesthetic quality of the community or the surrounding land uses. By way of exception, an off-site billboard may be erected and maintained without such a permit for official notices, directions, and signs for civic or fraternal organizations. An on-site billboard can always be erected and maintained without such a permit.

Threatened with administrative proceedings to compel the removal of off-site billboards that they erected and maintained without permits, Desert Outdoor Advertising, Inc. ("Desert") and Outdoor Media Group, Inc. ("OMG") filed this action against Moreno Valley in United States District Court, challenging the constitutionality of the ordinance under the First Amendment. The city moved for summary judgment. The district court granted the motion, and rendered judgment accordingly. Desert and OMG now appeal.

Desert and OMG contend that the ordinance violates the First Amendment in its permit requirement because it gives unbridled discretion to Moreno Valley's Director of Public Works.

Under the ordinance, a person must generally obtain a permit from the Director of Public Works before erecting an off-site billboard. The Director has discretion to deny a permit on the basis of ambiguous and subjective reasons — for example, that the billboard will have a harmful effect upon the health or welfare of the general public *or* will be detrimental to the welfare of the general public *or* will be detrimental to the aesthetic quality of the community or the surrounding land uses.

But any law — including the ordinance here challenged — that subjects the exercise of First Amendment freedoms to the prior restraint of a permit, without narrow, objective, and definite standards to guide the permitting authority, is violative of that amendment.

The ordinance contains no limits on the authority of Moreno Valley's Director of Public Works to deny a permit for an off-site billboard. The Director has unbridled discretion in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Moreover, the Director can deny a permit without offering any evidence to support the conclusion that a particular billboard is detrimental to the community. Moreno Valley claims that the Director's discretion in this regard is no more problematic than that of all such officials who must review and approve a billboard's

design in order to determine whether it is consistent with its surroundings in size, shape, color, and placement. We disagree. Over the years, design review and approval has given rise, in practice, to standards that have become known to both regulating and regulated parties, and that have generally been applied without substantial controversy. The fact is proved by the presence in many ordinances of provisions simply subjecting billboards to design review and approval for "consistency with their surroundings in size, shape, color, and placement," without more — and by the absence of any significant litigation challenging the lawfulness of such review and approval. There are no such standards, however, to guide the Director in determining whether a particular billboard will be harmful to the community's health, welfare, or aesthetic quality. Thus, we conclude that the ordinance violates the First Amendment in its permit requirement.

Desert and OMG next contend that the ordinance violates the First Amendment as an undue regulation of commercial speech.

To be valid under the First Amendment, as *Metromedia, Inc. v. City of San Diego* holds, an ordinance that regulates commercial speech must (1) serve a substantial governmental interest, (2) directly advance such interest, and (3) be no more extensive than necessary.

As the party seeking to regulate commercial speech, Moreno Valley has the burden of establishing that the ordinance meets each of these three elements.

Desert and OMG argue that Moreno Valley has failed to carry its burden as to the existence of a substantial governmental interest. We agree.

Although aesthetics and safety represent substantial governmental interests, as the court in *Metromedia, Inc. v. City of San Diego* made plain, in this case, Moreno Valley has not established that it enacted the ordinance to further any such interests. It did not incorporate any statement of purpose concerning either interest in the ordinance. Furthermore, it did not provide any evidence that the ordinance actually promotes either one.

Desert and OMG also contend that the ordinance violates the First Amendment because it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages.

Under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it imposes greater restrictions on billboards with noncommercial messages than on billboards with commercial messages. We find the ordinance wanting in this respect.

Under the ordinance, off-site billboards, which alone may include noncommercial messages, generally need a permit by the Director of Public Works, whereas on-site billboards, which may include only commercial messages, do not.

Desert and OMG then contend that the ordinance violates the First Amendment because it regulates billboards with noncommercial messages based on their content.

Here too, under *Metromedia, Inc. v. City of San Diego*, as we ourselves held in *National Advertising Co. v. City of Orange*, an ordinance is indeed invalid if it regulates billboards with noncommercial messages based on their content. We find the ordinance wanting in this respect as well.

Under the ordinance, an off-site billboard, which alone may include noncommercial messages, cannot be erected and maintained without a permit by the Director of Public Works — except for official notices, directions, and signs for civic or fraternal organizations. Because the ordinance effectively requires the Director to examine the content of the billboard to determine whether or not it is excepted, its regulation of any noncommercial speech is content-based.

The ordinance might be saved in spite of its content-based regulation if Moreno Valley could establish that it is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end. The city cannot do so. It failed to present any evidence that the ordinance promoted a substantial governmental interest, much less a compelling one.

The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Your firm represents Celia Stolier in an action to establish her right to visitation with her granddaughter.

3. You will have two sets of materials with which to work: a File and a Library. You will be called upon to distinguish relevant from irrelevant facts, analyze the legal authorities provided, and prepare a memorandum.

4. The File contains factual information about your case in the form of eight documents. The first document is a memorandum to you from Marsha Pushkin containing the instructions for the memorandum you are to prepare.

5. The Library consists of Columbia statutes and three cases. The materials may be real, modified, or written solely for the purpose of this examination. Although the materials may appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions on the dates shown.

6. Your memorandum must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should 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. In citing cases from the Library, you may use abbreviations and delete citations.

8. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing your memorandum.

9. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of the memorandum you write.

Britzke, Klare & Pushkin
22 Myrun Avenue
Thomsonville Heights, Columbia

MEMORANDUM

July 27, 1989

To: Applicant

From: Marsha Pushkin

Re: Stolier File

We represent Celia Stolier and are trying to help her establish the right to regular visitation with her granddaughter, Joanna Wallach. The child's mother, Elizabeth Lawton, died several years after divorcing David Wallach, the father. After the mother's death, the father was awarded custody and his second wife has adopted Joanna. Since then the parents have refused to permit our client to see her granddaughter and her every request to do so has been thwarted. My attempts to get an agreement for visitation through the parents' lawyer have similarly been rejected as the correspondence in the file makes clear.

There is a history of bad feelings between our client and her former son-in-law and it is clear to me that she has done nothing to improve that situation. He is apparently prepared to make ugly allegations about her, but nevertheless, since she is very anxious to reestablish what appears to have been an excellent relationship with the child, she wants us to press forward on her behalf.

I think that we are now at the stage where litigation is the only choice left. We will try to get the Family Division of Superior Court to require monthly weekend visitation for our client. In preparation for that, I have done some legal research and collected cases, statutes and court rules which will help us in figuring out exactly what to do next.

I have met twice with our client, discussed the case with opposing counsel and exchanged letters with him, interviewed Ms. Stolier's brother-in-law, and tried to gather other information. There is no doubt that the facts here are seriously in dispute. It is clear to me that we are going to have to work hard to develop the facts necessary to convince the court to issue the order our client needs.

Before we draft the Petition for Visitation, I need your thoughts on how we should go about gathering the facts. I am assuming that we will have to engage in extensive investigation and discovery.

What I need from you is a well-organized, thorough but not unduly repetitive statement as to how we can obtain the evidence needed to show the court that our client should be granted the right to visit her grandchild. Please do not burden this memorandum with a general discussion of the legal right to visitation, as I am aware of those requirements. Instead, the memorandum should set forth the legal elements which we must establish in order to prevail, the items of evidence we will need to prove or disprove facts related

to each of these elements, and the sources of such evidence. The memorandum should also set forth the means, including appropriate discovery procedures, of obtaining and making use of the needed items of evidence.

You should discuss facts of which we are already aware and items of evidence we may now have as well as those that might be discovered and/or obtained upon further investigation. For example, one of the elements to be established is that the grandchild Joanna has a desire to visit her grandmother. A fact of which we are aware and that needs to be proved in relation to that element is that Joanna has written a letter expressing that desire. An item of evidence to prove that fact is the letter written by Joanna that is in the File and which was given to us by our client. Discovery procedures that might be used in connection with this item of evidence would be to have it authenticated by asking our client Celia Stolier if she can identify Joanna's handwriting or requesting an admission of authenticity from our adversary, David Wallach. A fact which might be discovered upon further investigation is that Joanna may have told one of her teachers that she wished she could see her grandmother. A means of obtaining evidence to support that fact would be interviewing and, if appropriate, taking depositions from one or more of Joanna's teachers. These examples should give you an idea of what your memorandum should contain.

Britzke, Klare & Pushkin
22 Myrun Avenue
Thomsonville Heights, Columbia

In re Celia Stolier
Client Interview Notes
May 25, 1989

Celia Stolier was referred to us by Joseph Delbert, Esq., an attorney who represented her on a civil matter but who does not handle family matters. Client is a sixty-four-year-old widow who lives alone at 2317 Richmond Lane, Thomsonville, tel. #270-0282. She has lived here in the State of Columbia for most of her life and is the mother of Elizabeth Lawton, deceased.

Elizabeth Lawton died four years ago (6/19/1985) at age twenty-seven, leaving one child, Joanna Wallach, now age eight (DOB:8/27/1980). At time of Elizabeth Lawton's death, she had been divorced from David Wallach for approximately two years, having separated from him shortly after the birth of Joanna.

Client said that when Elizabeth separated from husband, Elizabeth got custody of Joanna by agreement and moved in with "Elizabeth's favorite aunt," Wanda Breckenridge. Breckenridge was sister of client. Daughter Elizabeth and granddaughter Joanna lived with Wanda until daughter remarried approximately one year later. At that time, daughter moved out to live with second husband and granddaughter stayed with Wanda (and her husband, Harry). Elizabeth died less than two years later as result of auto accident. She was struck by a drunk driver (who had a $25,000 insurance policy and no assets).

After her mother's death, Joanna's custody was the subject of litigation between the Breckenridges and the father, both of whom wanted custody. Custody was awarded to the father with visitation rights awarded to Wanda for a once-per-month weekend visit. The father subsequently remarried and his new wife has adopted Joanna.

Wanda Breckenridge died three months ago and father has steadfastly refused to let client see or visit with Joanna.

Client said that she and granddaughter "are very close" although she and son-in-law never got along. "He blamed me for all of the problems in his marriage to my daughter. My daughter and son-in-law wouldn't let me in their house and if it had been up to David, I would never even have known Joanna."

All of client's contact with Joanna apparently took place within the Breckenridge home and it seems to have occurred without the knowledge of the father. "When she was living with Wanda, I saw her a lot--particularly after Elizabeth moved out. I would visit at least twice a week and played with her when I was there. I took her places, like to shopping malls and movie theaters."

When I asked the client to tell me more about her relationship with David Wallach, she told me that her problems with him went back to when her daughter first started to date him. She said that he seemed to her then to be incapable of earning money and that, in

fact, she was right: "He has never had two nickels to rub together." She said, "He's lazy and not too smart. My daughter didn't come to her senses about him until it was too late. Joanna came into the picture before Elizabeth wised up and left him."

Client said that she had very little contact with him since his separation from Elizabeth and that all interactions with him were handled by Wanda, "who never seemed to mind him until the custody fight." Recently client had talked to him about permitting her to visit Joanna and the response has been "nasty." Client said that she has bought many things for the child, "nearly everything decent that she has. I bought her a lot of clothes and toys, but I think that David thinks that Wanda bought them. Joanna thinks that Santa brought some of the things, but she knows that I bought her most of the rest."

Client was concerned that if she is not permitted contact with Joanna, the father will not be able to buy her "nice clothes and the toys that every child wants." She was also quite upset about the child becoming cut off completely from her mother's side of the family.

I asked her if she knew whether the child wanted visits from her. She said that she had gotten through to the child several times on the phone when the father was not at home and the child answered the phone (apparently when the father answers the phone, he hangs up on client and she has resorted to doing the same). She described her conversations with the child as involving Joanna's begging to see her. "Grandma, I miss you. When are you going to visit me? Will you take me to the movies tonight, please." She was confident that the child loves her and wants to see her.

She showed me a photo of the child. It was a school picture and on the back the child had written her name in block letters. Client said that she has at least one letter from Joanna at home and that she will bring it in for me.

Told client that I needed to do some investigation and research before I could give her any encouragement. She seemed to understand. We agreed that I would call her as soon as I knew anything.

Britzke, Klare & Pushkin
22 Myrun Avenue
Thomsonville Heights, Columbia

In re Celia Stolier

File Notes

May 30: Checked Family Division records while at courthouse. Joanna Wallach was adopted on 6/17/1988 by Rebecca Wallach, wife of David Wallach, natural father of the child. All records sealed by order of court, Ketcham, J. The Wallachs were represented by Fred Andrews. The child was not represented separately.

June 1: Called Fred Andrews. Told him that my client wants visitation with grandchild in Wallach matter. He's not certain that he still represents David and Rebecca Wallach. Will check and call back.

June 5: No call from Andrews yet so called him. Left message.

June 6: Phone call from Andrews. The Wallachs want him to deal with me on this but were adamant about opposing grandmother visitation. "They want to put that part of Joanna's life behind her. She barely knows the grandmother." He will call after he has a chance to meet with them and find out the story.

June 12: Called Harry Breckenridge. He said that he would see me but is quite ill and confined to bed. Agreed to meet with me tomorrow at his home at Lake Gaston.

June 13: Met with Harry Breckenridge. See notes of interview.

June 15: Sent letter to Fred Andrews.

June 19: Client brought in letter from Joanna. Spoke to her briefly to tell her about progress. She confirmed that Wanda and Harry had lots of pictures of her and granddaughter but that she hadn't seen them in a long time and didn't know where they were.

June 21: Received letter from Andrews. Clear that this will have to be decided in court. Surprising allegations about client--will need to talk to her again. Called her to set up appt. Out of town until next week.

June 26: Client called from Florida. Will be back on July 5 and will come in then.

July 5: Met with client. See notes to file.

July 10: Legal Research. Collected cases & statutes.

July 11: Legal Research. Collected cases.

July 12: Called Karen Hegel to ask for photos. She said that she didn't care much for my client and therefore "couldn't be bothered to look."

Britzke, Klare & Pushkin
22 Myrun Avenue
Thomsonville Heights, Columbia

June 15, 1989

Fred Andrews, Esq.
Andrews, Snider & Deale
274 Guernsey Lane
Suite 2719
Thomsonville, Columbia

Re: Joanna Wallach

Dear Fred:

I hope that by now you have had the opportunity to meet with your clients, the Wallachs, and are prepared to arrange regular visitation between my client, Celia Stolier, and her beloved granddaughter, Joanna. As I told you on the telephone, my client is quite anxious to resume her relationship with the child and has heard from Joanna that she shares this desire.

Ms. Stolier's motives here are not selfish ones. She believes that the child will benefit substantially by continuing to have contact with her grandmother and the other family members who are her blood relatives through her natural mother. She also wants to continue to assist her granddaughter materially as she is in a better position to do than are the Wallachs.

My client recognizes that Mr. Wallach feels great antipathy toward her. She wants to make peace with him, if possible, for the benefit of his daughter. She is also quite flexible about the terms of any visitation agreement that we can work out and is certainly willing to agree to an arrangement which is convenient to the Wallach family.

Ms. Stolier wants to avoid causing your client the expense of litigation over this matter and hopes that formal proceedings can be avoided for that reason as well as to avoid causing any problems for her Joanna. Nevertheless, because she feels so strongly that visitation is in the best interests of the child, she is prepared to file a Petition in Family Division if we are unable to agree.

Very truly yours,

Marsha Pushkin
Marsha Pushkin, Attorney-at-Law

ANDREWS, SNIDER & DEALE
274 Guernsey Lane
Suite 2719
Thomsonville, Columbia

June 20, 1989

Marsha Pushkin
Britzke, Klare & Pushkin
22 Myrun Avenue
Thomsonville Heights, Columbia

Re: Joanna Wallach

Dear Marsha:

This letter is in response to yours of June 15 and the earlier telephone conversations. I have discussed this matter at some length with my clients and I regret to inform you that they are irrevocably opposed to any contact between their child and your client.

Based upon what the Wallachs tell me, I do not believe that your client has even a minimal chance of success in convincing a court to give her visitation rights here. As far as they know, and this is confirmed to them by their daughter, your client is nearly a stranger to the girl. The "benefits," material or otherwise to which your letter alludes are a fiction as far as my clients are aware and they are offended by any attempt to lure them into a visitation arrangement by promising presents for Joanna.

However, David Wallach's strong feelings in opposition to what you seek are based mostly upon his belief that your client was not a fit parent for her own daughter. He says that Ms. Stolier abandoned his late wife when she was a child and that she was forced to live with an aunt. He wonders why she would claim to be a loving grandparent when she was not a loving parent.

I urge you to convince your client not to go forward with litigation here. She has no chance to win and the litigation will be harmful for her granddaughter whom she purports to love.

I hope that we can both close our files on this quickly.

Very truly yours,

Fred Andrews
Britzke, Klare & Pushkin
22 Myrun Avenue
Thomsonville Heights, Columbia

In re Celia Stolier

Interview Notes: Harry Breckenridge, 22 Adverse Circle, Lake Gaston

June 13, 1989

I met with Breckenridge at 2:30 p.m. at his house. Met by woman who identified herself as private duty nurse. Breckenridge in bed. He is quite elderly and somewhat infirm. Nurse said he is quite ill and I should be brief.

Confirmed that Celia Stolier is his sister-in-law and that Joanna Wallach lived with him for several years. Said that he and Wanda were quite attached to the child and wanted permanent custody. They were very unhappy when David, the child's father, demanded custody after "Beth" (Elizabeth Lawton) died and surprised when the court ordered that he get custody. "At least we got to see her once a month." He said that now that Wanda has passed away and his own health has deteriorated, perhaps it was for the best. As soon as he said that, he paused and said, "But I'm shocked and angry about that no good father of hers keeping her away from her grandmother!"

He told me that he and Wanda were very close to Beth and they thought of her as a daughter. She lived with them at various points during her childhood as Celia had an "unusual" life. He said that Celia and Wanda were sisters who provided lifelong mutual support to each other and that Celia was in their house a lot. When Joanna was living with them, Celia was around a lot and was very excited and loving. "She was a terrific grandmother and Joanna reciprocated her affection."

He said that whenever Celia came to the house, she brought a present for her granddaughter, usually clothes or toys, and that Joanna always looked forward to her arrival. I asked how often Celia came, and he said that she was there for dinner at least once a week while Joanna and Beth were living there and more often after Beth got remarried and moved out. She always came for holidays such as Thanksgiving, Christmas, and Easter.

I asked about whether there were any photos of Celia and Joanna together, and he said that Wanda took a lot of pictures, but he wasn't certain where they were. He seemed to think that they were in a box somewhere in the house but said that he just wasn't able to search for them due to his physical condition.

When I asked him what he meant that Celia had an "unusual" life, he said that she never had a long and stable relationship with a man. She was married at least three times but none of the marriages lasted. Elizabeth's father was husband number two, but he left her when Elizabeth was just a baby. At that time Elizabeth came to live with Wanda and Harry but returned to live with her mother when Celia remarried. Elizabeth was approximately five years old when she returned to live with Celia. Apparently husband number three was wealthy from lottery winnings. He died when Elizabeth was about nine, and Celia inherited his money. She then traveled for less than a year and again Elizabeth stayed with the Breckenridges.

During the hours that I spent with him, the nurse kept interrupting to get me to leave as I was tiring him out. When she escorted me to the door, she told me that his condition was precarious. Says that his doctor is referring him to specialist.

Britzke, Klare & Pushkin
22 Myrun Avenue
Thomsonville Heights, Columbia

In re Celia Stolier

Notes from Second Client Interview

July 5, 1989

Met with client at 4 p.m. Told her about meeting with Harry Breckenridge. She said that she, too, had just visited with him and that he seemed to want to help her. She was worried that he might not live to see Joanna again.

Showed her the letter from Andrews and she read it and then started to cry. After she composed herself, she said that she was sorry that she had let her relationship with David deteriorate to the point that he would say such hateful things about her. She said that maybe it was true that she was not a good mother but that she had done her best.

Client said that Elizabeth's father, Ed Reynolds, was an alcoholic who was abusive. "As soon as the baby was born, his drinking got worse. He left one morning and didn't come back. Even though it turned out to be a good thing for me that he left, at the time I was devastated. I had been totally dependent upon him, so when he left us, I went into a deep depression and ended up as an inpatient at Columbia Psychiatric Center for six months." It was during that period (thirty-two years ago) that Elizabeth went to live with Wanda and Harry. "I never told her the reason since I didn't want her to know that her mother was in a mental hospital."

I asked her if she had any continuing psychiatric treatment. She revealed that she has seen various psychiatrists over the years but had never had an episode as serious as the one thirty-two years ago and had not ever again been hospitalized. For the past five years, since Elizabeth was killed, she has been seeing a psychiatrist, Jane Peters, who is a faculty member at Patrick Medical College. She sees her for one hour each week.

She told me that she had looked through Harry's house for the box of pictures and couldn't find them. Harry then remembered that he gave some boxes of Wanda's things to a close friend of Wanda's. That friend, Karen Hegel, and client are not on "speaking terms" so client does not want to visit her to get the photos.

Client remains steadfast in her desire for visitation with granddaughter and says we should go forward to get a court order. Celia says money is no object.

Rule 101. Depositions

(a) Time for taking; subpoena. Any party may take the testimony of any person, including a party, by deposition upon oral examination for the purpose of discovery or for use as evidence in the action or for both purposes. Such depositions may be taken in an action at any time after the service of process or after the appearance of the defendant or the respondent. The attendance of witnesses or the production of books, documents, or other things at depositions may be compelled by the use of subpoena. Upon leave of court, the deposition of a potential witness may be taken, notwithstanding the absence of a pending action, where good cause exists to believe the witness may be unavailable at the time suit is filed.

(b) Scope of examination; privilege. Unless otherwise ordered by the court, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 201. Written interrogatories

(a) Service; answers; motion for further response; copies; retention of original.

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, or body politic, by an officer or agent, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve the answers on the party submitting the interrogatories within 30 days after the service of the interrogatories. Such answers shall respond to the written interrogatories; or, if any interrogatory be deemed objectionable, the objections thereto may be stated by the party addressed in lieu of response. If the party who has submitted the interrogatories deems that further response is required, he may move the court for an order requiring further response. Otherwise, the party submitting the interrogatories shall be deemed to have waived the right to compel answers pursuant to this section.

(b) Scope; number; protective orders. Interrogatories may relate to any matters which can be inquired into under subdivision (b) of Rule 101 of this code. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as above provided and except as justice requires to protect the party from annoyance, expense, embarrassment or oppression.

Rule 301. Identification and production of documents and things for inspection, measuring, copying or photographing; response; objections; service

Any party may serve on any other party a request:

(1) to identify such documents, papers, books, accounts, letters, photographs, objects or tangible things, of a category specified with reasonable particularity in the request, which are relevant to the subject matter of the action, or are reasonably calculated to discover admissible evidence relating to any matters within the scope of the examination permitted by subdivision (b) of Rule 101 of this code and which are in the possession, custody, or control of the party upon whom the request is served, and to produce and permit the inspection and copying or photographing of the same, by or on behalf of the party making the request; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting, measuring, surveying, photographing or sampling the property or any designated object or operation thereon within the scope of the examination permitted by subdivision (b) of Rule 101 of this code. The request shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Rule 401. Physical, mental or blood examinations

(a) Order for examination. In an action in which the mental or physical condition or the blood relationship of a party is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of findings. If requested by the party against whom an order is made under subdivision (a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party or persons examined a like report of any examination, previously or thereafter made, of the same condition.

(c) Waiver of privilege. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party against whom an order is made under subdivision (a) of this section or the person examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same condition.

Rule 501. Requests for admission of genuineness of documents or truth of facts

(a) Copies of documents; statements or written objections; denials; motion for further response. After service of summons or the appearance of a party, any other party who has appeared in the action may serve upon any party who has been served or who has appeared a written request for the admission by the latter of the genuineness of any relevant documents described in the request or of the truth of any relevant matters of

fact set forth in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless, within the period designated in the request, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part.

(b) Effect of admissions. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by the party for any other purpose nor may be used against the party in any other action.

§3108. Visitation rights.

In a divorce, dissolution of marriage, alimony or child-support proceedings, the court may make any just and reasonable order or decree permitting any parent who is deprived of the care, custody, and control of the children to visit them at the time and under the conditions that the court directs. In the discretion of the court, reasonable companionship or visitation rights may be granted to any other person having an interest in the welfare of the child. The Family Division shall have exclusive jurisdiction to enter the orders in any case certified to it from another court.

§3109. Child's best interest.

A trial court must consider the following factors in determining the child's best interest:

(a) The wishes of the child regarding his custody if he is eleven years of age or older;

(b) The wishes of the child's parents regarding his custody;

(c) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to his home, school, and community;

(e) The mental and physical health of all persons involved in the situation.

* * *

§3120. Investigation, report and recommendation in adoption proceedings.

(a) Upon the filing of a petition for adoption, the court shall refer the petition for investigation, report and recommendation to:

1) The licensed child placing agency by which the case is supervised;

2) The Department of Child and Family Services, or other appropriate agency if the case is not supervised by a licensed child placing agency.

(b) The investigation, report and recommendation shall include an investigation of:

1) the truth of the allegations of the petition;

2) the environment, antecedents, and assets, if any, of the prospective adoptee, to determine whether he or she is a proper subject for adoption;

3) the home of the petitioner, to determine whether the home is a suitable one for the prospective adoptee; and

4) any other circumstances and conditions that may have a bearing on the proposed adoption and of which the court should have knowledge.

(c) The written report submitted to the court shall be filed with, and become, part of the records in the case.

§3121. Sealing and inspection of records and papers.

From and after the filing of the petition, records and papers in adoption proceedings shall be sealed. They may not be inspected by any person except upon order of the court, and only then when the court is satisfied that the welfare of the child will thereby be promoted or protected.

In re Whitaker, et al.

Supreme Court of Columbia (1986)

Charles T. Whitaker married Sarah J. Whitaker (now Clinger) in December 1974 and the couple obtained a divorce in April 1977. Custody of their child, Shay Whitaker, who was born on September 28, 1975, was granted to the mother with the father having visitation rights.

For approximately one year after the dissolution, Shay spent weekends with her paternal grandparents, Charles and Garnet Whitaker, appellants herein, in what the record described as "a lovely home." In addition, the child stayed with appellants on a regular basis for at least five months while appellee was training as a nurse in Florida and again for at least a week while appellee and her second husband were on their honeymoon.

In October 1984, appellee terminated appellants' visitation with the child for the reason that Shay's father, who did not live with appellants, had been arrested for abducting a nine-year-old girl. In an effort to gain visitation rights with Shay, appellants filed a petition in the Family Division of the Superior Court.

At an evidentiary hearing, both parties presented testimony by expert witnesses to support their respective positions. The trial court did not conduct the in camera interview of the ten-year-old girl that had been requested by appellants and opposed by appellees. The Court agreed with the assessment rendered by appellees' expert and refused to grant visitation rights to the grandparents.

I

The parties dispute whether the "special, limited circumstances" referred to in Hawkins v. Hawkins (1981) apply here. We need not decide that. The statute at issue in this case, Columbia Code §3108, provides that in a divorce, dissolution of marriage, alimony or child-support proceedings, a court has discretion to grant visitation rights to any person "having an interest in the welfare of the child." Courts generally give a custodial parent veto power over grandparent visitation because judicial enforcement of visitation would divide and thereby hamper proper parental authority, force the child into the midst of a conflict of authority and ill feelings between parent and grandparent, and coerce what should remain a moral rather than legal obligation. Parental autonomy in raising the child is observed despite any moral or social obligations that may encourage contact between grandparents and grandchildren.

However, we also recognize the benefits of a healthy grandparent-grandchild relationship. In Mimkon v. Ford (1975), the New Jersey Supreme Court stated:

> It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his

grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.

Therefore, we hold that grandparents may be granted visitation rights under §3108 if the trial court finds that such visitation is in the child's best interest.

II

The next issue we address is what evidence must a trial court consider in determining whether grandparent visitation--or any other visitation--is in the child's best interest? No statutory scheme currently exists by which a trial court is to determine the child's best interest in visitation cases. In custody cases, however, Columbia Civil Code §3109 sets forth five factors that a trial court must consider in determining the child's best interest. These are:

> (a) The wishes of the child regarding his custody if he is eleven years of age or older;
>
> (b) The wishes of the child's parents regarding his custody;
>
> (c) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest;
>
> (d) The child's adjustment to his home, school, and community;
>
> (e) The mental and physical health of all persons involved in the situation.

Other than the fact that a custody award is more permanent in nature, many of the goals and concerns involved in custody cases are substantially similar to those found in visitation cases. Therefore, we hold that the factors set forth in §3109 with respect to determining the child's best interest in custody cases apply equally to visitation cases. The trial court must weigh these and other relevant factors in determining the child's best interest in visitation cases. See Hawkins v. Hawkins (1981).

The statutory language of §3109(a) mandates that the trial court consider the child's wishes regarding his or her custody once the child reaches the age of eleven. Prior to the child's attaining that age, the trial court need not consider the child's wishes. But it is certainly within the trial court's discretion to allow a child under the age of eleven to testify concerning his or her wishes, although such wishes would not necessarily be determinative of the issue. Indeed, it must be remembered that the single most important individual in a case addressing visitation rights is the child.

III

The next question we must address--and the predominant one in this case--is what method should the trial court use in ascertaining a child's wishes regarding visitation?

While it may be entirely appropriate for a child to testify in open court under these circumstances, it may be more effective for the child to testify in chambers or for the trial court to informally interview the child in camera. Testifying puts the child in an awkward position at a time when he or she already feels the pull of conflicting loyalties. Where

the child wants to testify, or where the attorney has decided that it is necessary, the issue becomes whether the child testifies from the stand or whether the judge may conduct an interview in camera. We hold that an in camera interview of a child may be an appropriate method by which the trial court determines the child's best interest in visitation cases, even if one of the parties objects to such an interview.

In fashioning other methods to ascertain the child's wishes, a court could follow the procedure in adoption cases. In those cases, a child is often interviewed by a social worker, a family worker, a mental health professional or the like or is represented by his or her own counsel who undertakes to ascertain and report the position of the child.

In this case, since Shay was not eleven years old when the evidentiary hearing was held, the trial court was not required to ascertain the child's wishes concerning visitation pursuant to §3109(a). Nevertheless, we hold that the trial court's failure to consider these wishes solely on the ground that an in camera interview was not stipulated by the parties was an abuse of discretion.

For the foregoing reasons, the judgment of the court of appeals is affirmed in part, reversed in part, and the cause is remanded to the trial court to hold a new hearing on the visitation issue in which it considers the wishes of the child.

Hawkins v. Hawkins

Supreme Court of Columbia (1981)

This appeal arises from a decision of the Superior Court of Richmond County granting visitation privileges to the maternal grandparents of a minor child, Charland J. Hawkins. The minor's father, Jeffrey Hawkins, urges us to find that the circuit court lacked jurisdiction to order such visitation, or alternatively, that the circumstances of the instant case do not warrant such an order. We cannot agree with the father's position and therefore affirm the decision of the circuit court.

Jeffrey Hawkins was separated from Stephanie Hawkins on May 5, 1977, and their son, Charland, went to live with his mother. Subsequently, on October 6, 1978, Stephanie Hawkins was murdered while residing with Charland in the State of Florida. Following this tragedy, the minor lived for a time with his father, and then with his maternal great grandparents, Earl and Margaret Gooding. A dispute over custody arose between the minor's maternal relatives and his father, with the dispute culminating in an action before the Richmond County court. That court awarded custody to the father.

Following that decision, the Colsons, Charland's maternal grandparents, filed a petition for visitation rights. After a hearing those rights were granted. Jeffrey Hawkins contends that the visitation order of the circuit court should be reversed.

An issue has been raised regarding the jurisdiction of the circuit court to hear a request from grandparents for visitation privileges. Jeffrey Hawkins, the appellant here, correctly points out that the Columbia Marriage and Dissolution of Marriage Act (Civil Code §3108 et seq.) does not apply because of the absence of a divorce proceeding. Nevertheless, we believe the trial court was empowered to award custody to the grandparents. A long-standing common-law tradition clearly establishes the circumstances under which parents, grandparents and others might be entitled to court-ordered visitation with a minor child. We hold that this common-law tradition provides authority for extending visitation privileges to grandparents in special, limited circumstances. See Douglas v. Douglas (Indiana, 1980).

The other issue raised on this appeal concedes the authority of the court to consider a request on behalf of the grandparents for visitation, but challenges the granting of that request based on the evidence presented to the circuit court in the instant case. In general, the right to determine the third parties who are to share in the custody and influence of and participate in the visitation privileges with the children should vest primarily with the parent who is charged with the daily responsibility of rearing the children. In the absence of unusual circumstances, these matters should not be of judicial concern. Visitation is appropriate, however, where circumstances indicate that the normal sphere of parental authority and autonomy should be circumscribed for the limited purpose of maintaining grandparent involvement in a child's life.

We find the facts of the case sub judice to constitute the special circumstances required to sustain the visitation ordered by the circuit court. The natural parent was deceased; the minor child had a particularly close relationship with the grandparents because of their daily association; and it was determined that a continuation of the relationship between the child and his grandparents would be a positive benefit affecting the best interest of the child. And, in the final analysis, it is the best interest of the child that must weigh most heavily in the court's determination.

We conclude that the order previously entered by the Richmond County Superior Court was correct.

Douglas v. Douglas

Court of Appeals of Indiana (1980)

David Douglas, Sr. appeals the judgment of the trial court awarding Richard and Kathy Plummer visitation rights with his son, David Douglas, Jr.

The issue on appeal is whether the Plummers have a legally cognizable right to seek visitation with David.

David Douglas, Jr. (David) was born to Lori Ann Hicks in September of 1971. David Douglas, Sr. (Douglas) was declared the father of David in an uncontested paternity action on February 12, 1972. On August 2, 1976, Lori Hicks died. A custody dispute ensued between Douglas, and David's maternal relatives, Shirleen Schwindler, Lori Hicks' mother, and Richard and Kathy Plummer, Lori Hicks' aunt and uncle. The Plummers were awarded temporary custody of David on September 17, 1976, pending the final hearing. On December 17, 1976, after trial, Douglas was awarded custody of his son. A visitation order was not issued "because the parties indicated visitation could be resolved."

On February 2, 1977, Shirleen Schwindler died and thereafter Douglas did not allow David to visit with the Plummers. On May 8, 1977, the Plummers, together with another of Lori Hicks' aunts, Nancy Louise Hicks, petitioned for a hearing to set visitation. After a hearing, the trial court granted the Plummers visitation for two weeks each summer.

Visitation rights for non-custodial parents have long been the subject of legislation. However, the courts, rather than the legislature, recognized rights of visitation in third parties. In Krieg v. Glassburn (1973), this court held grandparents had a cognizable right to seek visitation with their grandchild.

Krieg recognized a right to seek visitation in one who had "acted in a custodial and parental capacity." Thus, contrary to the Plummers' argument, the "best interest of the child" is the standard by which the question of visitation is adjudged after the cognizable right is established; "the best interest of the child" does not determine the existence of the right. Thus, it is the party seeking visitation who bears the burden of establishing the threshold requisite of custodial and parental relationship.

The Plummers failed to meet this burden and accordingly, the trial court erred in granting them and, through them, other maternal relatives visitation rights with David. As a matter of law, the record is devoid of evidence which reasonably supports the conclusion the Plummers ever acted in a custodial or parental capacity toward David. Mrs. Plummer, David's great aunt, admitted that before Lori Hicks' death she had seen the minor child "mostly on family functions," and occasionally at other times. Her family, she said, "has seen him occasionally, approximately five times per year, at family gatherings, from the time of his birth until the date they were awarded custody." They had custody only from September 17, 1976 to December 17, 1976. This custodial period was the court ordered temporary custody pending the custody hearing. As such, it cannot form the basis of a cognizable right for the Plummers. Only the facts as they existed prior to judicial intervention are relevant. In other words, the Plummers cannot use this court ordered temporary custody as a means of bootstrapping themselves into a position of asserting a right to visitation. The threshold requirement for an award of visitation was not met.

The judgment of the trial court awarding visitation is reversed.

MODEL ANSWER

MEMORANDUM

To: Marsha Pushkin
From: Applicant
Date: Today
Re: In re Celia Stolier: Plan for Fact Gathering

I have organized this memo around the elements that we would be required to prove.

I. Stolier's Rights in General

There are two threshold questions here: (a) Do our courts have the authority to grant the visitation rights sought? and (b) if so, is Stolier, as Joanna's grandmother, able to request visitation?

A. Power of Columbia Courts to Grant Relief Sought

Columbia has no statute specifically covering the issue of visitation rights other than as part of a divorce, dissolution of marriage, alimony, or child support proceeding. Nevertheless, Hawkins v. Hawkins ruled that common-law tradition gives our courts the authority to extend visitation privileges "in special, limited circumstances." Because of your admonition to avoid a general discussion of visitation rights, I have not thoroughly discussed this issue. However, we could try to prove a "close relationship" similar to that in Hawkins by use of the evidence discussed under the heading "Child's Interaction and Interrelationship" (Part II., C., below).

B. Stolier's Eligibility for Visitation

According to In re Whitaker, the court should grant or deny visitation under the standards of Civil Code §§3108 and 3109.

Section 3108 provides that the court may grant visitation rights to any person who has "an interest in the welfare of the child." While §3108 does not list the kinds of persons who have such an interest, both Hawkins and Whitaker recognized that a grandparent would qualify. This is consistent with the law in other states (see, e.g., the Indiana case of Krieg v. Glassburn [cited in Douglas v. Douglas] and the New Jersey case of Mimkon v. Ford [cited in Whitaker]).

If David Wallach (Wallach) is unwilling to stipulate that Stolier is Joanna's grandmother, we should proceed as follows:

1. Admission Under Rule 501

After we initiate the case, we should made a written request, pursuant to Rule 501, that Wallach admit the relationship. It is unlikely that he would refuse this formal petition since we would end up proving the relationship anyway (see below), and an unjustified refusal would subject him to costs and/or other sanctions.

2. Other Methods

If Wallach refuses to admit that Stolier is Joanna's grandmother, we could introduce certified copies of the birth certificates of Joanna and her mother along with marriage and court records which would explain any intervening name changes; these documents are available on request from the County Clerk of the relevant county. Alternatively, we could prove the relationship through the testimony of Stolier, Harry Breckenridge (Breckenridge), or other people who know the family history. Finally, if necessary, we could find out if DNA tests could establish the relationship; if so, we could ask the court to require Wallach to allow a physician to withdraw some of Joanna's blood under Rule 401.

II. "Best Interests of the Child"

The major issue would be whether visitation rights would be "in the best interests of the child." Since the criteria listed in §3109 would govern this issue, I have separately analyzed each of the five enumerated factors.

A. Wishes of the Child

Section 3109 does not require the trial judge to consider the child's preference unless he or she is at least eleven years old; here, Joanna is not quite nine. Nevertheless, Whitaker recognized the relevance of even a younger child's wishes, reminding the lower courts, "It must be remembered that the single most important individual in a case addressing visitation rights is the child."

1. Proof Through Joanna's Testimony

Whitaker indicated that the judge has the discretion to allow a child under the age of eleven to testify on this matter. Such testimony could be taken in open court, through an in camera interview, or via a discussion with a social worker, mental health professional, or similar person. Alternatively, we could try to get Joanna's statements through a deposition.

2. Proof Through Extrinsic Evidence

Even if the court refuses to allow Joanna to testify directly, it is unlikely that the judge would totally disregard Joanna's feelings. We could prove that she wants to see Stolier by the following methods:

a. Admission Under Rule 501

Pursuant to Rule 501, we should ask Wallach to admit that Joanna wants to see her grandmother on a regular basis. Unlike the request to admit that Stolier is Joanna's grandmother, however, Wallach would not be afraid to deny this since a refusal to admit to such a subjective element is unlikely to justify sanctions.

We could make the same request of Rebecca Wallach (Mrs. Wallach). Since she has adopted Joanna, she would be a party to this lawsuit. While I expect that her

response would be consistent with her husband's, she is not hampered by the same emotional wounds and thus might be more objective and reasonable. In any case, the request costs virtually nothing, so it is worth a try.

b. Joanna's Note on the Back of the Picture and the Letter

The note on the back of the picture and the letter that Joanna sent to Stolier are evidence that Joanna wants to see her grandmother. Of course, these items would have to be authenticated. If we cannot get Wallach or Mrs. Wallach to admit to their genuineness under Rule 501, we could try to get the judge to allow Joanna to authenticate them herself. Alternatively, Stolier or anyone else familiar with Joanna's handwriting (such as her teacher) could establish that the note and letter were, in fact, written by Joanna.

[Both items are hearsay -- out-of-court statements offered to prove the truth of the matter asserted. Nevertheless, they clearly relate to Joanna's state of mind, an independently relevant issue in this case, and thus qualify for the "mental state" exception to the hearsay rule.]

c. Joanna's Statements on the Telephone

Joanna's statements to Stolier on the telephone are certainly evidence of her desires. Stolier can testify as to this in open court, but her testimony would be so obviously self-serving that the judge is unlikely to give it much weight.

d. Joanna's Statements to Others

We could prove Joanna's desires by statements that she may have made to Breckenridge or to her teachers or friends. Testimony by such individuals would carry greater weight than Stolier's.

We could discover the identity of Joanna's friends and teachers by serving written interrogatories on Wallach and/or Mrs. Wallach pursuant to Rule 201 or by deposing the Wallachs under Rule 101. Thereafter, an informal interview of these potential witnesses, to be followed up by in-court testimony, would generally be sufficient.

However, we should preserve the testimony of Breckenridge through depositions under Rule 101. His statements would be very helpful to our case, but his health is such that we could not count on his being able to testify at trial. In fact, the court would almost certainly allow us to depose Breckenridge even before we file our action because he is so sick that "good cause exists to believe that [he] may be unavailable at the time suit is filed." We could not use interrogatories, which would be less stressful to Breckenridge, because he is not a party.

B. Wishes of Parents

Both Whitaker and Hawkins indicate that the parents have a strong voice in determining whether a grandparent is given visitation rights. Nevertheless, Whitaker cites with approval the finding of Mimkon that the grandparent-grandchild relationship can be very important. Similarly, Hawkins held, "Visitation is appropriate, however, where circumstances indicate that the normal sphere of parental authority and autonomy should be circumscribed for the limited purpose of maintaining grandparent involvement in a child's life." In short, while Wallach's opposition is a problem, it is not an insurmountable barrier. Nevertheless, we should still see if it is possible to "patch up"

the relationship between Stolier and Wallach. Even if we cannot get him to allow visitation willingly, any lessening of his hostility would be of benefit.

I know that you feel that litigation is now unavoidable, but there are several key facts that have not yet been introduced into the discussions. According to Wallach's lawyer, Wallach's bitterness toward Stolier is primarily based on the fact that she was not a good mother to Elizabeth. However, Wallach is unaware of the circumstances surrounding the "abandonment" and it is quite possible that his position would soften if he knew the whole story. In addition, Wallach seems to believe that Joanna and Stolier are "nearly strangers" and that Stolier is simply trying to "lure them into a visitation arrangement by promising presents for Joanna"; perhaps he would be more willing to place Joanna's interests above his animosity to Stolier if he knew that Joanna and Stolier have, in fact, had a strong personal relationship. Of course, this strategy could backfire, and we would have to get Stolier's permission before revealing what she has told us in confidence. Nevertheless, I believe that the devastating effect that litigation would have on everyone concerned, especially Joanna, justifies one last attempt at a peaceful resolution. (If Stolier and Wallach are to meet, however, we must warn Stolier to avoid criticizing Wallach, bringing up old injuries [except to apologize], or stressing the material things that she has given [or will give] to Joanna; such behavior would clearly aggravate the situation. In addition, she would also have to be willing to acknowledge that Wallach has the ultimate responsibility for Joanna's upbringing and that she cannot criticize him in front of Joanna or disobey his rules.)

C. Child's Interaction and Interrelationship

According to both Stolier and Breckenridge, Joanna has had significant "interaction and interrelationship" with her grandmother. We could try to prove this in the same way, and generally by the same evidence, as discussed under the "Wishes of the Child" portion of this memo. I will only discuss the differences below.

1. Admission

Even if Wallach and/or Mrs. Wallach would be willing to admit that Joanna and Stolier had a real relationship, it appears that neither was aware that Joanna was regularly seeing her grandmother. (They thought that she was with, and the presents came from, Wanda Breckenridge.) As a result, there is little chance that we would get this admission (or sanctions for a failure to admit).

2. Testimony

Of course the testimony of those who are close enough to Joanna to know her wishes would be useful here. In addition, persons with a more tenuous relationship (such as Hegel and other friends and neighbors of the Breckenridges and even local merchants) might be able to testify that the two were close.

3. Photographs

We definitely want the photographs of Joanna and Stolier together; hopefully, there are pictures of the two laughing, playing, and hugging. Since "a picture is worth a thousand words," these would be powerful evidence of a strong personal relationship. I would ask Breckenridge for his permission to allow us (or perhaps Stolier) to look throughout his home for these photographs. Since he is "shocked and angry" about Wallach's behavior, I expect that he would give his consent. If he did not, we could seek a subpoena duces tecum pursuant to Rule 101, although Breckenridge's ill-health would

prevent sanctions should he not comply. We would not be able to use Rule 301 to get access to his property since Breckenridge is not a party.

If we cannot find the photographs at Breckenridge's, we would have to "get tough" with Karen Hegel. While I hate to antagonize her further, we can, after the case is filed, compel her, under Rule 101, to deliver any pictures that she might have. Since she is not a party, we would have to subpoena her.

Finally, it is possible that Wallach and/or Joanna have copies of some of these pictures. We could find out through depositions or interrogatories, and require Wallach to turn them over (or allow us to copy them) under Rules 101 and 301.

4. Other Tangible Evidence

In addition, we should see if Stolier has receipts or similar evidence of the things that she bought for Joanna. Conceivably, we could get access to Wallach's home to take or photograph such items under Rule 301.

D. Child's Adjustment

1. Lay Witnesses

We should talk to Joanna's teachers, friends, and others who know her to see if she is having trouble "adjust[ing] to [her] home, school, and community" because she cannot see her grandmother. I suspect, however, that school officials will be hesitant to discuss the matter. As a result, we might have to subpoena them (and any school records that would reflect on Joanna's "adjustment") under Rule 101. We might even need a court order if state law prohibits them from revealing information of this type without parental consent (I haven't looked into this yet).

2. Expert Witnesses

In addition, we could seek to have the court order a mental examination of Joanna under Rule 401. I believe that §3109(d) makes Joanna's mental state sufficiently in issue to justify such an examination.

With or without a formal mental examination, we should seek a qualified psychotherapist to testify on the problems of children who cannot interact with their grandparents and who are "cut off completely from [one side] of the family."

3. Court Records

Finally, we should seek the court records of the prior custody battle and the proceedings through which Mrs. Wallach adopted Joanna; such records may contain information concerning Joanna's adjustment. Under §3121, however, records of adoption proceeding are sealed. Nevertheless, we can obtain these records upon court order so long as "the welfare of the child will thereby be promoted or protected." Since this entire proceeding is concerned with Joanna's welfare, I expect that the court would give these items to us.

E. Mental and Physical Health of All Persons Involved

1. Joanna

I have discussed the relevance of Joanna's mental health, and the methods by which we could gain information about this, above. There appears to be no strong reason for looking into Joanna's physical health. Nevertheless, we might examine Joanna's medical and school records, and the records of the custody and adoption proceedings, to see if there is any problem here. In addition, we could ask Wallach and Mrs. Wallach some questions about this in interrogatories and follow up, if appropriate, with depositions. We should seek a court order for a physical exam under Rule 401 only if there is some indication that this is necessary.

2. Wallach and Mrs. Wallach

There is no apparent basis for questioning the mental or physical health of Wallach or his wife. Nevertheless, we should look through the custody and adoption records for evidence of a problem. We should also ask at least some general questions about their health through interrogatories. We could make a thorough follow-up if we find something that is potentially useful.

3. Stolier's Health

While this is technically outside the scope of your inquiry, I think that we are ethically bound to tell Stolier that Wallach can inquire into her mental and physical health; indeed, he would almost certainly do so if we explain that her abandonment of Elizabeth was due to a psychological breakdown. Wallach may seek a mental examination under Rule 401 and, since §3109(e) says that the court must consider the mental and physical health of all persons involved in the situation, he is likely to get it. Furthermore, if we were to request a copy of the report of this examination, Stolier would waive her privilege concerning her mental condition. As a result, the records of Dr. Peters, Stolier's current psychiatrist, would no longer be privileged and could be used by Wallach in an attempt to show that Stolier is presently unfit to have visitation rights.

III. Requirement of "Custodial and Parental Relationship"

According to the Indiana cases of Douglas and Krieg, the court can grant visitation rights in nonparents only if "the party seeking visitation bears the burden of establishing the threshold requisite of custody and parental relationship." Fortunately, I could find no Columbia cases which impose such a requirement. Furthermore, the Columbia cases seem to indicate that contact between grandparent and grandchildren is inherently valuable and have been quite liberal in granting visitation rights. Nevertheless, we should be prepared on this issue.

The file indicates that Joanna lived with the Breckenridges, not with Stolier. Furthermore, Stolier's contacts with Joanna are not like those of a parent. I would have to do more research on what is required for the existence of a "custodial and parental relationship," but I fear that we would lose our case if this must be proven.

In re Christopher Small

In re Christopher Small

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Columbia is located within the fictional United States Court of Appeals for the Fifteenth Circuit.

3. You will have two sets of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

4. The Library contains the legal authorities needed to complete the tasks. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit citations.

5. Your reasons must be written in the answer book provided. In answering this performance test, 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.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. In grading the answers to this question, the following, approximate weights will be assigned to each part:

A: 25%
B: 75%

KELLEHER and al-HIBRI
Attorneys at Law
Court House Square
Henniker, Columbia

MEMORANDUM July 29, 1997

To: Applicant

From: Leslie Kelleher

Re: Christopher Small

I was in court this morning and was asked by Judge Rosen to act as guardian ad litem in what appears to be a dispute between the Department of Social Services (DSS) and a foster parent. The hearing this morning, at which Judge Rosen issued the attached Order appointing me, was apparently *ex parte* under Code of Columbia §251. I have never been a guardian ad litem before, so I need your help in telling me what's expected of me and how I should proceed from here on out.

As far as I can tell, Christopher Small was placed by order of the court in permanent foster care in the home of Frances Melton in May 1992. The child, however, has actually been in the Melton's home for nine years. On July 22, Ms. Melton allegedly abused Chris and DSS removed the child from her home. DSS placed the child in the home of a temporary foster care parent. Two days later, Chris ran away and, after he was found, DSS moved him to an emergency shelter.

I have obtained the documents filed with the petition filed by DSS to rescind the Permanent Foster Care Order issued in 1992. 1 have also spoken very briefly with Ms. Melton. I have attached the documents filed with the petition, along with a memo summarizing my conversation with Ms. Melton. I have also attached what appears to be the relevant law on the topic, though given the limited time I spent on it, there may be more law that we need to look up.

Please do the following:

1. I'm unsure of the role of a guardian ad litem. As the guardian ad litem, am I the lawyer for the child? If not, what am I? Please don't write about the court procedures or the specifics of this case. All I want is a short memorandum describing my role as guardian ad litem.

2. More important, I need to know specifically what I am supposed to do. I want you to develop a Case Plan. I have attached the office memo that describes what a Case Plan entails. Keeping in mind that formal discovery is not available in Juvenile and Domestic Relations court, please follow the directions contained in the memo. Please also tell me what positions (e.g., flawed procedures and others) I could advocate consistent with my role as guardian ad litem.

KELLEHER and al-HIBRI
Attorneys at **Law**
Court House Square
Henniker, Columbia

MEMORANDUM July 29, 1995

To: Associates
From: Leslie Kelleher
Re: Case Plan

This memo provides guidance to all associates in developing uniform Case Plans. When I request a Case Plan, what I want is a memorandum explaining clearly and concisely the steps that I should take in order to handle the case from beginning to end, including researching the law, investigating and developing the facts, and taking any other necessary actions.

The case plan must cover the following:

What is the overall goal to be achieved?

- What legal issues need to be researched? As to each legal issue, what legal research needs to be done?
- For each legal issue, what factual issues, if any, need to be resolved?
- For each factual issue, 1) what additional facts do we need and 2) how and from what source do we obtain these facts?

Where formal discovery devices are available, state what specific devices should be employed. Do not ignore informal discovery devices such as interviews of potential witnesses or asking for copies of documents.

Be sure to indicate the order in which the steps should be taken. For example, in a product liability action you might suggest that we should take a party's deposition before serving interrogatories. State why this is so. For example, there are a limited number of interrogatories available and follow-up questions are not allowed. Therefore, the deposition which is more open ended and allows follow-up questions should be done first. Then based on this information, the interrogatories can be used to clarify more specific and possibly narrower details.

In writing the Case Plan for investigating, researching and preparing a case for resolution, be as specific as possible. In a custody case, for example, do not just tell me I need to do informal and formal discovery to establish that placement with our client is in the best interests of the child. Tell me what statutory or case law is relevant, what factual considerations should be brought to bear to establish those interests, and specifically how (e.g., deposition, affidavit, interrogatories, requests for admission, etc.) and from whom we should obtain and present the facts.

State of Columbia
Juvenile and Domestic Relations District Court
10th Judicial District
Department of Social Services

IN RE Christopher Small

Upon petition of the Henniker Department of Social Services, it is hereby ORDERED as follows:

1. This court will conduct a hearing pursuant to Columbia Code §206.1 for the removal of Christopher Small from the physical custody of the permananent foster care partent, Frances Melton. Such hearing shall take place no later that August 12, 1997.

2. Counsel of record and the guardian ad litem shall have full access to all records relevant to the determination of this issue, including the records lodged with this court in support of this petition. This shall include all psychiatric and psychological examinations.

3. Frances Melton shall be given the opportunity to visit the child at least once each week at his current place of residence.

4. The court appoints Leslie Kelleher guardian ad litem for Christopher Small.

Sharon Rosen
Sharon Rosen, Judge

July 29, 1997
Date

CITY OF HENNIKER

Department of Social Services
3200 Main Street
Henniker, Columbia

July 28, 1997

TO: The Honorable Sharon Rosen
FROM: Peter N. Sherwood, Social Worker
SUBJECT: Request for Rescission of Permananent Foster Care
Child: Christopher Small
Foster Mother: Frances Melton

The above-named child was placed in Permanent Foster Care by this court in 1992. During the past nine years, including four years before permanent foster care placement, the Department has worked closely with the foster mother. This arrangement was agreeable until recently when Child Protective Services determined that there was a founded complaint of abuse of the child by Ms. Melton.

The details of the complaint are contained in the attached *Child Protective Services Report* and *Foster Care Plans.* In essence, Ms. Melton corporally punished Christopher in the presence of day care workers and other children. In addition, Ms. Melton requires Christopher to engage in street preaching.

The child named above has been removed from the Permanent Foster Care home of Ms. Melton at the direction of the Director of the Henniker Department of Social Services. We are requesting that this court find that the best interests of the child require, and the court therefore should order, rescission of the Permanent Foster Care order of 1992.
cc: Frances Melton

FOSTER CARE SERVICE PLAN

To be completed for every case within 60 days of custody/placement—whichever comes first.
Information on this form must be updated as needed.
The Code of Columbia requires the involvement of biological parents/prior custodians, foster parents, and the child (where applicable)

Child: Christopher Small Date of Birth: May, 1987

Date of Custody: April 1988

Date of most recent removal from own home: April 1988

Program Goal: Continued foster care

Custody Status:

[ ] Abuse/neglect

[ ] Parental Request

[ ] CHINS

[ ] Delinquent

NOTE: Numbers 1, 2, and 3 are to be completed only upon initial removal of the child.

1. State briefly why child came into care and why placement is needed.

2. Describe services offered to prevent removal. If no services, explain why.

3. Briefly state child's situation relative to family, health, education, etc.

   Grandparents living in Middletown, Columbia.

4. Type of Placement.

   Temporary emergency foster care.

5. Describe efforts that have been made to place the child in the least restrictive environment consistent with the best interests of the child.

   No appropriate foster care home found on short notice.
   Pre-replacement visit to group home has been completed.
   Awaiting acceptance.

6. Describe the efforts to place the child in closest proximity to parent's home.

   Temporary emergency foster care home shelter is within
   15 miles of neighborhood of foster mother, Frances Melton.

7. Describe how any court orders made in respect to this child were carried out.

   Chris was originally placed in permanent foster care of
   Frances Melton. Frances Melton was found to abuse the
   child. Complaint filed by day care worker.

8. Mechanisms for ensuring proper care of the child.

a. Identify the needs of the child which must be met.

Chris must be placed in a sale and secure setting in which special educational needs are provided.

b. Biological Parents/Prior Custodians.

Biological mother and father are deceased.

9. List reponsibilities and target dates for child/parent/foster parent.

Chris to remain in placement, attend school, not run away. Target date: ongoing.

Placement to maintain safe secure environment and ensure child goes to school. Target date: ongoing.

Peter Sherwood — July 24, 1997

Social Worker — *Date*

Nora Osborne — July 24, 1997

Social Worker — *Date*

FOSTER CARE SERVICE PLAN

To be completed for every case every six months or within 24 hours of removal from Department placement.
The Code of Columbia requires the involvement of biological parents/prior custodians, foster parents, and the child (where applicable).

Child: Christopher Small Date of Birth: May, 1987

Date of Custody: April 1988

Date of most recent removal from own home: April 1988

Program Goal: Continued foster care

1. Describe the services which were offered to meet the needs identified in the last service plan. Identify barriers to goal achievement and appropriateness of services.
   Chris was removed from permanent foster care because of founded complaint of physical abuse. Chris was placed in temporary emergency foster care home after two nights, but ran away. Chris was then placed in emergency shelter (St. Thomas Home). Services provided are: secure least restrictive environment, psychological evaluation, transportation to school, counseling.

2. Describe biological family/prior custodians's current situation.
   Biological parents died when Chris was one year old.

3. Describe child's current situation and adjustment to placement.
   Chris is rebellious, demands to return to Frances Melton home Acting out behavior continues to be a problem. Threatened staff if not allowed to contact attorney. Constant confrontations with peers.

4. If review based on change of placement, describe reason for change.
   Worker received phone call from after school care taker. Betty Wolf, that Frances Melton had come to school and abused child.

Peter Sherwood
Social Worker

July 28, 1997
Date

Nora Osborne
Supervisor

July 28, 1997
Date

CITY OF HENNIKER

Department of Social Services
3200 Main Street
Henniker, Columbia

CHILD PROTECTIVE SERVICES REPORT

PRIMARY RECIPIENT: Christopher Small

A complaint was filed on July 22, 1997 at 3:30 p.m.

On July 23, a field contact was made at Elkbridge Day Care Center to speak to Betty Wolf, child care worker. Ms. Wolf related incident involving Christopher Small and Frances Melton. Ms. Wolf related that child has been recurring problem in the Center. The conduct involves poor peer and teacher relationships. There have been numerous confrontations between Chris and peers involving abusive language and threatening behavior. Chris has repeatedly verbally abused teachers, including complainant.

Ms. Wolf had contacted Frances Melton on several occasions complaining about Chris's behavior. On July 22, Ms. Wolf contacted Ms. Melton once again and explained the behavioral problem. On that day, when Ms. Melton came to pick up Chris from Elkbridge, Ms. Melton brought bottle of hot pepper sauce and first threatened to '"wash out" child's mouth unless he apologized and promised not to engage in such behavior in the future. Chris refused to apologize and Ms. Melton forced the sauce into his mouth causing the child to gag. This incident occurred in the child's activity room in front of Ms. Wolf and approximately twelve other ten- to twelve-year-olds.

My examination of the child showed fresh bruises and abrasions to knees and elbows. Chris stated injuries were received on playground. Chris stated he did not wish to return home.

ASSESSMENT OF IMMEDIATE NEED/DANGER

Chris's situation required immediate removal from Frances Melton's home. This decision was based on Ms. Melton's method of discipline, evidence of injuries and Columbia Department of Social Services Regulations §20 (discipline). See attached regulation and Ms. Melton's acknowledgment.

CHRONOLOGICAL NARRATIVE

Lynda Frost. Director of Elkbridge

I spoke to Lynda Frost, the Director of the Elkbridge Day Care Center. She indicated that the children who witnessed the incident were still traumatized by the event. Several students have expressed fears that Ms. Melton would return and hurt them. Ms. Frost indicated that Chris had been attending their after school program since the beginning of the school year. She confirmed that Chris's behavior has been a problem and that Ms. Melton has been requested to "do something about it." She indicated she would not take Chris back into the program.

Joel Eisen, Bus Driver

I spoke to Joel Eisen, the after school bus driver for Elkbridge. Mr. Eisen picks up Chris (and seven other children) from River Elementary School. Mr. Eisen indicated that he had no problems with Chris. He indicated that although there were occasional arguments among the children, there was never any violence. He did indicate that Chris was very "aggressive" in his religious beliefs. When I asked what that meant, Eisen indicated that Chris would preach "brimstone and damnation." This is consistent with neighbor's information related below.

Martha Edwards, Teacher

I spoke to Martha Edwards, Chris's teacher. She indicated that Chris was disruptive, though he showed no violence. Language was a problem. She indicated that on numerous occasions she had suggested to Ms. Melton that stronger discipline was needed. She stated she suspects Chris has both emotional and cognitive problems, though to her knowledge he has not been tested. She did not believe that Chris was performing to his academic ability.

Robert Jones, School Counselor

I spoke to school couselor, but was interrupted by disturbance in lunch room and he was unable to return to his office before I had to leave.

Terry Bagley, Neighbor

I went to Frances Melton's home to speak to her. Terry Bagley, a next door neighbor answered the door. She indicated she was waiting for a repairman as a favor to Ms. Melton, who had stepped out. Neighbor indicated Ms. Melton was a kind and caring individual, but that she occasionally seemed to go a bit overboard on the religion thing. When I asked what she meant, she indicated that Ms. Melton and Chris stand on the corner of Mason and Hamilton Avenues every Wednesday night while Ms. Melton uses a bullhorn to preach to the cars. Chris accompanies her, holding a sign with a religious quotation. She said she often feels sorry for Chris, who appears to be very uncomfortable. She has never seen any physical abuse of the child.

Frances Melton

Ms. Melton returned and I interviewed her. Ms. Melton appears unrepentant for having taken the action she did. She indicated that Chris was rebellious and needed to be controlled. In her words, some children just need a harsher lesson than others. I asked if she remembered signing the agreement concerning corporal punishment (see attached) and she did. She stated, however, that she was at the end of her rope with Chris. I asked why she did not come to DSS for assistance. She replied that she had spoken to Chris' teacher and her minister and that both had counseled her to be firmer. I expressed concern about the street preaching and she refused to respond. I pressed my concerns and she indicated that it was God she was concerned about, not DSS

Peter Sherwood _____ July 24, 1997

Case Worker *Date*

CITY OF HENNIKER

Department of Social Services
3200 Main Street
Henniker, Columbia

STATEMENT OF WILLINGNESS TO COMPLY WITH DISCIPLINE POLICY

Department of Social Services Standards and Regulations for Agency Approved Providers §20 "Discipline of Children" provides:

1. The provider shall establish rules that encourage desired behavior and discourage undesired behavior in cooperation with the parent/guardian of the children in care.
2. The provider shall not use corporal punishment. Corporal punishment includes but is not limited to hand spanking, shaking a child, forcing a child to assume an uncomfortable position, or binding a child.
3. The provider shall not humiliate or frighten the child in the course of disciplining the child. This includes the prohibition of any verbal abuse directed to a child. It also includes the prohibition of derogatory remarks about the child or the child's family.
4. The provider shall not withhold food, force naps, or punish toileting accidents in disciplining the child.
5. The provider shall not deny a child contact or visits with the child's family as punishment.

I fully understand the policy of the State of Columbia prohibiting the use of corporal punishment by foster parents. I have received training in the use of alternative discipline methods and techniques. I agree not to use corporal punishment in disciplining foster children in my home. I realize that any future use of corporal punishment with foster children could result in a letter of warning or the closing of my home to additional placements.Frances Melton

Signed: _____ Date: May 21, 1994
Foster Parent

KELLEHER and al-HIBRI
Attorneys at **Law**
Court House Square
Henniker, Columbia

MEMORANDUM July 29, 1997

To: File

From: Leslie Kelleher

Re: Preliminary Investigation

After being appointed by Judge Rosen, I had an opportunity to talk briefly to Frances Melton. This will summarize the points discussed:

- She wants Christopher back.
- She has not adopted Christopher because she cannot afford to, since she would lose state support for him.
- She believes that "punishment should fit the crime." Chris has been a "problem" for a number of years. She doesn't feel she is getting the help at school she needs and actually fears that Christopher "has something wrong." She admitted to me that she has spanked Chris in the past, but she "doesn't think DSS knows it."
- She believes that much of the problem she has now with DSS is really over the street preaching. They have on numerous occasions complained about this activity. The complaints have increased recently after the local paper did an article on street preachers and featured her and Christopher.
- When Christopher ran away, he came back to her house.
- She works for an accounting firm as an office manager. She has no other children.

While there, I got a copy of the documents filed with the court. I'm not sure that DSS alleged the right things and followed the correct procedures in filing its "petition" and obtaining the "order" from Judge Rosen. (Does this make any difference to the guardian ad litem?)

LIBRARY

In re Christopher Small

LIBRARY

Rule 8. The roles of counsel and of guardian ad litem when representing children.

The role of counsel for a child is the representation of the child's legitimate interests. When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child's interest and welfare. The guardian ad litem shall advise the court of the wishes of the child in any case where the wishes of the child conflict with the opinion of the guardian ad litem as to what is in the child's interest and welfare.

CODE OF COLUMBIA

Section 9. Guardian ad litem for persons under disability; when guardian ad litem need not be appointed for person under disability.

A. In a suit where a person under a disability is a party or when in the discretion of a judge of the juvenile and domestic relations court the judge shall deem it advisable, the court in which the suit is pending, or the clerk thereof, shall appoint a discreet and competent attorney-at-law as guardian ad litem to such person, whether such person shall have been served with process or not; or, if no such attorney be found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs.

Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such person is so represented and protected. The court, whenever of the opinion that the interest of such person requires it, shall remove any guardian ad litem and appoint another in his stead. When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow such guardian reasonable compensation therefor, and his actual expenses, if any, to be paid out of the estate of such person; provided, if such estate is inadequate for the purpose of paying such compensation and expenses, all, or any part thereof, may be taxed as costs in the proceeding.

B. Notwithstanding the provisions of subsection A or the provisions of any other law to the contrary, in any suit wherein a person under a disability is represented by an attorney-at-law duly licensed to practice in this State, who shall have entered of record an appearance for

such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; or unless a statute applicable to such suit expressly requires an answer to be filed by a guardian ad litem. The court may, in its discretion, appoint the attorney of record for the person under a disability as his guardian ad litem, in which event the attorney shall perform all the duties and functions of a guardian ad litem.

Any judgment or decree rendered by any court against a person under a disability without a guardian ad litem, but in compliance with the provisions of this subsection B, shall be as valid as if a guardian ad litem had been appointed.

Section 206.1. Permanent foster care placement.

A. A local department of public welfare or social services or a licensed child-placing agency shall have authority pursuant to a court order to place a child over whom it has legal custody in a permanent foster care placement where the child shall remain until he or she reaches the age of majority or thereafter, until the age of twenty-one years, if such placement is a requisite to providing funds for the care of such child, so long as the child is a participant in an educational, treatment or training program approved pursuant to rules and regulations of the State Board. No such child shall be removed from the physical custody of the foster parents in the permanent care placement except upon order of the court or pursuant to Section 251 or Section 248.9. The department or agency so placing a child shall retain legal custody of the child. A court shall not order that a child be placed in permanent foster care unless it finds that (i) diligent efforts have been made by the local department to place the child with his natural parents and such efforts have been unsuccessful, and (ii) diligent efforts have been made by the local department to place the child for adoption and such efforts have been unsuccessful or adoption is not a reasonable alternative for a long-term placement for the child under the circumstances.

B. Unless modified by the court order, the foster parent in the permanent foster care placement shall have the authority to consent to surgery, entrance into the armed services, marriage, application for a motor vehicle and driver's license, application for admission into college and any other such activities which require parental consent and shall have the responsibility for informing the placing department or agency of any such actions.

C. Any child placed in a permanent foster care placement by a local department of public welfare or social services shall, with the cooperation of the foster parents with

whom the permanent foster care placement has been made, receive the same services and benefits as any other child in foster care.

D. The State Board of Social Services shall establish minimum standards for the utilization, supervision and evaluation of permanent foster care placements.

E. If the child has a continuing involvement with his or her natural parents, the natural parents should be involved in the planning for a permanent placement. The court order placing the child in a permanent placement shall include a specification of the nature and frequency of visiting arrangements with the natural parents.

F. Any change in the placement of a child in permanent foster care or the responsibilities of the foster parents for that child shall be made only by order of the court which ordered the placement pursuant to a petition filed by the foster parents, local department, licensed child-placing agency or other appropriate party.

Section 248.9. Authority to take child into custody.

A. A physician or protective service worker of a local department or law enforcement official investigating a report or complaint of abuse and neglect may take a child into custody for up to seventy-two hours without prior approval of parents or guardians provided:

1. The circumstances of the child are such that continuing in his place of residence or in the care or custody of the parent, guardian, custodian or other person responsible for the child's care, presents an imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result; and

2. A court order is not immediately obtainable; and

3. The court has set up procedures for placing such children; and

4. Following taking the child into custody, the parents or guardians are notified as soon as practicable that he is in custody; and

5. A report is made to the local department; and

6. The court is notified and the person or agency taking custody of such child obtains, as soon as possible, but in no event later than seventy-two hours, an emergency removal order pursuant to Section 251; however, if a preliminary removal order is issued after a hearing held in accordance with Section 252 within seventy-two hours of the removal of the child, an emergency removal order shall not be necessary.

B. If the seventy-two-hour period for holding a child in custody and for obtaining a preliminary or emergency removal order expires on a Saturday, Sunday, or other legal holiday, the seventy-two hours shall be extended to the next day that is not a Saturday, Sunday, or other legal holiday, but in no event shall either such period exceed ninety-six hours.

Section 251. Emergency removal order.

A. A child may be taken into immediate custody and placed in shelter care pursuant to an emergency removal order in cases in which the child is alleged to have been abused or neglected. Such order may be issued ex parte by the court upon a petition supported by an affidavit or by sworn testimony in person before the judge or intake officer which establishes that:

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition.

2. Reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health pending a final hearing on the petition. The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a protective order.

When a child is removed from his home and there is no reasonable opportunity to provide preventive services, reasonable efforts to prevent removal shall be deemed to have been made.

B. Whenever a child is taken into immediate custody pursuant to an emergency removal order, a hearing shall be held in accordance with Section 252 as soon as practicable, but in no event later than five business days after the removal of the child.

C. In the emergency removal order the court shall give consideration to temporary placement of the child with suitable relatives, including grandparents, until such time as the hearing in accordance with Section 252 is held.

Section 252. Preliminary removal order; hearing.

A. A preliminary removal order in cases in which a child is alleged to have been abused or neglected may be issued by the court after a hearing wherein the court finds that reasonable efforts have been made to prevent removal of the child from his home. The hearing shall be in the nature of a preliminary hearing rather than a final determination of custody.

B. Prior to the removal hearing, notice of the hearing shall be given at least twenty-four hours in advance of the hearing to the guardian ad litem for the child, to the parents, guardian, legal custodian or other person standing in loco parentis of the child and to the child if he or she is twelve years of age or older. If notice to the parents, guardian, legal custodian or other person standing in loco parentis cannot be given despite diligent efforts to do so, the hearing shall be held nonetheless, and the parents, guardian, legal custodian or other person standing in loco parentis shall be afforded a later hearing on their motion regarding a continuation of the summary removal order.

The notice provided herein shall include (i) the time, date and place for the hearing and (ii) a specific statement of the factual circumstances which allegedly necessitate removal of the child.

C. All parties to the hearing shall be informed of their right to counsel.

D. At the removal hearing the child and his parent, guardian, legal custodian or other person standing in loco parentis shall have the right to confront and cross-examine all adverse witnesses and evidence and to present evidence on their own behalf.

E. In order for a preliminary order to issue or for an existing order to be continued, the petitioning party or agency must prove:

1. The child would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to

or left in the custody of his parents, guardian, legal custodian or other person standing in loco parentis pending a final hearing on the petition; and

2. Reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably and adequately protect the child's life or health pending a final hearing on the petition. The alternatives less drastic than removal may include but not be limited to the provision of medical, educational, psychiatric, psychological, homemaking or other similar services to the child or family or the issuance of a protective order.

When a child is removed from his home and there is no reasonable opportunity to provide preventive services, reasonable efforts to prevent removal shall be deemed to have been made.

F. If the court determines that pursuant to subsection E hereof the removal of the child is proper, the court shall:

1. Order that the child be placed in the care and custody of a suitable person, with consideration being given to placement in the care and custody of a nearest kin, including grandparents, or personal friend or, if such placement is not available, in the care and custody of a suitable agency; and

2. Order that reasonable visitation be allowed between the child and his parents, guardian, legal custodian or other person standing in loco parentis, if such visitation would not endanger the child's life or health.

Ruffin v. State

Supreme Court of Columbia (1987)

Alvin Leon Ruffin was convicted of operating a motor vehicle after having been declared an habitual offender in an earlier proceeding. He was sentenced to one year imprisonment. Ruffin appeals. Upon consideration of the record, the briefs and the arguments presented, we reverse.

At the time of his conviction as an habitual offender in 1982, Ruffin was imprisoned in the state penitentiary. On October 18, 1982, an order, issued October 15, 1982, by the Circuit Court of Sussex County, was served upon him. It ordered him to show cause why, as a result of incidents that had occurred before his imprisonment, he should not be deemed an habitual offender and barred from operating a motor vehicle in the State.

Shortly thereafter, on December 6, 1982, Ruffin wrote a letter to Judge Lemmond of the Sussex County Circuit Court. In that letter, Ruffin did not discuss the habitual offender case, but expressed the opinion that his attorney, James N. Barker, Jr., had not provided effective assistance of counsel in a previous case. Around that same time, Ruffin wrote Mr. Barker directly and informed him of his displeasure and that he did not want Barker to represent him in the habitual offender matter.

On September 9, 1984, after Ruffin had been released from prison, he was indicted for operating a motor vehicle while an habitual offender. Ruffin then alleged that the order declaring him to be an habitual offender was "void because there was no notice to him of the date of the proceedings."

At the trial to determine the validity of the prior judgment, the evidence revealed that the original order served on Ruffin recited a hearing date of November 9, 1982. For reasons not set forth in the record, the case was not heard at that time. The hearing ultimately was held on January 20, 1983.

On January 11, 1983, the court appointed Mr. Barker as the guardian ad litem for Ruffin because Ruffin was in prison and thus, was a "person under disability," as set forth in Section 9 of the Columbia Code. Barker was appointed despite Ruffin's previous letters to Judge Lemmond and Mr. Barker, complaining about Barker's prior representation. The evidence shows that Ruffin then sent letters to both the court and the guardian ad litem, prior to the hearing, advising them that he

was unhappy with the services of Mr. Barker and requesting that he not be assigned as his guardian. At the hearing of January 20, 1983, over Barker's objections, Ruffin was declared an habitual offender.

Mr. Barker then testified that there was no information in his files indicating that he ever notified Ruffin of the hearing, nor did he have any independent recollection that he contacted Ruffin to tell him the hearing date.

The defendant contends that the trial court abused its discretion by appointing Mr. Barker as his guardian and in disregarding his letter.

As well, the defendant argues that, when it became known to Mr. Barker that the defendant did not desire his services, Mr. Barker had a duty to notify the court of his client's wishes and attempt to withdraw as guardian. We disagree.

The defendant cites no authority for the unique proposition that he is entitled to choose his own guardian ad litem. Code Section 9 deals with the appointment of a guardian and sets forth minimum qualifications. The actual selection of the guardian, however, is left solely in the hands of the court.

Accordingly, the court was entitled to review Ruffin's letter and accord it whatever weight it deemed proper. The court was not bound by the defendant's demands or requests. It does not appear from the evidence presented that the court abused its discretion in the selection of Mr. Barker.

The defendant also provides no authority for his argument that Mr. Barker, as guardian ad litem, had a duty to report to the court that the defendant was unhappy with his services. To hold that the guardian ad litem has a duty to report to the court every instance in which a client expresses displeasure with his services would unduly burden both the guardian and the State. In the event that a defendant is unhappy with his guardian ad litem, it is his burden to show that the guardian is unfit to fulfill satisfactorily his obligations. Ruffin attempted to convince the court of this fact in the letter discussed above. As noted, the court was entitled to determine what weight to give the defendant's allegations and proceed at its discretion. Accordingly, we find no merit in this argument.

Finally, the defendant contends that the order was void because his guardian failed to maintain contact with him concerning his hearing or the result. On this point, we agree.

Columbia Code Section 9(A) requires that an attorney be appointed guardian ad litem if one can be found. If an attorney cannot be found then "some other discreet and proper person" may be appointed. In either case, the main requirement is that the guardian be discreet, proper, and faithfully represent and protect the interest of his charge. As such, a person who has been appointed guardian ad litem must, if possible, at a minimum discuss the matter with the person under disability.

Here, the defendant expressly stated that he did not wish to be involved with Mr. Barker. While the lower court had the discretionary right to dismiss this request and appoint Mr. Barker as guardian ad litem, Mr. Barker did not have the right to assume that he was the defendant's legal representative in any context other than as guardian ad litem.

It is the duty of the guardian ad litem to represent the interests of those for whom he is appointed faithfully and exclusively. Persons under a disability, however, always and throughout the litigation have the right to object to every step that is taken and everything that is done.

Regardless of his status as a prisoner, and unlike the situation as it relates to appointment of a guardian ad litem, Ruffin had a right to choose the person he wanted as his attorney or, if he determined that it was in his better interests, to defend himself. Ruffin was not given notice of either the new hearing date or that Mr. Barker had been appointed as guardian ad litem. Thus, he had no opportunity to obtain counsel of his choosing. This was a denial of his fundamental due process rights.

In circumstances such as those presented, where the person under disability is of sound mind, protection of the client's interests requires provision that he receive counsel of choice and safeguarding of his constitutional rights. Accordingly, Barker had an obligation to contact Ruffin, explain his situation, and determine what further steps were needed.

We also find that Mr. Barker failed to investigate thoroughly the facts surrounding the hearing. The duties of a guardian ad litem cannot be specifically spelled out as a general rule, but the underlying criteria are stated in Code Section 9. It is clear that the guardian has a duty to make a bona fide examination of the facts in order to properly represent the person under a disability. See Division of Social Services v. Unknown Father, (1986) (guardian may be removed if he fails to

faithfully represent his ward). In another context, this court has noted that the duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interests of the child by making a bona fide examination of the facts, and if he does not faithfully represent the interests of the infant, he may be removed. The duties of a guardian ad litem are the same as those of a parent when representing any person under a disability. Hence, the guardian ad litem may take a wide range of actions. For example, a guardian ad litem may consent, on behalf of his wards, for removal of a case from one court or another. Lemmon v. Herbert, (1950). And, a guardian ad litem may appeal an adverse ruling of the court. Givens v. Clem, (1907).

There is no evidence in the record showing that Mr. Barker ever contacted the defendant. Indeed, the only evidence available indicates that, insofar as the January 20, 1983, hearing is concerned, there was no contact between Mr. Barker and the defendant. Given this lack of communication with the defendant we are unable to conclude that Mr. Barker carefully examined the facts surrounding the case. Accordingly, he failed to comply with the mandate of Code Section 9 in the discharge of his duties as guardian ad litem.

For the reasons stated, the order dated January 20, 1983, adjudicating Ruffin an habitual offender is declared void because of trial error in violating the constitutional due process rights of the defendant. It follows that the defendant's conviction in this case for operating a motor vehicle after having been declared an habitual offender cannot be maintained. Therefore, the judgment appealed from is reversed.

Powell v. Columbia Department of Social Services

Court of Appeals of Columbia (1986)

This case, here on appeal from the circuit court, involves a controversy between the Department of Social Services (DSS) and Margie Sparks Powell concerning the permanent foster care placement of John, born on June 20, 1976.

As a result of physical abuse of the child by Mrs. Powell's husband, the Pittsylvania County Juvenile and Domestic Relations District Court, by order dated May 20, 1981, placed John in DSS custody. Mrs. Powell appealed to the circuit court.

A guardian ad litem was appointed to represent John's interest in the circuit court proceedings. On June 23, 1985, the circuit court denied Mrs. Powell's appeal and directed that John be placed in permanent foster care with a new foster parent.

At the hearing in the circuit court, various caseworkers and mental health professionals, in addition to Mrs. Powell, were called as witnesses. The record reveals that Mrs. Powell had two children by her marriage to Mr. Powell. A fifteen-year-old son is in the custody of his father and an older daughter is in the custody of Mrs. Powell's brother. Mrs. Powell has little, if any, contact with these children. At the time of the abuse of John by Mrs. Powell's husband in May 1981, Mrs. Powell had gone to Boatwright, Columbia for medical treatment.

The precise reason for this trip is unclear from the record. Mrs. Powell testified that she had bronchitis and allergies and that she was treated in the emergency room of a hospital in Boatwright for this condition. She had been taking medication for "nerves" but had discontinued taking the medication. John had been left in the care of the husband's sister, who subsequently relinquished custody of John to the husband. Upon learning of the abuse of John, Mrs. Powell returned but has not regained custody of him. Throughout these proceedings Mrs. Powell has remained separated from her husband though not divorced from him.

It is clear from the record that Mrs. Powell has never physically abused John. There is an emotional tie between the two. Pursuant to the first foster care plan, Mrs. Powell, according to her caseworker, for several years, until April 1984, made reasonable progress in establishing a stable home, attending parenting classes and providing care for John. At that time, John was concerned about alleged arguments between his foster mother and her boyfriend, as well as the facts that he

had to do household chores and that his foster mother had placed him inside garbage dumpsters to locate junk. This evidence was admitted by the circuit court to establish the reasons why a new permanent foster care parent should be appointed.

Mrs. Powell explained that John was in no danger during arguments with her boyfriend, that she considered household chores to be beneficial training, and that she often sold junk for extra income. Her regular income consisted of a monthly social security disability check and food stamps. We do not find that any of these matters were the basis of the circuit court's denial of her appeal. Furthermore, the issue of their admissibility into evidence is not before us.

The crucial evidence came from the mental health professionals. It is undisputed that Mrs. Powell is mildly to moderately mentally retarded. Her therapist, Gloria Culley, testified that Mrs. Powell could function as a parent but would need supervision and assistance under stressful circumstances. Dr. Ashby, a psychiatrist, testified that Mrs. Powell "does not have the necessary capability to assume responsibility for the custody and care of John at the present time and likely as not in the foreseeable future." At the direction of the trial judge, Mrs. Powell and John were seen for evaluation by Dr. Frazier, a child psychiatrist. Dr. Frazier testified that John "should not be considered retarded but should be considered a child who is on the low side of average and who needs help with verbal skills." He further testified that "a socially and intellectually stimulating program or environment" would help to improve verbal and arithmetic skills. Dr. Frazier further testified that Mrs. Powell needs "support in parent managing, assertive discipline and to be instructed in the various needs of the different levels of development as John grows," and for that "I think she needs help in managing him and that should continue throughout his life as a child until he becomes an adult." Although Dr. Frazier testified that John should not be in Mrs. Powell's sole care, he also stated that severing the relationship would be detrimental to the child.

We first consider Mrs. Powell's contention that the trial court's finding that she was incapable of assuming physical custody of John is not supported by substantial evidence. We review the record to determine whether there is clear and convincing evidence to support the determination of the trial court. Under familiar principles, we view that evidence and all reasonable inferences in the light most favorable to the prevailing party below. Where, as here, the court hears the evidence, its finding is entitled to great weight and will not be disturbed on appeal unless plainly wrong or without evidence to support it.

Code Section 206.1 provides the statutory scheme for permanent foster care placement. That scheme is intended to provide a more permanent placement for a child in a particular foster home than is generally obtained in regular foster care, and yet does not, as in the case of adoption proceedings, serve as a vehicle for terminating parental rights. Where the child has a continuing involvement with his or her natural parents, the statute provides for a continuation of that involvement through court-ordered visiting arrangements with the natural parents. Legal custody remains with the local department of welfare or social services or a licensed child-placing agency, and physical custody is granted to the foster parent. In this capacity, the foster parent is granted the authority to give parental consent in such matters as surgery, entrance into the armed services, marriage and others. The intended result is stability for the child and to ensure that foster parents know the nature and scope of their authority and responsibility. No change can occur in this placement without an order of the court which instituted the placement. A proper petition, filed by the foster parents, local department, licensed child-placing agency or "other appropriate party," is required for such a change.

As stated, under Code Sections 251 and 206.1, a child may be removed from permanent foster care custody only by order of the court originally placing the child. The termination of rights under Section 206.1 is a grave, drastic, and often irreversible action. When a court orders termination of rights, the ties between the foster parent and child are severed and the foster parent becomes a legal stranger to the child.

Where DSS seeks to remove the child from the custody of permanent foster care parents, they must establish that need by clear and convincing evidence. Clear and convincing evidence is defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is an intermediate form of proof, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.
As previously noted, the evidence established that John has remained in foster care for many years. While there is an emotional tie between them, the psychological evidence established beyond question that Mrs. Powell is mildly to moderately retarded, would need supervision and assistance under stressful circumstances, and that throughout John's life as a child, she would need help in managing and disciplining him.

Accordingly, we find no error in the trial court's denial of Mrs. Powell's petition.

MODEL ANSWERS

ANSWER 1

MEMORANDUM

To: Leslie Kelleher
From: Applicant
Date: July 29, 1997
Re: Christopher Small

Your memorandum raises two issues: the first is the nature and scope of your role as Christopher's guardian ad litem; the second is what action should be taken to fulfill that role. This memorandum will address those issues respectively.

THE ROLE OF A GUARDIAN AD LITEM

As Christopher's guardian, your duty is to protect his interests in the pending proceedings. "When appointed for a child, the guardian ad litem shall vigorously represent the child, fully protecting the child's interest and welfare. Columbia Rules of Court, Rule 8. You must "represent the interests of [Christopher] faithfully and exclusively." Ruffin v. State (1987). Although the "duties of a guardian ad litem cannot be specifically spelled out as a general rule," "it is clear that the guardian has a duty to make a bona fide examination of the facts in order to properly represent the person under a disability." Id., citing Division of Social Services v. Unknown Father (1986).

"The duties of a guardian ad litem when representing an infant are to defend a suit on behalf of the infant earnestly and vigorously and not merely in a perfunctory manner. He should fully protect the interests of the child by making a bona fide examination of the facts, and if he does not faithfully represent the interests of the infant, he may be removed. The duties of a guardian ad litem are the same as those of a parent when representing any person under a disability." Id.

Your appointment as guardian ad litem does not automatically make you Christopher's lawyer for these proceedings. A person subject to a guardianship order does not necessarily have the right to choose his guardian. Id. ("In the event that a defendant is unhappy with his guardian ad litem, it is his burden to show that the guardian is unfit to fulfill satisfactorily his obligations.") Even a person under a guardianship order, however, has an absolute right to choose his attorney. In Ruffin, a guardian ad litem purported to act as his ward's attorney in a court proceeding, despite the ward's clear objections to representation by the guardian ad litem. The Court determined that the proceeding constituted a "denial of [the ward's] fundamental due process rights" because the ward "had no opportunity to obtain counsel of his choosing."

Thus, your role as Christopher's guardian ad litem is to determine his best interests and to take steps to protect those interests. If he wants you to represent him as his lawyer, and if you deem such representation to be appropriate, you may also serve in that capacity.

CASE PLAN

1. Overall Goal

The overall goal to be achieved in this representation is to determine where the best interests of our client, Christopher Small, lie, and to vigorously pursue a judicial resolution which is favorable to those interests. A review of the facts and the law available at this time strongly indicates that Christopher's desire is to be reunited with his foster mother, Ms. Melton. If further investigation and research supports the proposition that Christopher's best interests will be served by returning him to Ms. Melton's custody, then we should zealously challenge his removal from her home.

2. Legal issues

The ultimate legal issue raised by this case is whether Christopher should be removed from his current foster placement with Ms. Melton. This raises two specific subsidiary questions: first, whether Ms. Melton has engaged in conduct which would warrant removal from the home, and second, whether the state has observed the procedural requirements for such a removal.

Generally, every removal of a child from a foster care situation requires a court order. Code of Columbia §§ 251 (A), 252. That order must be based upon a finding that the child "would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result" if the child were left in his guardian's custody. Id at §§ 251 (A)(1), 252(E)(1). Moreover, the movant for such an order must demonstrate that 'reasonable efforts have been made to prevent removal of the child from his home and there are no alternatives less drastic than removal of the child from his home which could reasonably protect the child's life or health." Id. at H 251 (A)(2), 252(E)(2).

Ms. Melton's conduct does not appear to subject Christopher to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result. It is apparent that Christopher is a child who has socialization problems, and may also have psychological problems. Therefore, it is important that Ms. Melton receive the training and support necessary to deal with those problems. There is no indication, however, that Ms. Melton's conduct at the school was anything other than an isolated incident, and there is no evidence of any other instances of physical or verbal abuse. Ms. Bagley, who lives next door to Ms. Melton, indicated that she has never seen any physical abuse of the child.

Ms. Melton has admitted to spanking Christopher, which is a violation of DSS regulations; however, spanking falls far short of the "imminent threat to life or health" which is required for removal. DSS also noted bruises and abrasions on Christopher's knees and elbows, which he attributed to falling on the playground. This is a plausible explanation given that Christopher appears to be an active ten-year-old boy, and, in the absence of evidence to the contrary, should probably be given credence.

Based upon these preliminary determinations, we need to conduct further research to determine what legal bases exist for terminating the foster relationship between Christopher and Ms. Melton. In Powell v. Columbia Department of Social Services (1986), the Court of Appeals affirmed the removal of a child from foster care without reaching an express determination of imminent threat to life or health. Rather, the court focused upon the ability of the foster parent to care for the child without outside assistance. In that case, the child had been abused by the foster parent's ex-husband, but there is no indication that the foster parent had any ongoing relationship with the ex-husband; accordingly, it is not clear whether the court determined that the abuse was subject to repetition, or, if so, what basis the court had for that finding.

The court's primary focus was upon whether the foster parent "would need supervision and assistance under stressful circumstances, and that throughout [the child's] life as a child, she would need help in managing and disciplining him." The opinion cites no authority whatsoever for its conclusion; in fact, most of the policy bases recited in the opinion would mandate the

opposite result: "The intended result [of foster placement] is stability for the child and to ensure that foster parents know the nature and scope of their authority and responsibility."

"The termination of rights under Section 206.1 is a grave, drastic, and often irreversible action. When a court orders termination of rights, the ties between the foster parent and the child are severed and the foster parent becomes a legal stranger to the child." The state, in order to terminate the foster relationship, bears a heightened burden of proof: it must establish the need to remove the child by clear and convincing evidence. Notwithstanding these pronouncements, however, the Powell court terminated a foster relationship without any findings more specific than those quoted above. More research is definitely required.

We also need to research the remedy for a procedurally defective removal from foster care. It appears that DSS acted improperly in removing Christopher from Ms. Melton's custody without first obtaining a court order, or, at the least, promptly obtaining a post hoc order authorizing the removal. "No [foster] child shall be removed from the physical custody of the foster parents in the permanent care placement except upon order of the court or pursuant to Section 251 or Section 248.9. Section 251 provides that a child may be taken into immediate custody upon the issuance of an ex parte emergency removal order. There is no indication in the file that such an order was entered prior to DSS removing Christopher from Ms. Melton's home.

Accordingly, the only appropriate basis for Christopher's removal was Section 248.9. That section provides that a protective service worker may take a child into custody without prior approval, but only if, inter alia, the child is in imminent danger, a court order is not immediately obtainable, and the person or agency taking custody obtains an emergency removal order pursuant to Section 251 within seventy-two hours. In your memorandum, you indicated that this morning's hearing was a Section 251 hearing, but Judge Rosen's order does not provide for the emergency removal of Christopher from Ms. Melton's care: it merely schedules a future hearing, provides for visitation. and appoints a guardian.

There is no indication that DSS took the appropriate steps to obtain an emergency removal order. DSS received a complaint on July 22, initiated field contacts on the 23rd, and removed Christopher from Ms. Melton's home on July 24th. It has now been five days since Christopher was removed from his home; the ex parte order was to have issued no later than yesterday. Moreover, the ex parte order contains no findings of fact which would support removal, and the file contains no testimony which could support such findings. Therefore, it clearly appears that both Christopher's and Ms. Melton's due process rights have been violated. This violation should be addressed immediately. The court's scheduled hearing date of August 12 is three weeks after Christopher's removal; since the statute requires at least preliminary determination on the merits within three days, we should probably press for immediate return to Ms. Melton's custody.

3. Factual issues

The factual issues which need to be resolved will turn, at least in part, upon the outcome of the legal research set forth above. The first and most important fact-gathering step should be a conversation with Christopher. We need to determine whether he wants to be returned to Ms. Melton's custody (apparently so, given both the DSS report stating that he demands to return to the Melton home, and Ms. Melton's statement that he returned there when he ran away) and whether he wishes to have our firm serve as counsel for him in the pending legal proceedings.

We also need to determine the nature of his relationship with Ms. Melton, and to gather as much factual information as possible about her fitness as a parent. For example, is he routinely subject to corporal punishment? What forms of discipline does Ms. Melton use? Are they effective? All of these questions must be probed in an interview with Christopher. Such an

interview may also be a useful motivational tool; Christopher may be more likely to control his behavioral problems if he realizes that his misbehavior is jeopardizing his domestic situation.

Next, we need to interview Ms. Melton. We need to address the same issues with her as we address with Christopher: we need to make a complete evaluation of the fitness of her home as an environment for him. Again, this interview will also present an opportunity to impress upon Ms. Melton the importance of handling disciplinary matters in an appropriate manner.

Once we have established a rapport with Christopher and Ms. Melton, we need to undertake further factual investigations, both to verify the information we have received and to seek independent information about Christopher and his home environment. Ms. Frost, Mr. Eisen, Ms. Edwards, Mr. Jones, and Ms. Bagley all must be interviewed, as well as any other teachers, administrators, or day care providers who have regular contact with Christopher. We need to know if Christopher often is bruised or shows other signs of abuse; if he ever speaks of Ms. Melton in a manner which would suggest that their relationship is unhealthy; and every other detail which the witness can provide about Christopher's personality and his home life

Based upon Christopher's wishes and the information we receive from our fact witnesses, we need to make an informed decision regarding whether Christopher's best interests are served by remaining in Ms. Melton's custody. If so, we need to aggressively oppose DSS's pending motion to remove him from that relationship.

Other issues

Once we have undertaken representation, we will be able to petition the court for a fee award. Section 9. In the meantime, however, it is important that we immediately begin protecting our client's interests.

ANSWER 2

MEMORANDUM

To: Leslie Kelleher
From: Applicant
Re: Guardian Ad Litem

You have requested a memorandum discussing the following questions:

Is a Guardian Ad Litem the Attorney for the child?
If not, what is a Guardian Ad Litem?

As you have requested, this memorandum deals solely with the role of the guardian ad litem for a child and not the court procedures or specifics of this case.

Is the Guardian Ad Litem an Attorney?

Although the cases and statutory law are not explicit on this point, there seems to be an implicit distinction separating an attorney from a guardian ad litem (GAL). In fact, the Code, Section 9, provides that a non-attorney may be appointed as GAL. In addition, Ruffin suggests that, while the defendant had a fundamental right to choose an attorney, he had no right to choose a GAL. Ruffin at 10-11. Finally, the duties of the GAL seem to extend beyond those duties required of counsel. In addition to duties under the professional responsibility code, counsel for a child has a duty to represent the child's legitimate interests. On the other hand, a GAL has the duty to "vigorously represent the child, fully protecting the child's interest and welfare." Rules of Court, Rule 8.

Given these distinctions, I must conclude that a GAL is not merely an attorney for the child, but had heightened duties of representation explained below.

Role of Guardian Ad Litem

1. Power of the Court to Appoint a Guardian Ad Litem

A judge of the juvenile and domestic relations court has the sole discretion to appoint discreet and competent attorney as guardian ad litem (GAL). Code, Section 9; Ruffin at 9. Alternatively, the court also has the discretion to remove and replace the GAL. Id. Even if the represented person is unhappy with the GAL, the represented party has the burden to show the court the guardian is unfit. Ruffin at 10.

2. Guardian Ad Litem's General Duties and Responsibilities

A GAL must faithfully represent the interests of the child. Code, Section 9A. As stated above, while counsel for a child merely has a duty to represent the child's legitimate interests, a GAL has the duty to 'vigorously represent the child, fully protecting the child's interest and welfare." Rules of Court, Rule 8.

In addition, implicit in the judge's discretion to appoint an GAL is the requirement that the attorney be discreet and competent. Code, Section 9; see also Ruffin at 10.

Competence in this respect would mean an attorney who has experience as a GAL or will educate herself to become competent in this field. In addition, the GAL must, at a minimum, discuss the

matter with the represented person. Ruffin at 10. Failure to communicate with the represented party can result in a breach of duty by the GAL. Id. at 11-12. In fact, the represented person has a right to object to everything that the GAL does. Id. at 10.

3. GAL's Specific Duties and Responsibilities

If the wishes of the child conflict with the GAL's opinion, the GAL must disclose the child's wishes to the court. Rules of Court, Rule 8. However, the GAL does not need to disclose every instance in which a client expresses displeasure. Ruffin at 10.

If the court is satisfied that the GAL has performed "substantial service" in her representation, it has the discretion to reasonably compensate the GAL and pay for actual expenses out of the estate of the represented party. Id. If the estate is inadequate, then the compensation and expenses may be taken as costs in the proceeding. Id. A GAL is not liable for costs. Code, Section 9.

In order to satisfy its duty of competence, the GAL must make a bona fide examination of the facts. Ruffin at 11.

4. Powers of the GAL

Since it has the same duties as a parent of a child, the GAL has broad authority to take a wide range of actions. Ruffin at 11 . This includes consenting on the represented person's behalf to removal from one court to another and appealing an adverse ruling of a court. Id.

MEMORANDUM

To: Leslie Kelleher
From: Applicant
Re: In re Christopher Small Case Plan

You have requested a case plan discussing the steps which need to be taken regarding the case of Christopher Small (Chris). This memorandum will be divided into two sections. The first section will objectively discuss the goals, legal issues, and factual issues. The second section will discuss an order of steps to be taken.

I. Goals, Legal Issues, Factual Issues

A. What is the overall goal to be achieved?

As discussed in the memorandum describing the role of the Guardian Ad Litem (GAL), the GAL must faithfully represent the interests of the child. She must do so vigorously and must fully protect the child's interest and welfare. She must be discreet and competent. In addition, if the wishes of the child and the opinion of the GAL conflict, the GAL must disclose the conflict to the court.

In order to fulfill her duties, it seems a GAL must not only determine what the wishes of the child are, but also form an opinion as to what is in the child's best interest.

1. Child's Best Interest

Department of Social Services (DSS) case worker Peter Sherwood states that Chris told him that he did not wish to return home to Frances Melton. However, this statement should be

taken with a grain of salt because it was made soon after the incident and to someone with whom Chris did not have an ongoing, trustworthy relationship.

However, the facts show that Chris returned home to Ms. Melton after he ran away from temporary care. This indicates that Chris desires, in some respect, to stay with Ms. Melton. Because the facts are in conflict, we should, after establishing a good rapport with Chris, determine what his real wishes are.

2. GAL's Opinion

In addition, after reviewing the facts and investigating this case, the GAL must make her own evaluation of what is in the best interests of Chris. In doing so, we should consider all of the legal issues and facts discussed below. In addition to these considerations, we may want to focus on the following: what is the likelihood of future abuse from Ms. Melton, how strong is the relationship between Chris and Ms. Melton and what damage would occur if Chris is separated from her, what is the likelihood of Ms. Melton being able to help Chris correct his destructive behavior, and will placement in another home help Chris overcome his various problems. In making these considerations, we should conduct the various interviews and investigation as outlined below.

The ultimate goal of our representation of Chris will depend on a balancing of his wishes and the GAL's opinion. If they conflict, we must disclose such conflict with the court. Obviously, whether we decide to allow Chris to remain with Ms. Melton or to request removal from her permanent foster care will have a significant impact on the steps we take. This memorandum will reflect both options.

B. What legal issues need to be researched? As to each issue, what legal research needs to be done?

1. If Goal is to Maintain Chris in Melton Permanent Foster

If the goal is to allow Chris to stay with Ms. Melton, we will need to fight the DSS's request for removal. The following is a legal summary and analysis of this effort.

A court must make an order pursuant to Code section 248.9 (authority to take child into custody) or Code section 251 (emergency removal order) in order to remove a child from permanent foster care. Code section 206.1A. Under 248.9, a DSS worker investigating abuse or neglect may take a child into custody for 72 hours without prior guardian approval and (1) circumstances present an imminent danger to the child resulting in severe or irremediable injury, (2) a court order is not immediately obtainable, (3) court has procedures for placing such children, (4) guardian is notified as soon as practicable, (5) report is made to local DSS, and (6) court is notified and no later than 72 hours after an emergency removal order (section 251) or preliminary removal order (section 252) is obtained. Here, no emergency removal order was obtained. In addition, the preliminary removal order has not yet been obtained.

The complaint in this case was made on July 22. Soon afterwards, Chris was taken into temporary emergency foster care. Two days later Chris ran away and returned to Ms. Melton. DSS found him and moved him to an emergency shelter. More than 72 hours has passed from the emergency removal, yet no court order has been obtained either under section 251 or 252. In addition, the DSS notes fail to state why Chris is in imminent danger of future harm. Thus, for these two reasons the removal of Chris seems to be procedurally defective.

However, nothing states what the remedies are for these defects. The first area of legal research should be done on this issue. Certainly, this is not the first time that DSS has failed to

follow procedure. The statutory code, rules, and case law should certainly be searched for any instance of procedural deficiency and the remedy for such. In addition, it may be worthwhile to research DSS internal regulation and procedures to see what they believe should happen under these circumstances.

2. If Goal is to Remove Chris from Melton Permanent Foster Care

If our goal is to remove Chris from Ms. Melton's care, we must be ready to defend against the procedural violations stated above. In addition to doing similar research, we should be ready to argue similar instances where procedural defects were overlooked to obtain the remedy that is in the best interest of the child. Similar cases in other situations would be helpful (e.g. divorce custody cases).

In addition, we must be ready to present evidence in a preliminary removal hearing. There we will have the right to present evidence and conduct cross-examination. In order to be successful, we must prove (1) the child will be subjected to an imminent threat to life or health, that severe or irremediable injury would be likely to result if the child were returned to custody and (2) reasonable efforts have been made to prevent removal and there are no alternatives less drastic than removal. When a child is removed and there is no opportunity for preventive services, reasonable efforts is presumed. Code Section 252.

If a court grants a preliminary removal order, it should give consideration to placement in the care of a nearest kin and order that reasonable visitation be allowed if it would not endanger the child's life or health. Id.

Powell is an example where the appellate court upheld a trial court's determination that removal was appropriate. There the child had remained in foster care for many years, but the foster parent was mildly retarded and needed supervision to care for the child.

More case law is needed to determine what are appropriate considerations for removal. More specifically, a determination will be made about imminent threat of harm. We need to determine how "imminent" a threat must be to satisfy the requirement. In addition, we must determine what kind of harm is recognized.

Finally, as an alternate basis for removal, we may try to use Ms. Melton's signing of the Statement of Willingness to Comply with Discipline Policy and her subsequent violation and disregard for the statement as a basis for removal. Breach of her agreement may be sufficient grounds to revoke her qualification as a foster parent. However, such a remedy may be subject to equitable powers of the court. If it is in the best interests of the the child to stay with Ms. Melton despite her breach of promise, the Court may disregard remedies under that promise. Further legal research will need to be done regarding enforcement of remedies with this kind of promise.

C. For each legal issue, what factual issues need to be resolved? For each factual issue (1) what additional facts do we need and (2) how and from what source do we obtain these?

1. Imminent danger resulting in severe or irreparable injury

First we need to determine whether there is a past history of abuse by Ms. Melton. This would include going over all her past reports by DSS, even those before Chris' foster care. We should interview Lynda Frost, Martha Edwards, Robert Jones at school regarding any reports by Chris of abuse at home and whether other events of abuse occurred at school. Terry Bagley indicated she never saw any physical abuse, but we should ask her again to see if she was intimidated by the presence of the DSS worker. She may be more willing to discuss past events if

we explain our position as Chris' representative. Also, we should try to find other neighbors, friends, or family who may be able to answer some questions about past abuse.

We should ask Ms. Melton about this and ask her to clarify her statement regarding corporal punishment. Finally, we should talk with Chris and see if he will admit to prior abuse.

In addition, we should look at Peter Sherwood's statement about fresh bruises and ask detailed questions about how fresh they look, their size, and location. We should seek medical advice as to those bruises, and if possible have Chris see a physician to evaluate the extent of the abuse.

Secondly, we should try to determine the likelihood of future abuse. Ms. Melton has signed a statement stating she would not abuse Chris, but she has disregarded this before. Questioning her about her beliefs and her view on corporal punishment may lead to a better understanding of her future actions. Also, if possible, we should try to look into her home and see if there is evidence of broken items leading to a conclusion of a violent personality.

II. Order of Steps to Take

1. Conduct preliminary questioning of witness over the phone to get suggestions on how best to build a rapport with Chris. Include questioning Martha Edwards (the Teacher) and Joel Eisen (the bus driver) since he seems to be the only one with a non-violent relationship with Chris.

2. Contact Chris. Try to set up a meeting in a non-threatening environment, somewhere where he'll feel safe. Ask him the above listed questions, including what he would like and whether there was abuse in the past. Determine the strength of the bond between Chris and Ms. Melton and try to determine how severe a separation would be.

3. Interview various witnesses. Include all the witnesses listed in Peter Sherwood's report. Ask the questions detailed above. Also include Chris' classmates, and other residents of the temporary shelter to see if Chris has said anything.

4. Obtain copies of medical reports regarding Chris if available. Obtain copies of any medical reports regarding Ms. Melton.

5. Form a formal opinion as to the best interests of Chris. If there is a conflict with Chris' wishes notify the court.

6. If the goal is to seek removal, file the appropriate motion with the court. If the goal is to stay with Ms. Melton file the appropriate motion attacking the DSS position.

7. Clearly separate attorney's compensation, expenses, and costs. The GAL is not liable for costs.

The Merida Discovery Group v. Consortium of Maritime Insurers

The Merida Discovery Group v. Consortium of Maritime Insurers

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional state of Columbia, one of the United States. Your firm represents The Merida Discovery Group (MDG) in an action against the Consortium of Maritime Insurers (CMI).

3. You will have two sets of materials with which to work: a File and a Library. The File contains factual information about your case.

4. 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 examination. Although the legal authorities may appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that the cases were decided in the jurisdictions on the dates shown. In citing cases from the Library, you may use abbreviations and omit volume and page citations.

5. Your answer must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided, but you should 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 Libracy provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to organizing and writing your response.

7. This performance test will be graded on your responsiveness to instructions and on the content, thoroughness, and organization of your response. The following weights will be assigned to each part:

A: 60%

B: 40 %

SMITH, RENZO & SIMON
555 Benjamin Street
Oceanside, Columbia 00020

MEMORANDUM July 31, 1997

To: Applicant
From: Steve Cunningham
Re: In Re an Unidentified and Abandoned Vessel Thought to be the S.S. Merida

As you know, we represent The Merida Discovery Group (MDG), a partnership of scientists, undersea recovery specialists and others engaged in locating and retrieving valuables from the wreck of the S.S. Merida, a ship that capsized and sank some 120 miles off the coast of our state, Columbia, during a violent storm almost 150 years ago in 1857. The Merida was carrying about $2 million in gold when it went down, consisting of a cache in gold bullion, other gold items, and additional artifacts, all of which are sure to be valued at more than $200 million in today's dollars.

About a year ago, after MDG discovered what it confidently believed to be the remains of The Merida, we filed an in rem action in the U.S. District Court for the Southern District of Columbia. In this suit, we seek to protect our client's right to explore and recover treasure from the site of the wreck within a two-square mile area of the ocean bounded by certain degrees and minutes of longitude and latitude. Once we gave public notice of the in rem action, a number of maritime insurance companies (Sojourner Insurance of the U.S., Leeds, Ltd. of London, and others), entered an appearance in the action, contesting MDG's claim of ownership of the "Treasure of Merida." The various insurance carriers were consolidated into a class of defendants known as the Consortium of Maritime Insurers (CMI).

While under the protection of the District Court's mandatory injunction that prevented others from interfering with its recovery operations, MDG conducted deepwater exploration of the wreck site. With extraordinary skill and innovative equipment developed by its maritime engineering team, MDG has so far been able to retrieve bullion, chains, and artifacts valued at more than $13 million. One of the items recovered from the shipwreck is a ship's bell, positively identified as that of The Merida.

CMI claims that its members are the rightful owners of the treasure discovered and to be recovered by MDG by subrogation to the interests of those who originally owned and lost the property. The consortium carriers assert that they insured those who suffered the loss in 1857 and they paid claims totaling about $1 million shortly thereafter. As a result, CMI maintains its members are the legal owners of the rescued property. Accordingly, CMI argues that MDG is entitled only to a salvage award.

Our client, MDG, contends that to the limited extent that CMI members once held ownership interests in some of the shipwrecked property by subrogation, they have abandoned those claims. Therefore, we argue that MDG is a finder, entitled to full and complete ownership interest in the property found and that still to be recovered.

Shortly after CMI filed its answer, the parties exchanged settlement proposals. On behalf of MDG, we offered to pay off the insurers' claims for $5 million. CMI rejected this offer, but counteroffered payment of a salvage claim to MDG upon completion of the recovery. CMI's offer was twenty percent of the ultimate proceeds from the sale of all recovered property, from which MDG would also have to bear its cost of recovery. We estimate that this would net MDG no more than $45 million and as little as $10 or $15 million in profit. The recovery could be worth between $150 to $350 million, depending on the value and number of coins, other gold, and artifacts finally recovered. MDG therefore rejected the counteroffer.

After our unsuccessful attempt to settle, MDG and CMI agreed to submit their differences to a form of arbitration, commonly known as "forced choice arbitration." Under this form of arbitration, each side submits its one best settlement proposal to the arbitrator in what is called an Arbitration Settlement Statement. The arbitrator must choose one of the settlement proposals and has no authority to formulate any other solution. The process is designed to elicit what each side believes is truly a fair and reasonable solution consistent with its position on the prevailing law.

I want you to draft our Arbitration Settlement Statement. The Statement contains two parts:

- Part A consists of a persuasive brief that details the strength of our legal position. This part should be written in accordance with the firm's policy on writing persuasive briefs which I have attached.

- Part B sets out and justifies one specific settlement proposal covering all claims. Because Part A provides the legal justification for our settlement proposal, do not repeat legal

arguments in Part B. Instead, you should propose a specific settlement of all claims and justify in detail why the solution is fair and reasonable with our position on the law.

Thus, as part of your draft of our Arbitration Settlement Statement, you must formulate MDG's new settlement proposal. If I agree with the proposal, we will recommend it to MDG for approval before submitting the final document to the arbitrator. I assume that we should offer more than the $5 million previously offered, but I have not concluded what our offer should be either in dollar amount or in terms of percentage of recovery. I prefer to see what you propose.

To assist you, I asked MDG's accountants, Munson & Peters, to prepare a cost/benefit analysis. You will need to use the information and estimates in this analysis in the Arbitration Settlement Statement. However, the document itself should not be attached to the Statement.

You need not bother addressing the question of the admissibility of newspaper articles from the 1850's as evidence of the insurers' losses. A memo prepared by another associate convinced me that such articles are admissible under the Ancient Documents evidence rules.

Thanks for your help.

SMITH, RENZO & SIMON
555 Benjamin Street
Oceanside, Columbia 00020

MEMORANDUM June 30, 1996

To: All Associates
From: Executive Committee
Re: Persuasive Briefs

To clarify the expectations of the firm and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our client's position.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, IMPROPER: COLUMBIA HAS PERSONAL JURISDICTION. PROPER: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our clients' position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The associate should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

The Columbia Times

July 29, 1858

S.S. MERIDA CLAIMS PAID SALVAGE EFFORTS PURSUED

When Erasmus, the Dutch scholar, mused that "a common shipwreck is a consolation to all" he did not foresee problems faced by insurers in the aftermath of the sinking of the S.S. Merida. Almost nine months after the disaster, the final claims of the owners of the gold bullion lost when the ship went down in a violent storm more than 100 miles off the Columbia coast have been paid by the insurers. Representatives of the Sojourner Insurance Company and Leeds of London said each had paid the last claims filed with them. Nine other insurance companies resolved their claims earlier with those who had losses in the shipwreck. In all, the 11 companies paid between $690,000 and $975,000 in claims for the lost bullion and the loss of the vessel itself, the largest set of insurance payments for vessel and cargo losses on record.

The Merida was en route from San Francisco to New York and London carrying 451 passengers and a cargo of gold valued at $1,600,000 being shipped from the California gold fields to the world's financial centers. Apart from the insured bullion, it is estimated that the passengers, many successful prospectors and other entrepreneurs, were carrying as much as $600,000 in the precious metal on their persons, some of which was deposited with the Purser, and some kept on their person or with their baggage. One survivor claimed a passenger who died in the wreck "carried a money belt containing about $20,000 in gold coins." None of the individual losses was covered by insurance.

On the night of November 5th last, The Merida was plowing through heavy seas when it was struck by a fierce storm. The ship, gripped in the force of the crashing waves and mighty winds of nature's most awesome phenomena, was lifted like a matchstick on mountainous crests to be plummeted in the next instant into deep troughs of the ocean. Tons of seawater crashed over the railings of The Merida, extinguishing the fires in the boilers and casting the ship adrift. The shriek of the wind drowned out the screams of seamen and passengers washed overboard to their deaths.

The black-hulled, coal-fired, three-decked, three-masted sidewheeler with a cruising speed of eleven knots capsized and sank within a few minutes, according to reports from 72 survivors who were picked up later by a passing schooner, The Richmond.

The sinking of The Merida is certainly the worst maritime mishap in the history of the nation. In addition to the tragic waste of human life, the loss of the incredible amount of gold bullion has rocked the financial world. A pronounced decline in the economy

of the country has been dubbed by some as the “Panic of 1857.”

The insurance companies are taking steps to recover their losses. The Sojourner and Leeds Companies contracted with Dr. Brutus Villeroi, the inventor of a submarine boat, to salvage the wreck. The agreement with Dr. Villeroi provides that the companies will not incur any expenses or liability in connection with the attempted salvage. Dr. Villeroi, however, has not made any excursions to date to recover items from the wreck.

Marine experts scoff at the idea of raising the ship. The Merida, they say, is on the bottom, thousands of feet below the surface and at a location no one can pinpoint with any accuracy. “Even if they knew where she went down,” said Professor Moore of the Universiry of Columbia, “they could not predict her present location, given the shifting underwater currents and tides. The Merida is lost forever!”

Despite these dire predictions concerning possible recovery of the “Treasure of Merida,” insurers, survivors and the families of those who went down with the ship hope that Dr. Velleroi is successful. Of course, there is no hope for the return of the more than 500 souls, passengers and crew, lost in the nation’s worst maritime disaster. ■

The Columbia Times
May 25, 1997

PROMISES OF RICHES FROM THE BRINY DEEP LURE MARINE EXPLORERS AS WELL AS INSURANCE LAWYERS

It's the stuff of Robert Ludlurn and James Bond novels: one-man submarines prowling the deep, reconnaissance flights over desolate stretches of the sea, technicians poring over sonar photos and computer printouts, venture capitalists and more. But it may be that a courtroom drama will be the final chapter in this lifelike version of *Goldfinger*.

The adventure began more than six score years ago when the S.S. Merida went down in 8,000 feet about 100 miles off the coast of Columbia in a violent storm. The ship was carrying 500 or so passengers and crew, less than a hundred of whom survived, and about $2 million in gold. That $2 million is worth a cool $1 billion today, according to conservative estimates, more than enough to pique the interest of well-heeled teams racing to capture the prize.

Nothing much happened for about 130 years. Just after the sinking of The Merida, there was a flurry of activity. The insurance companies paid off claims totaling somewhere between a half and $1 million. They then hired an engineer named Brutus Villeroi who claimed to have invented a submarine. If Villeroi had developed an underwater craft, there is no evidence that he ever actually used it to explore for "The Treasure of Merida." After Villeroi's "non-search, " the effort to find the ship apparently was abandoned.

Technological breakthroughs in recent years have made what was once impossible—the recovery of items more than a mile and one-half below the surface of the ocean—a task within the grasp of the daring. And daring, persevering, patient, skillful and lucky are the members of The Merida Discovery Group.

MDG, as the group is known, is headed by Dr. Paulette Ansello and Buck Miller. Ansello, an ocean engineer and scuba enthusiast, and Miller, a deep sea recovery specialist who has dived for treasure all over the world, hooked up about five years ago, drawn together by the challenge of raising The Merida's gold.

Ansello and Miller approached a number of insurance companies that had paid claims on The Merida disaster for information on the location of the wreck. They also sought financial support from the insurers for an attempt to recover the gold. The insurance companies made it clear they were not interested in cooperating with the explorers or in mounting a recovery action of their own.

Using historical data, contemporary meteorological information on the nature of

hurricanes and modern search theory mathematics, Dr. Ansello produced a computer analysis that predicted The Merida was located within a 750-square mile area of the ocean.

Miller, meanwhile, recruited a small group of investors who collected $3.5 million, more than the original value of the cargo. With money in hand, Miller organized a sophisticated search team. Employing wide-swath sonar technology that scanned the ocean floor and produced images on a computer monitor aboard The Landmark, MDG's leased research vessel, the search team prepared a probability map. In what is in reality a new field of science and in which little work had been done before, the team predicted sinking rates, drifting patterns and wind-blown currents. Combining incredible skill and great luck while being supported by deep pockets, the team succeeded in pinpointing a wreck they believed to be The Merida in October 1996.

MDG was forced to quickly complete construction of a tele-operated deep water robotic device that can operate under 5,000 pounds-per-square-inch of pressure and in complete darkness. Named The Atlantis and designed by Ansello with Miller's advice, the submersible is capable of recovering a 1,200 pound anchor or a single gold coin from the ocean floor. According to Miller, MDG feared that other search groups would "try to poach on our find once word leaked out that we'd found The Merida." Miller claims his fears were well-founded as the site of The Merida was "crisscrossed by spy planes launched by the insurance consortium."

While a representative of the insurers admits the companies conducted air reconnaissance, he objects to the term "spy." "The insurance companies that paid claims on The Merida more than a hundred years ago are the legal owners of the ship's valuables, " said a spokesman for Leeds, Ltd. "We merely want to protect our property."

Anticipating such claims by the insurers, MDG filed an *in rem* action, one claiming a legal interest in property, in the federal court in Columbia. Represented by Smith, Renzo & Simon of Oceanside, the top-rated admiralty law firm in the region, MDG sought and received temporary protection against all others who claim an interest in the remains of The Merida.

After an infusion of another $2 million, MDG launched The Atlantis. In its first dive, tragedy struck. Arturo Ansello, Dr. Ansello's son and himself an experienced diver, was killed while attempting to correct a malfunction on the robot's recovery claw. Eventually, the team returned with a new, redesigned robot explorer, and brought up the bronze bell of the ship, positive proof that MDG had discovered "The Treasure of Merida." Since then MDG has recovered hundreds of gold bars and thousands of rare,

privately minted "pioneer" coins whose value, according to a representative of Tristie's Auction House of New York, is "beyond belief."

Dr. Ansello and Miller are not spending the expected profits yet. As Ansello explained, "Some parts of the treasure are easier to get at than others. It's a whole lot easier to pick up a gold bar or large artifact than a nugget or coin. Then, of course, the gold dust, unless protected in the ship's safe, is simply beyond our ability to gather, given today's technology."

In its search for the treasure MDG is carefully preserving the scientific, historical and archeological details of the wreck and the site. Working closely with marine biologists and other researchers from the Smithsonian, MDG is protecting the integrity of the area and separating out those items of special significance.

Who will ultimately benefit most from the discovery of The Merida must await the conclusion of a lawsuit. CMI, a group of insurance companies, claim MDG is entitled only to a salvage fee for recovering their property. However, under the law, a salvage fee is bound to be in the many millions given the considerable investment of MDG and the risks associated with the recovery. However, Pam Licord, the lawyer for CMI, stated that "money was less important than the principles at stake in this matter." According to Licord, the insurance industry "must preserve the concept that insurers who pay claims on property lost at sea are the owners of anything recovered and their rights cannot be involuntarily lost by the mere passage of time." To demonstrate its "commitment to principle," Licord said, "CMI pledges to donate to museums all historically significant artifacts recovered from The Merida, regardless of value."

All voyages, whether eventful or calamitous, must eventually complete their course. The Merida's journey, long and tortuous, has temporarily dropped anchor in the federal court. Soon the cargo of gold that left San Francisco more than a century ago will be off-loaded at its final port, be that a museum, the coffers of some insurance companies or the bank accounts of some intrepid fortune hunters. ■

EXCERPTS FROM DEPOSITION OF
ALAN JOHN BIRCH, COMPTROLLER OF LEEDS, LTD AND
DOCUMENT DIRECTOR OF THE CONSORTIUM OF MARINE INSURERS

Mr. Cunningham: Please state your name and position.

Mr. Birch: I am Alan John Birch and I am the Comptroller of Leeds, Ltd., London, England. I also serve as the Document Director for the Consortium of Marine Insurers in this lawsuit.

Q: How long have you been with Leeds?

A: Well, I began in the claims division forty-three years ago.

Q: Describe your present position.

A: I am an officer of the company and the person responsible for the financial and other records of Leeds, Ltd.

Q: Are records relating to ships lost at sea included among those for which you are in charge?

A: Yes, indeed.

Q: What is your role as Document Director for CMI?

A: As you know, a number of insurance companies from the U.K. and the U.S. have joined together to challenge the MDG's claim of ownership of the property recovered from the wreck of The Merida. To coordinate our position a number of persons from the different insurers have assumed leadership roles within the group. I am the person in charge of conforming the various administrative policies of the several companies and taking charge of the records of each company as they pertain to The Merida incident.

* * *

Now, within the marine insurance industry, is there a general practice concerning document retention?

A: Yes. The average period for document retention is ten years. A few of the companies within CMI have a twelve-year rule.

How long have such policies been in effect?

A: Quite as long as I have been with Leeds, certainly, and it appears to have been the case earlier. So far as the other insurers within the group, the ten-year rule has been in place for at least forty or fifty years, perhaps much longer.

Q: What type of files are destroyed under the document retention programs in place within the CMI group?

A: All types of files; across the board.

Q: Are claims files within that policy?

A: Of course.

* * *

Q: Does Leeds or any of the other companies within CMI have copies of any of the policies that may have covered goods on board The Merida in 1857?

A: At present, none of the companies have any such policies.

Q: Do any of the CMI companies have copies of any of the invoices of shipment for the goods on board The Merida?

A: No, sir.

Q: Any documents relating to the value of the shipment on board The Merida?

A: No. Well, do you mean original documents as opposed to news accounts and the like?

Q: Any original documents or copies of them?

A: No.

Q: How about bills of lading or other proof of loss. Are there any records relating to that?

A: No, sir.

Q: Well, how about the amounts paid by companies in CMI? Do any of the companies you represent have proof that they paid losses under The Merida accident?

A: No, there are no records within the companies, but there are newspaper accounts of the fact that our members paid for losses.

Q: So all of the records that might be kept relating to the commercial aspects of this event have been destroyed, is that right?

A: That is correct.

* * *

Q: And in the case of a ship that sinks today, if you thought there was any hope of recovering goods, you wouldn't let supporting documents such as we have described be destroyed, would you?

A: No, we wouldn't.

Q: And is that the approach taken by other members of the CMI group?

A: Absolutely, it's standard practice.

Q: And if you have hopes of recovering goods lost at sea, you retain records of the lost ship, right?

A: Of course.

Q: So, when the company expects to recover property lost at sea, what is done?

A: Leeds policy - and the policy of other carriers, also - is to retain documents for so long as the carrier feels they are necessary. If we believe it could be financially

feasible to mount a recovery action, the documents pertaining to a loss are separated and exempted from the destruction policy and retained.

Q: So, from the fact that neither Leeds nor any other member of CMI retained any records of The Merida, I take it that none of you believed it would ever be possible to recover The Merida?

A: Absolutely not. There are many other reasons why we don't have those records today.

Q: Such as?

A: To begin with, these are current policies on document retention, not those of 150 years ago.

Q: Any other reasons?

A: Yes. Most of these insurance companies have moved at least once since the mid-nineteenth century. That necessarily involves consolidation of some records and destruction of others.

* * *

Q: So, a few newspaper accounts are the sum of all the records concerning The Merida that you have located at Leeds or at the other insurance companies within the CMI group?

A: Actually, it's quite a bit of information that has been accumulated. As you know, Leeds is one of the oldest marine insurers in the world. When we celebrated our 300th anniversary in the 70s, we published a marvelous history of the company. There was a very interesting section relating to the loss of The Merida, the "Panic of '57" and our role in paying off claims to help stave off financial disaster throughout the world. That part of the history drew on quite a bit of material about the sinking of the ship contained in our company's historical files.

Q: But other than historical data, you found no records relating to ownership claims to Merida property in the files of Leeds or the other companies, is that correct?

A: Well, of course, all companies have records beginning about twenty years ago when deep sea technology developed to the point that it seemed possible if not economical to consider recovery of long lost treasure. Those files contain every reference made in the media to The Merida and letters from potential salvors. And you realize that MDG was not the first group - nor the last, for that matter - to attempt to secure a release of any claim by the company to The Merida. All the CMI companies have correspondence from treasure seekers asking them to transfer or sell rights of ownership in The Merida.

Q: What efforts have the CMI companies made to recover The Merida?

A: What do you mean by efforts?

Q: Have the CMI companies themselves made any attempt at recovery?

A: No.

Q: Have you authorized anyone to do so?

A: No.

Q: You just mentioned that about twenty years ago, deep sea technology developed to the point that it seems possible to recover long lost treasures. Since then, have the CMI companies done anything to investigate the feasibility of recovering The Merida?

A: No.

Q: Why not, if it's possible and maybe economically feasible?

A: Well, frankly, we saw no need to risk our own capital to recover what is, after all, our own property. If others wish to do so, that's their venture or adventure, and if they succeed, they will be reimbursed.

MUNSON & PETERS
Certified Public Accountants
One Financial Center Plaza
Capitol City, Columbia

Steven Cunningham, Esq.
SMITH, RENZO & SIMON
555 Benjamin Street
Oceanside, Columbia 00020

Dear Steve:

At the joint request of you and Archie Yeats of Merida Discovery Group, we have prepared an analysis of cost and projected return on MDG's recovery of The Merida site. We also have prepared an estimate of costs associated with pursuing pending litigation to conclusion.

MDG hopes to be able to recover and sell gold bullion (which is in the form of gold bars), gold coins, and if recoverable, gold dust and nuggets, and other artifacts (e.g., bells, anchors, cannons, jewelry and other personal effects). The bullion is easier to recover and set a value on. The gold coins will be much harder to recover, and these privately minted pioneer coins could be extremely valuable. The gold dust and nuggets may not even be recoverable using today's technology, but no one will say that even these may not some day be recovered. The recoverability and value of the artifacts are also difficult to predict.

The recovery expenses and income to date are accurate figures. Estimates of future costs and return on recovered property, on the other hand, are relatively soft. Costs assume no significant difficulties in recovering the treasure and bringing it to port. Income is projected in a conservative manner because we are unsure of the actual value of the artifacts that will be recovered.

Actual litigation costs to date (five court days and 43 preparation days) are firm. Future costs are based on your estimates of 60 preparation days before trial, nine expert witnesses, 20 trial days, and 22 days preparing for an expected appeal by

the unsuccessful litigant at trial. Given your explanation of the novelty of this case, these calculations appear to be quite reasonable.

Given MDG's estimated litigation expenses, you have asked us to project the CMI's costs of litigation. We suggest you multiply MDG's costs by a factor of 3.6 based on an assumption of similar charges by counsel, eleven separate insurance companies in the consortium, and a consolidated defense. Thus, we suggest that CMI has or will incur litigation costs of about $5.29 million.

As usual, please be cautious in using this data, especially in this situation where our projections are made in a state of uncertainty about the value of goods more than 100 years old.

If you have questions concerning our estimates, please give me a call. We look forward to being of assistance in the future.

Sincerely,

Louis Munson

Louis Munson

MUNSON & PETERS

Certified Public Accountants

MERIDA RECOVERY COSTS:

Original exploration costs (discovery of The Merida, etc.)	$ 2,757,000
Construction and outfitting of The Atlantis	2,346,000
Initial series of dives (through June 30, 1997)	4,611,000
Second series of dives (through January 31, 1998)	6,500,000
Final series of dives (through July 31, 1998)	7,900,000
Other costs (including litigation)	2,235,000
TOTAL:	$26,349,000

VALUE OF PROPERTY REMOVED FROM THE MERIDA:

Value of property already removed from the ship (through June 30, 1997):

(a) Gold bullion	$ 7,680,000
(b) Other	5,945,000
SUBTOTAL:	$13,625,000

Value of gold bullion yet to be removed from ship (estimated to be 3.4 tons)[1].....48,640,000

Value of gold other than bullion yet to be removed from ship

(includes coins as well as gold carried by passengers)[2] 220,000,000

Value of all other artifacts yet to be recovered from ship .....~~45,000,000~~

TOTAL: $327,265,000

ESTIMATED COSTS OF LITIGATION (in actual dollars):

Litigation costs already incurred (through June 30, 1997) $388,255

Trial preparation ($7,460/day) 447,600

Trial (except experts) ($13,495/day).....269,900

Expert witnesses ($20,000/witness, plus expenses).....198,000

Appeal preparation .....~~164,120~~

TOTAL: $1,467,875

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[11] Based on $400 per ounce. Gold is presently selling above that amount on the world market and many expect the price to rise. However, we are presenting a conservative figure on which to base your calculations.

[22] While it is relatively easy to estimate the value of the gold being carried by passengers based on information contained in several newspaper sources, it is impossible to predict the value of privately minted gold coins and the like because of the value of this form of gold has increased at a much greater rate than the value of bullion. With the help of professionals at Tristie's and Notheby's Auction Houses, we have come up with a figure that is a "best guess."

LIBRARY

Zych v. The Unidentified, Wrecked and Abandoned Vessel,
Believed to be the SB "Lady Elgin"

United States District Court, Northern District, Illinois (1991)

This admiralty action was commenced by plaintiff Harry Zych, doing business as American Diving and Salvage Co., as an in rem complaint against a shipwreck located in Lake Michigan and believed to be the "Lady Elgin." The complaint alleges that the ship was abandoned after it sank in 1860 and Zych claims an interest in the vessel and its cargo by reason of his efforts to locate the wreck and recover certain items from the sunken ship.

Subsequently, the Lady Elgin Foundation intervened in the action, claiming it was the present owner of the shipwreck. The Foundation asserts that the Aetna Insurance Co. became the owner of the shipwreck when, in 1860, it paid out $11,993.20 pursuant to an insurance contract covering the vessel and her cargo, on a loss claim by the insured shipowners. After Zych filed his action, the Foundation alleges that it acquired the ownership interest in the shipwreck from Aetna in exchange for twenty percent of the gross proceeds from the sale of any property or artifacts recovered from the shipwreck. Accordingly, the Foundation contends that it now has title to the shipwreck.

Zych asserts title to the shipwreck pursuant to the law of finds. This doctrine awards title of abandoned property to the first finder who takes possession of the property with intent to exercise control over it. Zych concedes the facts asserted by the Foundation, but argues that Aetna abandoned the vessel. The sole dispute between Zych and the Foundation is whether the vessel has been abandoned. "Abandonment" is the voluntary relinquishment of one's rights in a property. It occurs "by an express or implied act of leaving or deserting property without hope of recovering it and without the intention of returning to it." 3A Benedict on Admiralty § 134 (7th ed. 1980). It must be voluntary, with a positive intent to part with ownership, and without coercion or pressure. To show abandonment, a party must prove (1) intent to abandon, and (2) physical acts carrying that intent into effect. Abandonment may be inferred from all of the relevant facts and circumstances. A finding of abandonment must be supported by strong and convincing evidence, but it may and often must be determined on the basis of circumstantial evidence.

The Foundation has submitted a number of documents and affidavits in support of its claim. The Foundation relies heavily on the affidavit of Ivan Avery, an expert in insurance archival matters and an officer of a subsidiary of Aetna. Avery reviewed a Letter Book containing correspondence from July 23, 1860, through March 5, 1861, and found therein five letters relating to the Lady Elgin wreck. He notes that the Letter Book would only have contained the most significant correspondence because of the difficulty and expense of copying documents at that time.

- The first document is a letter dated September 11, 1860, from Thomas Alexander, an officer of Aetna, to Gordon Hubbard, an agent of Aetna, in which Alexander states that he has been informed of the loss of the Lady Elgin and expresses hope that the company will escape claims on the cargo.

- Also on September 11, 1860, Alexander wrote to Captain E.P. Door, the surviving captain of the Lady Elgin, inquiring as to ongoing litigation against the owners of the schooner Augusta, which had caused the Lady Elgin to sink by ramming her during a storm.

- On September 22, 1860, Aetna President E.G. Ripley wrote Hubbard instructing him to pay on the Lady Elgin claims as soon as possible upon the receipt of invoices.

- On October 10, 1860, Alexander wrote again to Hubbard. In this letter, he states "permit us to confirm Capt. Door's instructions not to accept an abandonment of the vessel, for the reason which he informs us he gave you on his recent visit to Chicago."

- The final letter is from Alexander to Hubbard on November 15, 1860, noting the payment of $11,993.20 as "constituting payment in full on the policy on the Lady Elgin."

The Foundation also submitted the affidavit of Christopher Parson, its Executive Director. Parson states that the Lady Elgin has been the subject of intensive search efforts by a number of prominent salvors and underwater explorers as well as many less organized efforts by sport divers. Parson also describes the search methods which were used in conducting both Zych's earlier, unsuccessful efforts to locate the wreck and those used in his recent, successful effort. Because of the location of the wreck, in very deep water and spread out among boulders and large stones in the lake bed, the wreck could not have been found without the state-of-the-art technology which Zych used to discover the wreck, which was not available until the 1980's.

Zych does not dispute the facts set forth in the Avery and Parson affidavits. Indeed, the parties have stipulated that the documents show that Aetna insured the Lady Elgin's hull and cargo, that Aetna received claims and supporting documentation for the loss, that Aetna paid the claims in full for $11,993.20, and that Aetna instructed its agents not to abandon the Lady Elgin. Zych also concedes that Aetna acquired title to the Lady Elgin by subrogation. However, Zych disputes the legal significance of these facts. He argues that Aetna abandoned the wreck through the lapse of time and the failure to take any steps to recover the vessel.

Historically, courts have applied the maritime law of salvage when ships or their cargo have been recovered from the bottom of the sea by those other than their original owners. Under this approach, the original owners still retain their ownership interests in the property, although the salvors are entitled to a very liberal salvage award. Such awards often exceed the value of the services rendered. If no owner should come forward to claim the recovered property, the salvor is normally awarded its total value.

A related legal doctrine is the common law of finds, which treats property that is abandoned as returned to the state of nature and thus equivalent to property with no prior owner. The first person to reduce such property to "possession," either actual or constructive, becomes its owner. Admiralty has historically disfavored the law of finds, preferring instead the policies of the law of salvage. Would-be finders are encouraged to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or of other would-be finders which could entirely deprive them of their property. The aims, assumptions, and rules of the law of salvage fit well with the needs of maritime activity and encourage less competitive and secretive forms of conduct than does the law of finds. The primary concern of salvage law is the preservation of property on oceans and waterways. Salvage law specifies when a party may be said to have acquired, not title to, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.

Salvage law assumes that the property being salved is owned by another, and thus that it has not been abandoned. Admiralty courts have adhered to the traditional and realistic premise that property previously owned but lost at sea has been taken involuntarily out of the owner's possession and control by the forces of nature at work in oceans and waterways. Sunken cargo and vessels are in general deemed "abandoned" in admiralty only in the sense that the owner has lost the power to prevent salvage; a finding that title to such property has been conclusively lost requires strong proof, such as the owner's express declaration abandoning title.

In this case, of course, there is no affirmative act which indicates an intent by Aetna to abandon the wreck of the Lady Elgin. Indeed, one of the documents submitted to the Court and acknowledged by Zych appears to show a specific intent not to abandon it.

There remains, however, the argument that the failure to take any steps to recover the wreck is sufficient evidence of intent to abandon, when considered in light of the lapse of 130 years.

In support of this argument, Zych refers to Wiggins v. 1100 Tons of Italian Marble (E.D.Va. 1960). In Wiggins, property was recovered from the Bark Clythia which had been sunk for 66 years with only a portion of her top mast visible above the water. The court there held that although lapse of time and nonuse are not sufficient in themselves to constitute abandonment, they did imply an intent to abandon when considered along with the failure to conduct sufficient efforts to recover property when both its location and availability could be determined. Zych urges that Aetna's failure to attempt to recover the Lady Elgin for 130 years, twice the period involved in Wiggins, dictates a finding of abandonment.

The Foundation contends that Aetna's failure to act should be deemed inconsequential because the technology has not previously been available to locate this particular wreck - as evidenced both by the affidavit of Parsons and by the lack of previous success in locating the Lady Elgin, despite numerous search efforts. Zych responds that the lack of 1980's technology, however, did not dissuade others from attempting to locate the wreck.

In light of the law's hesitancy to find abandonment and the concomitant requirement that abandonment be supported by strong and convincing evidence, the Court finds that Aetna was not required to engage in efforts to recover the wreck in order to avoid abandoning its interest, when such efforts would have had minimal chances for success.

Zych has not provided sufficient evidence from which a reasonable fact-finder could conclude that Aetna abandoned the wreck of the Lady Elgin. Accordingly, the Court finds that the Foundation's claim to the wreck must be upheld and Zych's claim for ownership must be dismissed.

Judgment for the Lady Elgin Foundation.

Treasure Salvors, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel Believed to be The Nuestra Senora de Atocha

United States Court of Appeals, Fifth Circuit (1988)

Treasure Salvors, Inc. sued for possession of and confirmation of title to an unidentified wrecked and abandoned vessel thought to be the Nuestra Senora de Atocha. The United States government intervened, asserting title to the vessel. Summary judgment was entered for the plaintiff and the government has appealed that judgment.

In late summer of 1622, a fleet of Spanish galleons, heavily laden with bullion exploited from the gold mines of the New World, set sail for Spain. As the fleet entered the Straits of Florida, it was met by a hurricane which drove it into the reef-laced waters off the Florida Keys. A number of vessels went down, including the richest galleon in the fleet, Nuestra Senora de Atocha. Five hundred fifty persons perished, and cargo with a contemporary value of perhaps $250 million was lost. A later hurricane shattered the Atocha and buried her beneath the sands.

For well over three centuries the wreck of the Atocha lay undisturbed beneath the wide shoal west of the Marquesas Keys, islets named after the reef where the Marquis of Cadereita had camped while supervising unsuccessful salvage operations in behalf of the Spanish government, soon after the shipwreck occurred. Then, in 1981, after an arduous search, aided by survivors' accounts of the 1622 wrecks and an expenditure of more than $2 million, plaintiff located the Atocha. Plaintiff retrieved gold, silver, artifacts, and armament from the wreck, valued at $6 million.

The government argues that the district court erred in applying the law of finds to this recovery. We believe the government is incorrect.

The Atocha is indisputedly an abandoned vessel. The parties stipulated that "the wreck believed to be the Nuestra Senora de Atocha, her tackle, armament, apparel and cargo has been abandoned by its original owners." The Spanish Government long ago gave up attempts to recover the Atocha. We know of no others who are in position to assert a credible claim of ownership, nor is any such claim identified by appellant. Whether salvage law or the adjunct law of finds should be applied to property abandoned at sea is a matter of some dispute.

Martin J. Norris, in his treatise on salvage law, states that under salvage law the abandonment of property at sea does not divest the owner of title. M. Norris, The Law of Salvage, § 150 (1958).[1] Some courts, however, have rejected the theory that title to such property can never be lost, and have instead applied the law of finds. Wiggins v. 1100 Tons of Italian Marble (E.D.Va. 1960). Under this theory, title to abandoned property vests in the person who reduces that property to his or her possession.

The court in In re The U.S.S. Hatteras, Her Engines, Etc, (USDC SD Tex 1981) explained how a court should examine facts to decide whether property has been abandoned at sea:

> A formal declaration is not necessary to determine that an abandonment has occurred; it may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property. While mere nonuse of property and lapse of time without more do not necessarily establish abandonment, they may, under circumstances where the owner has otherwise failed to act or assert any claim to property, support an inference of intent to abandon.

The court below correctly applied this standard and the law of finds. To treat the disposition of a wrecked vessel, whose very location has been lost for centuries, as though its owner were still searching for it, stretches a fiction to absurd lengths. The law of salvage does not contemplate a different result. Salvage awards may include the entire derelict property. Brady v. S.S. African Queen (E.D.Va. 1960).

On this appeal, the United States claims the treasure chiefly upon two grounds: (1) application of the Antiquities Act to objects located on the outer continental shelf of the United States; and (2) the right of the United States, as successor to the sovereign prerogative asserted by the Crown of England, to goods abandoned at sea and found by its citizens.

The Antiquities Act authorizes executive designation of historic landmarks, historic and prehistoric structures, and objects of historic or scientific interest situated upon lands owned or controlled by the United States as, for instance, national monuments. Permission to examine ruins, excavate archaeological sites, and gather objects of antiquity must be sought from the

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[11] Norris raises the specter of violent clashes between competing finders in international waters if abandoned property is held to be a find. We fail to see how salvage law, which gives the right of possession to first salvors, would provide a more effective deterrent to such clashes. Under either doctrine, the property or an award for the value of the salvage efforts goes to the one who is first able to seize possession. The primary difference between the two doctrines is that under salvage law the claim of the finder of abandoned property is satisfied by proceeds from the sale of the property paid into court.

secretary of the department exercising jurisdiction over such lands. As the district court noted, the Antiquities Act applies by its terms only to lands owned or controlled by the Government of the United States. The wreck of the Atocha rests on the continental shelf, outside the territorial waters of the United States. We conclude that the remains of the Atocha are therefore not situated on "lands owned or controlled by the United States" under the provisions of the Antiquities Act.

The United States also claims the treasure as successor to the prerogative rights of the King of England. The English prerogative would seem irrelevant to the wreck of a Spanish vessel discovered by American citizens off the coast of Florida. The government contends, however, that the English common law rule - granting the Crown title to abandoned property found at sea and reduced to possession by British subjects - is incorporated into American law, and that Congress has specifically asserted jurisdiction over the res in this dispute.

While it may be within the constitutional power of Congress to take control of wrecked and abandoned property brought to shore by American citizens (or the proceeds derived from its sale), legislation to that effect has never been enacted. The Antiquities Act, which was intended to facilitate preservation of objects of historical importance, could hardly be read to subrogate the United States to the prerogative rights of the English Crown.

A further provision, the Abandoned Property Act authorizes the administrator of the General Services Administration to protect the interests of the government in wrecked, abandoned, or derelict property "being within the jurisdiction of the United States, and which ought to come to the United States." But the Abandoned Property Act has limited application. The Abandoned Property Act is designed to regulate salvage of property abandoned on government lands or property in which the government has an equitable claim to ownership. The Abandoned Property Act is not a legislative enactment of the sovereign prerogative. Since the United States has no claim of equitable ownership in a Spanish vessel wrecked more than a century before the American Revolution, and the wreck is not "within the jurisdiction of the United States," the Abandoned Property Act has no application to the present controversy.

The district court judgment is affirmed.

Owners of The F/V Sea Star, Individually and as Representatives
for Her Crew v. Tug Gordon Gill, Its Tackle, Etc.

United States District Court, Alaska (1989)

At around 2:00 a.m., Captain Larry Ricks of the Sea Star, a commercial fishing boat, observed a blip on his radar screen, indicating the presence of another vessel. The initial reaction of Captain Ricks was that the blip could be another fishing vessel dragging a net, which might endanger the Sea Star's string of crab pots. Since the other vessel's lights were off and it did not respond to a distress call, Captain Ricks had the Sea Star set out on a chase to approach and observe the other vessel. He found the Gordon Gill, a sea going tug, floating without power, with boarded-up windows and no one on board. The Gordon Gill was then located about seven miles east northeast of Egg Island, a tiny island in the Aleutian Chain. Temperature at the time was in the 20's (above zero) so there were icing conditions. The wind was blowing twenty to thirty knots in eight to twelve-foot seas.

Captain Ricks contacted the Coast Guard, which advised him that the Gordon Gill had been reported lost at sea several months before. When the Coast Guard asked him about his intentions, Captain Ricks said that he would put a man on board, to effect a tow, and try to get the Gordon Gill into a safe harbor.

Captain Ricks gave crewman Tom Payne his survival suit and several strobe lights, and Mr. Payne leaped from the Sea Star to the Gordon Gill. It took three tries in heavy seas for the Sea Star to get a good pass allowing the leap. Payne slid across the wet icy deck of the Gordon Gill, after picking a moment when the swells did not produce an eight to twelve-foot difference in the heights of the decks. Payne then secured a tow rope sent across from the Sea Star.

For more than seven hours the Sea Star towed the Gordon Gill, finally bringing it into Beaver Inlet, a somewhat sheltered bay but with no major towns or harbors, located on the east side of Unalaska Island. After several hours in Beaver Inlet working on the tow line, which was threatening to part under the force of the heavy seas, Captain Ricks determined that it was important to try to beat the weather and to get into an established harbor with man-made facilities such as Dutch Harbor. A gale with thirty-five to fifty knot winds was coming in and would produce impassable high seas, making it impossible for Captain Ricks to bring both vessels to Dutch Harbor, the only practical place to leave the Gordon Gill.

The tow line broke frequently as the Gordon Gill was towed through Unalga Pass on the way to Dutch Harbor because of high seas and opposing current. Each time, crew members leaped back and forth between the wet and icy vessels to resecure the line. On each occasion when the line snapped, it posed a hazard to the Sea Star crew and equipment.

The Sea Star finally arrived in Dutch Harbor towing the Gordon Gill, after about twenty hours of extremely difficult and hazardous work in the salvage operation.

Captain Ricks arranged for movement of the Gordon Gill to a protected spot for long-term storage. Before such storage could be completed, the crew.of the Sea Star secured the Gordon Gill with its own lines at a dock, and pumped out the bilge of the Gordon Gill in order to assure that the salvaged vessel would not sink. The Sea Star then left Dutch Harbor after devoting three work days to the successful salvage of the Gordon Gill.

If the Sea Star had not taken the Gordon Gill in tow given the weather conditions in effect, it would in all likelihood have run aground on one of the nearby islands and been destroyed. The salvage conducted was thus a high order salvage. The Gordon Gill was rescued from great peril at considerable risk to the salvors. The promptness, skill and energy with which the salvors acted was great, and resulted in the safe return of a vessel which had been floating derelict for four months. The means of rescue, though hazardous and difficult, were reasonable in the circumstances. In the very challenging part of the world in which the salvage took place, the Gordon Gill could not have been salvaged at all if the Sea Star had not engaged in the risky and aggressive methods it used.

The Sea Star incurred expense for three days of labor, reasonably chargeable to the salvage in the amount of $10,743. Other uncontested expenses in the salvage amounted to $13,266. In addition, the Sea Star had damage to its winch and lost fishing equipment in the storm when it was unable to pick it up once it had the Gordon Gill in tow. Thus, the total salvage labor and expenses amounted to $50,931.

The most difficult aspect of the case is the determination of the value of the Gordon Gill. Efforts to sell the vessel, where is and as is, for $500,000 to $600,000 have failed, but bids have come in for $300,000 Canadian, $300,000 U.S. and $400,000 Canadian, as is where is, even though the market for such vessels is very poor at this time. It would cost about $140,000 to $150,000 to repair the vessel and get her resurveyed and properly put back in service. Although the vessel was

insured for $1,500,000, this is not evidence of its current value, but rather of the need to insure it against mortgages placed against it.

Based on all the evidence, the vessel is worth at least $300,000, as is where is, and approximately $750,000 if sold in a commercially reasonable manner from a more accessible port. Further, the Gordon Gill could be towed into a port where it could be marketed effectively for no more than an additional $80,000. Thus, I find that the value of the Gordon Gill is $750,000, less the $150,000 repair cost, and less the $80,000 tow cost, for a net value of $520,000.

In the seminal salvage case, The Blackwell (U.S. Supreme Court 1860), Mr. Justice Clifford defined the salvage award as follows:

> Salvage is the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in the cases of shipwreck, derelict, or recapture.

A salvor is usually entitled to his expenses plus a salvage award. The award is more than quantum meruit; salvors are to be paid a bonus according to the merit of their services, and the awards vary according to a judge's conclusion that the salvage service was of "high order," "medium order," or "low order." Justice Clifford identified the six factors a court must consider in setting a salvage award for those who have rendered a valuable service to the owners of a ship or her cargo:

> (1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4) The risk incurred by the salvors in

securing the property from the impending peril. (5) The value of the property saved.[2] (6) The degree of danger from which the property was rescued. [3]

Applying The Blackwell standard, the labor provided by the Sea Star was limited but the speed, skills, and energy displayed by the salvors were high. The value of the Sea Star is about $1.25 million, and the danger to which this craft was exposed was high and the risks to its crew were very great. The value of the Gordon Gill, and of the property salved, was as stated above. The peril to the Gordon Gill was great, the salvage was entirely voluntary, and the salvage was entirely successful.

Considering these factors, the appropriate salvage award is $224,265, composed of about one-third[4] of the value of the salvaged vessel, plus more than $50,000 in expenses incurred as set out above. This is to be divided between the owners and the crew of the Sea Star in accord with the agreement they have made among themselves.

Judgment for the owners and crew of the fishing vessel Sea Star as ordered.

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[22] The value of the property saved is often a most important ingredient in determining the amount of salvage. The remuneration to the salvor and benefit to the owner are always larger where the property that receives assistance is large than where it is small; and vice-versa. The rule of decision is not a proportion, although the amount may be and often is expressed in that form in the decree, but an adequate reward.

[33] These six factors have been articulated in exactly the same way since first offered by the Supreme Court in 1860. In recent years, a seventh factor has emerged and is being evaluated, where appropriate, by admiralty courts. As explained by the court in MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel Believed to be The Spanish Treasure Ship, The San Fernando (USDC SD FLA 1986), preservation of the archaeological integrity of the site will constitute a significant element of entitlement paid to the salvor. Unlike the instant matter, in the case of a salvage of an ancient treasure ship, archaeological preservation, on-site photography, and marking of the site, serve the public interest in protecting a window in time and in creating an historical record of an earlier era.

[44] This award fits well within the range of recent salvage awards. See, e.g., Allseas Maritime v. M/V Mimosa (USCA 5th Cir. 1987) [salvage award of two-thirds of tanker valued at $400,000 divided among multiple salvors]; Vernooy v. New York (NY Court of Appeals 1987) [salvors who discovered two 18th century cannons in Lake Champlain entitled to a salvage award equal to 50% of the cannons' total $68,000 value, plus $11,500 in non-legal expenses and storage fees]; HRM, Inc. v. S/V Martha Mia (USDC RI 1991) [salvage award of 25% of the combined value of $67,000 of two pleasure boats saved from being driven ashore in 30 knot winds].

MODEL ANSWERS

Answer 1

Arbitration Settlement Statement

Statement of Facts

In October 1996, MDG located the remains of a 140 year-old shipwreck of the Merida, after a five year search, using technology and computer analysis developed by MDG specifically for this project.

The Merida sunk in November 1857 about 100 miles off the coast of Columbia. When lost at sea, the Merida was carrying a Cargo of gold bullion then valued at $1.6 million and assets belonging to passengers of about $600,000. The present value of possibly recoverable assets is approximately $327 million, according to conservative estimates.

MDG filed an in rem action to claim the property based on its recovery efforts. CGI, an insurance consortium, has contested our claim and asserted an ownership interest based on claims paid on the original disaster of allegedly $500,000 to $1 million dollars in 1857 and 1858.

I. MDG is the true owner of the Merida, an abandoned shipwreck, because MDG has taken possession and control over the ship by locating, preserving, and retrieving the assets.

The law of finds awards title of abandoned property to the first finder who takes possession of the property with the intent to exercise possession and control. (Zych)

MDG has, through its own efforts, researched and developed the tools and means used to locate the property. MDG has developed the technology required to recover the property and has spent 5 years doing so, therefore, MDG should be awarded title to the property.

The Merida is abandoned property.

Property is considered abandoned if the original owner:

1. Intended to abandon and
2. Owner physically acted to carry intent into effect. Zych

Abandonment may be inferred from the circumstances, from conduct clearly inconsistent with the intent to return and from the nature and situation of the property. Treasure Salvors.

Here, the owners of the Merida and the insurers have made no effort in the 140 intervening years to locate or recover the cargo or wreckage. Indeed, only the insurance companies assert any present interest. CGI admits that it has not retained any documents relating to the loss, which it would routinely do if it considered any recovery possible.

When MGD began this expedition, CGI was asked to join recovery efforts but declined and bore none of the risks associated with the effort. Because the lapse of time and the actions of CGI show intention and actions to abandon the Merida, title should be given to MGD.

II. The law of salvage does not apply because CGI clearly abandoned the Merida.

In Treasure Salvors, the Fifth Circuit held that the law of finds, Supra, may be applied to clearly abandoned maritime property rather than the law of salvage. The law of salvage, sometimes applied in admiralty, treats property lost at sea so that original owners retain interest although salvors are entitled to liberal salvage fee. (Zych) In Treasure Salvors the court applied the law of finds to award the property to the salvage company where the intent to abandon was clear from the circumstances.

Zych is distinguishable because although the court awarded the Lady Elgin to the insurance company, it did so because Aetna was able to show that it had no intent to abandon. CGI's intent to abandon is clearly inferred from the circumstances.

III. If the law of salvage applies to give title to CGI, MGD is entitled to recover all its expenses, plus a "high-order" salvage award.

A salvage award is compensation for saving/recovering property from loss at sea. Sea Star, citing The Blackwell.

Factors to be considered are:

1. labor expanded
2. skill and energy involved
3. value of property employed
4. risk incurred by the salvor
5. value of the property saved
6. degree of danger from which rescued.

A seventh factor emerging is preservation of the archaeological integrity of the site.

Applying these factors, a salvor is entitled to a bonus according to the merit of their services. Sea Star A high order salvage award may range up to 2/3 of the property saved value.

1. labor

MGD has spent five years on this project. The partners Ansello and Miller are an ocean engineer and a deep sea recovery specialist. Without their skills and efforts, the Merida would likely never have been recovered.

2. skill and energy

MGD used their personal resources and private investment to finance the venture. They developed computer analysis and the deep sea robotic device, the Atlantis, necessary for recovery.

3. value of property

The computer analysis program and the Atlantis are both cutting edge technology. Overall MDG expended about $5.5 million before any gold or cargo ever recovered.

4. risk incurred

Aside from obvious financial risk, salvage itself is dangerous hazardous work. In fact, Arturo Ansello, son of MDG partner Dr. Ansello was killed during recovery efforts.

5. value of the property

Present estimates of the Merida's value range from around $300 million to $1 billion.

6. degree of danger from which rescued

Without efforts of MGD, Merida may not have been recovered. Changes in tides, seismic activity, other natural forces could have lost the property to CGI forever.

Settlement Proposal

In settlement of CGI's claims, MDG will offer payment of $50 million from the proceeds of sale of property recovered from the Merida. This proposal is fair and reasonable because even if the Merida belongs to CGI, MGD is entitled to expenses and a high order salvage award.

Based on an independent cost benefit analysis, the value of all property recovered to date and yet to be recovered is approximately $327 million. Of the $327 million, about 1/3 of those assets represent gold coins/assets carried by passengers which were not insured. CGI represents insurers of the cargo and vessels only and cannot claim an interest in these assets. Since no estates of deceased passengers have made any claim, these assets, worth approximately $110 million belong to MDG.

Of the remaining $217 million, MGD is entitled to a salvage award of expenses and bonus based on Blackwell factors. Here, MGD's expenses are over $26 million.

Also high-order salvage bonuses range from 1/4 to 2/3 the value of the property. Sea Star. Therefore, CGI would at a minimum owe $80 million to MGD ($54 million salvage and $26 million expenses) or up to $134.5 million ($108.5 salvage and $26 million expense). CGI's maximum entitlement would be $82 million - $200 million. Because this settlement allows CGI to avoid loss by being found to have abandoned Merida and the related litigation expenses and because MGD bears all risk that recovery is less than expected or more expensive to recover, present settlement of $50 million is fair to CGI.

ANSWER 2

ARBITRATION SETTLEMENT STATEMENT

Statement of the Merida Discovery Group (MDG)

Earlier this year, MDG finally was able to confirm that it had discovered the long-lost ship Merida, culminating an arduous, multi-million dollar high-tech exploration by a team of scientists and explorers led by Dr. Ansello and Buck Miller. The Merida sank in 1857 off the coast of Columbia, carrying large deposits of gold bullion and even greater wealth carried by the passengers on board. The exact location of the wreck remained a mystery. The insurance companies, who apparently paid between $600,000 and $1 million in claims for the bullion - records are scarce and reports vary - apparently made no effort to locate the ship, considering it a lost cause. As one expert at the time noted, under the conventional wisdom of the time, "The Merida is lost forever." Two companies, The Sojourner and Leeds Companies, did talk to an eccentric inventor who hoped (by some accounts "claimed") to invent a submarine to search for the ship. However, the companies did not pay anything to him and no search was attempted. Submarines have in fact existed since the 1860s, but that alone created little hope the ship could be found.

MDG is an experienced team of scientists and divers who have exclusively focused and dedicated themselves to finding the Merida for more than two years, and the team leaders, Dr. Paulette Ansello and Buck Miller, have been researching for more than five years. Ansello is an expert ocean engineer, and Miller is a highly-experienced, world renowned diver with experience as a sea recovery specialist at sites all over the world. MDG sought investors and received $5.5 Million.

The substantial investment was entirely dedicated to the risky proposition of finding the gold - if nothing was found, the backers would have little to show for their investment. Including the development of new research technology and infrastructure and all dives through June 30, 1997, MDG has spent nearly $12,000,000. Costs for the project through July 31, 1998 are estimated at $26.35 million, not including an additional $3 million in legal costs that would be required to defend the suit by CMI.

MDG has agreed to submit the issues to arbitration in the hope that they can be expedited more efficiently.

ARGUMENT

Introduction

The law of sunken underwater treasures is governed by two legal doctrines: abandonment, which awards full recovery to the finder, and salvage, which awards a substantial award to the finder, above and beyond its costs under quantum meruit. It is important to recognize that, while abandonment is the preferred argument, MDG should recover the vast majority of the value whichever theory is used.

I. The majority of the find cannot be claimed by CMI because they do not have subrogation rights of personal property.

While it remains unclear whether CMI ever had any ownership rights over the gold bullion, it is clear that the consortium has no interest in the personal property aboard the ship, including the gold coins and jewelry that belonged to the passengers. According to the estimates

of an independent cost-benefit analyst hired by MDG, the gold bullion represents only 15% of the value of the find. Furthermore, while historical accounts indicate the ship carried $2 million in bullion (1857 dollars), the insurance companies only paid claims of $600,000 to $1 million (and even this needs to be established, since they have destroyed records). Therefore, they apparently should only have subrogation rights over a portion of the gold bullion.

Note: [CMI also has some claim, if their rights are established at all, to part of the $45 million from the ship artifacts - before we submit this brief, we should ask Munson and Peters to break down how much is from the ship, which CMI can claim, and how much was personal property (CMI has no clairn)]. (This is note to firm - should be answered and then removed from doc.)

II. Substantial Evidence Exists that a court would reiect CMI's claim in its entirety on the grounds that it abandoned Merida.

To save time and avoid litigation, MDG has agreed to submit to arbitration, and will not make a claim here for 100% recovery. However, in doing so, it is sacrificing a substantial legal claim of abandonment.

Any settlement calculated upon a salvage theory should additionally compensate MDG for forgoing this legal claim. CMI benefits from the litigation costs and avoids a risk of complete divestment.

A. CMI made no physical attempts to search for Merida: allowing an inference of abandonment,

CMI has presented no evidence that it has ever, in 140 years, lifted a finger to search for Merida. While it "hired" an erratic man who said he would look for it, this person had no apparent experience, funding, or equipment, and CMI paid him no consideration and did not assume any liabilities, according to newspaper accounts. For years, CMI might have operated on the belief that it was scientifically impossible to find and recover Merida. However, as CMI's officer admits, the company has known that scientific advancements have made an exploration possible, perhaps even cost effective, for 20 years. Still, CMI has apparently never considered searching for the ship.

In In re Hatteras, a federal district court held that a formal declaration is not necessary to establish abandonment, and that it may be inferred when the owner "has otherwise failed to act or assert any claim to property."

While in Zych, a court found this doctrine inapplicable when only minimal choice of success existed, CMI representatives acknowledge and MDG's find proves that the technology does now exist and has for at least several years. A third court, in Wiggins, agreed that when failure to conduct any efforts occurred while the location and availability could be determined, an inference of abandonment could be raised.

Because CMI failed to take any steps whatsoever to locate the ship even after its own representatives appreciated its discoverability, it can be inferred that they abandoned the ship.

B. Even if affirmative evidence of abandonment is required, CMI abandoned Merida by destroying all records and by refusing to cooperate with or show interest in legitimate recovery efforts.

Zych and some theorists have asserted that there is a presumption against abandonment and some affirmative evidence must be shown. CMI has taken at least two steps that illustrate its abandonment.

1. Destruction of Records

Mr. Birch, Document Director for Leeds, one of the largest CMI reps, asserted in a sworn deposition that it is a long-standing practice in the insurance industry to maintain records of any policies for goods lost at sea that the company had any hope of recovering. Such documents were exempt for the regular document destruction policy. While MDG is unable to prove that the policy was in place in the 1860's, the fact that the documents no longer exist indicate a substantial likelihood that Leeds had abandoned any hope of recovering. The physical destruction of papers is a manifest affirmative act.

2. Refusal to cooperate with or show interest in MDG's work

When MDG approached CMI about the possibility of finding Merida, CMI clearly refused to be of any help and told MDG that they were not interested, even after MDG demonstrated a impressive team and technology plans capable of finding the ship. Their behavior shows an unwillingness to expend effort, effort that is essential to avoid an inference of abandonment. It could also be interpreted as an affirmative revocation.

CMI might argue that it continued its assertion of ownership by placing surveillance planes to watch MDG. While this does help their claim by showing some interest, it should hurt even more by illustrating their lack of genuine efforts necessary to warrant the protection of property rights.

Therefore, MDG is capable of making a substantial good faith claim that it is entitled to 100% of the find because CMI has abandoned it. Because any settlement would spare CMI this risk, it should be accounted for in the calculation.

III. Even if CMI did not abandon Merida, MDG is entitled to a substantial portion as salvage award.

It should be first noted that CMI is not entitled to the personal property as a matter of law, and the salvage calculations only apply to the estimated $52 million in gold bullion and the undetermined value of personal property.

Second, it is important to establish that, while salvage awards are often represented as a percentage, they are in fact primarily intended to compensate in money the efforts, risks, and investment of the finder. While the common range for such awards, as noted by one count, is 25-67%, they can be as high as 100% when the finder's risks and expenses greatly exceed the owners's present-day interests (see Brady v. Africa Queen for 100% salvage award). The awards of less than 50% are generally low order and medium order services (see below).

The US Supreme Court set forth a six-part test for salvage awards in The Blackwell, in 1860. With only the addition of a 7th factor, the test continues to be applied today.

The Court said, "A salvor is usually entitled to his expenses plus a salvage award. The award is more than quantum meruit - salvors are paid a bonus according to the merit of their services, and the awards vary according to whether the service was of "high order," "medium order" and "low order." This determination is made using a 6 (now 7) factor test:

1. Labor Expended: Ansello and Miller have worked on this project for 5 years, full-time for nearly two. They assembled a team of researchers and divers and have conducted extensive research. Even using special new techniques devised by them for this project, they still had to scour 750 square miles of uncharted ocean floor. This was clearly a major

effort. Thousands of man-hours were put in, many not calculated in the $26 million projected cost.

2. Skill and Energy Used: Miller is recognized as an international expert, and Ansello is a Ph.D. scientist. The team used complex meteorological and mathematical models to calculate the approximate location. They used wide-swath sonar, and developed what has been described as a new field of science, using patterns to calculate sinking rates, drifting patterns, and currents. They designed a prototype and then actual ocean rover, using state of the art research and design. The Atlantis rover cost $2,346,000 to design and build. These highly-specialized techniques required considerable skill, investment, and dedication.

3. Value of Equipment Used: As noted the Atlantis rover cost over $2 million. The boats, sonar, diving equipment, computers, and other materials are also worth millions. (Note: better calculation would be preferred - can be an estimate).

4. Risk Incurred: The project was a tremendous financial risk and was also very dangerous. The two initial investments, totaling over $5.5 million were drawn from financial investors seeking a return on their money. All of this money was expended on the project, and would have been completely lost had the project failed. The personal risk took a serious toll. Dr. Ansello's son was killed during the project. Diving in deep ocean is very dangerous and requires special care. Ansello's son was an experienced diver, but using new equipment exposed new risks.

5. Value of Property: The Sea Star case emphasized that finders should reap greater fees when they make a difficult recovery of a more expensive treasure.

6. Degree of Danger from which Rescued: The degree of danger is more relevant to property which is at risk of immediate destruction, like the Sea Star. For underwater treasure, a more apt test is difficulty of recovery. Because owner, CMI, had a very low expectation for recovery, they are less entitled to recovery, more so than if they were likely to get it back intact on their own.

7. A seventh factor has been added in modern courts - see Sea Star, footnote 3, Archeological and scientific value - Finders are entitled to keep a greater share when their activities result in public goods. MDG is carefully preserving historical, scientific and archeological details of the ship. They are working closely with marine biologists and Smithsonian curators. These efforts should be reflected in their compensation.

Thus, on each of the seven factors MDG's efforts are of the highest order. The 25% recovery named in Sea Star was a low order find. High Order recoveries range from 50% and up. Any arbitrator should rationally conclude that, if this suit went to court, CMI stands to lose at least half of the gold bullion.

IV. Settlement Offer (Res is total amount subject to salvage fee)

Total Res

Gold Bullion - The value of the bullion is estimated at $52 million, $7 million of which has already been recovered.

Other Property - For now, I will assume the other property, valued at $50 million, is 75% personal property and 25% ship, based on the percentages of gold. Thus, the property available to CMI here is $12.5 million.

The total res is $64.5 million. All other property is personal property for which they have no claim. Because CMI only paid up to $1 million in insurance, they only covered 1/2 the gold bullion. Thus, that amount should be reduced to $26 million, and res = $38.5 million. The costs of the project are $26 million. As noted, MDG is entitled to costs. $38.5M -$26M = $12.5M. Of this amount, MDG should receive at least a 50% salvage fee. This would leave CMI with $6.25 million.

Because CMI is willing to drop its claims, we are willing to add half our expected litigation costs of $1.5 million. Also, we are willing to add 5% to our estimated gold price, which was conservative. At $420/oz., it would raise the take by about $600,000. (.05xl/2goldx.5% fee). Thus our offer is 6.25M & 600K & 1.5M = $8.3 million.

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

INSTRUCTIONS

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

BLANE, MORA & NIEBAUM, LLP
Attorneys at Law
M EM O R A N D U M

To: Applicant
From: Craig Mora
Date: July 25, 2006
Re: SavAll Drugstores, Inc. v. Phister Pharmaceuticals Corp.

Our client, SavAll Drugstores ("SavAll"), a multi-national chain of discount retail drugstores, sued Phister Pharmaceuticals ("Phister") for Phister's longstanding anti-competitive practice of refusing to sell its popular cholesterol control drug Serapatrin to SavAll.

Phister has been stonewalling us on discovery. Most recently, we propounded a narrowly drawn request for production of documents requesting Phister to produce all e-mail messages sent and received in the last five years bearing on the subject of sales and pricing of Serapatrin. About six weeks ago we had a hearing before Discovery Commissioner Felicia Moreno on our motion to compel production of the e-mails and Phister's cross-motion for a protective order seeking either to deny production or shifting the entire cost of production to us.

As ordered in the Commissioner's Findings of Fact and Order, we have taken steps to develop the facts surrounding the discovery issues by deposing Phister's Chief Technology Officer, Chester Yu, and Phister has deposed SavAll's computer expert, LaVon Washington.

I want you to prepare our supplemental brief. Our position is that Phister should not be relieved of the obligation to produce the documents and that Phister should pay the costs of production. I have attached a recent ruling in Columbia, Zwerin v. United Merchant Bank, that sets forth the currently applicable rules on production and cost-shifting concerning electronically stored data. I have also attached a later case, Baldocchi v. Orion Films, Inc., which applies the Zwerin factors and gives you some guidance on how to apply the rules.

Based on Commissioner Moreno's order, Phister has stipulated that it will produce at its own expense all readily available e-mails, i.e., e-mails that Mr. Yu said in his deposition remain on the individual users' hard drives and haven't yet been transferred to storage. Therefore, this first-level category (i.e., "category one") of e-mails is no longer in dispute.

In accordance with the guidelines set forth in Commissioner Moreno's Order, please draft a persuasive brief in which you do the following:

1. Summarize in a short introductory statement of facts the steps we have taken since the last hearing before the Commissioner and categorize the levels of data storage identified in the depositions; and

2. Argue that (a) Phister's motion for protective order relieving it completely of the obligation to produce the electronically stored data should be denied and (b) that Phister should be required to produce, at its own expense, all the e-mails in the remaining categories.

BLANE, MORA & NIEBAUM, LLP
Attorneys at Law
MEMORANDUM

To: All Associate Attorneys
From: Executive Committee
Re: **Persuasive Briefs**

To clarify the expectations of the firm and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

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

Following the Statement of Facts, the argument begins. The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER**: COLUMBIA HAS PERSONAL JURISDICTION. **PROPER**: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The associate should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

IN THE SUPERIOR COURT IN AND FOR THE STATE OF COLUMBIA

SAVALL DRUGSTORES, INC.,	*	
Plaintiff	*	**Case # 413406 FM**
v.	*	
PHISTER PHARMACEUTICALS CORP.,	*	**Findings of Fact and Order**
Defendant	*	

This matter came on for hearing on June 6, 2006 on a discovery motion of plaintiff SavAll Drugstores, Inc. ("SavAll") to compel production of documents and a cross-motion of defendant Phister Pharmaceutical Corp. ("Phister") for a protective order relieving it of the obligation of producing the documents or, in the alternative, requiring SavAll to pay all costs of production.

The underlying action is a suit brought by SavAll for injunctive relief and damages arising from the alleged violation by Phister of the Columbia Unfair and Deceptive Trade Practices Act (the "Act"). The conduct complained of is the alleged refusal of Phister to sell its popular cholesterol control drug, Serapatrin, to SavAll during the period of the five years preceding the filing of this action. SavAll alleges that Phister unlawfully attempts to control and fix retail prices in violation of the Act.

SavAll propounded the following Request for Production of Documents:

Request No. 34: Please produce, either in hard copy or in readable electronic form, all e-mail messages sent and received by Phister's Sales and Marketing Department staff to and from other members of said staff regarding Serapatrin retail prices set or recommended by Phister during the period January 2001 to the present.

Phister's objection is that it would be unduly burdensome for it to comply with

SavAll's request for the e-mails. Its assertion of burdensomeness is based on the following facts. In the past 20 years, Phister, like most modern business entities making the transition from recording their business transactions in paper media to computerized methods, has increasingly converted its record-keeping, management reporting, and interoffice and customer communications systems to electronic media. Throughout that period, Phister has had a records retention practice of periodically purging the hard drives on the computers utilized by its employees, including the members of its Sales and Marketing staff, and preserving all data therefrom which are stored randomly in various "backup" media such as digital tapes, floppy disks, compact disks ("CDs"), and the like, in archives. The data are not segregated by type. For example, a particular backup tape or CD might contain indiscriminately stored e-mails, marketing reports, accounting records, 20 interoffice memos, and the like. Phister claims that for it to segregate and retrieve e-mails from five years of such randomly stored data would be extremely costly and consume time and resources that Phister cannot divert from its business objectives. Additionally, over the years Phister has gone through an extensive series of modernizations of its computers and systems. As a consequence, the means of retrieving and reproducing the e-mails from storage media more than about a year old are no longer available internally. Thus, Phister asserts that either it should be relieved of the obligation to produce any e-mails except those that happen to be readily available in hard copy, i.e., in paper form, or SavAll should be required to pay all costs of retrieving and reproducing the e-mails, including the time and expense incurred by Phister personnel to review the e-mails for the purpose of redacting privileged and business-sensitive/confidential information.

SavAll responds by saying that Phister's election to store its documents in electronic media rather than paper does not alter the usual rule that the burden and cost of production must be borne by the producing party, i.e., it is no different than if Phister had used paper memos rather than e-mail. Moreover, there must necessarily be a number of e-mails on hard drives that have not yet been purged and transferred to archival storage media. Those can certainly be merely printed out and produced to SavAll. Also, the most recent archival backups must necessarily be easily retrievable by Phister's existing computer equipment and personnel.

SavAll is correct in stating that the usual presumption is that the producing party, in this case Phister, is required to bear the cost of producing the requested documents. However, Rule 26 of the Columbia Rules of Civil Procedure gives the court broad discretion to depart from that presumption in part or in whole depending on the circumstances. The widespread use of computers in the conduct of business, the indiscriminate storage in bulk form of vast amounts of information, and the repeated advances and obsolescence of the means of data storage and retrieval have presented unprecedented discovery issues and

require the courts to adopt novel approaches to discovery requests that require production of stored, archived electronic data.

On the record before me, the parties have simply not presented enough information to rule on all aspects of the cross-motions. However, based on the moving papers and the arguments presented at the hearing, I can and do make the following findings of fact:

- This litigation presents important public policy issues having to do with price fixing and consumer protection.

- SavAll's claim appears to have some merit – it has come into possession of about 50 pages of e-mails that tend to show efforts by Phister to manipulate prices of Serapatrin.

- The disputed request for production (Request No. 34, supra) is sufficiently narrow and specific to overcome any objection that it is vague or overbroad.

- The amount of money at stake is significant. SavAll is suing for its lost profits, which it estimates to be in excess of $120 million over the past five years, to be trebled if SavAll can prove the statutory violation.

- The effect of the court's ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay for this important drug.

- Both parties, SavAll and Phister, are large multi-national corporations with substantial resources.

- SavAll already has in its possession a number of printed-out e-mails that tend to bear on its allegations of wrongdoing by Phister. Although it cannot be ascertained at this stage whether the sources SavAll seeks to discover contain a "gold mine" of information that might support SavAll's case, the materials that SavAll has already discovered suggest that there might be other similar data embedded in Phister's stored data.

- Because Phister is a drug and pharmaceuticals manufacturer, it is required by the Federal Food and Drug Administration to retain all communications relating to its sales, marketing, and manufacturing functions for a period of seven years.

- The five-year period covered by SavAll's request is reasonable, given that the

complaint alleges that to be the period of Phister's alleged misconduct toward SavAll.

- Phister has designated Chester Yu, Vice President and Chief Technology Officer of Phister, as the "person most knowledgeable" about Phister's computer systems, record retention policies, and record retrieval methodologies.

- LaVon Washington, an independent consultant retained by SavAll, is the person designated by SavAll as its "person most knowledgeable" on discovery of electronically stored data.

There is no reason to depart from the presumption that Phister must bear the cost of producing all requested e-mails retrievable from as-yet unpurged hard drives that are in active use. Phister has stipulated that it will do so. I will withhold all rulings on the remaining issues until the parties have developed further information as prescribed below.

In Zwerin v. United Merchant Bank (Columbia Court of Appeal, 2002), the court
approved an approach that appears suited as the mechanism for resolving the issues presented in this case.

Accordingly, I make the following ORDER:

1. Phister shall produce at its own expense all requested e-mails retrievable from as-yet unpurged hard drives that are in active use.
2. The parties shall develop a factual record based on Zwerin's analysis to the extent applicable and file supplemental briefs arguing in support of their positions. The most expedient means of developing such a record would be for the parties to take the depositions of each other's "person most knowledgeable," but I leave it to the parties to make that determination.

Date: June 16, 2006

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Felicia Moreno
Superior Court Discovery Commissioner

EXCERPT OF TRANSCRIPT OF DEPOSITION OF CHESTER YU

MR. CRAIG MORA [Attorney for Plaintiff, Savall Drugstores, Inc.]: Mr. Yu, are you the person at Phister Pharmaceuticals Corp. ("Phister") who is principally responsible for computerized office systems?

CHESTER YU: Yes, that's right. That's been my responsibility for about the past 15 years.

Q: Over that period of time, to what degree has Phister utilized computers to conduct communications internally and with customers?

A: Well, when I first joined the company, we had, by comparison to today, a fairly primitive computer system, and the programs weren't very sophisticated. We've been through several upgrades in the equipment and programs we use. At first, the computers were only used by specially trained people. Nowadays, almost everybody uses them, and most of our business is carried out by means of various computer media.

Q: Well, my questions will focus principally on the extent of the use of computers as the means of communications in Phister's executive, sales and marketing departments, and with customers. Did there come a time when Phister adopted an official "paperless workplace" policy?

A: If by that you mean did we reach a point where we decided to forego to the extent possible the use of hard copy – that is, paper – and begin using mainly electronic media to generate, communicate, and store business information, the answer is yes. We began implementing such a plan about 10 years ago and, I'd say, it's been fully in place for the past 7 years.

Q: Has e-mail always been a component of your computer system?

A: Yes, although in the early days it was pretty basic. Over the years, we've used

probably 6 or 7 different e-mail programs, changing them as improvements came on the market. For the last year or so, we've been using the SoftPlan program because we've found it to be the most compatible with most business uses.
Q: Has e-mail been the principal means of conducting written communications among your executive, sales, and marketing staff and with your customers over the past five years?

A: Well, I can't say it's the principal method, but it is very widespread. It just depends on the nature of what's being communicated and the nature of the transaction.
Q: Isn't it correct that Phister prescribes to its wholesale and retail customers the prices at which its products, particularly Serapatrin, should be sold?
A: I don't know that "prescribes" is the right word. I know we "suggest" prices.
Q: Okay, I'll use your word. Does the company use e-mail as a medium of communicating internally and among its customers its pricing policies and "suggestions" as to prices?
A: Yes, I'm sure we do.
Q: In any given day or week or month in the past 5 years, how many e-mails relating to pricing of Serapatrin are sent and received by company employees and its customers?
A: You know, I really have no way of knowing. There are thousands of sales, marketing, and executive employees and customers all over the world, and the number has increased over the years as we've grown. I think I can safely say that in the past 5 years there are thousands of such e-mails every month. I can't even guess at how many of them relate to Serapatrin, but it must be in the hundreds every month. Probably very few of those would have anything to do with the pricing of Serapatrin.
Q: Does Phister have a policy or practice of printing out these e-mails?
A: No. We discourage it. However, I'm sure some people print out ones they particularly want to keep, but we have no way of tracking that. The whole object is to minimize the use of paper and the expense of maintaining paper files. We can store electronic documents

at virtually no cost, whereas it costs huge amounts of money to process, file, and store paper documents.

Q: Aside from retrieving these e-mails electronically, how else can we get them?

A: I don't really know. I guess we could canvass our sales and marketing employees to ask for any printed-out ones or canvass our customers for the same thing. But that would produce questionable results.

Q: I agree. That would be a waste of time and money. Well, let me ask you this. In the past 5 years, has Phister had an official record retention policy regarding electronic documents?

A: Yes. It's been generally the same for about 10 years, and it works this way. We "back up" all of our computer transactions and communications at the end of every business day just in case of an emergency. Then, every 30 days, we do a "sweep" of all the hard drives in our company-wide computer system and transfer all the data to permanent storage for our archives.

Q: So for 30 days, all e-mails that a particular individual staff member sends and receives stay on the individual user's hard drive, and all you'd need to do is print them out, is that right?

A: That's right, unless the individual deletes them for some reason.

Q: OK. Why do you do "sweep" or "purge" the hard drives every 30 days?

A: Two reasons. First, to guard against the possibility of a catastrophic systems failure such as might result from power failures, computer viruses, fires, casualty losses, and so forth. If need be, we'd be able to reconstruct all the data. Second, to clear old data off the system and maintain the useable computer capacity we need just to conduct our business.

Q: Has it ever happened that you've had to reconstruct data from your archives?

A: Fortunately, not on any significant scale.

Q: Isn't it true that one of the reasons you have to back up your systems is that the federal Food and Drug Administration requires you to retain all communications relating to sales, marketing, and manufacturing functions for 7 years?
A: Yeah, that's right. But we don't segregate that stuff from all the other backed up data. We've never been called on by the FDA to retrieve such communications, so I don't know what we'd do if we needed to.
Q: What mediums do you use to preserve and store the archived materials, and how far back do you save them?
A: We actually still have all the archives for the past 15 years that I know of – they're all stored in an offsite fireproof vault. It costs virtually nothing to store the disks and tapes, so we just keep them rather than try to sort through them. As far as the actual storage mediums are concerned, those have changed over the years along with advancements in computer science. Of course, for 30 days, before we do our monthly "sweep" the data

remain on the individual users' computer hard drives, so that's one storage medium. In the early days, we used ordinary recording tapes. Then we switched to compact disks, then to offsite hard drives. It just depended on the degree of sophistication of our system and capabilities and what business programs we were licensed to use at any given time.
Q: What about in the past 5 years?
A: I'm sure we've used some of each storage medium. For the past year, we've been using the latest SoftPlan Office operating systems and storing our backups on offsite hard drives. Before that – let me see. I'd say that during 2004 and 2005 we used mainly compact disks – CDs - and during 2002 and 2003 we used tapes.
Q: Let's take them one at a time. Is there a single offsite hard drive that contains all the backup data for 2006 and, if not, how many are there?

A: Oh, no. There are hundreds of them. When one fills up, we remove it and replace it with another and store the filled up ones.
Q: How about the CDs Phister used in 2004 and 2005? How many of those are there?
A: I'd have to say thousands – they don't hold as much data as the hard drives we're now using.
Q: And how many tapes that you used in 2002 and 2003 are there?
A: Again, I'd have to say thousands.
Q: Now, you've said that you've never segregated the stored data. What do you mean by that?
A: I mean that any given storage device in the archives will contain an unsegregated mass of data – e-mails, letters, accounting reports, marketing and sales reports, business plans, and any other kind of business documents you can think of randomly recorded on the storage medium.
Q: Would I be correct in assuming that there are computer programs that will allow you to search each of the storage mediums by document type and content and retrieve only the e-mails that deal with matters relating to the pricing of Serapatrin?

A: It would be a lot of work but possible to do that with the stored hard drives we've been using in the past year, but I have serious doubts that we could do it with any of the earlier storage mediums – at least, not in-house.
Q: Please explain that.
A: Well, for the past year, all the data we've stored was initially produced on programs that are compatible with our current e-mail system and the SoftPlan system. So, it would be possible to run and sort the data and pull out the e-mails.
Q: Why do you put the emphasis on the word possible?
A: Because it would be a tremendous amount of work and extremely expensive. We don't have the spare personnel it would require, and if we assigned existing staff to do it we wouldn't be able to get our normal work done. We'd have to hire extra people. Also, it

would tie up computer capacity that we need for everyday business matters.
Q: Have you tried to figure out what it would cost to do this?
A: Yes. It's hard to estimate it with any certainty, but just to retrieve the e-mail data you want from the hundreds of hard drives we have, assuming everything went smoothly, would take about 1500 employee-hours. At an average of $25 an hour, which is about what qualified people would have to be paid, that would be $37,500. Then, we'd have to print them out or transfer them to CDs, have someone read them all to make sure they're responsive to your request and sort out any confidential or privileged data – maybe another $15,000, for a total of just over $50,000. I suppose we could get a better idea of time and cost if we ran a sample with a few hard drives and extrapolated from there.
Q: OK. Couldn't you do the same thing with the CDs and tapes from the earlier years?
A: Probably not. The farther back in time we go, the less likely it is that we have the capability of even being able to read the data. What I mean by that is that we've changed the computer equipment and the software programs that were in use when the data were initially recorded. We'd have to reacquire the equipment and programs – if that's even possible anymore – to be able to read and retrieve the data.
Q: Have you made any estimate of what that would cost?

A: That's really hard to do. As to the CDs we used in 2004 and 2005, the equipment and software programs are probably still available on the market. I suppose we could lease the equipment and renew our licenses to the software programs. The rough cost of that would be about $25,000 a month, and it would probably take about 6 months -- $150,000, plus about $50,000 in additional personnel costs to do the work. So, for those CDs, a total of about $200,000. I suppose we could outsource it and have an outside specialist do the work, but, even at that, we'd have to supervise and review the production of the materials,

probably at a total cost of $150,000 to $175,000. It's cheaper than doing it in-house, but we have to worry about losing control of the process and the danger of disclosing confidential business information. That's a major concern of ours, so I don't think we'd be willing to just turn the materials over without subjecting them to a careful review before we produce them to SavAll.

Q: What about the tapes from the earlier years?

A: That would be just about impossible for us to do because I don't think we could replicate the equipment and programs necessary to read and retrieve the data. We'd have to outsource that to outside contractors who specialize in such work. I've gotten a very rough estimate from an outside contractor – he gave me the figure of $250,000 to read, sort, and reproduce the relevant information. So, adding it all up, it would cost somewhere in the neighborhood of $500,000 to do what you're asking us to do. And, what makes that hard to swallow is that there probably isn't much to be found. I mean, Phister hasn't tried to fix prices like SavAll has accused us of doing, so you're not going to find much.

Q: Well, to defend this lawsuit, you're going to have to do exactly what we're asking you to do – go through all the data and prove that you haven't fixed prices. Isn't that right?

A: I don't think so. It's not our job to prove the negative. It's your job to prove it, so, as far as we're concerned, we don't need to go through any of the data for Phister's benefit. Although I guess it would marginally help Phister in defending the case if we were to search the data and find that there were no responsive e-mails. But we have absolutely no current business need for the data.

MR. MORA: No further questions.

END OF DEPOSITION

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EXCERPT OF TRANSCRIPT OF DEPOSITION OF LAVON WASHINGTON

MS. LAUREN LATHROP [Attorney for Defendant Phister Pharmaceuticals Corp.]:

Mr. Washington, can you please explain the capacity in which you've been retained by SavAll Drugstores, Inc. ("SavAll") in this lawsuit?

LAVON WASHINGTON: Yes. I am the principal owner of a consulting firm called Innovative Computer Solutions. We specialize in retrieval and reproduction of electronically stored data. SavAll has retained my firm to assist it in pretrial discovery in its suit against Phister.

Q: Are there companies other than yours that do that kind of work?

A: Oh, yes. We have lots of competition.

Q: You were present during the deposition of Chester Yu, Phister's Chief Technology Officer, weren't you, and you have read the transcript of his deposition, haven't you?

A: Yes.

Q: Do you understand Mr. Yu's testimony to the effect that Phister has experienced successive changes in the computer equipment, software programs, and data storage mediums it has utilized over the years?

A: Yes. What he said is fairly typical of the transitions the business community has gone through in recent years. Computer science has changed at an accelerated pace, and it's likely to continue.

Q: You agree, don't you, that the task of identifying and reproducing for the past 5 years the e-mails that SavAll has requested is virtually impossible?

A: No, not at all. It won't be easy, but it is certainly technologically possible. That's what my company does. We do it all the time. I agree that it gets more difficult the farther back in time you go. But, as to Phister's most recent data, it's relatively easy.

Q: What do you mean, "Phister's most recent data?"

A: There are two categories of recent data. First, there are the e-mails that haven't yet

28 been transferred to permanent storage and are still on the active hard drives of Phister's
29 system. That is, the accumulated e-mails for the last 30 days since the last general

1 archival back up. Those can just be downloaded and printed from existing active files – just
2 like you'd look at your e-mails on your home personal computer. Let's call that "category
3 one."
4 The second category – let's call it "category two" - of recent data are the data Phister has
5 transferred to the offsite hard drives in the past year. Phister has all the equipment and
6 software necessary to read, sort, and pull out the relevant e-mails. So it's just a matter of
7 assigning employees to do the job – just like you'd have them go through paper files.
8 **Q:** You agree, don't you, that even that would be time-consuming and costly and that Mr.
9 Yu's estimate of about $50,000 is about right, maybe even conservative?
10 **A:** Well, using Mr. Yu's assumptions about the volume of materials and the employee
11 hours required, I believe $37,500 for the retrieval work is a bit high, but not by much. The
12 only part of it that I can't evaluate is the $15,000 he says it would cost to review the
13 materials for privileged and confidential information.
14 **Q:** What about the materials for the earlier years?
15 **A:** Well, they belong in a third category – "category three."
16 **Q:** Do you agree with Mr. Yu's estimates regarding category three?
17 **A:** He's correct about it being harder to do. Based on what I know so far, I think I could
18 do the CDs for about $75,000 and the earlier tapes for about $100,000. I have the people
19 who are trained to do it and access to the obsolete equipment and software programs.
20 **Q:** So, overall, you think the job could be done for, say, $200,000 to $225,000?
21 **A:** That's right. In fact, I think it would be cheaper for me to do it than if Phister went out
22 and hired its own contractor.
23 **Q:** Why is that?

A: Because I've been working with SavAll on the problem, and I've already got a head start. Any other contractor would have to go back to square one and incur startup costs that I've already put behind me.

Q: All right. How would you handle the problem of privileged and confidential information? I mean, if you're working for SavAll, you'd be in a conflict situation, wouldn't you?

A: I guess so, but if I were ordered by the court or there were an agreement of the parties not to turn over the materials to SavAll until they'd been reviewed and redacted by Phister, I'd abide by that.

Q: How long would it take you to complete the work?

A: Hard to say. Assuming that Phister took care of the recent data in-house and turned over all the other archives to me, I could turn it around in about 3 months. That also assumes that Phister did its review for privileged and confidential data promptly. It might help to predict this more accurately if whoever did the job could do some trial runs on limited samples of each of the different kinds of storage mediums.

Q: What would that accomplish?

A: Two things, really. First, it would give you a chance to test the equipment and software to make sure it works. Second, it would allow Phister to extrapolate from the sample and get an idea of the ultimate volume of e-mails that would come out of it.

Q: How much would that cost?

A: It depends on how large a sample we were instructed to run. If we took a month's worth of the archives for each of the types of storage mediums, I'd guess we could do the sampling for $25,000 to $30,000.

MS. LATHROP: No further questions.

END OF DEPOSITION

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LIBRARY

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

LIBRARY

Zwerin v. United Merchant Bank (Columbia Court of Appeal, 2002)

Baldocchi v. Orion Films, Inc. (Superior Court of Columbia, 2004)

Zwerin v. United Merchant Bank

Columbia Court of Appeal (2002)

We accept this interlocutory appeal from a discovery Order issued by Commissioner Marrit Schein, and we endorse what we believe is a good model for resolving the increasingly common pretrial discovery disputes involving the burdens of retrieving and producing electronically stored data.

Laura Zwerin is suing United Merchant Bank ("UMB") for gender discrimination, harassment over a protracted period of time, and retaliation under the Columbia Civil Rights Act. Her case has prima facie merit, and, if she prevails, her damages may be substantial. She has come into possession of a number of e-mails that tend to show she was terminated from her position as Senior Vice President/Asian Equities Sales Department because she filed a complaint of gender discrimination. She contends that additional key evidence is located in various e-mails exchanged among UMB employees and that those e-mails now exist only in backup tapes and other archived media. Zwerin moved to compel UMB to produce all such e-mails at its own expense. UMB objected, asserting that compliance with Zwerin's motion would cost approximately $175,000, exclusive of attorney time, and moved for a protective order.

In June 2002, Zwerin served upon UMB a document request demanding that UMB produce "all documents, including without limitation electronic or computerized compilations, concerning any communications by or between UMB employees relating to Plaintiff." UMB produced about 100 pages of printed e-mails and refused to search for or produce any others on the ground that it would be unduly burdensome for it to have to resort to electronically stored archival data. Zwerin deposed Alan Benny, who, as UMB's expert, testified as to UMB's e-mail backup protocols and the cost of restoring and retrieving the relevant data.

In the first instance, the parties agreed that e-mail was an important means of communication at UMB during the relevant time period of 1999 through 2001. Each salesperson in the Asian Equities group sent and received approximately 200 e-mails a day. Given this volume, and, because the Securities and Exchange Commission regulations required UMB to preserve such communications for three years, UMB implemented an elaborate e-mail backup and preservation system. In particular, UMB backed up its e-mails in two distinct ways: on backup tapes and on compact disks.

The Tapes: Using an automated backup program, UMB routinely backed up its internal e-mail traffic on tapes at various intervals, the monthly backup tapes

being the ones that were preserved for three years. According to Benny's testimony, there are 94 extant backup tapes.

To restore e-mails stored on the tapes requires a lengthy and elaborate process, each tape requiring about five days to restore. It could be done faster by an outside vendor specializing in data retrieval, but the cost would be commensurately greater.

The Compact Disks: Certain e-mails to and from outside "registered traders" in Asian securities are automatically stored and archived onto a series of compact disks ("CDs"). UMB has retained all the CDs since the system was put into place in mid-1998.

These CDs are easily searchable, and a person with the proper credentials can simply log into the system, search for e-mails using key words (e.g., "Laura" or "Zwerin") and isolate and reproduce responsive e-mails.

Paralleling the federal standards, the discovery processes articulated in the Columbia Rules of Civil Procedure, particularly as applicable here, in Rule 26, are intended to allow the parties to obtain the fullest possible knowledge of the issues and facts before trial. Consistent with this approach, Rule 26(b)(1) provides that the parties may obtain by discovery "any matter, not privileged, that is relevant to the claim or defense of any party" in the form of "books, documents, or other tangible things," including things preserved in electronic rather than paper form.

There is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims, which they clearly are. As noted, e-mail constituted a significant means of communication among UMB employees. UMB had admittedly not searched the 94 backup tapes it possesses. Zwerin herself came into possession, other than by discovery from UMB, of over 100 pages of e-mails, several of which bear directly on her claims. These two facts strongly suggest that there are relevant e-mails that reside on UMB's backup media.

There are, of course, limitations. Rule 26(b)(2) imposes a general limitation on the frequency or extent of discovery. This so-called "proportionality test" confers upon the court broad discretion to restrict discovery that it deems unduly burdensome, cumulative, duplicative, or outweighed by the burden or expense in light of the nature of the litigation.

The usual presumption is that the responding party must bear the expense of complying with the discovery requests. However, Rule 26(c) allows a court to grant protective orders to protect the responding party from undue burden or expense, including orders conditioning discovery on the requesting party's payment of the costs of discovery.

Any principled approach to the question whether discovery costs should be shifted to the requesting party when it comes to producing electronic evidence must respect the usual presumption that the costs must be borne by the responding party. Electronic evidence is no less discoverable than paper evidence. As large companies increasingly move to entirely paper-free environments, any approach to discovery that routinely departs from the usual presumption will often cripple the ability of plaintiffs to obtain the evidence. Thus, cost shifting should be considered only when electronic discovery imposes a truly undue burden or expense on the responding party.

The case at bar is a perfect illustration of the range of accessibility of electronic data. As explained, UMB maintains e-mail files in three forms: (1) active user e-mail; (2) archived e-mails on compact disks; and (3) backup data stored on tapes. UMB's active user e-mails and those stored on CDs are easily accessible. The 94 available tapes fall into the backup tape category and would require a costly and time-consuming process to search and isolate the documents for production pursuant to Zwerin's request.

Whether production of electronic documents is unduly burdensome or expensive turns primarily on whether they are maintained in an accessible or inaccessible format, a distinction that corresponds directly to the expense of production. In turn, the question of accessibility or inaccessibility turns largely on the media on which the data are stored.

Deciding disputes regarding the scope and cost of discovery of electronic data requires a two-step approach:

First, it is necessary to understand thoroughly the responding party's computer system, both with respect to the active and stored data. For data that are kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of production. A court should consider shifting only when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media.

Second, because the cost shifting analysis is so fact-intensive, it is necessary to determine what data may be found on inaccessible media. As we discuss below, we endorse any measure that will assist the court in evaluating the marginal utility, i.e., how likely it is that the expensive search will produce something worthwhile. Often, proceeding in small increments such as requiring the responding party to bear the expense of running small samples from different chronological parts of the archive will be enlightening on whether the responsive data are present and in what quantity.

The application of these steps is particularly complicated where electronic data are sought because otherwise discoverable evidence is often available only from storage media from which the data are expensive to retrieve.

To make the decision, we rely on a 7-factor test, weighing the factors as we discuss below.

The 7-Factor Test:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

The Seven Factors Should Not Be Weighted Equally: Whenever a court applies a multifactor test, there is a temptation to treat the factors as a checklist, resolving the issue in favor of which column has the most check marks. But when the ultimate question on the issue of cost shifting is whether the request for production imposes an undue burden on the responding party, the test cannot be applied mechanically at the risk of losing sight of its purpose.

The order in which the seven factors are listed above suggests their order of importance, i.e., they should normally be weighted in descending order. The first two, and most important factors – (1) the extent to which the request is specifically tailored to discover relevant information, and (2) the availability of such information from other sources – comprise what can be called the "marginal utility analysis." As the court observed in McPeek v. Aschcroft, (USDC, D. Franklin, 2001),

> **The more likely it is that the backup tape contains the information that is relevant to the claim or defense, the fairer it is that the responding party search at its own expense. The less likely it is, the more unjust it would be to make the responding party search at its own expense. The difference is "at the margin."**

A problem with applying the "marginal utility analysis" is that, at the inception, there is usually an insufficient factual basis for knowing to what extent the information being sought exists in the electronic storage media. Some courts have made an assumption that, unless the requesting party can show that there is a "gold mine" of information to be retrieved, the marginal utility is modest, at best, and they tend for that reason to lean heavily in favor of shifting the cost to the requesting party. However, requiring the requesting party to prove a "'gold

mine" is contrary to the plain language of Rule 26, which permits broad discovery of any matter that is relevant. Thus, we agree with the precept of marginal utility, but we reject the "gold mine" approach.

The second group of factors, next in importance, addresses the cost issues, i.e., how expensive will the production be and who can handle the expense? These factors include: (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; and (5) the relative ability of each party to control costs and its incentive to do so.

The third "group" – (6) the importance of the issues at stake in the litigation – stands alone, and may not often come into play. However, where it does come into play, this factor becomes weightier.

Finally, the last factor – (7) the relative benefits to the parties of obtaining the information – is the least important because it is usually a fair assumption that the response to a discovery request is for the benefit of the requesting party. But in the unusual case, where production will also provide a tangible benefit to the responding party, that fact may weigh against shifting the costs.

The case is remanded to the trial court, the Superior Court, for determination of the pending production request in accordance with this opinion.

Baldocchi v. Orion Films, Inc.

Superior Court of Columbia (2004)

Plaintiff, Rina Baldocchi, sued defendant, Orion Films, Inc. ("Orion") for gender discrimination under the Columbia Civil Rights Act. She prays for special and compensatory damages in the amount of $100,000 and punitive damages in the amount of $3,000,000.

In the course of discovery, she filed a sweeping request for production of documents covering a four-year period, including e-mail messages that exist only in electronic form on Orion's computer system and in its electronically stored archives. Orion produced a substantial volume of paper documents, which it asserts is all it has in readily producible form. Orion then moved for a protective order to relieve itself of the obligation of producing the requested electronically stored documents. The basis for Orion's motion is that the burden and expense of production far outweighs any possible benefit that Baldocchi will gain from the additional discovery. Orion further contends that, if the additional discovery is ordered, the entire cost should be shifted to plaintiff.

Orion's computerized records system consists of three levels of accessibility: first, records stored in active files on hard drives that are in daily use and have not yet been transferred to another storage medium; second, records that have recently been transferred to storage on compact disks pursuant to Orion's records retention policy under which active files are purged every 90 days and transferred to compact disks; and, third, records more than two years old that were transferred to a series of about 100 magnetic recording tapes at a time when Orion was using now obsolete computer and software systems. The second and third categories are archived solely for "disaster recovery" purposes, i.e., in the event of a catastrophic systems failure. Baldocchi successfully demonstrated that the discovery she seeks, although very broad, is generally relevant.

It is not uncommon to shift the expense of production of discovery to the requesting party, especially when the discovery involves electronically stored evidence that may be extremely expensive to retrieve and produce. Rule 26 of the Columbia Rules of Civil Procedure clearly gives the court broad discretion in this regard.

Discovery of data stored electronically poses new and different issues from those applicable to the discovery of traditional paper documents. The Columbia Court of Appeal, in Zwerin v. United Merchant Bank (2002), recently dealt with those problems and articulated a 7-factor test for doing so. We apply those factors to

the present case in the order and relative weights prescribed by the court in Zwerin:

1. The Extent to Which the Request is Specifically Tailored to Discover Relevant Information: The less specific the requesting party's demands, the more appropriate it is to shift the cost of production to that party. Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the cost. Here, plaintiff's requests are broad and nebulous, and, if that were the sole determining factor, it would favor shifting the costs to her. However, as the Zwerin Court makes clear, the seven factors are to be taken as a whole and assigned relative weights in descending order.

2. The Availability of Such Information From Other Sources: Some cases that have denied discovery of electronic evidence or have shifted costs to the requesting party have done so because equivalent information either has already been made available or is accessible in a different format at less expense.

Factors 1 and 2 go hand in hand. They can be best applied using the concept of "marginal utility" articulated in McPeek v. Ashcroft, (USDC, D. Franklin, 2001), under which the inquiry is how likely it is that a computerized search of the files will produce relevant information. Here, plaintiff argues that there is a high enough probability that a broad search of the defendant's e-mails will produce relevant information that the search should not be precluded altogether.

If the plaintiff can show that it is likely that the electronic medium contains certain targeted information and can demonstrate with reasonable certainty that the information is not otherwise readily available, then she has crossed over the margin into the realm where it is just to require the responding party to bear the expense of producing it. On the other hand, if plaintiff's showing is too broad or uncertain or the responding party can show that the information is readily available elsewhere, then plaintiff's request falls below the margin and it would be unjust to require the responding party to bear the expense.

In the instant case, there has been no showing that the electronic records plaintiff seeks from defendant are available other than by a search of defendant's hard drives and backup media. Defendant's representations that it has produced all there is to be found is speculative because defendant has not conducted a search of the electronic files. However, neither has plaintiff shown any reasonable likelihood that the information she seeks can be found on the electronic media to any extent that would make an expensive search of those media worthwhile. Part of the problem is that plaintiff's discovery requests are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what she seeks.

In light of these conclusions, it seems just to shift to plaintiff the cost of at least the initial, preliminary searches of the storage CDs and tapes. Of course, the current, unexpurgated data that remain on Orion's active files must be produced at Orion's cost.

The next three factors address the cost issues and are to be considered together.

3. The Total Cost of Production, Compared to the Amount in Controversy: This factor deals with the relativity between the dollar value of what plaintiff is attempting to recover and what it will cost to produce the information. There is no bright-line. If the cost is not extraordinary or out of line with what a responding litigant can expect in the ordinary course of litigation, there is no justification for departing from the presumption that the responding party must bear the cost irrespective of the relationship between the cost and the amount in controversy. However, if the amount of plaintiff's alleged damages is small and the cost of extracting and producing the information is relatively large, then it makes little economic sense to require a defendant to incur a huge expense when the ultimate economic benefit is relatively small. In the present case, we know that the plaintiff's prayer exceeds $3,000,000, which is a substantial sum. Plaintiff projects that the total cost of production would exceed $1,000,000, a substantial sum by any standard. Defendant's estimate is $150,000. The magnitude of this expense in relation to the most special and compensatory damages being sought by plaintiff militates in favor of shifting the cost of production to defendant.

4. The Total Cost of Production, Compared to the Resources Available to Each Party: Plaintiff proceeds as an individual against an established major film studio. Although the record does not reflect the extent of each party's financial resources, we can assume that this is not a situation where two functioning, successful business entities are sparring with one another such that this factor would be a wash, or, conversely, where a wealthy plaintiff is pursuing an impoverished defendant. Here, it is safe to assume that defendant can afford whatever the cost might be better than plaintiff. Standing alone, this factor favors shifting the cost to defendant.

5. The Relative Ability of Each Party to Control Costs and Its Incentive to Do So:
The plaintiff probably has a greater ability, i.e., being sensitive to the cost, plaintiff will be able to calibrate her discovery based on information obtained in the initial sampling (see infra). If she is required to pay, she will be in the best position to decide whether further searches will be justified to limit the costs of discovery of the e-mails to a much greater extent than defendant. Of course, this factor alone does not prevent later shifting of the cost back to defendant if the results of the

initial search warrant it. But, as to the initial sampling, this consideration militates slightly in favor of cost shifting.

6. The Importance of the Issues At Stake in the Litigation: This factor does not always come into play. In this case, the issue is a straightforward one of whether there has been gender discrimination as to plaintiff, an individual. Although, in a broader context, gender discrimination is an important public policy issue, this case proceeds in the context of well-settled law and will affect only Ms. Baldocchi's interests. It is not an action that will result, for example, in vindication of a broader public interest that would be stifled if plaintiff were prevented by cost considerations from conducting discovery that would expose a widespread wrong. Thus, in this case, this factor is not particularly weighty and tends in favor of shifting the cost to plaintiff, but in the appropriate case it could be extremely important to prevent cost shifting.

7. The Relative Benefits to the Parties of Obtaining the Information: If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. Under such circumstances, the guiding principle is that information that is stored, used, or transmitted in new forms (e.g., electronically) should be available through discovery with the same openness as traditional forms (e.g., paper). A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery. Conversely, a party that happens to retain vestigial data for no current business purpose but only for retrieval in case of an emergency or simply because it has neglected to discard the data should not be put to the expense of producing it. Defendant's backup tapes clearly fall into this category. There is no evidence that defendant itself ever searches these tapes for information or even has the means of doing so. Cost shifting is therefore warranted with respect to the backup tapes. Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the cost of retrieving deleted e-mails. Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requested party. For example, a collateral benefit could result for the responding party's business such as the creation of a computer search program that would also be useful in its regular business activities. Second, the responding party might benefit in the litigation from the review of its own records. Third, the search could create a universe of data that either side could use to support its case. On balance, the relevant factors tip slightly in favor of shifting the cost to plaintiff of conducting at least a preliminary search for the e-mails in this case. The protocols to be followed will be addressed below.

Privileged and Confidential Documents: Beyond the cost of isolating and producing the required e-mails, defendant argues that the time and expense of reviewing these documents for privilege and confidentiality would be enormous.

Defendant estimates that it would take over six months of work by attorneys and paralegals and the cost would be about $75,000. However, the sanctity of defendant's documents can be adequately preserved at little cost by nforcement of a protective order requiring that all documents produced during this litigation be used solely for purposes of the litigation and that, at the end of the case, the documents all be returned to Orion. Moreover, as suggested in the protocol discussed below, defendant's interests can be protected by making provision that the e-mails be for "attorneys' eyes only" during discovery and that disclosure of attorney-client documents, whether intentional or inadvertent, shall not be deemed a waiver of the privilege. Even with such protections, however, disclosure of privileged documents cannot be compelled if defendant objects. Thus, notwithstanding the recommended precautions, if defendant still chooses to conduct a complete review of the e-mails prior to production, defendant shall do so at its own expense.

The Protocol to Be Followed: The parties shall comply with the following protocol. It is a guideline only and may be modified by agreement of the parties as they proceed through discovery. Initially, plaintiff shall designate one or more experts who shall be responsible for isolating the defendant's e-mails and preparing them for review. The experts shall be bound by the terms of this order as well as any confidentiality order entered in the case. With the assistance and cooperation of the defendant's technical personnel, the plaintiff's experts shall then obtain a log of all hard drive and backup tapes containing e-mails. The plaintiff may choose to review a sample of hard drives and tapes in lieu of all such devices. Plaintiff's counsel shall formulate a search procedure for identifying responsive e-mails and shall notify defendant's counsel of the procedure chosen, including any specific word searches. A very sensible protocol that was suggested by plaintiff but rejected by defendant was that the parties mutually select a limited representative sample of the hard drives and backup tapes and that defendant, at its own expense, develop the search programs, isolate the responsive e-mails, and produce them to plaintiff. The object would have been to gauge the nature, incidence, and frequency of responsive e-mails and perhaps, by extrapolation, limit the scope of the search. Defendant refused to go along because, under the proposal, it would have had to pay the cost of the sampling. Plaintiff shall develop such sampling protocol in her suggested protocol if she believes it will be helpful. It shall be conducted at plaintiff's expense.

Once an appropriate search method has been established, it shall be implemented by plaintiff's expert. Plaintiff's counsel may then review the documents elicited by the search on an "attorney's eyes only" basis. Once plaintiff's counsel have identified the e-mails they consider material to the litigation, they shall print out and provide those documents to defendant's counsel in hard copy, numbered and logged for later verification. At this point,

plaintiff shall return all hard drives and tapes to defendant. Plaintiff shall bear all costs associated with the production described thus far. Defendant's counsel shall then have the opportunity to review, at defendant's expense, the documents for claims of privilege and confidentiality. Documents identified as being privileged or confidential shall be retained for attorneys' eyes only until any dispute has been resolved. No waiver of privilege or confidentiality shall result from this procedure. If defendant wishes to delete from the hard drives and tapes the documents that are ultimately determined to be confidential, defendant shall do so at its own expense and shall, also at its own expense, furnish plaintiff with copies of the hard drives and tapes so redacted. Once the nature, incidence, and frequency of the responsive e-mails are reliably estimated,
the parties shall return to this court for further direction on how to proceed and which party shall bear the cost from that point forward.

Conclusion: Defendant's motion for relief is denied, and the parties are ordered to proceed in accordance herewith.

MODEL ANSWER

Answer 1 to Question PT-A

1)

1. STATEMENT OF FACTS

The parties were before Commissioner Moreno on June 6, 2006, and subsequently received her findings of fact and order on June 16, 2006. Since that time, we have deposed defendant's Vice President Chester Yu, indicated to be the person most knowledgeable about Phister's computer systems. Similarly, defendant has deposed our independent consultant LaVon Washington. During these depositions, we have determined that Phister has over the course of the past five years switched its medium for storing and archiving data as the means to do so have modernized. As the various media available have matured and become obsolete, the cost to access and retrieve the information on those media has grown. In addition, Phister began implementing a "paperless office" policy, beginning about ten years ago. This process was fully completed seven years ago, two years prior to the beginning of the period for which documents are sought. As Phister's witness described this policy, it encouraged the use of electronic media to communicate within the firm. Further, the executive, sales, and marketing staff extensively uses e-mail as a method of communicating information on prices and sales of the drug in issue here, Serapatrin.

Since the accessibility of the various e-mails which are sought on discovery varies, consultant Washington has categorized the various media used by Phister over the years, based on Yu's description, as follows:

Category One consists of e-mails that are present on each employee's computer hard disk. These e-mails are tightly integrated with Phister's enterprise-wide management software, and searching these e-mails is very inexpensive. Phister has already agreed to produce the e-mails in category one that conform to SavAll's document request.

Category Two consists of e-mails that are stored on offsite hard disk drives. Every month, Phister performs a "clean sweep" of the computers in their facilities for purposes of efficiency. The contents of each hard drive is archived permanently, and placed in offsite hard disk drives. These hard disk drives are not separated according to content, or individual, or any other metric. Phister simply places all the e-mails in the enterprise together as they come in. Yu has indicated that these hard drives can be searched using computer programs already in existence, since the hard drives from the past year are integrated into the company's office management software, SoftPlan. The estimated cost

by Phister to perform searches of these e[-]mails is $37,500, plus an additional $15,000 for a privilege screen by the firm's attorneys. Category two includes all e-mails from the past year.

Category Three consists of e-mails that were archived according to the same "clean sweep" policy during the period of 2002 through 2005. From 2002 to 2003 the firm used tapes to permanently archive these files, but in 2004 the firm began using compact discs instead. All of these media were also moved offsite after they were filled. They cannot be searched using the company's existing data search software, and so if such a program were to be used to search the volumes of data, it would have to be created specifically for this task.

The estimated cost to search these archives by Phister's witness Yu is $200,000 for the compact discs if done in-house, and $250,000 for the tapes, which must be outsourced [due] to the unavailability of the machinery and software to access these files. Comparatively, the consultant Washington has indicated that for his firm to accomplish a task like this would cost approximately $225,000, due to the fact that his firm has access to the hardware and software necessary to access the obsolete storage media.

SavAll asserts that all three categories of data are subject to discovery at Phister's expense. Phister counters that production in categories two and three must be borne by SavAll.

II. ARGUMENT

A. PHISTER'S MOTION FOR PROTECTIVE ORDER RELIEVING IT COMPLETELY OF THE OBLIGATION TO PRODUCE THE ELECTRONICALLY STORED DATA SHOULD BE DENIED SINCE PRODUCTION OF ELECTRONICALLY STORED DATA IS ALWAYS ALLOWED WHERE IT IS RELEVANT[.]

The first issue presented is whether Phister should be relieved of the obligation to produce electronically stored data based purely on the expense of doing so. This is in conflict with Columbia case law governing whether discovery should be granted with respect to electronically stored data.

The Columbia Court of Appeal addressed the issue of whether discovery should be granted over the producing party's objections that the cost was too great. In Zwerin v. United Merchant Bank, the Court determined that Columbia Rules of Civil Procedure Rule 26 demanded production. The Court stated that: "Rule 26 (b)(1) provides that the parties may obtain by discovery "any matter, not privileged, that is relevant to the claim or defense of any party ... including things preserved in electronic rather than paper form" (italics in original). Accordingly, the threshold inquiry for production depends not on the cost, but rather on the relevance of the production sought. The Court made this clear when it stated

that “[t]here is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims ... there are, of course, limitations.” The limitation described by the court refers to Columbia Rule 26(c), which permits shifting of cost in the discretion of the court. The same approach was applied in Baldocchi v. Orion Films, where the court determined that “Baldocchi successfully demonstrated that the discovery [she] seeks, although very broad, is generally relevant” before denying defendant’s motion for a protective order to relieve it of the obligation to produce.

The facts in the present case are sufficient to reach the threshold articulated in Zwerin and Baldocchi. In her findings, Commissioner Moreno stated that “the materials [plaintiff] has already discovered suggest that there might be other similar data embedded in [defendant’s] stored data.” In addition, she stated that the specificity and time period sought to be discovered are “reasonable.” This supports the finding of relevance necessary to compel discovery. While defendant’s employee Yu testified in his deposition that there were “thousands of e[-]mails a month”, with “several hundred a month” relating to the drug at issue here, he also testified that he was certain that e-mail was used as a medium to communicate pricing policies, which is extremely relevant to establishing plaintiff’s case of anti-competitive practices. This is similar to the court in Zwerin finding discovery appropriate where the defendant generated “200 e-mails a day” over the course of two years. All that is necessary is that plaintiff demonstrate that the discovery sought is relevant, which is met here.

The scope of the discovery quest is extremely similar to that in Zwerin and Baldocchi, being relevant to the plaintiff’s case, and should accordingly be granted.

B. PHISTER SHOULD BE REQUIRED TO PRODUCE AT ITS OWN EXPENSE ALL OTHER E-MAILS SINCE THE UTILITY OF RECOVERY OUTWEIGHS THE BURDEN.

The next issue is whether the cost should be shifted to plaintiff due to the substantial burden of conducting discovery where there is uncertainty as to the amount of documents which will be produced.

1) PRODUCTION CONDUCTED ON CATEGORY TWO DATA MUST BE AT PHISTER’S EXPENSE SINCE OFF-SITE HARD DRIVES ARE NOT “INACCESSIBLE[.]”

The Court in Zwerin set forth the standard for cost-shifting in discovery cases where the defendant has alleged that discovery would incur great expense due to the obsolescence of the equipment necessary to conduct the search. The standard articulated is that: “A court should consider shifting only when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media.” The relevant language is that regarding “obsolete

or other very difficult-to-search media" which determines what electronic sources cannot be shifted to the requesting party.

The information stored in "category two", or offsite hard disk drives, does not meet the standard in Zwerin for "inaccessible" media, which the court indicated included "backup tapes or obsolete or other very difficult-to-search media." Indeed, Yu testified that the offsite hard drives are part of the "SoftPlan Office operating system", indicating that it is relatively straightforward to conduct searches on that data. The fact that such a program already exists to search the data contained therein further serves to separate category two from the types of data contemplated by the Court in Zwerin.

Phister may attempt to argue that the fact that the hard drives are offsite contributes significantly to the expense, and that therefore the hard drives should be considered "inaccessible" and fall under the 7-factor test. This does not properly interpret Zwerin's definition of inaccessible. There is no difficulty in searching the category two data, as witness Yu made clear in his deposition - it is possible to perform the search because the systems and software already exist and are in Phister's possession. The only burden associated with the production is the sheer volume of it, and the time required in terms of man-hours to conduct the search. Had the Zwerin court intended the test for accessibility to turn on the volume of the data, it would have said so. Instead, recognizing the unique problems posed by rapid obsolescence and adoption of new technologies for storing records, the court articulated a standard based on whether the technology was obsolete, or out of date, or such that searching the media posed an undue burden.

Phister having chosen to store its data by throwing the contents of its staff's hard drives together indiscriminately, it cannot now be allowed to state that its own choice not to file data at the time of collection should excuse it of the duty to produce. If it were paper records at issue, and Phister reported that it simply put all of its papers, unlabelled and unsorted, into a large warehouse, it could not then argue that it was too difficult to search the data.

Accordingly, the proper metric for determining accessibility under Zwerin is the availability of the means to search the offsite records, and not the volume of records offsite.

2) PRODUCTION CONDUCTED ON CATEGORY THREE DATA MUST BE AT PHISTER'S EXPENSE SINCE THE 7-FACTOR ZWERIN ANALYSIS DOES NOT INDICATE IT WILL CONSTITUTE AN UNDUE BURDEN[.]

Where the data is relatively inaccessible, the court should apply the 7-factor test set out in Zwerin, considering: i) the extent to which the request is specifically tailored to discovery relevant information, ii) the availability of such information

from other sources, iii) the total cost of production, compared to the amount in controversy, iv) the total cost of production compared to resources of the parties, v) the relative ability of each party to control costs and its incentive to do so, vi) the importance of the issues at stake in the litigation, and vii) the relative benefits to the parties of obtaining the information. These factors are each considered in turn, and then balanced to determine whether the burden should be shifted.

i) THE DISCOVERY REQUEST IS NARROWLY TAILORED TO THE DOCUMENTS SOUGHT[.]

The first factor weighs the breadth of the requesting party's description of documents sought. A highly specific request minimized both the number of documents which must be printed and verified, but also minimizes those that must be checked for privilege and demonstrates the producing party's good faith assertion of relevance. A requesting party that cannot adequately articulate what materials it seeks should be compelled to pay the expenses of compliance.

Here, SavAll's requests, as indicated by Commissioner Moreno, "is sufficiently narrow and specific to overcome any objection that is vague or overbroad." Indeed, since the incident is limited to Phister's cholesterol drug Serapatrin, and to those marketing and sales e[-]mails dictating the price, this request is very specific. In Baldocchi the court found that the requests were "expansive rather than targeted," which is simply not the case for SavAll's request.

ii) THE DATA IS NOT AVAILABLE FROM ANY OTHER SOURCES[.]

The second factor looks to the necessity and utility of obtaining this information from difficult to access backup media as opposed to other means. Where the information sought is available in other formats, it is preferable for the requesting party to obtain discovery from those sources rather than demanding time consuming and expensive searches of out-of-date records. Where there is no other source available, however, the presence of relevant data in offsite archives becomes crucial.

The court in Baldocchi used the approach that if the plaintiff can demonstrate that the electronic media contains certain targeted information, and that the information is not otherwise readily available, then the responding party must bear the expense of production. Where it is uncertain, then the plaintiff should bear the cost.

The court in Baldocchi took the approach that a targeted sample of prior records could be used to demonstrate the existence of relevant information in older records. Further, the court found that where the discovery requests "are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what [plaintiff] seeks," then plaintiff should bear that cost.

Here, Phister's witness Yu stated that Phister discourages printing out e-mails, and that there is no reliable way to obtain the contents of those e-mails "aside from retrieving [them] electronically." This is part and parcel of Phister's own paperless office policy, which Yu admits has saved Phister a "huge amounts [sic] of money" over the years.

Therefore, there is no other source to obtain this data from. Similarly, the request is sufficiently specific to not require SavAll to pay for a targeted sample search, as was done in Baldocchi. Here, unlike in that case, the request is highly specific, and a few searches should suffice to determine whether any relevant documents in fact exist. Therefore, Commissioner Moreno's finding that "it cannot be ascertained at this stage whether the sources SavAll seeks to discover contain a 'gold mine' of information that might support SavAll's case will not shift the burden to SavAll. Rather, the fact that SavAll has already discovered substantial documents "suggests that there might be other similar data embedded in Phister's stored data."

Accordingly, this factor favors plaintiff, and there is no need to conduct a targeted search.

iii) THE TOTAL COST OF PRODUCTION IS MINOR COMPARED WITH THE AMOUNT IN CONTROVERSY[.]

The total cost of production looks to whether the document request, as a whole, is disproportionate to the expected recovery by the plaintiff. After all, if plaintiff only filed a claim for $50,000, and it would cost $200,000 to comply with discovery, the defendant would prefer to simply pay the plaintiff's claim than undergo a more expensive discovery process. When the court in Baldocchi applied this test, it found the factor favored plaintiff where the plaintiff made a good faith claim for $3,000,000, including punitive damages, and the cost of production would be from $150,000 to $1,000,000.

Here, SavAll has made a good faith claim for $120,000,000 in purely compensatory damages. Under Columbia competition law, this figure may be trebled as a punitive measure due to the statutory violation. As the punitive damages were imposed in Baldocchi, the proper measure of SavAll's damages is $360 million for purposes of compliance with discovery.

The cost of discovery varies by category of data to be retrieved. The calculations by Yu, Phister's witness, stated that the cost to retrieve "category two," or offsite hard drive backups, would be $37,500, plus an additional $15,000 for screening by Phister's attorneys. Since category two cannot be shifted to SavAll based on 1, above, only category three should be included. "Category three," or compact

discs and tapes, have a cost of approximately $450,000, which may or may not include the cost of screening by attorneys.

Comparatively, the consultant retained by SavAll testified that the cost for his firm, of which there are many others in competition, would be approximately $175,000, plus whatever costs are required in order to perform screening. The total cost, even using Phister's own estimates of the cost, are over 500 times smaller than the amount sought in relief. Compare to Baldocchi, where this factor weighed for plaintiff even where the damages figure was only three times higher then the production cost, or twenty times higher, if defendant's figures were believed.

Since the cost of production is minor compared to the amount in controversy, this factor favors SavAll.

iv) THE TOTAL COST OF PRODUCTION IS MINOR COMPARED WITH THE RESOURCES OF BOTH PARTIES[.]

This factor looks to the relative abilities of each side to afford the cost of production based on the financial resources available. Where an individual proceeds against a large corporation, there is a strong presumption that the corporation is better able to shoulder the burden of producing, and should be required to do so as is the norm under the discovery rules in Columbia.

Here, both Phister and SavAll are "large, multi-national corporations with substantial resources," as Commissioner Moreno found. Accordingly, this factor should favor neither side.

v) NEITHER SIDE HAS A GREATER ABILITY OR INCENTIVE TO CONTROL COSTS[.]

This factor looks to which party has a better ability to control costs. The court in Baldocchi looked at this factor primarily with regards to the initial targeted sampling identified in factor 2, supra, and found that since plaintiff was in a better position to decide how much discovery to conduct based on information retrieved there, this factor should favor shifting the burden to the requesting party.

Here, there is no need for a targeted sampling as indicated above. The court in Baldocchi further indicated that if the initial search indicated that there were discoverable materials to be found, then the factor could be shifted back to the defendant. The factor should therefore favor neither party.

vi) THE ISSUE AT STAKE IN THE LITIGATION IS IMPORTANT[.]

Where the issues at stake in the litigation “vindicat[e] a broader public interest that would be stifled if plaintiff were prevented... from conducting discovery,” then the factors militate against shifting and leaving the burden on the producing party.

Here, as Commissioner Moreno found, “the effect of this court’s ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay for this important drug” (italics added).

Since there is an important public interest in paying fair prices for important medications, this factor should also favor SavAll.

vii) BOTH PARTIES WILL BENEFIT FROM OBTAINING THIS INFORMATION[.]

Where the producing party has stored documents only for purposes of emergency recovery, and not for ongoing business concerns, the court in Baldocchi stated that this factor leans towards shifting the costs to the requesting party. The court there indicated further that “where the responding party itself benefits from the production,” the fact that the production is most useful to the requesting party is mitigated.

Here, Phister is under a duty to the Food and Drug Administration to store copies of all communications relating to sales, marketing, and manufacturing functions for 7 years. Phister’s technology officer testified in his deposition that “we’ve never been called on by the FDA to retrieve such communications, so I don’t know what we’d do if we needed to.” This indicates that Phister would benefit from doing an in-house search of its documents to separate out those relevant to specific drugs. Further, as in Baldocchi, creating a tool to facilitate such searches would also be a benefit, both for compliance with Phister’s regulatory obligations and for use in this and further litigation.

Accordingly, this factor should tilt in favor of SavAll.

viii) THE BALANCE OF THE 7 FACTORS IN THE ZWERIN TEST FAVOR SAVALL[.]

In considering the disposition of the factors, the Zwerin court indicated that the factors do not all bear equivalent force. Instead, since the ultimate question is to minimize the undue burden on the responding party, the first two factors are the most important, followed by the next three. Where the sixth factor “does come into play, this factor becomes weightier.” And lastly, the seventh factor is the least important.

Here, the first two factors clearly favor SavAll, due to the very narrow and specific document request and the fact that Phister has adopted a policy by which these materials, stored indiscriminately in offsite warehouses, does not have them available in any other form. Of the next three factors, the cost of discovery

relative to the claim for relief favors SavAll, and the rest are neutral. This is true even considering the cost of all of the different “categories” of data storage and the associated costs. The sixth factor, the public interest in resolution of the matter, also favors SavAll, since its interests are aligned here with the public interest in fairly priced medication. The seventh factor, also, favors SavAll.

Accordingly, on the balance of the factors, Phister should be required to pay for all discovery conducted on category three data searches.

3) COSTS OF PERFORMING PRIVILEGE SCREENING ON PHISTER’S DOCUMENTS SHOULD BE BORNE BY PHISTER[.]

Notwithstanding the Zwerin analysis, which dictates that Phister must bear the cost of producing the documents, it bears noting that the Baldocchi court also determined that since defendant’s privilege can be preserved with an adequate protective order, there was no urgent need for screening for attorney-client privilege purposes. Accordingly, if the producing party opted to have full screening performed, rather than using an “attorneys’ eye only” protective order, that producing party should be required to bear the costs.

III. CONCLUSION

Accordingly, on the balance of the factors, Phister’s motion for a protective order with respect to all categories of data must be denied.

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional State of Columbia, one of the United States.

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

4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.

6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.

8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

MEMORANDUM

To: Applicant
From: Anatoly Krotov, Senior Partner
Date: July 27, 2010
Re: **Vasquez v. SpeakEasy, Inc. and Northern Center of Worship**

Our clients, Greg and Mary Vasquez, filed a complaint seeking to enjoin SpeakEasy, Inc., a cellular telephone company, from erecting a 50-foot cellular tower on property owned by Northern Center of Worship adjacent to the Vasquez' property. We have agreed to submit resolution of this matter to the judge based on the Stipulated Statement of Agreed Facts. Please draft the brief supporting our position. You need not include an additional statement of facts at the beginning of your brief.

Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia

MEMORANDUM

To: All Attorneys
From: Executive Committee
Re: **Persuasive Briefs and Memoranda**

In drafting persuasive briefs, the firm conforms to the following guidelines:

Except when there is already an agreed or stipulated identification of the facts, the brief should begin with a short statement of facts, using only those facts supported by the record. Include only those facts you need for your persuasive argument.

The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER**: COLUMBIA HAS PERSONAL JURISDICTION; **PROPER**: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION. The analysis following each heading should flow logically from each heading.

The body of each argument should persuasively argue how the facts and law support our client's position. Contrary arguments and authority must be acknowledged and responded to rather than ignored.

In writing a first draft, the attorney should not prepare a table of contents, a table of cases, a summary of argument, or an index. These will be prepared, where required, after the draft is approved.

Anatoly Krotov, Esq.
Law Offices of Anatoly Krotov
645 Elvis Way
San Claritan, Columbia
Attorney for Plaintiff

Paul McDonald, Esq.
McDonald, Carpenter & Dean
98 Rebecca Lane
Francisco, Columbia
Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF COLUMBIA
IN AND FOR THE COUNTY OF MICO

Greg Vasquez and Mary Vasquez,
Plaintiffs,
v.

Civil Action No. 03281955 DEB

Northern Center for Worship
a Columbia Nonprofit Corporation,
and
SpeakEasy, Inc.,
a Columbia Corporation,
Defendants
_____ /

STATEMENT OF AGREED FACTS AND SUBMISSION OF THE CASE

INTRODUCTION

The Complaint filed herein by Plaintiffs on June 27, 2010 seeks a mandatory permanent injunction requiring Defendants to dismantle and demolish a 50-foot bell tower housing a cellular telephone transmission facility constructed on the property of Defendant Northern Center for Worship by Defendant Speakeasy, Inc. (“SpeakEasy”). The Complaint alleges that the tower violates the Covenants, Conditions and Restrictions (“CC&R’s”) limiting and restricting uses of the property within the Pinnacle Canyon Estates Subdivision. Pursuant to the Order of this Court, the parties have entered into this Statement of Agreed Facts and Submission of the Case, and shall each submit supporting briefs, after receipt of which this Court shall issue its decree.

JOINT STIPULATION OF FACTS

Plaintiffs and Defendants agree that:

1. Pinnacle Canyon Estates (the “subdivision”) is a residential subdivision of 42 lots located in the City of San Claritan, Mico County, Columbia.

2. Plaintiffs Greg and Mary Vasquez own and reside in a detached one story single-family dwelling on Lot Two of Pinnacle Canyon Estates.

3. SpeakEasy is a Columbia corporation conducting a cellular telephone business in Mico County.

4. Northern Center for Worship (the “Church”) is a Columbia nonprofit corporation and is conducting business in Mico County.

5. Covenants, Conditions and Restrictions, which limit and restrict uses of the property in the subdivision, are the agreement that is the subject of this litigation. These CC&R’s were executed on December 9, 1960. Selected provisions of the CC&R’s are attached as Exhibit “A.”

6. The Church owns and occupies Lots Seven, Eight and Nine of the subdivision.

7. The Vasquez’ property, Lot Two of the subdivision, shares a boundary line with the Church’s Lot Seven.

8. On July 29, 2009, the Church entered into agreement 1 with SpeakEasy for construction of a 50-foot bell tower on Lot Seven that would house a wireless telephone facility. The terms of the agreement were that SpeakEasy would pay all costs for construction of the bell tower and a monthly rental of $1,000 for use of the property.

9. On September 27, 2009, a group of neighbors in the subdivision, including the Vasquezes, voiced objections to the construction of the tower. The Church convened a meeting to discuss the matter with the neighbors and advised each objecting neighbor that SpeakEasy had already expended $106,000 on the tower, and that the Church would be obligated to reimburse SpeakEasy for at least that amount were the Church to terminate its agreement with SpeakEasy for the construction of the bell tower. The Church told the neighbors that it had no real choice but to proceed with its agreement and so advised the complaining neighbors.

10. On January 27, 2010, the Vasquezes notified the Church and SpeakEasy in writing by letter that construction of the bell tower was in violation of the CC&R’s. From the time of the meeting until the lawsuit was filed, there were no objections or complaints to the tower other than the letter from the Vasquezes.

11. On February 13, 2010, Defendant SpeakEasy completed construction of the bell tower housing the wireless telephone facility.

12. Prior to construction of the tower in Pinnacle Canyon Estates that is the subject of this lawsuit, the following potential violations of the subdivision's CC&R's existed:

(a) a two-story barn converted into living quarters;
(b) a two-story house addition;
(c) two amateur radio towers;
(d) a satellite dish on the peak of a house;
(e) a flagpole;
(f) a previously existing 40-foot bell tower at the Church;
(g) a steeple at the Church with a cross on the top, which extends nearly as high as the disputed tower;
(h) a flagpole at the Church;
(i) a large sign for the Church at the front entrance; and
(j) several large, wooden telephone poles and electric lines 1 located throughout 36 the subdivision and between Plaintiffs' home and the Church.

13. Mr. and Mrs. Vasquez purchased their home on Lot Two in 2001 for $114,000. The highest recent sale of a comparable residence in the subdivision was for $360,000. The parties retained separate experts to determine the impact of the disputed tower on the value of Plaintiffs' property. The experts could not agree. However, they put the range of diminution of value between 0% and 5%.

14. On the date Plaintiffs filed their complaint and application for injunction, SpeakEasy had spent the following in resources concerning planning and construction of the bell tower: $106,000 for planning, architecture, and pre-construction permits and $148,000 for all aspects of construction, for a total construction cost of $254,000.

15. Demolition and removal of the tower from its present location would cost 47 $50,000.

16. Thus the total loss to SpeakEasy should it be required to remove the tower would be $304,000, which is calculated as the $254,000 construction cost plus the $50,000 cost for demolition and removal.

17. A church, the present existing sign, and cross on the steeple have occupied Lot Nine for 25 years.

18. When Lot Nine was acquired by the Church in 1995, the lot was covered

with weeds, the driveways were rough and dusty, and in general the property was in bad repair.

19. Over the years the Church has steadily improved their properties, expending more than $4 million. By the time the Plaintiffs acquired their property in the subdivision, the Church had already made substantial additions and improvements to Lots Eight and Nine.

20. In 2005 the Church acquired Lot Seven, and shortly thereafter designed and built the sanctuary with the same stucco walls and tile roof and covered porches as the other buildings, so as to blend in with the other buildings on the Church grounds. The Vasquez' lot had no rear fence, so the Church arranged for erection of a block wall at its own expense. Mr. and Mrs. Vasquez never complained about any of these improvements.

21. In the 50 years since the CC&R's were recorded, 1 no action has ever been filed to enforce any of the provisions thereof.

22. No neighbor or lot owner in the subdivision has ever attempted to stop the operation or expansion of the Church or any sign, bell tower, cross or other church related structure or improvement on Lots Seven, Eight, or Nine.

23. Plaintiffs allege that Defendants' proposed structure has disturbed, and will continue to disturb, the quiet enjoyment of Plaintiffs' property.

SUBMISSION OF THE CASE

The parties agree to submit for determination by this Court the following issues:

1. Do the CC&R's prohibit the construction of the disputed tower?

2. Has the CC&Rs' prohibition of the disputed tower, if found to exist, been waived or abandoned?

3. Are the Plaintiffs barred from obtaining the injunctive relief sought due to laches?

4. Does the balance of hardships dictate that the Plaintiffs' sought remedy of removal of the tower be denied?

Respectfully submitted,
Dated: July 27, 2010

Law Offices of Anatoly Krotov

by: *Antoly Krotove*

McDonald

Anatoly Krotov, Esq.
Attorney for Plaintiff

McDonald, Carpenter & Dean

by: *Paul*

Paul McDonald, Esq.
Attorneys for Defendants

EXHIBIT “A”

Selected Provisions of the Declaration of Covenants, Conditions and Restrictions for Pinnacle Canyon Estates

* * *

General Provisions:

1. All of the lots in Pinnacle Canyon Estates shall be known and described as residential lots.

2. All structures on the lots shall be of new construction and no building shall be moved from another location onto any lot. At no time shall house trailers be allowed on the lots.

3. No garage or other building shall be erected on any of the lots until a dwelling house shall have been erected.

4. No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed one story in height and a private garage not to exceed one story in height for not more than three cars, and a guest or servant quarters for the sole use of actual non-paying guests or actual servants of the occupants of the main residential building.

* * *

7. No fence or solid wall, other than the wall of the building, shall be more than 6 feet in height, nor any hedge more than 3 feet in height, or closer than 20 feet to front lot line.

* * *

15. No structure of any kind shall be erected, permitted or maintained on the easements for utilities as shown on the plat of Pinnacle Canyon Estates.

* * *

Enforcement: Upon the breach of any of the covenants or restrictions herein, anyone owning land in Pinnacle Canyon Estates may bring a proper action in the proper court to enjoin or restrain the violation, or to collect damages or other dues on account thereof.

Anti-waiver Provision: Failure to enforce any of the restrictions, rights, reservations, limitations and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof.

Choice Residential District: All deeds shall be given and accepted upon the express understanding that Pinnacle Canyon Estates has been carefully planned as a Choice Residential District exclusively, and to assure lot owners in Pinnacle Canyon Estates that under no pretext will there be an abandonment of the original plan to preserve Pinnacle Canyon Estates as a Choice Residential District.

* * *

VASQUEZ v. SPEAKEASY, INC. AND NORTHERN CENTER OF WORSHIP LIBRARY

Horton v. Mitchell
Columbia Supreme Court (2004)

The facts in this matter are largely undisputed. In June 2003, Michael and Gayle Horton (the “Hortons”) acquired Lot 1 in Erin Shannon Estates, a deed restricted nine lot subdivision in Mateo, Columbia, and constructed a home on the lot. Shortly after the Hortons acquired Lot 1, Zoe Mitchell (“Mitchell”), who owned lot 2, advised them that the Erin Shannon Estates community intended to seek construction of a roadway across Lot 2 that would connect to a main road. The Hortons objected to the plan, mainly because they would be backed into a corner and their home would be surrounded by asphalt. Nevertheless, over the Hortons' objections, Erin Shannon Estates property owners obtained approval and assistance for completion of the public roadway project. The Hortons then filed suit against Mitchell seeking a permanent injunction preventing the construction of the roadway and the dedication of Lot 2 to the City of Mateo for purposes of constructing the roadway. The Hortons based their complaint on Erin Shannon Estates' recorded Covenants, Conditions and Restrictions (“CC&R’s”) that forbid the construction of "any structure" on the lots except for one single-family dwelling. After a bench trial, the trial court summarily denied the Hortons' request for injunctive relief and dismissed their complaint, necessarily concluding that despite the language contained in the CC&R’s, Erin Shannon Estates could construct a roadway over Lot 2. The Hortons timely appealed.

DISCUSSION

Restrictive covenants such as the CC&R’s for this subdivision constitute a contract between the property owners as a whole and each individual property owner, pursuant to which each owner agrees to refrain from using his or her property in a particular manner. One purpose of restrictive covenants is to maintain or enhance the value of land by controlling the nature and use of lands subject to a covenant's provisions. Columbia law permits restrictive covenants but finds them disfavored; they are justified only to the extent they are unambiguous and enforcement is not adverse to public policy. When courts are called upon to interpret restrictive covenants, they are to be strictly construed, and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions.

Because CC&R’s are a form of express contract, we apply the same rules of construction. The covenanting parties' intent must be determined from the specific language used. Specific words and phrases cannot be read exclusive of other contractual provisions. The parties' intentions must be determined from the contract read in its entirety. We attempt to construe contractual provisions so as

to harmonize the agreement and so as not to render any terms ineffective or meaningless.

The Hortons claim that the trial court abused its discretion because the CC&R's clearly preclude the construction of a roadway over Lot 2. The interpretation of the CC&R's presents a question of law. The Hortons took possession of Lot 1 with both actual and constructive knowledge of the CC&R's, and are therefore entitled to enforce the contractual obligations contained therein.

The provisions of the CC&R's on which the Hortons rely state:

> 4. No structure shall be erected, altered, placed or permitted to remain on any of the lots other than one detached single-family dwelling not to exceed two stories in height, or tri-level single-family dwelling and a private garage not to exceed one story in height for not more than three cars.

The controlling rule of contract interpretation requires that the ordinary meaning of language be given to words where circumstances do not show a different meaning is applicable. The CC&R's are clear and unambiguous. They state that all of the lots in Erin Shannon Estates are single-family residential lots and that no structure except for a single-family home shall be erected on or be permitted to remain on any of the lots. The relevant inquiry is whether the proposed roadway is a "structure."

We conclude that the roadway is a structure within the ordinary meaning of the word and within the meaning of the CC&R's. Our review of the CC&R's does not evidence an intent to limit the term "structure" to anything other than its ordinary meaning. For example, paragraph 7 of the CC&R's states that "[a]ll structures of the Lots shall be of new construction and no building shall be moved from any other location onto any of the lots." Therefore, buildings are not the only structures that are anticipated on the lots. For example, driveways, fences, and gates are also contemplated. The CC&R's specifically provide for other structures such as attached garages, dwelling houses, open porches, pergolas, storage rooms, and basements. Moreover, paragraph 8 of the CC&R's indicates that "structure" was meant to be given its ordinary meaning by stating that "[n]o structure of any kind or nature shall be erected on the easements for public utilities shown on the plat of ERIN SHANNON ESTATES." Finally, paragraph 13 of the CC&R's states that "[n]o structure shall be commenced or erected on any of the lots" unless approved by the architectural committee, "[p]rovided ... that the building shall be in harmony with existing buildings and structures."

The dictionary defines a "structure" as "[s]omething constructed." *The American Legacy Dictionary of the English Language*. 1782 (3d ed., 2002). A roadway is a structure — that is, "something constructed" — within the ordinary meaning of the term and within the meaning of the CC&R's.

Mitchell's argument that such an interpretation would preclude the construction of complementary or auxiliary structures does not convince us otherwise. In construing restrictive covenants, the intention of the parties to the instrument is paramount. The CC&R's provide that all of the lots in the subdivision are intended to be "residential lots," and that the "subdivision has been carefully planned as a Choice Residential District exclusively." Paragraph 4 of the CC&R's gives homeowners in the subdivision the ability to prevent structures on the lots that might compromise the aesthetics and general character of the neighborhood. Applying the provision as we interpret it furthers the goal of maintaining the subdivision as a "Choice Residential District." The fact that the homeowners may choose to allow complementary structures that do not negatively impact the character of the neighborhood does not defeat the meaning of paragraph 4.

For the foregoing reasons, we reverse the trial court's judgment and remand with directions to grant the relief sought by the Hortons in their complaint.

Blaire v. Evans
Columbia Supreme Court (1999)

Dana and Ryan Blaire (the “Blaires”) and Laura and John Evans (the “Evans”) are residents and lot owners in Occidental, a residential community located in Soper County, Columbia. Covenants, Conditions and Restrictions (“CC&R’s”) were promulgated and adopted for Occidental and were recorded in the Soper County Recorder's Office. The Evans' lot currently contains a detached single-family dwelling, which includes an attached private garage for two cars, and they seek to build an additional detached private garage for two additional cars.

> CC&R No. 2 of the Occidental Restrictive Covenants provides:
>
> No structure shall be erected, altered, placed or permitted to remain on any residential building lot other than one detached single-family dwelling not to exceed two stories in height and a private garage for not more than three cars; carports shall be considered as garages.

The trial court issued an injunction prohibiting the Evans from erecting the additional detached private garage.

Waiver by Acquiescence

The Evans argue that in light of evidence that other property owners in Occidental have spaces for more than three cars, the Blaires have acquiesced in prior restrictive covenant violations of other Occidental landowners, have waived their ability to assert a violation and are therefore barred from challenging the Evans' building of the additional detached two-car garage.

The defense of waiver by acquiescence is raised when the restrictions sought to be enforced are not universally enforced or when there are frequent violations of the restrictions. A review of the relevant case law reveals three factors particularly significant to the analysis: 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.

Acquiescence by the complainant to violations of dissimilar restrictions cannot be a bar to enforcement where the restrictions are essentially different so that abandonment of one would not induce a reasonable person to assume that the other was also abandoned. Likewise, failure to sue for prior breaches by others where the breaches were noninjurious to the complainant cannot be treated as an acquiescence sufficient to bar equitable relief against a more serious and

damaging violation. This situation may arise where the prior violations have been in a distant part of the subdivision while the present violation is immediately adjacent to the complainant's land.

In the past, there has been a marked lack of enforcement of the restrictive covenant in question. A significant number of Occidental properties have been permitted to maintain garage space for more than three cars (the trial court record indicates the number to be somewhere between 15 and 26), including several on the same block as the Blaires. Thus the location of the objecting landowner and the frequency of prior nonconforming uses suggests acquiescence. In addition, the evidence is that the violation is identical to the violation the Blaires seek to enjoin. The Evans thus appear to have established sufficient evidence that the Blaires should be held to having acquiesced to the Evans' building of the additional detached two-car garage.

The Non-Waiver Provision — Paragraph Number 27

The Blaires, however, argue that even if these facts indicate acquiescence, under paragraph No. 27 of the CC&R's the Blaires are still entitled to enforce CC&R paragraph No. 2, despite prior violations by other Occidental landowners. CC&R No. 27 of the Occidental restrictive covenants states:

> The failure for any period of time to compel compliance with any covenant, condition or restrictions shall in no event be deemed as a waiver of the right to do so thereafter, and shall in no way be construed as a permission to deviate from the covenants, conditions and restrictions.

The Evans are concerned that the enforcement of the non-waiver clause raises the specter of selective enforcement. Nevertheless, unambiguous provisions in restrictive covenants generally should be enforced according to their terms. Enforcement of the non-waiver clause allows prospective purchasers of property to rely on recorded CC&R's. Thus so long as the waiver clause is unambiguous and not adverse to public policy, it can be enforced.

CC&R No. 27 of the Occidental restrictive covenants is an unambiguous non-waiver clause. Indeed, the Evans do not dispute this, and instead argue that its enforcement would be adverse to public policy. They correctly point out that Columbia courts have the power to decline to enforce restrictive covenants. According to the Evans, application of the non-waiver provision would lead to "the entirely selective, random, arbitrary, capricious, and potentially discriminatory enforcement" of the CC&R's and thus would be adverse to public policy. They thus urge us not to enforce CC&R No. 27.

We conclude that the non-waiver provision in the CC&R's is reasonable. There is nothing arbitrary or capricious in homeowners seeking to prevent additional detached garages being erected on a neighboring lot. Without the non-waiver

provision, the inaction of a homeowner on one side of the subdivision could result in a waiver of the right of a homeowner on the other side of the subdivision to enforce the CC&R's in regard to an adjacent lot.

Abandonment

The non-waiver provision would be ineffective if a complete abandonment of the entire set of CC&R's has occurred. The test for determining a complete abandonment of deed restrictions — in contrast to waiver of a particular section of restrictions — is whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the CC&R's, defeat the purposes for which they were imposed, and consequently amount to an abandonment thereof.

No evidence was presented, however, that Occidental is no longer a "Choice Residential District." The violations described by the Evans have not destroyed the fundamental character of the neighborhood. We conclude, as a matter of law on the record before us, that the non-waiver provision of the CC&R's remains enforceable and the subdivision property owners have not waived or abandoned enforcement of CC&R No. 2 even though they or their predecessors have acquiesced in several prior violations of its provisions.

As such, it was not error to conclude that the Evans are barred from raising the defense of acquiescence by the non-waiver provision.

Affirmed.

Lutz v. Gundersen
Columbia Court of Appeals (2000)

Kent Lutz, an owner of property in Honker Bay Estates (HBE), a subdivision in Madison, Columbia, brought suit against Peter Gundersen, seeking to have Gundersen vacate, abandon and remove his warehouse building in HBE that Lutz claimed was in violation of certain Conditions, Covenants and Restrictions ("CC&R's") for the subdivision. The Superior Court granted a mandatory injunction directing the removal of the building.

The Honker Bay Estates CC&R's provide:

> All the property shall be used for residential property only except that portion fronting on Gessler St. with a depth of 200 ft., which may be used for neighborhood retail business purposes.

Gundersen purchased lot Sixty-One in HBE and within a year commenced construction of a bowling alley and cocktail lounge on the lot. Gundersen stopped the construction after three weeks upon being informed by an attorney that the building was in violation of use and depth restrictions in the CC&R's. Gundersen recommenced construction about six months later, modifying the building to a warehouse he intended to lease, and completed the building at a cost of approximately $200,000.

Fundamental Change to the Neighborhood

Gundersen argues that rapid and radical changes in the character of the neighborhood adjacent to the restricted property preclude the homeowners from enforcing the restrictive covenant. This state follows the general rule that a court will enforce the terms of restrictive covenants unless the changes in the surrounding areas are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions. It is true that across the street from the warehouse were a miniature golf course and a polka dance hall, that one block further east was a large shopping center, and that across Gessler to the north and approximately one block to the west was a large bowling alley and a veterinary hospital. While this appears to constitute substantial change so as to render the restriction ineffective, in this case the changes from residential to business were not within the restricted area.

Laches

Gundersen also argues that Plaintiff Lutz is precluded from obtaining equitable relief on the ground of laches, due to the fact that Lutz was aware of Gundersen's commercial building construction plans a year before construction

started yet did not file his complaint seeking permanent injunction until construction was completed. The trial court rejected his argument.

Courts may provide relief in whole or in part upon a finding of laches. In order to bar a claim on the basis of laches, a court must find more than mere delay in the assertion of the claim. The delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other party sufficient to justify denial of relief.

Here, the CC&R's do not require an enforcing landowner to seek injunctive relief prior to a violation of the CC&R's. Section 18 of the CC&R's authorizes a landowner to seek injunctive relief "in the event of a breach of any of the covenants and restrictions contained herein." It is not clear from the record the point at which a violation of the CC&R's was patently obvious to the Plaintiff Lutz, and, in any event, Plaintiff, to avoid laches, is not required to file a lawsuit as the very first course of action. Gundersen knew or should have known of the restrictive covenant because it appears in the deed, and nothing prevented him from filing a declaratory judgment action seeking a determination of its enforceability. Under such circumstances Gundersen acted at his own peril without first obtaining a resolution of the covenant. We conclude that Plaintiff Lutz is not precluded by laches from seeking injunctive relief.

Balance of Hardships

Gundersen also contends that the granting of injunctive relief results in damage and hardship to him out of all proportion to any benefits to be gained by the homeowners. It is true that in cases of this nature courts are motivated by such matters as comparative value and consider relative hardship by weighing the interest of both sides. But no court will allow an intentional violator of CC&R's to rely upon the contention of relative hardship. It would indeed be inequitable to permit a party who is fully cognizant of building restrictions and the opposition of at least some homeowners to changes in those restrictions to expend large sums of money on the gamble that the restrictions would not be enforced against him and then claim that enforcement of the restrictions works a hardship on him.

That Gundersen is an intentional wrongdoer for all expenditures that took place after he was informed of the deed restriction is clear from the following testimony:

Q: Were you aware that a warehouse was equally prohibited under the CC&R's?
A: I heard that they were.
Q: Knowing you couldn't build a warehouse there, why did you do it?
A: Because I had so much money in it that I couldn't do otherwise, I had to finish it. I had a terrific financial investment in that property and practically everything that I owned was in it. You are going to try to salvage and do something with that, are you not?

Q: So you were trying to make the most of a bad situation then?
A: That's right.

Were we to adopt Gundersen's argument, CC&R's would become difficult to enforce. Any owner of real property governed by CC&R's could claim that he had commenced construction in ignorance of the restriction or under a different interpretation of the restriction. The adjoining property owners would not have had an opportunity to object, but the violator could require a decision on relative hardships. This would erode the uniformity to which all owners of property covered by the CC&R's, including the violating owner, agreed.

Delay by homeowners will, in many instances, prevent injunctive relief to enforce deed restrictions. Our opinion should not be understood as suggesting that the homeowners of a subdivision could force removal of structures that have been uncontested and present for a lengthy period of time. Here, while it is correct that the suit came after construction was complete, it was not an unreasonable delay, in light of the willful violation of covenants by the defendant.

Therefore, we find no abuse of discretion in the trial court's judgment.

Piedmont Valley Homes Association v. Walter
Columbia Supreme Court (2002)

The rear property line of Dr. Alexander Walter's property in Piedmont Valley abuts a parkland parcel owned by the City of Piedmont Valley. Because no homes can be built on the parkland parcel, Walter has an unobstructed ocean view from the back of his property. Property within Piedmont Valley is subject to Contracts, Covenants and Restrictions ("CC&R's"), and the Piedmont Valley Homes Association ("PVHA") has the authority to enforce these CC&R's. The CC&R's, which require prior written approval from PVHA's design review committee (the "committee") for all construction or alteration, dictate that the required minimum rear yard "setback distance between a structure and the parklands parcel is five feet."

When Walter originally bought his property, there was a wrought iron fence along the rear of his lot which he believed marked the line between his property and the parkland parcel. In 1983, Walter submitted plans, received approval, and completed construction of a deck, a breakfast nook, and other additions to the back of the house, spending about $176,000 on the project. The plans identified Walter's property line consistent with the location of that fence. However, in 1999 a neighboring homeowner complained that Walter was encroaching on city parkland, and a subsequent investigation and survey revealed that the fence had not properly marked Walter's property line. Thus the plans for the project, submitted by Walter's architect and approved by the committee, were erroneous. In fact, the breakfast nook and deck extended several feet onto the City's parkland.

PVHA sought declaratory relief and a permanent injunction against Walter. Walter argued that the parkland setback should not be enforced due to relative hardship.

Balancing the hardships

A court has discretion to balance the hardships and deny a mandatory injunction to remove a building or structure that has encroached or otherwise violates an enforceable restriction, even in the absence of an affirmative defense such as laches. In exercising its discretion and in weighing the relative hardships to determine whether to grant or deny a mandatory injunction, a court should start with the premise that an owner who violates a restriction is a wrongdoer and that the interests of the plaintiffs have been impaired. Thus, doubtful cases should be resolved in favor of the plaintiff. In order to deny the injunction under a balance of hardships, a court must find certain factors to be present: 1) the Defendant must be innocent — the encroachment must not be the result of Defendant's willful act. In this same connection the court should also weigh Plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2) The Defendant's acts

must not cause irreparable harm to the Plaintiff. If the Plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to the defendant. 3) The hardship to the Defendant by the granting of the injunction must be greatly disproportionate to the hardship caused to the Plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant.

1. Innocent Violation

Equitable discretion should not be used to protect an intentional wrongdoer. The case law both in Columbia and in other jurisdictions supports the conclusion that where a party has actual or constructive notice prior to actually violating a restriction that his structure will violate a restriction, and then completes construction of the structure, the party may not claim the benefit of relative hardships. Although the amount of hardship and the date it is incurred may be relevant if a court reaches the third step of determining the relative levels of hardships, those factors are not relevant to a determination of the intent of the violator.

The trial court concluded that Dr. Walter constructively knew of the restriction by virtue of being a landowner, was responsible for determining the boundary line for his property, and thus was precluded from arguing balance of hardships. The trial court stated:

> Dr. Walter's only excuse is mistake of fact. What is to stop all other property owners whose rear property line abuts City property from extending their homes past the boundary limits with an "I don't know" excuse? It was Dr. Walter's responsibility to confirm the property lines whether through his own efforts or that of his agents. Walter's remedy, if any, is against his architect or contractor.

We disagree, and find that the genuine mistake of fact is sufficient to enable Dr. Walter to argue balance of hardships. Landowners who live in a restricted subdivision receive constructive notice of the CC&R’s when they purchase, rendering Dr. Walter aware of the restriction. Nevertheless Dr. Walter was not an intentional violator. Dr. Walter might well be held responsible were this a matter of contractual "mistake." But he is on different footing from the usual "wrongdoer" who is aware that the construction at least arguably violates the CC&R’s but constructs anyway, in the hope that no one will notice or do anything about it or that an argument that the CC&R’s do not apply or have been waived will succeed. The undisputed evidence demonstrates that Dr. Walter, his architect, and his contractor all honestly believed his construction complied with the CC&R’s and was not an encroachment.

2. Irreparable Injury

The trial court found that regardless of whether Dr. Walter's encroachment was wilful, PVHA suffered irreparable injury. At trial, PVHA's counsel stated "We don't like being here but we're here because we have a duty to enforce the CC&R's against everybody. If we can't enforce them against everybody equally, we can't enforce them against anybody. And if we can't enforce our CC&R's, we are irreparably harmed." The trial court agreed, stating:

> This Court finds that PVHA would suffer great and irreparable injury if this Court did not enforce the CC&R's. Property owners purchase property here, in part, because of these very restrictions. To allow Dr. Walter a variance of his structures to the limit line of his property would violate all notions of light, air and space. This would be a harmful precedent, causing the harm which the PVHA seeks to prevent: a flood of setback variance requests or violations justified by other previously granted variances. There would be no end to the variances sought and the whole purpose of the minimum setback requirement would be undermined.

We disagree. Despite the balance of hardship, injunctions will issue on behalf of a homeowner whose property is irreparably damaged due to a violation of the CC&R's. Irreparable damage occurs when a CC&R violation interferes with uses, views, or other quiet enjoyment of the property, or undermines property values, in a manner that cannot easily be ascertained and remedied. In those situations, despite the hardship suffered by the encroacher, an injunction is appropriate. On this record, however, there is nothing to support the PVHA's assertions that the parkland setback restrictions are inviolate or that it will be irreparably harmed if Walter's property is allowed to remain within the setback area. It has made allowances for other properties already built within the setback area, and has identified no principled distinction between the variances repeatedly granted and Walter's effective request for one here. Dr. Walter's encroachment does not impair a view, present a lot owner with an unsightly obstruction inconsistent with the neighborhood, or possibly affect the property values of the subdivision in any way. The city has allowed it without objection for 16 years. There is no irreparable injury.

3. Relative Hardship

When balancing hardships, it is important to note that the analysis is not merely a mechanical toting up of the dollar amount of the violator's losses compared to the dollar harms of the landowner(s) seeking to enforce the restriction. Such an "efficiency-style" balance would too often preclude an injunction, as construction and removal costs often are substantially greater than the diminished property value to an individual landowner affected by the violation of a restriction. A balance of hardships analysis appropriately may consider impairment of property values and other harms to the entire subdivision. At trial, testimony revealed that it would cost $104,570 to remove the encroachments to within five feet of the property line. Combined with the amount spent on the project, the out-of-pocket

loss to Dr. Walter would be roughly $280,000. Although he enjoyed the benefit of the 16 years, the removal likely will significantly reduce the value of his property. The disproportionate hardship borne by Dr. Walter is of considerable magnitude, because, as noted above, in this unusual case there is no apparent harm to the subdivision or the City of Piedmont Valley that owns the parkland. Finally the fact that the suit was brought years after the violation, rather than contemporaneous with the construction, is also a factor leaning strongly in the direction of giving relief to the homeowner.

Reversed.

IN RE BLACK

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional State of Columbia, one of the United States.

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

4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.

6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.

8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Smith & Wong, LLP

Attorneys at Law
897 Claire Avenue
Bodie, Columbia 99922
(555)602-1959

MEMORANDUM

To: Applicant
From: Donna Granata
Date: July 29, 2010
Re: **In re Black**

We represent Amanda Black, a local attorney, who has retained us for consultation in a fee dispute with one of her clients, Brian Lester.

Black was retained by Lester eight months ago under a contingent fee agreement to resolve a matter involving a parcel of real property located at 42 Valle Vista Drive here in River County just outside Bodie. Under the agreement, Black is entitled to fees if Lester obtains a recovery. Black has retained us to prepare an opinion letter to guide her in seeking fees from him.

Please draft an opinion letter, in accordance with our guidelines, addressed to Black, answering the questions she asked in the interview.

Smith & Wong, LLP

Attorneys at Law
897 Claire Avenue
Bodie, Columbia 99922
(555)602-1959

MEMORANDUM

To: Associates
From: Executive Committee
Date: October 29, 2007
Re: **Opinion Letters**

The firm follows these guidelines in preparing opinion letters to clients:

- State the questions asked by the client.

- Following each question, provide a concise statement giving a short answer to the question of no more than a few sentences.

- Following the short answer, write an explanation of the issues raised by the question, including how the relevant authorities combined with the facts lead to your conclusion.

TRANSCRIPT OF INTERVIEW 1 **WITH AMANDA BLACK**
July 28, 2010

DONNA GRANATA (DG): Amanda, it's good to meet you in person. As I mentioned on the phone, we're glad to be able to take your case. Do you mind if I tape-record our conversation, to free me from the distraction of taking lots of notes?

AMANDA BLACK (AB): No, Donna, that's perfectly fine with me.

DG: You told me a bit about the case when we talked on the phone. Why don't you fill me in on the details?

AB: Sure. It's a fee dispute with a client. No fireworks, but I know he doesn't want to pay and I need an opinion letter on how to try to get my fees, legally and ethically.

DG: Fine. Go ahead.

AB: My client, a fellow named Brian Lester, owned a piece of property here in River County as a joint tenant with a woman named Joyce Tunnell. The property is located at 42 Valle Vista Drive just outside Bodie. Lester said he thought it was worth between $1 million and $2 million. Lester wanted to sell, but Tunnell didn't. That meant, as a practical matter, Lester's interest was unmarketable. Lester retained me to resolve the matter in some way—one way, of course, was to bring an action against Tunnell to partition the property.

DG: When did Lester retain you?

AB: On December 1, 2009.

DG: Hourly?

AB: No, contingent fee. I brought a copy of the fee agreement with me. I also brought 24 copies of all the other documents I have that relate to it in any way—a lien agreement, a 25 notice of lien, an e-mail Lester sent me, and a notice I sent him of his rights under the 26 Mandatory Fee Arbitration Act.

DG: Thanks. Are there any other papers relating to the fee agreement or the lien agreement?

AB: No, none.

DG: Going back to the beginning, what happened right after Lester retained you?

AB: I started work on the matter immediately, and made some 1 overtures to Tunnell, who hadn't hired a lawyer yet, but had no luck in resolving the matter. I then brought an action for partition.

DG: When did you do that?

AB: On December 21, 2009. I filed a notice of lien that same day. Lester was in a hurry. We served Tunnell and commenced what would turn out to be extensive discovery within a relatively brief period of time. I took Tunnell's deposition, and was quite happy with the outcome. That proved to be the turning point.

DG: Why do you say that?

AB: Shortly after Tunnell's deposition, Lester told me it was over. That's what he said, "It's over."

DG: What did he mean?

AB: He said he and Tunnell settled the matter between themselves, "privately," he said. He said he just decided to "give up," in his words, and that was that.

DG: When was that?

AB: On June 29, 2010.

DG: You didn't believe Lester?

AB: No, I didn't.

DG: Why?

AB: It's a complicated story. Let me start at the beginning. For starters, Lester wasn't the sort just to "give up," and I suspected that he might have been the sort to *"say"* he gave up to avoid paying my fees.

DG: You pursued the matter, I suppose.

AB: Right. I called Tunnell's lawyer, but he said he didn't have a clue what had happened. Over a period of about two weeks, I called Lester repeatedly, but he never answered. We finally connected, though.

DG: When was that?

AB: On July 14, 2010. We talked at some length; he knew I had worked hard on this case, and had to forego other opportunities, and his conscience seemed to

bother him; he said he'd be willing to pay me for my services at the hourly rate I had quoted him originally—$300—as soon as I brought the case to a close by filing a dismissal with prejudice. I wasn't very happy about that, and I said so. I had expected that my fees under the contingent fee agreement would be much higher. But some fees were better than no fees. I told him I had put in 120 hours, yielding fees of $36,000. I guess he hadn't expected the number to be that high, and said he'd have to think about it and then ended the call.

DG: Did you speak with him again after that?

AB: No. But on July 17, 2010, I received an e-mail from him, reminding me that I should file the dismissal with prejudice and that the representation would then end.

DG: Have you done so?

AB: Not yet. I didn't want to end the representation before talking to you.

DG: Have you done anything else?

AB: About the case, no. About my fees, yes—I sent him a written notice of his right to arbitration under the Mandatory Fee Arbitration Act.

DG: I was going to ask about that. When did you send the notice?

AB: On July 19, 2010, ten days ago.

DG: Have you heard anything about it from Lester?

AB: You mean, has he requested arbitration? No; he certainly hasn't told me he has. I'd like to avoid arbitration under the Mandatory Fee Arbitration Act if I can, in favor of the sort of arbitration provided for in the contingent fee agreement—you know, standard arbitration under the Columbia Arbitration Act. Can I do that?

DG: I'll take a look at that. Just to clarify, you haven't brought any claim against Lester yet, either in court or in arbitration?

AB: No.

DG: Thanks. Now, going back to Lester's "private" settlement with Tunnell—do you know anything about it?

AB: Yes, I heard that Lester and Tunnell have made some kind of deal. On July 18, 2010, I heard from a real estate broker who's a mutual acquaintance of Lester and me that the Valle Vista property was about to be sold for $1.4 million, and that the sale was set to close in a week, on August 5, 2010.

DG: Did you hear how much Lester was going to get?

AB: That's a bit uncertain. But it seems that under the "private" 1 settlement, Tunnell had either bought Lester out already, at Lester's asking price of $600,000, or had agreed to pay him half the $1.4 million once the sale closed.

DG: How sure are you that this real estate broker got it right?

AB: Pretty sure, but who can really tell?

DG: Interesting. Well, that gives me enough information to begin my research for the opinion letter. What's your time-frame? I assume you want the opinion letter as soon as possible.

AB: Please. When we talked on the phone, you estimated that your fee would be about $1,500, isn't that right?

DG: That's right, barring any unforeseen difficulties—which, of course, I'd bring to your attention.

AB: Fine. In preparing the opinion letter, could you take a look at the fee agreement to see if I'd be entitled to obtain reimbursement from Lester for your fees as costs under the agreement?

DG: Will do. By the way, does he owe you anything for costs?

AB: No, thank goodness, he kept current with my billings for costs.

DG: Anything else you'd like me to address?

AB: No.

DG: So, let me summarize what you want to know. First, can you bring a claim against Lester under your fee agreement, whether in court or in arbitration? Second, can you bring a claim against him under your lien agreement, whether in court or in arbitration? Third, can you arbitrate under the Columbia Arbitration Act rather than the Mandatory Fee Arbitration Act? Fourth, how much are you entitled to in fees? And fifth, can you get reimbursement of the fees you're paying us for the opinion letter as "costs" under your fee agreement with Lester?

AB: That's it.

DG: I should have a draft ready in a day or two.

AB: Great. Thanks so much.

ATTORNEY-CLIENT CONTINGENT FEE AGREEMENT

AMANDA BLACK ("Attorney") and BRIAN LESTER ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below:

SCOPE OF SERVICES. Client is hiring Attorney to represent Client in the matter of Client's claims relating to Client's dispute with one Joyce Tunnell regarding a parcel of real property located at 42 Valle Vista Drive in River County, Columbia.

FEES. Attorney will be compensated for services from any recovery in the matter, whether by judgment or settlement or otherwise. If recovery occurs during Attorney's representation, Attorney's fees shall be calculated as follows: (1) If recovery is obtained without the filing of a complaint on behalf of Client, Attorney's fees will be equal to 25% of the amount recovered; (2) if recovery is obtained within 30 days after the filing of a complaint, Attorney's fees will be equal to 33% of the amount recovered; and (3) if recovery is obtained beyond 30 days after the filing of a complaint, Attorney's fees will be equal to 40% of the amount recovered. If a real property interest is recovered, the value of such real property interest shall be the basis for the amount recovered as described in this paragraph. For example, if Client owns real property as a joint tenant worth $100,000 and the result of the matter is an equal partition, Client would own a share of real property worth $50,000. Client would then owe Attorney either 25% or 33% or 40% of that resulting share, meaning $12,500 or $16,500 or $20,000, respectively. If recovery occurs after Attorney's representation has terminated, Client agrees that, upon recovery, Attorney shall be entitled to be paid by Client a reasonable fee for the services rendered at an hourly rate of $300.00.

COSTS. Attorney will incur various costs in performing services for Client under this Agreement. Client agrees to reimburse Attorney for all such costs.

DISPUTES. If any dispute arises between Attorney and Client as to fees or costs, Attorney and Client agree to submit the dispute to binding arbitration before the Columbia Arbitration and Mediation Service pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280), with the expenses of arbitration shared equally by Attorney and Client.

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Brian Lester*

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Amanda Black*

AMANDA BLACK

LIEN AGREEMENT

AMANDA BLACK ("Attorney") and BRIAN LESTER ("Client") hereby agree as follows:

LIEN. Client grants, and Attorney accepts, a lien on any amount recovered pursuant to the Attorney-Client Contingent Fee Agreement entered into by Client and Attorney on this date in order to secure payment and reimbursement for any fees Attorney has earned and any costs Attorney has incurred under that agreement.

DISPUTES. If any dispute arises between Attorney and Client as to fees or costs, Attorney and Client agree to submit the dispute to binding arbitration before the Columbia Arbitration and Mediation Service pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280), with the expenses of arbitration shared equally by Attorney and Client.

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Brian Lester*

BRIAN LESTER

ACCEPTED AND AGREED TO:
December 1, 2009

By: *Amanda Black*

AMANDA BLACK

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
500 Ruxton Street
Bodie, Columbia

Attorney for Plaintiff Brian Lester

IN THE SUPERIOR COURT OF THE STATE OF COLUMBIA
FOR RIVER COUNTY

BRIAN LESTER, Plaintiff, v. JOYCE TUNNELL, Defendant.	No. Civ. 103007 **NOTICE OF LIEN**

TO ALL PARTIES AND THEIR ATTORNEYS AND TO OTHERS INTERESTED:

PLEASE TAKE NOTICE THAT Amanda Black, of the Law Offices of Amanda Black, attorney of record for Plaintiff Brian Lester, has and claims a lien ahead of all others on any recovery that Plaintiff may obtain in this matter in order to secure payment for fees earned and costs incurred.

Date: December 21, 2009

Amanda Black

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
Attorney for Plaintiff Brian Lester

E-MAIL MESSAGE

From: Lester, Brian
Sent: July 17, 2010 at 11:27 AM
To: Black, Amanda
Subject: Lester v. Tunnell

Dear Amanda:

This is just a reminder for you to file the dismissal with prejudice we talked about within the next week or two. Once you've done so, I won't have any further need of your services, and the representation will be over.

I appreciate all the work you've put into this. I wish it could have turned out better for both our sakes, but I guess it wasn't meant to be.

Sincerely,
Brian

Amanda Black, Esq.
LAW OFFICES OF AMANDA BLACK
500 Ruxton Street
Bodie, Columbia
(555)303-1955

July 19, 2010

Brian Lester
67 Clarendon Avenue
Bodie, Columbia 99911

Re: Notice of Rights Under Mandatory Fee Arbitration Act (Lester v. Tunnell)

Dear Brian:

I hereby give you written notice of your right to arbitration under the Mandatory Fee Arbitration Act (Columbia Business & Professional Code, §6200) with respect to our dispute about attorney's fees in this matter. If you wish to exercise your right, you must send (1) a written request to the Office of Mandatory Fee Arbitration, State Bar of Columbia, 555 Franklin Street, Bodie, Columbia 99902, and (2) a copy of that request to me. If you fail to do so within 30 days, you will waive your right.

Very truly yours,

Amanda Black

Amanda Black

SELECTED COLUMBIA STATUTORY AND RULE PROVISIONS

Section 1280 of the Columbia Code of Civil Procedure

(a) This section shall be known as the Columbia Arbitration Act.

(b) A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.

(c) Any party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award.

* * *

Section 6200 of the Columbia Business and Professions Code

(a) This section shall be known as the Mandatory Fee Arbitration Act.

(b) The State Bar of Columbia shall offer to conduct arbitration of disputes concerning fees, costs, or both, charged for professional services by attorneys, under rules that the Board of Governors of the State Bar of Columbia may, from time to time, determine, with the costs borne solely by the attorney.

(c) This section shall not apply to any of the following:

> (1) Claims for affirmative relief against the attorney, for damages or otherwise, based upon alleged malpractice or professional misconduct.
>
> (2) Disputes where the fees or costs to be paid by the client, or on his or her behalf, have been determined pursuant to statute or court order.

(d) Arbitration under this section shall be voluntary and non-binding for a client and shall be mandatory and binding for the attorney.

(e) An attorney shall send a written notice to the client prior to or at the time of service of summons or claim in an action against the client, or prior to or at the commencement of any other proceeding against the client under a contract between attorney and client which provides for an alternative to arbitration under this section, for recovery of fees, costs, or both. The written notice shall include a statement that (1) the client has a right to arbitration under this section and (2) the client shall be deemed to waive that right if, within 30 days, he or she fails to send (a) a written request for arbitration to the State Bar of Columbia and (b) a copy of such request to the attorney. The sending of the written notice provided

for in this subsection shall not be deemed to commence any action or other proceeding against the client. The attorney's failure to send the written notice provided for in this subsection shall be a ground for the dismissal of the action or other proceeding.

(f) Within 30 days of the written notice provided for in subsection (e), a client must send:

> (1) a written request for arbitration to the State Bar of Columbia and (2) a copy of such request to the attorney, in order to preserve the client's right to arbitration under this section. Failure to do so shall be deemed a waiver of such right by the client.

(g) A client's right to request or maintain arbitration under this section is waived by the client commencing an action or filing any pleading seeking either of the following:

> (1) Judicial resolution of a fee dispute to which this section applies.
>
> (2) Affirmative relief against the attorney, for damages or otherwise, based upon alleged malpractice or professional misconduct.

* * *

Rule 3-300 of the Columbia Rules of Professional Conduct

An attorney shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

(a) The acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably be understood by the client; and

(b) The client is advised in writing that the client may seek the advice of an independent attorney of the client's choice and is given a reasonable opportunity to seek that advice; and

(c) The client thereafter consents in writing to the terms of the acquisition.

Discussion

Rule 3-300 is intended to apply to any agreement through which an attorney seeks to acquire any ownership, possessory, security, or other pecuniary interest adverse to the client. The rule regularly comes into play when an attorney seeks

to acquire a security interest—that is, a lien—in order to secure the payment of his or her fees.

Columbia law provides that any agreement between an attorney and a client involving the acquisition of an interest adverse to the client is unenforceable, as is the interest purportedly acquired, if the attorney has not complied with Rule 3-300.

Fracasse v. Brent
Columbia Supreme Court (1972)

Plaintiff George Fracasse, an attorney, was retained by defendant Renee Brent to prosecute a claim for personal injuries on her behalf. Fracasse and Brent entered into a written contingent fee agreement, under which Brent agreed that Fracasse's compensation would be one-third of any recovery. Sometime thereafter, but before any recovery had been obtained, Brent informed Fracasse that she wished to discharge him and retain another attorney, and did so. Fracasse then filed the present action seeking declaratory relief. Alleging that his discharge was without cause, and that Brent had breached the agreement and had refused to give him the fees to which he would have been entitled, Fracasse prayed for a declaration that the agreement was valid and that he had a one-third interest in any recovery ultimately obtained. Brent demurred to the complaint. The trial court sustained the demurrer without leave to amend and dismissed the action. The Court of Appeal affirmed. We granted review.

At the threshold, Brent claims that we should affirm the judgment without reaching the merits. She argues that Fracasse was ethically prohibited from bringing this action against her in the first place by the duty of loyalty imposed on him by the Columbia Rules of Professional Conduct. To be sure, during his or her representation of a client, an attorney is indeed ethically prohibited by the duty of loyalty from asserting any claim against a client, whether in or out of court. But the ethical prohibition dissolves once the representation has terminated. Here, of course, prior to suing Brent, Fracasse's representation had in fact terminated—when he was discharged by Brent. Under the law of Columbia, a client, like Brent, has an absolute right to discharge an attorney, at any time and for any, or no, reason—a right the attorney may not interfere with to protect his or her fees. But once the client exercises that right, he or she releases the attorney from the ethical prohibition in question.

Brent goes on to claim that, in any event, we should affirm the judgment on the merits. Under a contingent fee agreement, an attorney is not entitled to fees, and hence does not have a cause of action against the client for breach arising from failure to pay fees, unless and until the contingency specified has occurred. And if the contingency specified occurs after the representation has terminated, the attorney's right to, and cause of action for, fees is limited to the reasonable value of the services rendered during the representation, and does not extend to the full fees that would have been due under the agreement. Otherwise, the client's absolute right to discharge the attorney might be unduly burdened by the prospect of paying the discharged attorney's full fees plus fees to a successor attorney as well. We find no injustice in limiting the fees of a discharged attorney to an amount consisting of the reasonable value of the services rendered during the representation. In doing so, we preserve, as noted, the client's absolute right

to discharge the attorney without undue burden. We also preserve the attorney's entitlement to fair fees for part performance—albeit not to full fees, which would have been earned only by full performance.

In light of the foregoing, Fracasse's action is premature. Since Brent has yet to obtain any recovery in her personal injury action, the contingency specified in the contingent fee agreement has yet to occur. Indeed, Brent may end up obtaining no recovery at all—in which case, Fracasse would be entitled to no fee whatsoever. One thing, however, is sure: Fracasse does not yet have any entitlement to fees, and hence does not yet have a cause of action against Brent for breach arising from failure to pay fees.

Affirmed.

Carroll v. Interstate Brands Corporation
Columbia Court of Appeal (2002)

In this action for employment discrimination against defendant Interstate Brands Corporation ("Interstate"), plaintiff Daniel Carroll was originally represented by Allen & Allen, LLP. Allen & Allen in turn hired William McMahon, an attorney, to perform certain legal work on the case. When McMahon left the Allen firm's employ, Carroll discharged the firm and substituted McMahon in its place, entering into a contingent fee agreement with McMahon based on obtaining a recovery against Interstate through settlement or judgment, and also agreeing to a lien in McMahon's favor against any recovery he might obtain against Interstate. Through McMahon's services, Carroll did indeed obtain recovery, via settlement, against Interstate. Simultaneously with obtaining the recovery, Carroll refused to pay McMahon any fees. Prior to dismissal of the action pursuant to the settlement, McMahon filed a motion to enforce his lien against Carroll to obtain his fees. The trial court granted McMahon's motion. Carroll filed an appeal. We reverse.

In order to obtain his or her fees, an attorney may assert a cause of action for breach of contract based on the underlying fee agreement. To prevail on the claim, the attorney must prove that the client breached the fee agreement by failing to pay fees to which the attorney was entitled, and thereby caused the attorney damages in the amount of the fees in question. To the same end, the attorney may also assert a cause of action to enforce a lien. To prevail on this claim, the attorney must prove the same facts as for breach of contract, but must also prove that the lien is enforceable as authorized by the law of contract and also compliant with Columbia Rule of Professional Conduct 3-300. The attorney is not compelled to choose between these causes of action, but may bring both at the same time in the alternative—although, of course, if the attorney should prevail on both, he or she may not obtain double recovery.

That said, it is the rule that the attorney may not seek to obtain his or her fees in the same action in which he or she is representing the client, but must bring a separate action against the client. Because that is so, the trial court should have denied McMahon's motion at the threshold without considering the merits. McMahon argues that this rule is subject to exceptions. True, but none of the exceptions helps McMahon, since all of them require the client's consent—which is altogether lacking here.

Reversed.

Aguilar v. Lerner
Columbia Supreme Court (2004)

Plaintiff Raul Aguilar hired defendant Esther Lerner, an attorney specializing in family law, to represent him in a marital dissolution proceeding. Aguilar explained to Lerner that he desired the matter to be resolved quickly and inexpensively. Lerner agreed to represent him and produced a written fee agreement that included the following arbitration provision:

> In the event that there is any dispute between CLIENT and ATTORNEY concerning fees, this Agreement, or any other claim relating to CLIENT'S legal matter which arises out of CLIENT'S legal representation, CLIENT hereby agrees to submit such dispute to binding arbitration, pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280). Any such arbitration shall be conducted before the Columbia Arbitration and Mediation Service, with CLIENT and ATTORNEY sharing the costs of such arbitration equally.

Aguilar signed the fee agreement and initialed the arbitration provision.

After a dispute arose, Aguilar discharged Lerner and filed a complaint for damages in Sommerview County Superior Court, alleging Lerner had committed malpractice. In response, Lerner petitioned to compel arbitration of these claims pursuant to the Columbia Arbitration Act (Columbia Code of Civil Procedure, §1280); she also added her own claim for unpaid attorney fees and costs. The Superior Court granted the petition to compel, stating that the results of the arbitration would be binding, and that Aguilar's "claim for malpractice falls within the scope of the arbitration provision he initialed." Lerner prevailed in arbitration, the arbitrator granting her judgment against Aguilar on his complaint for damages. On Lerner's claim for unpaid legal fees and costs, the arbitrator awarded her $32,710. The costs of arbitration amounted to $3,000, with Lerner and Aguilar each paying $1,500. Aguilar paid under protest. The Superior Court denied Aguilar's motion to vacate the arbitration award and granted Lerner's motion to confirm it. The Court of Appeal affirmed. We granted review, and now affirm.

Aguilar contends the parties' agreement to arbitrate was invalid and unenforceable because it was contrary to the Mandatory Fee Arbitration Act (Columbia Business & Professional Code, §6200), which makes arbitrating attorney fee disputes voluntary for a client and non-binding as well, thereby giving the client the option of rejecting the arbitrator's decision and proceeding to trial. Moreover, he contends that although he filed a lawsuit against Lerner for malpractice, he is entitled to rely on the protections of the Mandatory Fee

Arbitration Act. In response, Lerner invokes the Columbia Arbitration Act, pursuant to which the parties arbitrated their dispute.

The Columbia Arbitration Act represents a comprehensive statutory scheme regulating arbitration in this state. Through this statutory scheme, the Legislature has expressed a strong public policy in favor of arbitration, as agreed to by the parties themselves, as a speedy and relatively inexpensive means of dispute resolution.

By contrast, the Mandatory Fee Arbitration Act constitutes a separate and distinct arbitration scheme. The nature of the obligation to arbitrate under the Mandatory Fee Arbitration Act differs from that under the Columbia Arbitration Act in important ways. First, the arbitration obligation under the Mandatory Fee Arbitration Act is limited to disputes between attorneys and clients about fees and/or costs. Second, the arbitration obligation under the Mandatory Fee Arbitration Act is based on a statutory directive and not the parties' agreement. Third, although a client cannot be forced under the Mandatory Fee Arbitration Act to arbitrate a dispute concerning legal fees or costs, at the client's election an unwilling attorney can be forced to do so. Fourth, whereas an attorney is bound by an arbitration award under the Mandatory Fee Arbitration Act, a client is not bound, but may seek a trial *de novo*. Fifth, the Mandatory Fee Arbitration Act specifies conditions under which the client can waive its protections, including by commencing an action or filing any pleading seeking either judicial resolution of a fee dispute or affirmative relief against the attorney based on malpractice or professional misconduct. The Mandatory Fee Arbitration Act thus provides the client with an *alternative* method of resolving a dispute with his or her attorney about fees or costs, *not one in addition* to traditional litigation.

As indicated, the parties in this case arbitrated their dispute pursuant to the Columbia Arbitration Act, not the Mandatory Fee Arbitration Act. Although Aguilar never sought to arbitrate the fee aspect of the dispute under the Mandatory Fee Arbitration Act, he seeks to invoke the Act's protections in order to invalidate the parties' agreement.

This case thus poses the question whether the parties' agreement to arbitrate is enforceable or is superseded by the Mandatory Fee Arbitration Act.

Lerner contends Aguilar waived his statutory rights under the Mandatory Fee Arbitration Act because he sued her for malpractice. That Aguilar filed a lawsuit against Lerner alleging malpractice is undisputed. Consequently, pursuant to the plain language of the Act, he waived his rights thereunder.

Aguilar's counterargument is unavailing. He argues that a client does not waive his or her rights under the Mandatory Fee Arbitration Act by entering into a fee agreement with an arbitration provision invoking the Columbia Arbitration Act *before* a dispute arises. We agree. The Mandatory Fee Arbitration Act does not

provide for the pre-dispute waiver of its protection. Phrased positively, the Mandatory Fee Arbitration Act renders an arbitration provision invoking the Columbia Arbitration Act unenforceable unless and until the Mandatory Fee Arbitration Act's protection is waived. Our agreement with Aguilar on this point benefits him not at all. Our conclusion that he waived his rights under the Mandatory Fee Arbitration Act rests not on the arbitration provision in his fee agreement with Lerner, but, rather, on the malpractice lawsuit he filed against her.

Affirmed.